

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Patricia Witcher,

Appellant,

v.

North Dakota Workers
Compensation Bureau and
University of North Dakota,

Appellees.

Supreme Court No. 990138

990138

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 23 1999

STATE OF NORTH DAKOTA

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**BRIEF OF APPELLEE NORTH DAKOTA
WORKERS COMPENSATION BUREAU**
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**APPEAL FROM JUDGMENT OF MARCH 17, 1999,
RAMSEY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE DONGVAN FOUGHTY**
+++++

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I. STATEMENT OF THE ISSUES

- I. WHETHER THE CLAIMANT'S PERMANENT PARTIAL IMPAIRMENT AWARD WAS PROPERLY REDUCED BY THE AMOUNT OF PRIOR AWARDS FOR PERMANENT IMPAIRMENT?**
- II. WHETHER ENTITLEMENT TO ATTORNEY'S FEES IS GOVERNED BY THE LAW IN EFFECT ON THE DATE OF INJURY.**

II. STATEMENT OF THE CASE

On November 16, 1989, Witcher made application for workers compensation benefits in connection with a work injury sustained November 7, 1989. (App. p. 34¹) On that date, Witcher was employed by the University of North Dakota, as a cook. Id.

On March 9, 1995, the Bureau issued an Order Awarding Permanent Partial Impairment Benefits. (App. p. 36) Witcher appealed this Order. (App. p. 39) On June 16, 1995, the Bureau issued an additional Order Awarding Permanent Partial Impairment Benefits. (App. p. 40) Witcher again appealed this Order. (App. p. 43) On June 20, 1995, the Bureau issued an Amended Order Awarding Permanent Partial Impairment Benefits. (App. p. 45) Witcher again appealed the Order. (App. p. 48)

On July 23, 1996, the Bureau issued an Order Denying Psychiatric Permanent Partial Impairment. (App. p. 53) Witcher appealed. (App. p. 59) Following an administrative hearing, the Bureau issued Findings of Fact, Conclusions of Law and Order dated July 11, 1997. (App. p. 72)

On March 26, 1998, the Bureau issued its Order Denying Additional Permanent Impairment Benefits. (App. p. 86) Witcher appealed. (App. p. 89) An Amended Order

¹ "App." refers to the Appellant's Appendix.

Awarding Permanent Partial Impairment Benefits was issued May 12, 1998. (App. p. 94) Claimant again appealed. (App. p. 98) Benjamin E. Thomas was designated to preside over the administrative hearing relating to this appeal. (C.R.². 87)

A Combined Notice of Hearing, Specification of Issues and Prehearing Order was issued June 2, 1998, ordering the matter be decided on submission of stipulated exhibits and written briefs. (App. p. 100) Witcher submitted her Brief to the Administrative Law Judge on July 17, 1998. (C.R. 238) The Bureau submitted its Brief on August 7, 1998. (C.R. 294) Witcher also submitted a Reply Brief on August 13, 1998. (C.R. 311)

On September 8, 1998, ALJ Thomas issued Recommended Findings of Fact and Conclusions of Law (App. p. 105), which the Bureau adopted as its Final Order on September 24, 1998. (App. p. 119) Witcher filed a "Petition for Reconsideration" from the Final Order on October 20, 1998 (App. p. 120), which was denied by the Bureau. (App. p. 122)

On December 10, 1998, Witcher appealed to the District Court, Ramsey County. (App. p. 2) After submission of briefs, the Court, the Honorable Donovan Foughty, issued its "Order Affirming" on March 12, 1999. (App. p. 123) Judgment was entered March 17, 1999. (App. p. 125) Witcher took her appeal to this Court on May 13, 1999. (App. p. 127)

III. STATEMENT OF FACTS

Witcher's claims for entitlement to permanent partial impairment benefits has a long history. In order to properly address and consider the issues raised by Witcher in this appeal relating to whether her entitlement to permanent impairment benefits was properly reduced

² "C.R." refers to the Certificate of Record on Appeal to District Court dated December 29, 1998.

by prior awards, it is important to comprehend that history. Thus, rather than summarily reciting positions of the parties, the Bureau will outline the history of Witcher's claim for permanent impairment benefits.

