

## **Gardiner, Kirtley**

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### **TREATMENT**

#### **After claim closure**

The Board held that pursuant to RCW 51.36.010(4), only the supervisor of industrial insurance, and not the supervisor's designee, may decide requests for post-pension treatment. A Department determination in writing without protest or appeal rights language is valid, but effectively has no deadline by which it must be challenged.

...*In re Kirtley Gardiner*, BIIA Dec., 23 22640 (2024) [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 24-2-01741-34.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1     **RE: KIRTLEY D. GARDINER**                     )     **DOCKET NO. 23 22640**  
2   )  
3     **CLAIM NO. AH-24090**                             )     **DECISION AND ORDER**  
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5             In 2016, Kirtley Gardiner was placed on a pension under his occupational disease claims for  
6     bilateral carpal tunnel syndrome and right shoulder conditions. In 2023, Mr. Gardiner experienced  
7     numbness in his right hand and sought treatment for it. Mr. Gardiner's neurologist conducted an  
8     EMG nerve conduction study in July 2023 and informed him that the numbness was caused by carpal  
9     tunnel syndrome, a condition under one of his occupational disease claims. In October 2023, the  
10    Department sent a letter to the neurologist, denying authorization for the EMG study. After a hearing,  
11    our industrial appeals judge granted the Department's Motion for Summary Judgment, affirming the  
12    Department's letter on the grounds that the worker did not obtain prior authorization for post-pension  
13    treatment, as required by RCW 51.36.010(4).  
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15             We granted review to address an issue of first impression. Mr. Gardiner argues that under  
16    RCW 51.36.010(4), only the supervisor of industrial insurance has the authority to deny post-pension  
17    treatment. We agree. Under a strict reading of the statute, only the supervisor has discretion to  
18    authorize post-pension treatment, and may not delegate that decision to anyone else. The  
19    Department letter dated October 19, 2023, is **REVERSED AND REMANDED** to the Department with  
20    direction to issue a letter or an order that complies with RCW 51.36.010(4).  
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**DISCUSSION**

22             In 2008 and 2009, the Department allowed Kirtley Gardiner's two occupational disease claims.  
23    The first claim was for bilateral carpal tunnel syndrome, and the second claim was for several right  
24    shoulder conditions. In 2016, Mr. Gardiner was placed on a pension with respect to both claims. In  
25    2023, Mr. Gardiner experienced numbness in his right thumb and sought treatment from  
26    Shankar Dixit, M.D., a neurologist, to determine the cause. Mr. Gardiner underwent an EMG nerve  
27    conduction study in July 2023. During the follow-up visit with Dr. Dixit in October 2023, Mr. Gardiner  
28    learned that the cause of the numbness was carpal tunnel syndrome. Mr. Gardiner then sent a  
29    message to the Department's claims manager, requesting medical treatment and payment to Dr. Dixit  
30    for the study. Mr. Gardiner had not requested authorization for the study before it took place in  
31    July 2023.  
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33             On October 19, 2023, the Department sent a letter to Dr. Dixit, the stating:  
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1 The department has received your request for post-pension treatment. . . . Once a  
2 worker is placed on pension the claim is never reopened, rather, the Supervisor of  
3 Industrial Insurance may use their sole discretion to authorize treatment for conditions  
4 previously accepted. This treatment is limited to that which protects the life of a worker  
5 or if a surgical procedure is required. Further, all treatment must be approved in writing  
6 and in advance of the procedure.

