

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Michael Jassek,	)	
	)	
Claimant and Appellant	)	
	)	
-vs-	)	
	)	Supreme Ct. No. 20110225
Workforce Safety and Insurance,	)	Burleigh Co. No. 28-10-C-2841
	)	
Appellee	)	
	)	
Northern Improvement Company,	)	
	)	
Respondent	)	
.....	)	

---

**SUPPLEMENTAL BRIEF OF APPELLANT**

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA FROM  
THE JUDGMENT OF THE DISTRICT COURT DATED JUNE 6, 2011, AFFIRMING  
THE FINAL ORDER OF WORKFORCE SAFETY AND INSURANCE OF MAY 18,  
2011.

---

Dean J. Haas  
Larson Latham Huettl LLP  
PO Box 2056, Suite 450  
Bismarck, ND 58502-2056  
Phone No: (701) 223-5300  
BAR ID No: 04032  
Attorney for Appellant

**TABLE OF CONTENTS**

	<u>Page No.</u>
Table of Authorities .....	1
	<u>Paragraph No.</u>
Statement of the Issues.....	1, 2
Statement of Facts .....	3
Law and Argument .....	12
I.    The Determination of the appropriate prosthesis does not meet either of the two limits on reviewability to medical provider appeals .....	12
II.   Jassek participated in the dispute resolution, and is entitled to review.....	18
Conclusion .....	38
Certificate of Compliance .....	39

**TABLE OF AUTHORITIES**

	<u>Paragraph No.</u>
<u>Armstrong v. Miller</u> 200 N.W.2d 282, 283 (N.D. 1972) .....	32
<u>Hanson v. Williams County</u> 389 N.W.2d 319, 333 (N.D. 1986) .....	37
<u>Hofsommer v. Hofsommer Excavating, Inc.</u> 488 N.W.2d 380, 384 (N.D. 1992) .....	31
<u>Lass v. North Dakota Workmen's Compensation Bureau</u> 415 N.W.2d 796 (N.D. 1987) .....	33
<u>Meier v. North Dakota Dept. of Human Services</u> 2012 ND 134 ¶ 10, 818 N.W.2d 774 .....	14
<u>Vickery v. North Dakota Workers Compensation Bureau</u> 545 N.W.2d 781, 784 (N.D. 1996) .....	26

**Statutes and Rules**

N.D.C.C. § 1-02-38(2) .....	14
N.D.C.C. § 65-02-20.....	1, 11, 12, 18
N.D.C.C. § 65-05-07.....	12, 15, 26
N.D. Admin. Code § 92-01-02-34(3)(a)(2) .....	12

**Other Authorities**

Hearing on H.B. 1138 Before House Industry, Business and Labor Committee, 53rd N.D. Legis. Sess. (January 27, 1993) .....	27
N.D. Constitution Art. I, § 9 .....	36

## **Issues Presented**

[1] Whether the Binding Dispute Resolution determination of the appropriate prosthesis for Jassek constitutes “a request for diagnostic tests or treatment” under N.D.C.C. § 65-02-20.

[2] Whether the dispute resolution decision is reviewable.

### **Statement of Additional Relevant Facts**

[3] Michael Jassek (Jassek) lost his left hand over three years ago, in an accident on September 12, 2009. Since then, he has struggled emotionally and physically with a devastating loss, especially the inability to do scores of activities we take for granted, compounded by a less than fully functional prosthesis. Jassek’s pursuit of the myoelectric prosthesis was communicated to WSI in a meeting attended by Jassek, his wife, Nathan McKenzie, Certified Prosthetist Orthotist, and WSI’s medical coordinator, Karen J., as early as November 13, 2009. (WSI Supp. App. at 4). Karen J. recognized that McKenzie would be supplying the technical material in support of Jassek’s request for a myoelectric prosthesis. *Id.*

[4] On November 27, 2009, Karen J. reported that she had asked McKenzie to “provide letter/documentation of medical necessity for both manual and UE prosthetic and myoelectric hand.” (WSI Supp. App. at 5). On December 8, 2009, WSI claims adjuster Laurie J. informed Jassek that WSI decided to pay for a hook, and deny the myoelectric hand. (WSI Supp. App. at 8). Jassek expressed disagreement. *Id.* The adjuster called McKenzie the next day, December 9, 2009, at which time McKenzie supported Jassek’s contention that he is a candidate for a myoelectric prosthesis. (WSI Supp. App. at 8).

