BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

In re: ROBERT B. JONES vs. DEPARTMENT OF LABOR & INDUSTRIES Claim No.: AT-68965	**Docket No.: 18 17363** **CLAIMANT'S PETITION FOR REVIEW**

COMES NOW, Claimant, Robert B. Jones, by and through his attorney of record, Spencer D. Parr, of Washington Law Center, and hereby petitions the full Board to conduct a review of the Proposed Decision and Order ("PD&O") of Industrial Insurance Appeals Judge, Steven Straume, dated August 12, 2019. The PD&O of 8/12/19 is incorrect decided based upon numerous important questions of law. It misunderstood the critical issues placed into contention by Mr. Jones' appeal. Therefore, because it misunderstood and improperly adjudicated the critical questions presented, full Board review is now clearly required.

KEY ISSUES PRESENTED IN THIS PETITION FOR REVIEW:

QUESTION 1: Can the Department of Labor & Industries require an injured worker to modify their body via unwanted surgical procedure, at the injured worker's sole expense, before the Department is required to furnish proper and necessary treatment for an Industrial Injury?

QUESTION 1 ANSWERED: No. There is no statutory or case law basis for such a rule of law, which if imposed, would also abridge an injured worker's constitutional rights.

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QUESTION 2: Can the Department of Labor & Industries refuse to pay for medical treatment to a worker's body part not expressly covered in a Labor & Industries claim if it is medically proper and necessary to perform that treatment in order to effectively treat an expressly covered condition?

QUESTION 2 ANSWERED: No. Once an injured worker requires a particular treatment for a covered medical condition, any adjunct medical services necessarily required to treat the covered medical condition must also be provided. This is because there exists a clear distinction between uncovered conditions which may merely "retard" (somewhat delay) the injured worker's recovery if left untreated and those which will essentially prevent that recovery if left untreated.

QUESTION 3: Is it permissible for the Department to render medical treatment coverage decisions based upon the socioeconomic status (i.e., "class") of the injured worker, or otherwise by using "profile" considerations?

QUESTION 3 ANSWERED: No. There is no basis in statute or case law to differentiate treatment that can be provided to an injured worker based upon their past socioeconomic status. It is also entirely speculative and therefore improper to consider that the worker's socioeconomic class will also continue into the future. Moreover, profile evidence is not permitted within the legal proofs traditionally allowable in the courts, so neither should the Department utilize any method of profiling while adjudicating the specific Industrial Insurance Act rights of injured workers.

QUESTION 4: Does the Department fail in its burden to rebut an injured worker's prima facie case for what constitutes proper and necessary, causally-related dental treatment if it fails to put on evidence that the injured worker agrees with and is willing and financially capable to undergo the invasive or surgical preparatory procedure which even the Department's expert witness testifies must precede the provision of the care the Department is willing to provide?

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QUESTION 4 ANSWERED: Yes. The Board must presume no agreement, willingness or financial capability of the injured worker to undergo preparatory surgical procedures regarding which the Department is refusing to pay even though the Department recognizes same as medically necessary precedents to the care the Department is actually willing to provide. If the Department cannot prove during its rebuttal case the practicality and appropriateness of the alternative care it is proposing to provide to the injured worker, it has not rebutted the injured worker's prima facia case in favor of the treatment the injured worker has otherwise proved to be proper and necessary.

FACTS:

Mr. Jones suffered an industrial injury on February 12, 2013 when he was assaulted at work by a patron of the hotel in which he was employed. During the assault, he was thrown down a stairway and suffered severe fractures to his right foot and ankle, a broken bone in his spine and fractured teeth. He later fell at home due to continuing right foot instability and knocked out some of his teeth. Ultimately, the Department of Labor & Industries accepted responsibility for missing teeth numbers 9, 10, 11, 21 and 25. Meanwhile, Mr. Jones already had several missing teeth[1]; moderate periodontal disease (underlying bone loss) around his remaining three teeth in his upper arch[2]; more advanced periodontal disease around his remaining teeth in his lower arch[3]; and five previously-placed but as-of-yet unrestored implant bases regarding which he had not yet been able to afford the final (crown) restorations[4]. Mr. Jones still has

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[1] Teeth numbers 1, 2, 3, 14, 15 and 16 (all of the tricuspid, or "molar" teeth….the back teeth…in the upper arch); as well as numbers 17, 18, 31, and 32 (four of six tricuspid teeth in the lower arch).

[2] At teeth numbers 6, 7, and 8.

