

Dwyer, Robert

AGGRAVATION (RCW 51.32.160)

Pensions

RCW 51.32.160 does not apply after the worker has been found to be permanently totally disabled. An order placing the worker on a pension is not a closing order as contemplated by RCW 52.32.160.*In re Robert Dwyer, BIIA Dec., 13 19440 (2014)*

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: ROBERT A. DWYER) DOCKET NO. 13 19440**
2 **CLAIM NO. AC-97756) DECISION AND ORDER**
3 _____)

4 **APPEARANCES:**

5 Claimant, Robert A. Dwyer, by
6 Small, Snell, Weiss & Comfort, P.S., per
7 David W. Lauman

8 Employer, Gresham Transfer, Inc.,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Lynette Weatherby-Teague

13 The claimant, Robert A. Dwyer, filed an appeal with the Board of Industrial Insurance
14 Appeals on August 1, 2013, from an order of the Department of Labor and Industries dated July 30,
15 2013. In this order, the Department determined that the law regarding reopening of closed claims
16 does not apply to pension cases; noted that medical treatment is subject to RCW 51.36.010(4); and
17 denied authorization for a revised laminectomy and L5-S1 micro discectomy performed on April 23,
18 2013, because the worker failed to seek pre-authorization of the surgery as provided by
19 RCW 51.36.010. The Department order is **AFFIRMED**.

20 style="text-align:center">**DECISION**

21 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
22 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
23 Order issued on May 27, 2014, in which the industrial appeals judge affirmed the Department order
24 dated July 30, 2013. On August 8, 2014, the Department filed a Response to the Petition for
25 Review.

26 Prior to a hearing on the merits, the industrial appeals judge resolved this matter in a
27 Proposed Decision and Order in which she granted the Department's motion for summary
28 judgment.

29 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,
30 the Response to Petition for Review, and a review of the record before us, we are persuaded that
31 the Proposed Decision and Order is supported by the preponderance of the evidence and is correct
32 as a matter of law. We granted review to clarify the documents and evidence considered, and to

1 clarify that RCW 51.32.160 does not apply in claims where the worker has been found to be
2 permanently and totally disabled. We have considered the Department's Motion for Summary
3 Judgment and attached declaration and exhibits; Claimant's Response to the Department's Motion
4 for Summary Judgment and Cross Motion for Summary Judgment with attached declaration and
5 exhibits; and the stipulated jurisdictional history.

6 The issue presented by this appeal and the evidence presented by the parties are
7 adequately set forth in the Proposed Decision and Order. We will restate only those facts
8 necessary to clarify our decision.

9 On October 29, 2012, Robert Dwyer was found to be permanently totally disabled and
10 placed on a pension effective November 16, 2012. On March 8, 2013, Mr. Dwyer filed an
11 aggravation application. His medical provider noted that Mr. Dwyer needed a surgical consultation
12 for a discectomy. On March 15, 2013, the Department acknowledged receipt of the aggravation
13 application and explained to Mr. Dwyer and his medical provider that further treatment was at the
14 Supervisor of Industrial Insurance for Labor and Industries' discretion. The Department authorized
15 the consultation but noted further treatment was not yet authorized. On March 26, 2013, the
16 Department requested a copy of the surgeon's consultation report directly from the surgeon and
17 explained to the surgeon that only the consultation was approved at that point. The Department
18 made numerous requests for a copy of the surgical consultation report. On May 3, 2013, the
19 Department received a copy of a February 21, 2013 consultation report; an April 19, 2013 chart
20 note for a pre-operation history and physical; and an April 23, 2013 surgical report. The
21 Department had not authorized more than the consultation.

22 On July 30, 2013, the Department issued a letter in which it explained authorization for the
23 surgical treatment was denied because RCW 51.36.010(4) does not permit the Supervisor to
24 retroactively authorize treatment. The Department also explained that the law regarding reopening
25 of closed claims does not apply to pension cases. Consistent with its letter, on July 30, 2013, the
26 Department issued an order in which it denied the request for surgical treatment because
27 Mr. Dwyer did not seek pre-authorization. The July 30, 2013 order did not address the
28 Department's position that the law regarding reopening of claims does not apply to pension cases.

29 Mr. Dwyer appealed the July 30, 2013 order and letter. We denied the appeal of the letter
30 because it was merely an explanation of the Department's actions in issuing the order. Although
31 the July 30, 2013 order does not specifically state the Department's position regarding whether a
32

1 worker on a pension can reopen the claim, we find the issue is encompassed in the order and is an
2 issue properly before us. The parties presented evidence and arguments on this issue; the issue
3 was listed as a contested issue in the Proposed Decision and Order; and the issue was addressed
4 by our industrial appeals judge in her decision.

5 First, we will address whether RCW 51.32.160 applies to pension cases. The relevant
6 portion of the statute reads as follows:

7 If aggravation, diminution, or termination of disability takes place, the director may,
8 upon the application of the beneficiary, made within seven years from the date the
9 first closing order becomes final, or at any time upon his or her own motion, readjust
10 the rate of compensation in accordance with the rules in this section provided for the
11 same, or in a proper case terminate the payment: PROVIDED, That the director
12 may, upon application of the worker made at any time, provide proper and
13 necessary medical and surgical services as authorized under RCW 51.36.010.

14 Mr. Dwyer contends that RCW 51.32.160 applies to pension cases because a pension order
15 is a closing order. He further argues that RCW 51.36.010 does not preclude a reopening of a
16 pension case. The Department contends that RCW 51.36.010(4) is the proper avenue through
17 which a pensioned worker may seek treatment, and WAC 296-14-400 unambiguously precludes
18 reopening a claim that has been closed with permanent total disability benefits.