On November 2, 1994, Witcher was evaluated for permanent partial impairment with respect to her left knee by P.T.-O.T. Associates and Dr. Michael J. Lillestol. (C.R. 96, 99) Dr. Lillestol reported Witcher had sustained a permanent impairment for loss of range of motion and arthritic deformity. (C.R. 99, 101) Witcher was then scheduled for a "supplemental permanent partial impairment evaluation" on April 17, 1995, regarding her right knee, right shoulder and arm, left wrist and entire spine, as those areas had not yet been evaluated. (C.R. 104) Additionally, an evaluation for permanent impairment for mental and behavior disorders was set for April 18, 1995. (C.R. 105)

Dr. Lillestol's report of November 11, 1994, relating to the left knee impairment was audited by the Bureau. (C.R. 106) Based upon that audit, it was determined that Witcher had a combined 34 percent impairment of her left lower extremity for range of motion and arthritis. Id. On March 9, 1995, the Bureau issued an Order Awarding Permanent Partial Impairment Benefits, wherein Witcher was awarded: "34% LEFT LEG AT HIP FOR KNEE 79.56 weeks," pursuant to N.D.C.C. § 65-05-13(18), entitling Witcher to \$9,706.32 in permanent partial impairment benefits. (App. p. 36) Witcher appealed this Order. (App. p. 39)

On April 17, 1995, Witcher completed the "supplemental" evaluation for permanent partial impairment. (C.R. 107, 118) In letters dated May 3 and May 10, 1995, Dr. Michael Lillestol reported his findings of permanent impairment with respect to Witcher's right shoulder, right elbow, left upper extremity, right knee, and cervical, thoracic and lumbar

spine. (C.R. 118, 121) Dr. Lillestol's reports were then audited by the Bureau. (C.R. 124) On May 30, 1995, Dr. Lillestol sent a letter to the Bureau correcting some of his prior impairment ratings. (C.R. 128) The Bureau's PPI medical auditor then summarized the various ratings relating to the "supplemental evaluation" as follows: 26.5% lower extremity for right knee diagnostic; 9.8% upper extremity for right shoulder and elbow for range of motion; 2.4% upper extremity for left wrist; 10.0% whole body for cervical and thoracic spine. (C.R. 130) On June 16, 1995, the Bureau issued an additional Order Awarding Permanent Partial Impairment Benefits, wherein Witcher was awarded the following:

26.5%	RIGHT LEG AT HIP FOR KNEE	62.01 weeks
9.8%	RIGHT ARM AT SHOULDER FOR SHOULDER AND ELBOW	24.50 weeks
25.0%	ADDITIONAL FOR MASTER HAND	6.13 weeks
2.4%	LEFT ARM AT SHOULDER FOR WRIST	6.0 weeks
10.0%	WHOLE BODY FOR CERVICO- THORACIC AND THORACOLUMBAR	50.0 weeks

(App. p. 40) The award for the right leg was made pursuant to N.D.C.C. § 65-05-13(18); the right and left arm pursuant to N.D.C.C. § 65-05-13(1)³; and the cervical and thoracic spine pursuant to N.D.C.C. § 65-05-12. However, because the Bureau's Order erroneously subtracted the 79.56 weeks for the left leg award (which had mistakenly not been included in the impairments listed in the Order), an Amended Order Awarding Permanent Partial

³ Witcher was also awarded an additional 25 percent for the impairment of her right arm pursuant to N.D.C.C. § 65-05-13 which provides: "Twenty-five percent additional must be allowed as compensation for the loss of use of the master hand or any member or members thereof."