[5] On January 12, 2010, the medical coordinator, Karen J. met with Jassek and Dr. Eggert. She noted that Jassek was “working with” McKenzie “regarding a possible rental program for the myoelectric hand to trial,” and that Dr. Eggert “would support this.” (WSI Supp. App. 11). On January 28, 2010, Karen J. again noted that Jassek wanted a myoelectric hand, and was working with McKenzie to provide the technical materials in support of his effort to obtain approval of the device. (WSI Supp. App. 12).

[6] On February 12, 2010, claims adjuster Laurie J. reported that Jassek was seeking both prosthetic devices, the dorrance hook and the myoelectric. (WSI Supp. App. 13). The adjuster noted that WSI had denied payment of both prosthetics. *Id.* WSI arbitrarily sent the notice of denial dated February 22, 2010, to MedEquip, rather than Jassek, who was supposedly copied. (Jassek Appendix 33). Dr. Eggert and McKenzie sent the follow-up documentation to WSI on April 7, 2010. (Jassek Appendix 34-35 (Dr. Eggert); and Jassek Appendix 36-42 (McKenzie)). Claims adjuster Laurie J. made a notation on April 9, 2010, that the documentation was not filed within 30 days. (WSI Supp. App. 14).

[7] On April 16, 2010, Claims Adjuster Laurie J. advised McKenzie that WSI would consider additional documentation to support Jassek’s demand for a myoelectric prosthesis. (WSI Supp. App. 15). She noted that McKenzie told her that “he will bring IW [injured worker] in and see if they can put something together that [sic] of the things IW can’t perform right now.” *Id.* The claims adjuster talked with Jassek again that same day, and discussed the prosthesis, “wherein Nathan will be submitting additional information informing us what things IW can’t do.” *Id.*

[8] On May 14, 2010, Laurie J. talked with Jassek again, who reported that he and McKenzie had “come up with some things that IW can’t do with his current prosthesis to support the myoelectric hand.” (WSI Supp. App. 16). McKenzie provided the additional documentation that WSI sought on May 28, 2010, including the list of activities that Jassek reports he is unable to do. (Jassek Appendix 41-42). On June 9, 2010, WSI again wrote only to MedEquip, advising that its decision remained unchanged. (Jassek Appendix 43).

[9] As before, McKenzie replied on Jassek’s behalf, submitting another disability questionnaire that evaluated Jassek’s functional losses. (Jassek Appendix 46-57). Jassek was clearly the author of many of these materials: Jassek supplied “home life and lifestyle” information (Appendix 50); “education, vocation, recreation & hobbies” information (Appendix 51-51); and the “goals worksheet.” (Jassek Appendix 53).

[10] In response, WSI decided on August 3, 2010, to request the IME from Dr. Gurin. (WSI Supp. App. 17). After receiving the IME report, WSI’s program director, Chuck Kocher, staffed Jassek’s request for a myoelectric prosthesis with the claims supervisor and the medical director, Luis V., and rendered a conclusory “Binding Dispute Resolution” decision (BDR), without inviting Jassek to participate in any way. (Jassek Appendix 17-18).

