

## Carey, Andrew

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### TREATMENT

#### Hearing aids

In order to require provision of hearing aids without regard to the date treatment was concluded or the claim closed, the ongoing responsibility to provide hearing aids must be stated in an order entered at, or prior to, closing. ....*In re Andrew Carey, BIIA Dec., 04 18928 (2005)* [dissent] [Editor's Note: The Board's decision was appealed to superior court under Pacific County Cause No. 05-2-00377-6.]

Scroll down for order.



1 complete loss of hearing in both ears. Pertinent to the present appeal, the Department order of  
2 November 2, 1981, failed to include language indicating the self-insured employer was to be  
3 responsible for the purchase and maintenance of hearing aids. Following a timely protest from  
4 Mr. Carey, the subject of which is unknown, the Department issued its order of January 15, 1982, in  
5 which it affirmed the order of November 2, 1981. The January 15, 1982 order was neither  
6 protested nor appealed and became final. Twenty-one years passed.

7 In early 2003, Simpson received a letter from Avada Hearing Care Center in Centralia that  
8 referenced Mr. Carey's 1978 claim number and requested authorization to provide Mr. Carey with  
9 hearing aids. Simpson declined to provide authorization, and, apparently, the request was  
10 forwarded to the Department.

11 On April 27, 2004, the Department issued an order in which it directed Simpson to pay for  
12 Mr. Carey's hearing aids. Simpson protested, the Department affirmed its order, and Simpson  
13 appealed to the Board, moving for summary judgment. The affirmance order of June 23, 2004, is  
14 presently before the Board.

15 The Department suggests that RCW 51.36.020(5) gives it the authority to order self-insured  
16 employers to provide necessary mechanical appliances to a worker without regard to the date  
17 treatment was completed or whether the claim was closed. While acknowledging that the  
18 Department of Labor and Industries has the authority to provide mechanical appliances in certain  
19 situations, we do not believe that the Department's interpretation of RCW 51.36.020(5) is entirely  
20 accurate. WAC 296-20-1101 states that when the Department or self-insurer has accepted a  
21 hearing loss condition either as a result of an industrial injury or an occupational exposure, the  
22 Department or self-insurer will furnish a hearing aid (hearing aids when bilateral hearing loss is  
23 present) when prescribed or recommended by a physician. In the case at hand, we fail to find  
24 evidence that hearing aids were prescribed or recommended to Mr. Carey by any such physician.  
25 We note that prior to the claim being closed in 1981, Richard Voorhees, M.D., commented that  
26 hearing aids could help Mr. Carey, but he was not sure. Beyond that, we find no other doctors'  
27 opinion on the subject.

28 The Department order dated January 15, 1982, failed to indicate that the self-insured  
29 employer was responsible for the purchase and maintenance of hearing aids. The order was  
30 neither protested nor appealed. It became final and binding, both on the Department and on the  
31  
32

1 parties. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 537 (1994).

2 RCW 51.36.020(5) provides:

3 All mechanical appliances necessary in the treatment of an injured  
4 worker, such as braces, belts, casts, and crutches, shall be provided  
5 and all mechanical appliances required as permanent equipment after  
6 treatment has been completed shall continue to be provided or replaced  
7 without regard to the date of injury or date treatment was completed,  
8 notwithstanding any other provision of law.

9 As noted by our industrial appeals judge, the statute addresses treatment while a claim  
10 remains open. There is provision to "continue" treatment but not to provide it for the first time some  
11 twenty-two years after claim closure. If Simpson had been directed to provide hearing aids prior to  
12 or by the January 15, 1982 closing order, RCW 51.36.020(5) would be compelling authority that  
13 hearing aids should "continue to be provided" by Simpson. Here, Simpson was never required to  
14 provide hearing aids so cannot be required to "continue" to provide them.

15 Once the Department's January 15, 1982 closing order became final, in the absence of a  
16 reopening of the claim based on aggravation of condition, the Department no longer had the  
17 authority to order further treatment.

### 18 **FINDINGS OF FACT**

- 19 1. On March 14, 1978, the claimant, Andrew R. Carey, filed an application  
20 for benefits with the Department, in which he alleged an occupational  
21 hearing loss while working within the scope of his employment with  
22 Simpson Timber Company.

23 On June 19, 1981, the Department issued an order in which it rejected  
24 the claim. On July 14, 1981, the claimant filed his protest with the  
25 Department from the Department order dated June 19, 1981. On  
26 September 10, 1981, the Department issued an order in which it  
27 affirmed its order dated June 19, 1981, wherein it rejected the claim.

28 On November 2, 1981, the Department issued an order in which it set  
29 aside its earlier orders dated June 19, 1981 and September 10, 1981,  
30 allowed the claim, and closed the claim with an award for permanent  
31 partial disability equal to 5.9 percent of the complete loss of hearing in  
32 both ears, but without directing that the self-insured employer pay for  
hearing aids.