Impairment Benefits was issued June 20, 1995. (App. p. 45) Pursuant to that Order, Witcher received an award of 148.64 weeks of permanent partial impairment benefits or \$18,134.08. Id. Witcher appealed from this Order. (App. p. 48)

Witcher also made a claim for permanent partial impairment benefits for her psychiatric condition. See C.R. 131-140. On July 23, 1996, the Bureau issued its Order Denying Psychiatric Permanent Partial Impairment on July 23, 1996. (App. p. 53) Witcher appealed this Order, and the same was the subject of an administrative hearing held February 19, 1997. (App. p. 59; C.R. 38) Following the hearing, the Bureau issued its Findings of Fact, Conclusions of Law and Order, in which Witcher was found to have a permanent partial impairment of 65% whole body for her psychiatric condition. (App. p. 72). Pursuant to that decision, Witcher was entitled to an additional award of 295 weeks of permanent partial impairment benefits pursuant to N.D.C.C. § 65-05-12, or \$38,055.00. (App. p. 79)

Witcher also made claim for additional permanent partial impairment benefits for “chronic pain.” See C.R. 23. The Bureau disputed entitlement to such benefits. To resolve this dispute, Witcher and the Bureau entered in a settlement agreement whereby Witcher elected to pursue an additional evaluation to assess her chronic pain. (App. p. 80) That evaluation was then scheduled with Dr. Dennis G. Sollom. (C.R. 146) In addition, because of this Court’s decision in McCabe v. North Dakota Workers Compensation Bureau, 1997 ND 145, 567 N.W.2d 201 (N.D. 1997), the incorrect version of the AMA Guides was utilized in evaluating Witcher’s permanent impairment (Fourth Edition).⁴ Thus, to resolve

⁴ The issue of whether the proper edition of the AMA Guides was utilized in evaluating Witcher’s impairment was raised by Witcher in her requests for reconsideration from the

the outstanding appeal from the June 20, 1995, Order, Witcher's permanent impairments were required to be redetermined in accordance with the AMA Guides, Third Edition, Revised. (C.R. 150) This evaluation was scheduled for January 15, 1998. (C.R. 152)

Following his evaluation for "chronic pain", Dr. Sollom issued comprehensive and detailed reports outlining Witcher's history, his physical examination, impressions and review of medical records. (C.R. 157, 165) Dr. Sollom concluded Witcher had a "12 percent whole body impairment for her chronic pain." (C.R. 211) With respect to the recalculation of Witcher's other impairments under the AMA Guides, Third Edition Revised, Dr. Michael Lillestol reviewed the data and measurements previously obtained in order to determine Witcher's permanent impairments.⁵ Those impairment were determined to be the following: 20.5% lower extremity for left knee; 13.1% lower extremity for right knee; 2.5% upper extremity for left wrist; 9.8% upper extremity for right elbow and shoulder; 36.45% whole body for cervical, thoracic and lumbar. (C.R. 231) Before issuance of an order, Witcher's whole body impairment for her spine was combined with

June 20, 1995, Order. (App. p. 48) That issue was placed on hold pending this Court's decision in McCabe.

⁵ Witcher was required to undergo additional measurements with respect to her lumbar spine, as the measurements previously taken were invalid under the AMA Guides. (C.R. 150) Thus, an evaluation for taking of lumbar spine measurements was scheduled for January 15, 1998. (C.R. 152, 153) These measurements were also invalid (C.R. 225). Dr. Lillestol noted that "due to the size of the patient, however, I suspect that these are as good measurements as we are going to get and, therefore, would consider them a reasonable estimation of her impairment." Id.

her impairment for chronic pain (per Dr. Sollom), and psychiatric impairment (per the previous litigation). See C.R. 233-235. Thereafter, on March 26, 1998, the Bureau issued its Order Denying Additional Permanent Partial Impairment Benefits, which set forth the following permanent impairments:

20.5%	LEFT LEG AT HIP FOR KNEE	47.97 weeks
13.1%	RIGHT LEG AT HIP FOR KNEE	30.65 weeks
2.5%	LEFT ARM AT SHOULDER FOR WRIST	6.25 weeks
12.3%	RIGHT ARM AT SHOULDER FOR WRIST, ELBOW AND SHOULDER	30.75 weeks
	ADDITIONAL 25% FOR MASTER HAND	<u>7.69 weeks</u> 123.31 weeks

(App. p. 87) The Order further provided that Witcher was entitled to 385 weeks of permanent partial impairment benefits for a combined 77 percent whole body impairment for cervical, thoracic and lumbar spine, psychological, and chronic pain. Id. Therefore, combining awards for the scheduled injuries with that for the whole body impairments. Witcher was entitled to 508.31 weeks of permanent partial impairment benefits. (App. p. 88) However, because Witcher had previously received 523.20 weeks of permanent partial impairment benefits, the Bureau denied further benefits. Id. Witcher appealed from this Order, raising the additional issue of entitlement to attorney's fees in accordance with laws in effect on the date of injury. (App. p. 89, 91)

Following referral of the hearing request from the March 26, 1998. Order. to outside counsel for litigation, the undersigned counsel for the Bureau discovered an error in the calculation of the permanent partial impairment award. Counsel for the Bureau then wrote to Witcher's counsel on May 12, 1998, explaining the error, and setting forth the Bureau's

position on the proper calculations. (App. p. 92) The error related to calculation of the whole body impairment, which was corrected to 81 percent whole body. An 81 percent whole body impairment entitled Witcher to 405 weeks of permanent partial impairment benefits. (App. p. 93) In addition, Witcher's "scheduled injuries" entitled her to 123.31 weeks of permanent partial impairment benefits, calculated as follows:

20.5%	LEFT LEG AT HIP FOR KNEE	47.97 weeks
13.1%	RIGHT LEG AT HIP FOR KNEE	30.65 weeks
2.5%	LEFT ARM AT SHOULDER FOR WRIST	6.25 weeks
12.3%	RIGHT ARM AT SHOULDER FOR WRIST, ELBOW AND SHOULDER	30.75 weeks
25.0%	ADDITIONAL FOR MASTER HAND	7.69 weeks

(App. p. 93) Therefore, Witcher was entitled to a total of 528.31 weeks (405 weeks plus 123.31 weeks) of permanent partial impairment benefits. Id.

The Bureau then issued its Amended Order Awarding Permanent Partial Impairment Benefits. (App. p. 94) From the total award of 528.31 weeks, the Bureau subtracted 523.30 weeks of benefits that Witcher previously received, entitling Witcher to an additional award of 5.11 weeks of benefits, or \$659.19. (App. p. 96) Witcher again petitioned for reconsideration from the May 12, 1998, Amended Order. (App. p. 98)

IV. LAW AND ARGUMENT

A. Standard of Review.

On appeal, this Court reviews the decision of the Bureau, not that of the District Court. Saari v. North Dakota Workers Compensation Bureau, 1999 ND 144, ¶ 7; Loberg v.

North Dakota Workers Compensation Bureau, 1998 ND 64, ¶ 5, 575 N.W.2d 221. The Court must “affirm the Bureau's decision unless its findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, its decision is not in accordance with the law or violates the appellant's constitutional rights, or the agency's rules or procedures deprived the appellant of a fair hearing.” Geck v. North Dakota Workers Compensation Bureau, 1998 ND 158, ¶ 5, 583 N.W.2d 621, 622 (N.D. 1998), citing Loberg.

The facts in this case are essentially undisputed. See Specifications of Error, App. p. 4. Rather, the issues to be addressed by this Court on appeal relate to questions of law and statutory construction. Questions of law are fully reviewable. Saari, 1999 ND 144, ¶ 7. Interpretation of a statute is a question of law. Kallhoff v. North Dakota Workers Compensation Bureau, 484 N.W.2d 510, 512 (N.D. 1992); Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992). The primary objective of statutory construction is to ascertain the intent of the legislature. Kallhoff, 484 N.W.2d at 512. However, the practical construction and interpretation of a statute by the administrative agency administering the law is entitled to deference, as long as that interpretation does not contradict statutory language. Hamich v. State, 1997 ND 110, ¶ 13, 564 N.W.2d 640, 644 (N.D. 1997); Koch Oil Co. v. Hanson, 536 N.W.2d 702, 706 (N.D. 1995).