[11] Throughout this entire lengthy process Jassek did not have counsel, but continued to pursue the myoelectric prosthesis in the only way in which he had been invited, through discussions with his medical benefits coordinator and claims adjuster, and in reliance on McKenzie to file the supporting documentation. It was WSI’s unexplained decision to send only notice of decision to McKenzie and not Jassek that formed the

structure through which the BDR then proceeded. As a factual matter, this is not the kind of BDR demand *generated and pursued* by a medical provider contemplated by N.D.C.C. § 65-02-20.

### Law and Argument

#### **I. The determination of the appropriate prosthesis does not meet either of the two limits on reviewability to medical provider appeals.**

[12] There is no dispute that an injured employee is entitled to payment of reasonable medical treatment under N.D.C.C. § 65-05-07, or that N.D. Admin. Code § 92-01-02-34(3)(a)(2) specifically requires WSI to “authorize and pay for prosthetics and orthotics as needed by the claimant because of a compensable work injury when substantiated by the attending doctor.” The first question posed by the Court, instead, concerns the meaning of the term “diagnostic tests or treatment” used in the Binding Dispute Resolution statute, N.D.C.C. § 65-02-20:

If an employee, employer, or medical provider disputes a managed care decision, the employee, employer, or medical provider shall request binding dispute resolution on the decision. ... A dispute resolution decision under this section requested by a medical provider concerning payment for medical treatment already provided or a request for diagnostic tests or treatment is not reviewable by any court. A dispute resolution decision under this section requested by an employee is reviewable by a court only if medical treatment has been denied to the employee. ... The dispute resolution decision may be reversed only if the court finds that there has been an abuse of discretion in the dispute resolution process....

[13] If the medical provider, Nathan McKenzie, was taking this appeal, rather than Jassek, WSI’s denial of Jassek’s prosthesis would still be reviewable. The statute provides only two limitations on a provider’s right to obtain judicial review. The first, concerns “medical treatment already provided.” This, obviously, is not the case here.

[14] The second limitation on a provider’s right of review pertains to “a request for *diagnostic tests or treatment*.” If the word “treatment” is read alone, out of the context

in which it is used (as part of the *term* “diagnostic tests or treatment”), then this second category of non-reviewability subsumes *every treatment*—including the first category “medical treatment already provided.” This reading renders the first category superfluous. The legislature does not intend idle acts. *Meier v. North Dakota Dept. of Human Services*, 2012 ND 134 ¶ 10, 818 N.W.2d 774, citing N.D.C.C. § 1-02-38(2) (“The entire statute is intended to be effective.”)

[15] Moreover, if the word “treatment” is read separately from the manner in which it was used (as part of the *term* “diagnostic tests and treatment”) then medical providers would never be entitled to judicial review. This follows because the word “treatment” includes not only diagnostic medical services, but also palliative, surgical, and etc. Quite simply *all* “medical supplies and services” that constitute compensable medical care under N.D.C.C. § 65-05-07 must fall within some category of treatment, whether diagnostic, palliative, surgical, or drug.

[16] The only way to reconcile that there is indeed some provision for any medical provider appeal at all, with two relatively narrower categories of non-reviewability, is to read the statute in a straight-forward manner. That is, a medical provider is not entitled to judicial review if the medical treatment had already been provided, or if the *provider* requests approval of *diagnostic medicine*<sup>1</sup>—which the statute refers to in a catch-all manner, “diagnostic tests or treatment.”

[17] To its credit, WSI recognized this essential truth at oral argument, when Ms. Anderson advised the Court that she had reviewed the reviewability issue, but had

---

<sup>1</sup> Diagnostic tests are commonly known to include MRI, CT, etc. Less known are some of the diagnostic treatments used in the medical profession, such as epidural steroid injections, discograms, etc.

concluded that Jassek's prosthetic did not fall within the limitations on reviewability, as Jassek's demand for a myoelectric prosthesis was not "treatment already provided," nor "diagnostic tests and treatment." Clearly, Jassek's claim is reviewable. Perhaps, at the Court's invitation, WSI will see fit to try to invent a new theory. Hopefully, WSI will be straight-forward. But a brand new argument invented for this case alone must be viewed skeptically, given WSI's admission at the oral argument.

