

Perez, Martha

INJURY (RCW 51.08.100)

Psychiatric conditions with pain as primary symptom - WAC 296-14-300(3).

WAC 296-14-300(3) purports to limit coverage of mental conditions that specify pain primarily as a psychiatric symptom (for example, somatic symptom disorder, with predominant pain) or that are characterized by excessive or abnormal thoughts, feelings, behaviors, or neurological symptoms (for example, conversion disorder, factitious disorder) by declaring they are not clinically related to occupational exposure. By using the term occupational exposure in the regulation, the Department made clear its intent that the regulation does not apply to industrial injury claims.***In re Martha Perez, BIIA Dec., 18 10694 (2019)*** [*Editor's Note:* The Board's decision was appealed to superior court under Yakima County Cause No. 19-2-02372-39.]

OCCUPATIONAL DISEASE (RCW 51.08.140)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARTHA E. PEREZ) DOCKET NOS. 18 10694 & 18 10695
)
CLAIM NO. AZ-05225) DECISION AND ORDER

In 2016, Martha Perez was injured while working for Inspire Development Centers. The Department of Labor and Industries allowed her claim as an industrial injury. In two orders, the Department assessed an overpayment for time-loss compensation benefits for a period and closed the claim without an award for permanent partial disability. Ms. Perez contends that the Department should have accepted responsibility for her somatic symptom disorder under this claim. Both Ms. Perez and the Department filed motions for summary judgment. Our industrial appeals judge granted the summary judgment in favor of Ms. Perez and reversed and remanded the orders with direction to accept somatic symptom disorder and major depressive disorder as proximately caused by the industrial injury and ordered the Department to pay back time-loss compensation. We agree with the ultimate outcome that our industrial appeals judge reached. But we granted review to explain the extent of our application of *In re Sabir Velicanin*.¹ The Department's orders are **REVERSED AND REMANDED** to the Department to accept somatic syndrome disorder and pay time-loss compensation benefits from October 9, 2017, through January 12, 2018.

DISCUSSION

These appeals involve several issues including time-loss compensation/overpayment, treatment, permanent partial disability, and total permanent disability. The parties filed motions for summary judgment. They stipulated that the claimant had major depressive disorder proximately caused by the industrial injury that required medical treatment and was entitled to time-loss compensation benefits from October 9, 2017, through January 12, 2018. The parties further agreed that the Department orders dated January 11, 2018, and January 12, 2018, should be reversed and remanded to the Department to pay time-loss compensation benefits from October 9, 2017, through January 12, 2018; allow major depressive disorder as a condition proximately caused by the industrial injury; provide further proper and necessary medical treatment; and take other action as indicated by the law and the facts. Pursuant to WAC 263-12-1180(2) (b), the parties waived hearing and oral argument.

In its motion for summary judgment, the Department argued that it has broad authority to establish and adopt rules governing the administration of Title 51 of the RCW. The Department

¹ *In re Sabir Velicanin*, Dckt. No. 15 22887 (May 15, 2017).

1 contends that in 2015, it made an interpretive and clarifying change to WAC 296-14-300 following
2 the 2013 DSM 5 that adopted language to WAC 296-14-300(3) that the Department believes
3 eliminated pain disorder from the psychological disease category, an act that also precluded it from
4 allowing claims for somatic symptom disorder. WAC 296-14-300(3) states:
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7 Mental conditions or mental disabilities that specify pain primarily as a psychiatric
8 symptom (e.g., somatic symptom disorder, with predominant pain), or that are
9 characterized by excessive or abnormal thoughts, feelings, behaviors or neurological
10 symptoms (e.g., conversion disorder, factitious disorder) are not clinically related to
11 occupational exposure.
12

13 The amendment to WAC 296-14-300(3) became effective in October 2015. The Department
14 indicated the amendment is a legislative change and applies prospectively.
15

16 Ms. Perez contends that the declaration of Ronald Early, M.D., shows that her condition was
17 proximately and directly related to the industrial injury. She also argued that the Department lacked
18 authority to enact legislation or amend WAC 296-14-300 because the change it previously made
19 reflected a significant legislative change and not the interpretive clarifying action that the Department
20 claimed. As a result, Ms. Perez concluded that the Department didn't follow the process for enacting
21 legislative changes as set out in Title 34.05, so its legislative changes to WAC 296-14-300 are invalid.
22

23 The sole question for the Board is whether WAC 296-14-300(3) precludes the Department
24 from allowing Ms. Perez's somatic symptom disorder as a matter of law. We hold that it does not.
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26 On February 1, 2016, the Department allowed this claim for an industrial injury. An **injury** is
27 a term defined in RCW 51.08.100. WAC 296-14-300(3) doesn't apply to cases involving industrial
28 injuries. As written, WAC 296-14-300(3) applies only to **occupational exposures**. Although the
29 term **occupational exposure** isn't defined anywhere in Title 51, it is certain that the Department
30 didn't intend to have the regulation apply to industrial injury claims or it would have used precise
31 language and the term **injury** in the WAC. When a legislating body inserts a provision in only one of
32 two statutes or regulations that deal with a closely related subject, courts construe the omission as
33 deliberate rather than inadvertent. In other words, by using the term **occupational exposure** in the
34 regulation, the Department made clear its intent that the regulation does not apply to industrial injury
35 claims. Because the plain language of WAC 296-14-300(3) does not apply to industrial injury claims,
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1 it is not necessary here to reach the question whether the Department had authority to promulgate
2 the regulation.²
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4 **DECISION**