B. Witcher's Award of Permanent Partial Impairment Benefits was Properly Reduced by the Amount of Prior Awards.

At the outset, it is important to note that Witcher is not disputing the calculation of the percentages of permanent impairment which form the basis of the Bureau's Orders of March 26, 1998, and May 12, 1998. Rather, Witcher's sole dispute is with the subtraction of prior awards from what is currently due in permanent partial impairment benefits. Witcher's calculations are set forth at App. p. 103. Essentially, Witcher contends the Bureau is improperly subtracting "scheduled" injury awards under N.D.C.C. § 65-05-13 from "whole body" awards under N.D.C.C. § 65-05-13. With respect to reduction of prior awards, these respective statutes provide:

N.D.C.C. § 65-05-12:

Any subsequent award for impairment must be made minus any previous award given on any earlier claim or the same claim for that same member or body part.

N.D.C.C. § 65-05-13:

An impairment award made by the bureau in the past under this section or section 65-05-12 must be deducted from a subsequent impairment award for injury to the same part of the body.

With respect to "whole body" awards under N.D.C.C. § 65-05-12, Witcher and the Bureau agree that she has a combined 81% whole body impairment for her psychiatric condition, chronic pain, and cervical, thoracic and lumbar spine. See Ex. App. p. 94, 103. Under 65-05-12, this impairment would entitle Witcher to 405 weeks of permanent partial impairment benefits. However, Witcher has previously received in connection with these

impairments, 50 weeks for the spinal impairments pursuant to the Order of June 20, 1995 (App. p. 40); 295 weeks for the psychiatric impairment pursuant to the Order of July 11, 1997 (App. p. 50); and 5.11 weeks pursuant to recalculation of the combined whole body impairment under the Amended Order of May 12, 1998 (App. p. 94), for a total of 350.11 weeks. Therefore, Witcher was entitled to an additional 54.89 weeks of permanent partial impairment benefits for her whole body impairments..

However, also had “scheduled” injuries entitling her to compensation under N.D.C.C. § 65-05-13. Some of those injuries resulted in impairments which, after recalculation under the 3rd edition of the AMA Guides, were actually less than that for which she has previously received benefits.⁶ As a result, utilizing the proper edition of the AMA Guides (3rd edition Revised), Witcher’s actual permanent impairments for her scheduled injuries entitled her to 123.31 weeks of benefits, calculated as follows:

20.5%	LEFT LEG AT HIP FOR KNEE	47.97 weeks
13.1%	RIGHT LEG AT HIP FOR KNEE	30.65 weeks
2.5%	LEFT ARM AT SHOULDER FOR WRIST	6.25 weeks

⁶ Again, by way of history, the prior impairments determined pursuant to the previous Orders of March 9, 1995, and June 20, 1995, from which Witcher took appeals, were made under the 4th edition of the AMA Guides. (See C.R. 96, 99, 101, 107, 118, 121, 128) However, as noted in the Statement of Facts, as a result of this Court’s decision in McCabe, it was determined that Witcher’s impairment should have been evaluated in accordance with the AMA Guides, 3rd Edition Revised. Thus, the impairment percentages were redetermined in accordance with the proper edition of the Guides.