7 Treatment is denied because it was not authorized in advance as required by  
8 RCW 51.36.010(4).  
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10 The letter was signed by a pension adjudicator, not the supervisor of industrial insurance. The letter  
11 did not contain language stating that it becomes final unless it is protested or appealed within 60 days  
12 of communication.  
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14 **Supervisor's Sole Discretion**

15 RCW 51.36.010(4) provides:

16 In all accepted claims, treatment shall be limited in point of duration as follows:  
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18 [I]n case of a permanent total disability not to extend beyond the date on which a lump  
19 sum settlement is made with him or her or he or she is placed upon the permanent  
20 pension roll: **PROVIDED, HOWEVER, That [sic] the supervisor of industrial**  
21 **insurance, solely in his or her discretion, may authorize continued medical and**  
22 **surgical treatment for conditions previously accepted by the department** when  
23 such medical and surgical treatment is deemed necessary by the supervisor of  
24 industrial insurance to protect such worker's life or provide for the administration of  
25 medical and therapeutic measures including payment of prescription medications, but  
26 not including . . . controlled substances . . . which are necessary to alleviate continuing  
27 pain which results from the industrial injury. In order to authorize such continued  
28 treatment the written order of the supervisor of industrial insurance issued in advance  
29 of the continuation shall be necessary.  
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31 (Emphasis added.)

32 Under the statute, the general rule is that treatment is not available after a worker is placed on a  
33 pension. However, there is an exception that gives the supervisor of industrial insurance discretion  
34 to authorize continued treatment for industrially related conditions to protect a worker's life and for  
35 non-narcotic pain relief. This exception only applies if the supervisor authorizes such continued  
36 treatment in writing and in advance. In *In re Edward Green*,<sup>1</sup> we interpreted this language in  
37 RCW 51.36.010(4) to mean that treatment may only be authorized prospectively, not retrospectively.  
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40 Mr. Gardiner argues that under RCW 51.36.010(4), the supervisor of industrial insurance has  
41 sole discretion to authorize post-pension treatment, not a pension adjudicator. Our industrial appeals  
42 judge held that the pension adjudicator had the authority to deny authorization because she was the  
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47 <sup>1</sup> Dckt. No. 98 19138 (January 26, 2000).

1 director's designee. Our industrial appeals judge relied on WAC 296-20-02701, which states, "Who  
2 makes medical coverage decisions? The director or the director's designee makes medical coverage  
3 decisions."  
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5 We disagree that WAC 296-20-02701 applies. The statute at issue here, RCW 51.36.010(4),  
6 makes no mention of the director or the director's designee. It mentions only the "supervisor of  
7 industrial insurance," which is defined by RCW 43.22.020 as follows:  
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10 The director of labor and industries shall appoint and deputize an assistant, to be known  
11 as the **supervisor of industrial insurance**, who shall have authority to perform those  
12 duties delegated by the director and by statute.  
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14 The director may appoint and employ such adjusters, medical and other examiners,  
15 auditors, inspectors, clerks, and other assistants as may be necessary to the  
16 administration of workers' compensation and medical aid in this state.

17 (Emphasis added.)

18 RCW 43.22.020 merely establishes that the supervisor of industrial insurance is the director's  
19 designee. And while a pension adjudicator may indeed be considered the director's designee, that  
20 does not mean a pension adjudicator has any authority under RCW 51.36.010(4). RCW 51.36.010(4)  
21 only refers to the "supervisor of industrial insurance." There is no language indicating that the  
22 supervisor can delegate that authority to anyone else, including a designee. The legislature knows  
23 how to delegate authority to a director's designee or to a supervisor's designee, and has done in  
24 other sections of the Industrial Insurance Act.<sup>2</sup> In fact, the legislature did just that in the very next  
25 paragraph of RCW 51.36.010(4), which deals with inoculation against infectious disease:  
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28 The supervisor of industrial insurance, **the supervisor's designee**, or a self-insurer, in  
29 his or her sole discretion, may authorize inoculation or other immunological treatment  
30 in cases in which a work-related activity has resulted in probable exposure of the worker  
31 to a potential infectious occupational disease.  
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33 (Emphasis added.)  
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35 The fact that the legislature chose not to add language allowing the supervisor to delegate authority  
36 to a designee, in the very same statute at issue in this appeal, signals its intent that only the supervisor  
37 can make decisions relating to post-pension treatment.  
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39 The Department argues that the pension adjudicator had the authority to issue the denial letter  
40 because RCW 51.36.010(4) states only that the supervisor of industrial insurance has the sole  
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46 <sup>2</sup> See, for example, RCW 51.14.090; RCW 51.32.095; RCW 51.32.096; RCW 51.48.170; RCW 51.48.180;  
47 RCW 51.48.190; RCW 51.44.142.