**II. Jassek participated in the dispute resolution, and is entitled to review.**

[18] The question of reviewability under N.D.C.C. § 65-02-20 is more complicated than a simple question as to the accidental form in which the request for BDR was formally presented. Here, it was Jassek who demanded the myoelectric prosthesis, and he duly enlisted the aid of McKenzie to provide the supporting documentation. In fact, as the legislative intent reveals, the legislature engaged in significant discussion to explicitly provide for judicial review where it was the injured worker who was dissatisfied with the utilization review decision. Many of these cases, especially pertaining to diagnostic medicine, are indeed brought and pursued only by medical providers who alone appear concerned about the denial—hence the limitations on provider appeals.

[19] In fact, the provision for judicial review is not intended to focus on whether the request for BDR review was, as a matter of form, submitted in writing by the medical provider or the employee. Here, WSI chose to communicate with and send notices of denial of care to McKenzie, thus treating the BDR as though filed by McKenzie, even though Jassek had made the demand for the myoelectric prosthetic. It is not clear from the record why WSI's decisions denying the demand were mailed to

McKenzie rather than to Jassek. If WSI had instead mailed the first notice of denial to Jassek as it should have done, he would have filed the requests for review and paperwork concerning the nontechnical inputs he provided relating to his functional losses.

[20] Thus, the relevant question is who is actually taking the appeal from the BDR. If a provider files the appeal, then the above described limits on review apply. If the employee files the appeal because he or she is ‘actually aggrieved’ by any BDR decision (one that actually denies medical treatment), then the denial is reviewable. The focus on the party who ultimately filed a written petition for the BDR is misdirected.

[21] As noted in the facts above, there was a drawn out process spanning a period of many months prior to the ultimate BDR decision. Jassek was part of these processes that together constituted his demand for the BDR panel to render an appealable decision. The record reflects that Jassek advised WSI that he desired a myoelectric prosthesis, and that McKenzie supported the request, supplying the technical materials that would be needed to convince the decision-makers. McKenzie did not pursue this BDR on his own behalf, and did not intend to file the appeal, which was up to Jassek to pursue. This is not a medical provider appeal.

[22] WSI was investigating *Jassek’s request* for a myoelectric prosthesis over a period of many months, reviewing the submissions of McKenzie following the initial meeting on November 13, 2009, of McKenzie, Jassek, and WSI’s medical coordinator Karen J. (WSI Supp. App. at 4). In fact, as part of the BDR process, WSI decided to schedule an IME before the BDR panel convened, to respond to Jassek’s report that he and McKenzie had “come up with some things that IW can’t do with his current

prosthesis *to support the bioelectric hand.*" (See May 14, 2010 notebook entry at WSI Supp. App. 16). Jassek is the ultimate source behind this demand for this BDR.

[23] Any employee—especially one unrepresented by counsel, as here—will certainly rely upon the medical provider to submit the supporting medical materials. This submission of the technical documentation of the case by the medical provider cannot govern whether or not the aggrieved employee is entitled to judicial review. Jassek initiated the inquiry into the appropriate prosthesis, and was part of the process. WSI and Jassek both asked McKenzie to present the scientific and medical opinion evidence. Jassek was copied each time WSI rendered a decision, and then he conferred with McKenzie about the next steps in the drawn out BDR process. In fact Jassek thought he was a participant, and that he had a right to a hearing. (See his hearing request, at Jassek Appendix 21).

[24] No other construction of the facts is possible but that Jassek was part of the BDR, which indeed did not contemplate involving him to any extent—evidenced by the fact that Jassek was not provided any opportunity to appear before the BDR tribunal. Given this, it is difficult to imagine what else a pro se employee must do to preserve his rights to appeal. To say that because McKenzie submitted the materials that Jassek is not entitled to appeal heightens form over substance. The legislative history supports this interpretation. The sole limitation on review for employees was intended to be in circumstance in which the medical benefit was not actually denied.