[3] At teeth numbers 20, 22, 23, 24 and 26.

[4] Located at teeth numbers 4, 5, 12 and 13 in the upper arch (all of which are bicuspid teeth); and tooth number 30 in the lower arch (a tricuspid tooth).

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numerous of his original (biological or natural) teeth, including in both the upper (maxillary) arch and lower (mandibular) arch.

At the time of his Board hearing in this matter, Mr. Jones was using temporary acrylic (plastic) partial dentures which were ill-fitting, caused him discomfort, did not function sufficiently to allow him to chew his food (so had to be removed during eating), and had already broken numerous times. Mr. Jones would have to use super glue to repair his self-purchased, acrylic partial dentures, but even then was left with impairments in his speech and while performing his hobby of glass blowing. It is undisputed in this record that Mr. Jones' acrylic partial dentures have provided insufficient recovery to render him "fixed and stable," meaning to bring him to a point of maximum medical improvement with respect to his industrially-related missing teeth.

Mr. Jones argues that he should be provided dental implants for his industrially-related, missing teeth. The Department argues that he should be provided cast partial dentures, ***but only after Mr. Jones first pays to remove several of his existing, biological teeth that Mr. Jones absolutely does not want removed***. The PD&O of 8/12/19 adopts the Department's view, and Mr. Jones now therefore seeks review. In Mr. Jones' view, it is unconscionable for the Department to hold him in a place of disallowing appropriate and curative dental care for teeth numbers 9, 10, 11, 21 and 25 unless he first pays for the removal of several of his remaining biological teeth ***that he does not want removed***.

Mr. Jones put on the testimony of dentists Theresa Mah, DDS (a treating dentist who had performed a full examination) and Tar C. Aw, DDS (a Department-paid, IME examiner). The Department put forward the testimony of non-examining dentist, Robert B. O'Neil, DDS. Dr. Mah testified in relevant part that replacing industrially-related missing teeth numbers 9, 10, 11, 21 and 25 with fully-restored implants is within the appropriate standard of dental care and constitutes proper and necessary treatment in Mr. Jones' case. The implants would constitute a

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"high quality"[5] option for Mr. Jones. Other treatment options were available, but those would constitute lower quality options. Dr. Aw testified that either of two options would be of similar, high quality for Mr. Jones; either replacing the missing industrially-related teeth with implants or performing bone grafts and then casting more long-lasting partial dentures than Mr. Jones currently has. The Department has not agreed to the bone grafting either.

Dr. O'Neil then testified in essence that implants are always an option, but in the case of poor people (using Apple care, etc.) and injured workers, especially those like Mr. Jones who have not previously had sufficient money to perform follow-up dentistry on the implants he's started in the past, as well as for those with past questionable oral hygiene habits resulting in periodontal disease, only a more conservative option should be offered until the injured worker has sufficiently proven himself capable and willing to perform better oral hygiene going forward. Dr. O'Neil's testimony drips with personal judgments and statements regarding people having Mr. Jones' socioeconomic profile. During that testimony, Mr. Jones' counsel preserved an objection, granted as "continuing" by the Assistant Attorney General present at the deposition, to the state putting forward such "profile" evidence[6]. Mr. Jones' counsel specifically cited to a recent Court of Appeals, Division 3, criminal law case indicating that it is contrary to several rules of evidence to allow profile evidence into a trial record. Those same rules of evidence also are to be applied in all matters before the Board. Accordingly, Dr. O'Neil's testimony providing "profile" evidence should not even be allowed into this record.

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[5] RCW 51.36.010 specifies that injured workers are entitled to "high quality" medical treatment.

[6] See discussion of *State v. Crow*, 438 P.3d 541 (2019) which took place on the transcript of Dr. O'Neil's testimony taken on May 7, 2019, beginning at page 40.

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ANALYSIS:

In deciding all Industrial Insurance matters, the three most important judicial canons to observe are: 1) the Act is to be liberally-construed in order to advance the remedies provided therein; 2) the courts must apply the law based upon the spirit, not just the letter of the Act, and 3) the courts must resolve any doubts as to the application of the Act in favor of the injured worker. *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d 269 (1968).