1 discretion to "authorize" post-pension treatment. The Department claims that here, the adjudicator  
2 did not "authorize" treatment; rather, the adjudicator only "denied" treatment. In other words, the  
3 Department claims that the supervisor of industrial insurance is the only one who can authorize  
4 treatment, but a designee can deny treatment and still follow the statute. We are not convinced. The  
5 Department's interpretation essentially results in a two-tiered decision-making system under which  
6 the supervisor's designee can "deny" post-pension treatment, but if they want to "authorize" it, they  
7 would have to pass it up the chain of command to the supervisor of industrial insurance. Common  
8 sense dictates that this was not the legislature's intent.

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13 The language in RCW 51.36.010(4) that gives the supervisor sole discretion is an exception  
14 to the general rule that post-pension treatment is limited. Exceptions to a statute's general rule,  
15 especially when the general rule is unambiguous, must be strictly and narrowly construed, with any  
16 doubts resolved in favor of the general provision, rather than the exception.<sup>3</sup> Therefore, an exception  
17 to the general rule that disallows post-pension treatment must be strictly construed. In strictly  
18 interpreting the exception contained RCW 51.36.010(4), we conclude that the phrase "supervisor of  
19 industrial insurance, solely in his or her discretion" means that only the supervisor of industrial  
20 insurance, and not his or her designee, has the authority to make the decision whether or not to  
21 authorize continued medical treatment once a worker has been placed on the pension rolls.

### 22 **Absence of Protest of Appeal Language**

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28 Mr. Gardiner also argues that because the Department letter failed to include the typical  
29 language informing parties that they must protest or appeal it within 60 days in order to avoid finality,  
30 it is invalid. RCW 51.52.050(1) provides that an order becomes final in 60 days, unless a written  
31 request for reconsideration or an appeal is filed. The Washington Supreme Court has held that letter  
32 determinations omitting the statement of appeal rights do not rise to the dignity of a formal statutory  
33 Department order.<sup>4</sup> The effect of this omission is not invalidity; the effect is to remove the 60-day  
34 deadline within which an aggrieved party must file an appeal or protest.<sup>5</sup>

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39 *In re Bernard Nickolai, Dec'd*<sup>6</sup> is a significant decision in which the supervisor of industrial  
40 insurance sent a letter to the claimant's widow, rejecting her request for benefits on the grounds that  
41 none of the claimant's benefits survived his death. The question was whether the widow had the  
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45 <sup>3</sup> *Converse v. Lottery Comm'n*, 56 Wn. App. 431 (1981); *State v. Wright*, 84 Wn.2d 645 (1974).

46 <sup>4</sup> *Lee v. Dep't of Labor & Indus.*, 81 Wn.2d 937 (1973); *In re Kerry Kemery*, BIIA Dec., 62,634 (1983).

47 <sup>5</sup> *In re Stephanie R. Kalis*, Dckt. No. 19 20882 (January 27, 2022).

<sup>6</sup> BIIA Dec. 38,266 (1971).