[25] For example, if an employee is not interested in and actually aggrieved by the denial of diagnostic testing or treatment (as is usually the case), but the provider is,

seeking to protect a source of income, then a denial pursued and appeal filed by the provider alone is not reviewable.

[26] Similarly, where the benefit was already provided to the employee, there has not been a denial of medical treatment. Thus, in *Vickery v. North Dakota Workers Compensation Bureau*, 545 N.W.2d 781, 784 (N.D. 1996), the Court held that the employee lacked standing to take an appeal regarding denial of diagnostic services because he lacked injury-in-fact. In that case, the employee was not injured by the denial of payment because the services had been given, and N.D.C.C. 65-05-07(4) did not allow the provider to bill him for services. The statute states, in pertinent part, "[h]ealth care providers or doctors may not bill injured workers for any services rendered as a result of the compensable work injury." The Court noted that "Vickery has received the CT scan and myelogram. Vickery has not shown that he was personally billed for those services. Nor has he shown that he has since been denied any medical services whatsoever as the result of the Bureau's refusal to pay ADIC's claim." *Id.* The only limit the legislature intended to place on the employee's right to appeal a BDR decision relates to the circumstance when the employee was not actually denied a medical benefit.

[27] In a related vein, WSI explained the rationale for limiting medical provider appeals:

Often there may be disputes over medical necessity of a particular type of treatment. Our program right now requires that all high-tech diagnostic imaging procedures, such as CT scan, MRI and myelogram, be pre-certified as to medical necessity. If a provider does not pre-certify this procedure as required, we deny the charges for lack of opportunity to review the issue. The provider must then request retrospective review of that charge to determine medical necessity. If, upon review, the managed care vendor finds the procedure not medically necessary, the Bureau will not pay the charge. It is important to note, however, that the claimant is held harmless for this charge; i.e., the claimant cannot be made to pay this

bill. Therefore, the claimant has not lost any benefit – s/he had the test and is not responsible for paying the provider. At times, we have had attorneys request to take these issues to binding arbitration yet, in reality, the claimant has not been denied a benefit. Only the provider has been denied. This type of dispute, after exhausting appeal mechanisms through the managed care company, should be presented before a panel of peers for final determinations with the decision of the panel binding on all parties.

(January 27, 1993, Hearing on H.B. 1138 Before House Industry, Business and Labor Committee, 53rd N.D. Legis. Session, testimony of Pat Mayer, at 3).

[28] Significantly, the bill presented to the legislature did not provide an employee a right of review. Given the concern of various legislators during the hearings on the legislation, an amendment was made to provide such a right.<sup>2</sup> However inartfully drafted, the legislative intent is to allow a factually aggrieved employee—an employee suffering the denial of a medical benefit he or she sought—an entitlement to judicial review.

[29] Finally, while the courts frequently defer constitutional questions if possible, that will not be possible here. For if the Court determines that Jassek's appeal should be dismissed because McKenzie filed the supporting paperwork, then as a logical matter, the Court must also conclude that Jassek is not even party to the BDR. If Jassek is not a party, then he retains the right to pursue the myoelectric prosthesis in a further proceeding, and the constitutional question cannot be avoided. That is, the BDR decision cannot be binding on him, a nonparty, under the doctrines of collateral estoppel or res judicata.

[30] Clearly, the constitutional question must eventually be resolved. As the facts here illustrate eloquently, the legislature did not direct just how WSI is to determine

---

<sup>2</sup> See WSI brief to the Court, filed on October 11, 2011, ¶ 49, citing Minutes of March 2, 1993, Senate Industry, Business and Labor Committee of the North Dakota Legislature at WSI Supp. App. 24-25.

who made the BDR request. Here, WSI's treatment of the request as emanating from McKenzie is a subjective determination on its part: by simply sending the informal denial letters to MedEquip, the die was cast as to the form this matter took. Given that ambiguity, and that an employee's right to obtain review is logically conditioned on whether a medical benefit sought is denied, the Court should not require Jassek to wait another two years for additional proceedings to wend its way through the agency and the Courts, while he struggles with a less than ideal prosthesis.