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- 6 1. In Docket No. 18 10694, the claimant, Martha E. Perez, filed an appeal with the Board of Industrial
7 Insurance Appeals on January 30, 2018, from an order of the Department of Labor and Industries
8 dated January 11, 2018. In this order, the Department assessed an overpayment of \$1,847.88
9 for the period October 9, 2017, through October 26, 2017.
 - 10 2. In Docket No. 18 10695, the claimant, Martha E. Perez, filed an appeal with the Board of Industrial
11 Insurance Appeals on January 30, 2018, from an order of the Department of Labor and Industries
12 dated January 12, 2018. In this order, the Department ended time-loss compensation benefits as
13 paid through October 8, 2017, and closed the claim without an award for permanent partial
14 disability.
 - 15 3. The Department orders dated January 11, 2018, and January 12, 2018, are reversed and
16 remanded to the Department to allow somatic symptom disorder and major depressive disorder
17 as conditions proximately caused by the industrial injury, provide further proper and necessary
18 medical treatment, pay time-loss compensation benefits from October 9, 2017, through
19 January 12, 2018, and take further action as indicated by the law and the facts.
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27 **FINDINGS OF FACT**

- 28 1. On March 13, 2018, an industrial appeals judge certified that the parties
29 agreed to include the Jurisdictional History in the Board record solely for
30 jurisdictional purposes.
- 31 2. On February 1, 2016, Martha Perez sustained an industrial injury, as that
32 term is defined in RCW 51.08.100.
- 33 3. The February 1, 2016 industrial injury proximately caused Martha Perez
34 to develop major depressive disorder and somatic symptom disorder.
- 35 4. The February 1, 2016 industrial injury and its residuals precluded Martha
36 from engaging in reasonably continuous gainful employment from
37 October 9, 2017, through January 12, 2018.
- 38 5. As of January 12, 2018, Martha Perez's mental health conditions
39 proximately caused by the industrial injury were not fixed and stable and
40 required further proper and necessary medical treatment.
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45 ² We decline to determine whether WAC 296-14-300 is valid at this time. However, the claimant's argument that the
46 Department failed to follow the process in Title 34.01 may have merit. Further Board review on this issue is inevitable
47 and we urge the Department to review the WAC and its promulgation history because it may not withstand closer scrutiny
in an occupational disease context.

1 6. The pleadings, evidence, and stipulations submitted by the parties
2 demonstrate there is no genuine issue as to any material fact in this
3 appeal.
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5 **CONCLUSIONS OF LAW**

- 6 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
7 and subject matter in these appeals.
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9 2. Martha Perez is entitled to a decision as a matter of law as contemplated
10 by CR 56.
11
12 3. WAC 296-14-300(3) does not apply to Martha Perez's claim for industrial
13 injury as defined in RCW 51.08.100.
14
15 4. The Department's Motion for Summary Judgment made pursuant to
16 CR 56 is denied.
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18 5. The Claimant's Cross-Motion for Summary Judgment made pursuant to
19 CR 56 is granted.
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21 6. Major depressive disorder and somatic symptom disorder are
22 compensable conditions under this claim pursuant to RCW Title 51.
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24 7. From October 9, 2017, through January 12, 2018, Martha Perez was a
25 totally temporarily disabled worker pursuant to RCW 51.32.090.
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27 8. As of January 12, 2018, Martha Perez was entitled to further proper and
28 necessary medical treatment pursuant to RCW 51.36.010.
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30 9. The Department orders dated January 11, 2018, and January 12, 2018,
31 are reversed and remanded to the Department to allow somatic symptom
32 disorder and major depressive disorder as conditions proximately caused
33 by the industrial injury; provide further proper and necessary medical
34 treatment; pay time-loss compensation benefits from October 9, 2017,
35 through January 12, 2018; and take further action as indicated by the law
36 and the facts.

37 Dated: June 7, 2019.

38 BOARD OF INDUSTRIAL INSURANCE APPEALS

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40 LINDA L. WILLIAMS, Chairperson

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42 FRANK E. FENNERTY, JR., Member

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44 JACK S. ENG, Member
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3 **Addendum to Decision and Order**
4 **In re Martha E. Perez**
5 **Docket Nos. 18 10694 & 18 10695**
6 **Claim No. AZ-05225**

7 **Appearances**

8 Claimant, Martha E. Perez, by Smart Law Offices, per Nicholas D. Jordan

9 Employer, Inspire Development Centers (did not appear)

10 Department of Labor and Industries, by Office of the Attorney General, per Gigi I. Tsai

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13 **Petition for Review**

14 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
15 and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order
16 issued on March 1, 2019, in which the industrial appeals judge reversed and remanded the orders of
17 the Department dated January 11, 2018, and January 12, 2018.
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