1 right to appeal the Department's letter. We said the widow "had the right to appeal the letter in  
2 question, but was not required to do so in order to avoid the decisive effects thereof, since the letter  
3 did not meet the 'final' requirements of an 'order, decision or award' as provided in RCW 51.52.050."  
4 In essence, we held that a Department letter that does not contain protest or appeal language may  
5 be protested or appealed at any time. Here, the omission of the protest language in the Department  
6 letter has the effect of removing the 60-day deadline within which to protest or appeal the letter in  
7 order to avoid finality. The Department letter is valid, but it is not final.  
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### 11 **DECISION**

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13 In Docket No. 23 22640, the claimant, Kirtley D. Gardiner, filed an appeal with the Board of  
14 Industrial Insurance Appeals on October 23, 2023, from a letter of the Department of Labor and  
15 Industries dated October 19, 2023. In this letter, the Department denied treatment for an EMG nerve  
16 conduction study because it was not authorized in advance, as required by RCW 51.36.010(4). This  
17 letter is incorrect and is reversed. This matter is remanded to the Department with direction to issue  
18 an order that complies with RCW 51.36.010(4).  
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### 22 **FINDINGS OF FACT**

- 23 1. On November 30, 2023, and January 18, 2024, an industrial appeals  
24 judge certified that the parties agreed to include the Jurisdictional History  
25 in the Board record solely for jurisdictional purposes.
- 26 2. In 2008, the Department allowed Kirtley Gardiner's occupational disease  
27 claim for bilateral carpal tunnel syndrome under Claim No. AH-24090. In  
28 2009, the Department allowed a second occupational disease claim for  
29 right shoulder adhesive capsulitis, right acromioclavicular joint  
30 osteoarthritis, and right rotator cuff tendonitis under Claim No. AE-91646.
- 31 3. In 2016, Mr. Gardiner was found to be permanently and totally disabled  
32 under Claim Nos. AH-24090 and AE-91646 and was placed on a pension.
- 33 4. On July 27, 2023, Mr. Gardiner underwent an EMG nerve conduction  
34 study to determine the cause of his right-hand numbness. On  
35 October 5, 2023, Shankar Dixit, M.D., Mr. Gardiner's neurologist,  
36 informed him that the numbness was caused by carpal tunnel syndrome,  
37 one of the conditions allowed under his occupational disease claims.  
38 Mr. Gardiner did not obtain authorization for the nerve conduction study  
39 before it took place on July 27, 2023.
- 40 5. On October 19, 2023, Tanya Schoonover-Turner, a Department pension  
41 adjudicator, sent Dr. Dixit a letter denying authorization for the nerve  
42 conduction study on the grounds that such treatment was not approved  
43 in advance of the procedure, as required by RCW 51.36.010(4).  
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6. The Department's October 19, 2023 letter did not contain any language stating that it becomes final unless it is protested or appealed within 60 days.

**CONCLUSIONS OF LAW**

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. RCW 51.36.010(4) gives the supervisor of industrial insurance sole discretion in determining whether or not to authorize further treatment once a worker has been placed on a pension. RCW 51.36.010(4) does not allow the supervisor of industrial insurance to delegate that authority to anyone else.
3. The Department's October 19, 2023 letter violated RCW 51.36.010(4) because the pension adjudicator, not the supervisor of industrial insurance, made the decision not to authorize post-pension treatment.
4. The absence of protest or appeal language in the October 19, 2023 Department letter did not render it invalid. Rather, it merely removed the 60-day deadline within which the letter could be protested or appealed.
5. The Department letter dated October 19, 2023, is reversed and remanded to the Department to issue a letter or an order that complies with RCW 51.36.010(4).

Dated: April 16, 2024

BOARD OF INDUSTRIAL INSURANCE APPEALS



HOLLY A. KESSLER, Chairperson



ISABEL A. M. COLE, Member



JACK S. ENG, Member

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**Addendum to Decision and Order**  
**In re Kirtley D. Gardiner**  
**Docket No. 23 22640**  
**Claim No. AH-24090**

**Appearances**

Claimant, Kirtley D. Gardiner, Self-Represented

Employer, Various Employers (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per James S. Johnson

**Petition for Review**

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on February 27, 2024, in which the industrial appeals judge affirmed the Department letter dated October 19, 2023.