The Industrial Insurance Act, Title 51 RCW, was written to provide swift and certain relief to injured workers. *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001) (emphasis added). The "overarching objective" of the Act is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle,* 142 Wn.2d at 822 (quoting RCW 51.12.010)(emphasis added). The Act is remedial in nature and is therefore to be construed liberally in order to achieve its purpose. RCW 51.12.010; *Sacred Heart Med. Ctr. V. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979). The Act is "grounded in such humanitarian impulse" (rephrased for grammatical conformity) as to allow findings "included within the reason, although outside the letter, of the statute." *Ross v. Erickson Const. Co.*, 89 Wn. 634, 639-641, 155 P. 153 (1916). When interpreting the Act, all doubts regarding the law are to be resolved in favor of the injured worker. *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635.

RCW 51.36.010(1) provides that injured workers are entitled to "high quality" medical care, which includes also dental care. RCW 51.36.010(2)(a) provides that "upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his own choice…" This plain statutory language makes clear that injured workers retain significant control over their own bodies and

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medical choices to be made during treatment undertaken for industrial injuries, and they are not required to accept low-quality or minimalist treatments from the Department.

It makes no sense in the context of the clear meaning of RCW 51.36.010 to find that Mr. Jones must now subject himself to invasive or surgical bodily modifications, whether those be considered significant or insignificant to the Department of Labor & Industries, simply because the Department believes removing several of Mr. Jones remaining natural teeth is a "conservative," viable and more appropriate option for an individual having Mr. Jones' profile. To rule otherwise is to negate the clear intention of this statute that injured workers may choose their own providers, which inherently also means they may choose between providers recommending different available treatments. The spirit of this statute cannot be upheld by forcing Mr. Jones to pay for surgical removal of several of his biological teeth in order to access lesser-quality care that will only thereafter render him fixed and stable. No such preliminary hurdles need be jumped before proper and necessary care is mandatory pursuant to RCW 51.36.010. Nor is it consistent with the purposes of the Industrial "Insurance" Act to require Mr. Jones to bear any incident of the risks being insured. He cannot be forced to pay in advance for preliminary surgical dental work that is deemed necessary by the Department in order to only thereafter receive the care the Department would prefer to provide to the allegedly low-class, Mr. Robert Jones[7]. RCW 51.36.010(2)(a) says "upon the occurrence" of the injury, not "upon the fulfilment of additional conditions precedent, including the payment of what effectively amounts to a deductible or co-pay."

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[7] For the record, Mr. Jones is not low class. He is from a prominent artisan family having a well-established name in the glass-blowing community even if the prior economic downturn did temporarily ruin his personal finances, although that is hardly the point. The point is that no injured worker should be subjected to such pernicious judgments as the allowance of profile evidence will guarantee results.

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Simply stated, the Department of Labor & Industries cannot legally require an injured worker to modify their body via unwanted surgical procedure, nor force the injured worker to pay for that unwanted procedure, before the Department is required to furnish the high quality, proper and necessary treatment the injured worker is entitled to pursuant to the plain language of RCW 51.36.010. There is no statutory or case law basis for deciding to the contrary, and the invitation to allow such a discriminatory power to the Department should be resisted given the likely constitutional ramifications and conflicts involved, which neither the Board of Industrial Insurance Appeals nor the Department of Labor & Industries are even competent to thereafter adjudicate.

Accordingly, the Board should hold that the Department of Labor & Industries cannot extort the injured worker to act in a way the Department prefers, or to choose the medical or dental care the Department would most prefer to provide, such as it is obviously doing in the current case, by refusing Mr. Jones even that dental treatment the Department's own medical expert recommends as curative (unless or until Mr. Jones first undergoes and also pays for his own unwanted dental extractions at sites not covered under his L&I claim). If the law allowed such abusive conduct from Department, an injured worker could also be compelled to pay for marital counseling before undergoing treatment for consequential depression related to an industrial injury (just to make sure the depression treatment obtained highest benefit); or to undergo expensive bariatric weight loss surgery at the injured worker's own expense before the Department could be required to pay for industrially-related and medically proper and necessary low back fusion surgery; or to undergo many other expensive or unwanted procedures before the Department is required to pay for the medical and dental benefits otherwise clearly mandated by RCW 51.36.010. Such a holding would destroy the often-cited intention that the Industrial Insurance Act provide "swift and certain" relief. The spirit of the law would thereafter be forever

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damned. Hell for injured workers would certainly follow in many example scenarios such as those cited above, but also undoubtedly in many others as well.