[31] As to the unavailability of the constitutional question, North Dakota continues to follow the historical rule requiring mutuality, explaining that:

Historically, collateral estoppel was limited by the principle of mutuality, which means that 'a judgment can operate as collateral estoppel only where *all the parties to the proceeding in which the judgment is relied upon were bound by the judgment.*' ... Although the principle of mutuality has been abandoned in numerous jurisdictions ... this court has applied the mutuality rule as a prerequisite to the application of collateral estoppel. ... For all practical purposes, the mutuality rule is coextensive with the requirement that the plea of res judicata is available only to a party to the judgment and his privies.

*Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992) (emphasis added) (citations omitted).

[32] In *Armstrong v. Miller*, 200 N.W.2d 282, 283 (N.D.1972), the Court, quoting extensively from an Annotation in the American Law Reports, said:

The phrase 'rule of mutuality' refers to the requirement ... that as a general proposition, a judgment can operate as collateral estoppel only where *all the parties to the proceeding in which the judgment is relied upon were bound by the judgment.*

\*\*\*

The mutuality rule has been expressed by the courts in varying language. Thus, *it has been stated that an estoppel by judgment is mutual if both litigants are concluded by the judgment, and that otherwise it binds neither.* ...

*Armstrong v. Miller*, 200 N.W.2d 282, 283 (N.D.1972), quoting 31 A.L.R.3d 1044, 1048-1061, Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel To a Stranger to the Judgment (emphasis added).

[33] But even if Jassek is considered a party for res judicata purposes but not for purposes of a party entitled to review, *Lass v. North Dakota Workmen's Compensation Bureau*, 415 N.W.2d 796 (N.D. 1987), mandates that res judicata does not bind Jassek if there is a significant change in circumstances. Here, that will be if Jassek has a change in his job, from one that exposes him to grease, to one that does not. Such a significant change in his vocational circumstances will entitle him to another proceeding.

[34] The Constitutional issue must be addressed now; Jassek is indeed factually aggrieved by WSI's denial of his demand to pay for a myoelectric prosthesis, and the accident that WSI directed the initial informal denial letters to McKenzie should not be used to deprive Jassek of judicial review where he actively pursued this medical benefit under the Act.

[35] Furthermore, a determination that Jassek is not entitled to judicial review of the actual denial of a functionally adequate replacement hand arguably deprives him of open access to the Courts—the very thing that WSI represented to the Court in its initial brief was alone sufficient to provide Jassek due process. See WSI brief to the Court, filed on October 11, 2011, ¶ 49. Though WSI is not correct that a provision for judicial review alone is sufficient to afford due process, WSI was right that the legislature indeed intended to allow any injured worker actually denied such an important medical benefit to obtain review in the Courts.

[36] The legislature indeed intended to ensure injured workers have access to the Courts. Art. I, § 9, N.D. Const. states:

All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

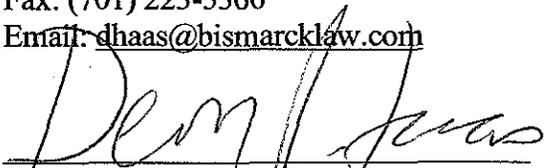
[37] While this constitutional provision has not been construed as an absolute right, it is a “mandate to the judiciary,” serving “as a guarantee of access to our state system of justice.” *Hanson v. Williams County*, 389 N.W.2d 319, 333 (N.D. 1986). Since Jassek’s demand for an adequate prosthesis, communicated to his medical coordinator and claims adjuster initiated the BDR process, the arbitrary decision by the adjuster to send the communications regarding the proceedings to his medical provider (who was expected to provide the supporting expert documentation of the superiority of the myoelectric device) should not be used to deny review. Jassek’s life without a functional prosthesis has gone on long enough; he is entitled to a decision without a needless delay for a second BDR process on change of vocational circumstance.