On December 31, 1981, the claimant filed his protest with the  
Department from a prior order dated November 2, 1981. On  
January 15, 1982, the Department issued an order in which it affirmed  
its claim closure order dated November 2, 1981. That Department

1 closing order, dated January 15, 1982, was neither protested nor  
2 appealed.

3 Twenty-one years later, on March 25, 2003, the claimant wrote to the  
4 self-insured employer to request hearing aids. The self-insured  
5 employer denied the claimant's request. On April 27, 2004, the  
6 Department issued an order in which it directed the self-insured  
7 employer to provide hearing aids for the claimant.

8 On June 4, 2004, the self-insured employer filed its protest with the  
9 Department from an order dated April 27, 2004. On June 23, 2004, the  
10 Department issued an order in which it affirmed its earlier order dated  
11 April 27, 2004.

12 On July 12, 2004, the self-insured employer filed its Notice of Appeal  
13 with the Board of Industrial Insurance Appeals from the Department  
14 order dated June 23, 2004. On August 11, 2004, the Board granted the  
15 self-insured employer's appeal, assigned the appeal Docket  
16 No. 04 18928, and directed that proceedings be held on the issues  
17 raised by the Notice of Appeal.

- 18 2. Mr. Carey has not filed an aggravation application since his claim was  
19 closed in 1982.
- 20 3. There are no genuine issues of material fact.

### 21 **CONCLUSIONS OF LAW**

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
23 parties to and the subject matter of this appeal.
- 24 2. RCW 51.36.020(5) does not authorize the Department of Labor and  
25 Industries to order the post-closure purchase and maintenance of  
26 hearing aids if the order wherein the Department closed the claim does  
27 not contain provisions to this effect.
- 28 3. The Department of Labor and Industries lacked the authority to issue the  
29 order appealed from because the final order wherein the Department  
30 closed the claim did not include language making the employer  
31 responsible for the post-closure purchase and maintenance of hearing  
32 aids.
4. The Department order of June 23, 2004, is incorrect and is reversed.  
This matter is remanded to the Department of Labor and Industries with  
instructions to issue a further order indicating the self-insured employer

1 is not responsible for the purchase and maintenance of hearing aids and  
2 denying the claimant's request for hearing aids.

3 It is so **ORDERED**.

4 Dated this 30th day of August, 2005.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

6  
7 /s/ \_\_\_\_\_  
8 THOMAS E. EGAN Chairperson

9  
10 /s/ \_\_\_\_\_  
11 CALHOUN DICKINSON Member

12 **DISSENT**

13 I am unconvinced that RCW 51.36.020(5) requires that we read into the statute that the  
14 provision of hearing aids or other mechanical devices must be determined in the closing order.  
15 Although the Department generally does not provide treatment or other benefits to an injured  
16 worker once the injured worker has reached maximum medical improvement, there are limited  
17 situations in which the Industrial Insurance Act authorizes the Department to provide aid to an  
18 injured worker, despite the fact that the worker's condition has become fixed and stable and the  
19 worker's claim is ready to be closed.

20 RCW 51.36.020(5) states:

21 All mechanical appliances necessary in the treatment of an injured  
22 worker, such as braces, belts, casts, and crutches, shall be provided  
23 and all mechanical appliances required as permanent equipment after  
24 treatment has been completed shall continue to be provided or replaced  
25 without regard to the date of injury or date treatment was completed,  
notwithstanding any other provision of law.

26 I believe that the language "without regard to the date of injury or date treatment was  
27 completed" is that language that requires the Department to provide devices after claim closure. If  
28 not interpreted this way, I am unaware of any other statutory provision that authorizes the  
29 Department to provide such devices on a closed claim. It follows that the existence of language in  
30 an order requiring provision of the devices is unnecessary because of the statutory obligation. The  
31 Department must provide, or require the self-insured employer to provide, the devices when they  
32 are necessary.

1 For the above reasons, I believe that the Department order of April 27, 2004, wherein the  
2 Department directed the self-insured employer to provide Mr. Carey with hearing aids, is correct.  
3 Under the liberal interpretation of the Industrial Insurance Act, as mandated by statute, Mr. Carey is  
4 entitled to hearing aids under this claim. I would affirm the order under appeal, allow Mr. Carey to  
5 be fitted for hearing aids, and require the self-insured employer to be responsible for the  
6 maintenance of the hearing aids for as long as such maintenance is required.

7 Dated this 30th day of August, 2005.

8 BOARD OF INDUSTRIAL INSURANCE APPEALS

9  
10 /s/ \_\_\_\_\_  
11 FRANK E. FENNERTY, JR. Member