It is also important at this juncture to address the issue of the Department's discretion. Only for the purpose of argument, Mr. Jones will concede here that there may be cases in which the Department retains discretion to deny coverage for adjunct (meaning, not causally-related) medical procedures which merely "retard" an injured worker's ultimate recovery, but here there is no doubt that without at least some adjunct treatments also being demanded by the Department, or else paying for the implants Mr. Jones actually seeks, his recovery will be halted and prevented altogether. Mr. Jones will be left in an inhumane condition in which he cannot eat, speak, or function adequately to meet the humanitarian impulses and purposes of the Industrial Insurance Act. Whatever the minimal extent of the discretion perhaps allowable to the Department in other cases, it certainly does not extend as far as the Department has attempted to push in this case.

Next, the board should hold that it is impermissible for the Department to render medical treatment coverage decisions based upon the socioeconomic status (i.e., "class") of the injured worker, or otherwise by using "profile" considerations normally disapproved by the evidence rules that apply during appeals to the Board and higher courts. There is no basis in statute or case law to differentiate treatment that can be provided to an injured worker based upon their past socioeconomic status. A worker's inability to pay for dental treatment in the past does not mean they will be unable in the future, especially in a case like with Mr. Jones where it can already be understood that he will likely receive substantial permanent partial disability benefits at the time of his claim closure, and it is entirely possible (even perhaps likely) that he may use those benefits to finish the incomplete, pre-existing implant work that exists in his mouth.

It is entirely speculative and improper for the Department here to profile an injured worker as belonging to a lower socioeconomic class and to then predicate denial of acceptable, high-quality dental treatment based upon assumptions that the injured worker will remain "low

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class" or otherwise unwilling to take care of his oral hygiene going forward. If the worker is "unable" to care for his hygiene, that may be a valid consideration for the Department to keep in mind when authorizing a particular medical procedure; but the department is at no point permitted to assign character attributes or bring speculative condemnation of presumed future habits by the injured worker in order to deny the injured worker high quality care. Yet, that is exactly what Dr. O'Neil's testimony indicates was done in this case, so although the Board cannot be expected to express an apology to Mr. Jones by reason of the Department's ill-founded consideration toward him, nevertheless, the thrust of Dr. O'Neil's testimony predicated upon "profile" evidence and Dr. O'Neil's apparent biases must now be rejected as a matter of law.

Next, there also remains an important technicality regarding the operation of the shifting of burdens of proof in this case. Mr. Jones testified that he wants implants. He put on two dental expert witnesses indicating that dental implants are an appropriate, high-quality, proper and necessary form of dental care for the teeth he is missing due to his industrial injury. He made a prima facie case to this end. Meanwhile, there is no evidence in this record, and Mr. Jones submits an affidavit herewith denying, that Mr. Jones is in any way willing to undergo surgical removal of any of his remaining biological teeth. He is not. Accordingly, the Board must now be constrained to find that the Department has not proved its rebuttal case that a cast partial denture option (necessitating Mr. Jones' prior removal of certain of his remaining natural teeth) is "proper and necessary" treatment in this case.

Finally, Mr. Jones notes that it is grossly-speculative and also irrelevant for the Department's expert witness to testify that Mr. Jones' current options should be limited to a cast partial denture that requires removal of remaining biological teeth, just because he might get punched in the face or fall and hurt himself at some point in the future if he has dental implants placed instead. Dr. O'Neil's testimony gave no basis or statistical prospects of Mr. Jones ever getting punched again or falling so hard squarely on his newly-implanted teeth that he would

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then break his jaw bone. These improperly-founded, highly-dramatic, never-quantified potentials are likely no greater than would exist for anyone of a higher class than Mr. Jones, unless of course the real reason these risks were voiced by Dr. O'Neil was due to obvious bias against low-class, injured workers (as it appears was the case). In any event, the Board should now overrule the PD&O of 8/12/19 in finding that such risks were never properly founded, largely expressed as hypothetical in nature, an too attenuated as contraindicating risks to be credited for denying implant placements in this case.

CONCLUSION:

The Board should reverse the PD&O of 8/12/19 in favor of a finding that the Department must now either pay for dental implants for all five missing teeth that are causally-related to Mr. Jones' industrial injury, or in the alternative, work with Mr. Jones to find an alternative to which Mr. Jones and the Department both consent and agree. In no case should the Board sustain the PD&O of 8/12/19, which effectively holds that Mr. Jones must pay for surgical removal of remaining biological teeth before he is entitled to further Industrial Insurance Act dental treatment benefits (which is EXACTLY what the letter on appeal stated).

RESPECTFULLY SUBMITTED THIS 6TH DAY OF SEPTEMBER, 2019.

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