#### Conclusion

[38] For the reasons above stated, the BDR decision is reviewable.

Respectfully submitted this 25<sup>th</sup> day of September, 2012.

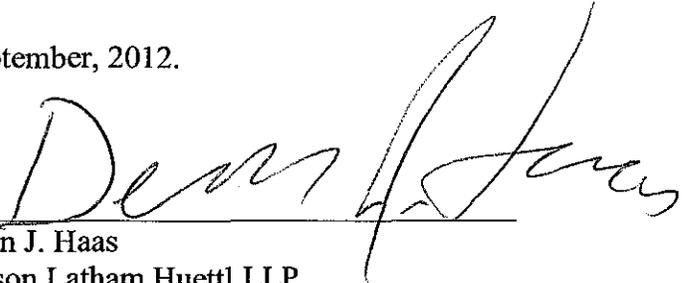
LARSON LATHAM HUETTL LLP  
Attorneys for Claimant  
521 East Main Ave., Suite 450  
P.O. Box 2056  
Bismarck, ND 58502-2056  
Phone: (701) 223-5300  
Fax: (701) 223-5366  
Email: [dhaas@bismarcklaw.com](mailto:dhaas@bismarcklaw.com)

  
By: Dean J. Haas (ID 04032)

## CERTIFICATE OF COMPLIANCE

[39] The undersigned, as attorney for the appellant in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and that the total number of words, excluding words in the table of contents and table of authorities, is 3,984 words.

Dated this 25th day of September, 2012.



---

Dean J. Haas  
Larson Latham Huettl LLP  
PO Box 2056, Suite 450  
Bismarck, ND 58502-2056  
Phone No: (701) 223-5300  
BAR ID No: 04032  
Attorney for Appellant

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Michael Jassek, )  
)  
Claimant and Appellant )  
)  
-vs- )  
)  
Workforce Safety and Insurance, )  
)  
Appellee )  
)  
Northern Improvement Company, )  
)  
Respondent )  
..... )  
STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

**CERTIFICATE OF SERVICE**

Supreme Ct. No. 20110225  
Burleigh Co. No. 10-C-2841

I, Dean J. Haas, hereby certify that on September 25, 2012, I served the SUPPLEMENTAL BRIEF OF APPELLANT upon the following by emailing a true and correct copy to the following email addresses:

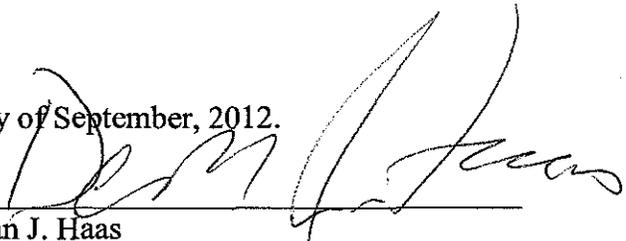
Jacqueline S. Anderson  
[janderson@nilleslaw.com](mailto:janderson@nilleslaw.com)

Al Schmidt – WSI Legal Department  
[aaschmidt@nd.gov](mailto:aaschmidt@nd.gov)

and by mailing a true and correct copy to the following U.S. Mail address:

Northern Improvement Company  
PO Box 2846  
Fargo, ND 58108-2846

Dated this 25th day of September, 2012.



Dean J. Haas  
Larson Latham Huettl LLP  
PO Box 2056, Suite 450  
Bismarck, ND 58502-2056  
Phone No: (701) 223-5300  
BAR ID No: 04032  
Attorney for Appellant