19 We disagree with Mr. Dwyer. A pension order is not a closing order. The order in which the
20 Department found Mr. Dwyer to be permanently and totally disabled did close his claim. In addition,
21 the Department continues to administer the claim with the payment of pension benefits.

22 The statute and recent case law dictates that a worker found permanently and totally
23 disabled is not subject to the aggravation statute prior to receiving treatment. As our industrial
24 appeals judge discussed, the court has determined that RCW 51.36.010 establishes "separate and
25 distinct provisions for the duration of treatment in the case of the three separate types of disability:
26 permanent partial, temporary, and permanent total."¹ The three types of disability are meant to be
27 treated differently. Treatment is not at the discretion of the Director when a claim is reopened
28 under RCW 51.32.160. When the injured worker is permanently and totally disabled, treatment
29 only is allowed at the discretion of the Director. Thus, it follows that reopening of the claim to obtain
30 treatment in a pension case is inappropriate. As such, the deemed granted provisions of
31 RCW 51.32.160 do not apply to a worker found permanently and totally disabled.

32 ¹ *Department of Labor & Indus. v. Slauch*, 17 Wn. App. 439 (2013).

1 The statute has given an absolute directive for a permanently and totally disabled worker to
2 seek and receive treatment.

3 In all accepted claims, treatment shall be limited in point of duration as follows: . . . in
4 case of a permanent total disability not to extend beyond the date on which a lump
5 sum settlement is made with him or her or he or she is placed upon the permanent
6 pension roll: PROVIDED, HOWEVER, That the supervisor of industrial insurance,
7 solely in his or her discretion, may authorize continued medical and surgical
8 treatment for conditions previously accepted by the department . . . **In order to
authorize such continued treatment the written order of the supervisor of
industrial insurance issued in advance of the continuation shall be necessary.**¹

(Emphasis added.)

9 Mr. Dwyer did not pursue pre-authorization for his surgery from the Supervisor. The Department
10 authorized a surgical consultation on March 15, 2013, that had already taken place on February 21,
11 2013. By the time the Department was made aware of the outcome of the surgical consultation,
12 Mr. Dwyer had already undergone the surgery. We agree with our industrial appeals judge that the
13 Supervisor was correct, and there was no abuse of discretion when he denied Mr. Dwyer's surgical
14 treatment.

15 There is no genuine issue as to any material facts, and the Department's Motion for
16 Summary Judgment is granted. We find an injured worker found permanently totally disabled may
17 not apply to reopen the claim under RCW 51.32.160. The worker is limited to benefits consisting of
18 medical or surgical treatment at the discretion of the Supervisor, and the worker must receive
19 pre-authorization consistent with RCW 51.36.010(4).

FINDINGS OF FACT

- 21 1. On February 27, 2014, an industrial appeals judge certified that the parties
22 agreed to include the amended Jurisdictional History in the Board record
23 solely for jurisdictional purposes.
- 24 2. Robert A. Dwyer sustained an industrial injury on March 22, 2009, while
25 working for Gresham Transfer, Inc., and suffered injuries that included in
26 part a fracture to his right clavicle; sprained back and neck; and multiple
27 right rib fractures.
- 28 3. On October 29, 2012, the Department of Labor and Industries issued an
29 order in which it determined Robert A. Dwyer was a permanently and totally
30 disabled worker effective November 16, 2012.
- 31 4. Robert A. Dwyer filed an application to reopen his claim on March 8, 2013.

32 ¹ RCW 51.36.010(4)


- 1 5. On March 15, 2013, the Department issued a letter in which it
2 acknowledged receipt of Mr. Dwyer's aggravation application. The
3 Department found the aggravation statute does not apply to pension claims,
4 and the application to reopen claim was treated as a request for treatment
5 under RCW 51.36.010(4). The Department authorized a surgical
6 consultation and noted further treatment would be at the discretion of the
7 Supervisor of Industrial Insurance.
- 8 6. On April 23, 2013, Robert A. Dwyer underwent a revision laminectomy and
9 L5-S1 microdiscectomy. Mr. Dwyer did not seek approval from the
10 Supervisor of the Industrial Insurance prior to having this surgery.
- 11 7. On July 30, 2013, the Department of Labor and Industries denied
12 Mr. Dwyer's request for treatment under RCW 51.36.010(4) because he had
13 not received prior authorization for the surgery.
- 14 8. Mr. Dwyer's March 8, 2013 application to reopen his claim did not apply to
15 him for the reopening of his claim because he was a permanently and
16 totally disabled worker.
- 17 9. The pleadings and evidence submitted by the parties demonstrate that there
18 is no genuine issue as to any material fact.

19 **CONCLUSIONS OF LAW**

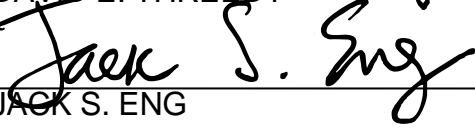
- 20 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
21 and subject matter in this appeal.
- 22 2. The Department of Labor and Industries is entitled to a decision as a matter
23 of law as contemplated by CR 56.
- 24 3. Prior to receiving treatment, Robert A. Dwyer failed to seek approval from
25 the Supervisor of Industrial Insurance as required by RCW 51.36.010(4).
- 26 4. The Supervisor of Industrial Insurance did not abuse her discretion when
27 she denied Mr. Dwyer's surgical request as provided by RCW 51.36.010.
- 28 5. The aggravation statute, RCW 51.32.160, does not apply to claims where
29 the worker has been found to be permanently and totally disabled
- 30 6. The Department order dated July 30, 2013, is correct and is affirmed.

31 Dated: November 17, 2014.

32 BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY Chairperson



JACK S. ENG Member