12.3%	RIGHT ARM AT SHOULDER FOR WRIST, ELBOW AND SHOULDER	30.75 weeks
25.0%	ADDITIONAL FOR MASTER HAND	7.69 weeks
		<hr/> 123.31 weeks

However, once again Witcher's award must be reduced by her prior awards for these body parts. N.D.C.C. § 65-05-13. Witcher has already received prior awards of 79.56 weeks for her left leg (App. p. 37); 62.01 for her right leg (App. p. 41); 6.0 weeks for her left wrist (App. p. 41), 24.5 weeks for her right elbow and shoulder(App. p. 41); and 6.13 weeks for her master hand (App. p. 41), for total prior awards for scheduled injuries of 178.2 weeks of permanent partial impairment benefits. Thus, Witcher had actually been **overpaid permanent partial impairment benefits by 54.89 weeks** (178.2 weeks minus 123.31 weeks).

It is at this point, the dispute with the Bureau's actions begin. The Bureau did not improperly subtract the "scheduled injury" awards from the "whole body" awards. Rather, as set forth above, there was simply an overpayment on the scheduled injuries, offset against the amount due under the whole body injuries. Since it is undisputed that Witcher does not have the degree of impairment for which she had previously been awarded benefits for her scheduled injuries, she clearly was not entitled to the amount that she has previously been awarded. Therefore, the Bureau properly offset that amount against the amount to which Witcher was entitled for her psychiatric condition, chronic pain, and spinal impairments. Apparently, Witcher would require the Bureau go through with the fallacy of issuing an Order for the additional award of 54.89 weeks of permanent partial impairment benefits Witcher was entitled to under the N.D.C.C. § 65-02-12, and, at the same time, seek to

recoup the overpayment of permanent impairment benefits for the “scheduled” injuries under N.D.C.C. § 65-05-13, of the exact same amount.

Witcher’s position ignores the fact that she has been overpaid permanent partial impairment benefits for some of the scheduled injuries. For example, when one subtracts the prior award for the right knee impairment from the current award, one does not come up with “0 wks.” Rather, 30.65 (current) minus 62.01 (prior) equals a 31.36 week overpayment with respect to that impairment. A complete calculation of the overpayment based upon the scheduled injury award was annexed as Exhibit A to the Bureau’s Brief to the Administrative Law Judge, and can be found at Page 309 of the Certified Record. Any argument that the Bureau may not reduce a prior award is wholly without merit, given the terms of N.D.C.C. § 65-05-04, which provides:

If the original claim for compensation has been made within the time specified in section 65-05-01, the bureau at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation.

(Emphasis supplied.) In fact, this was not a case wherein the Bureau simply looked at Witcher’s prior awards of permanent impairment on its “own motion” and decided to recalculate the same. Rather, Witcher’s claim for entitlement of permanent impairment benefits had been pending in litigation since the initial Order of March 9, 1995, was issued. It was not until the recalculation of Witcher’s permanent impairments under the proper edition of the AMA Guides was completed that all outstanding disputes on the percentages

of those impairments were resolved. At that point, Witcher turned her attention away from the percentages to the reduction (or offset) of the prior awards against her current award based on the recalculation.

In the end, Witcher received an award of permanent partial impairment benefits for the appropriate number of weeks, in accordance with the undisputed amounts of her permanent partial impairments to her left leg, right leg, left arm, right arm, master hand, cervical, lumbar and thoracic spine, psychiatric condition and chronic pain. Witcher has been paid for a total of 405 weeks of benefits under N.D.C.C. § 65-05-12, and 123.31 weeks of benefits under N.D.C.C. § 65-05-13, for a total of \$66,554.59 in permanent partial impairment benefits. Adopting Witcher's argument would result in her being awarded compensation for permanent impairments to a greater extent than she actually sustained as a result of her work injury. Accordingly, the Bureau's reduction of Witcher's permanent partial impairment award was proper and in accordance with the law, and the District Court properly affirmed the Bureau's Order of September 24, 1998. See Lee v. North Dakota Workers Compensation Bureau, 1998 ND 218, 587 N.W.2d 423 (affirming Bureau's application of law).

C. This Court's Decisions in Flink, Johnson, Cridland and Kerzman Do Not Preclude the Action Taken by the Bureau in Reducing Witcher's Award of Permanent Partial Impairment Benefits in this Case.

In her Brief, Witcher relies primarily upon that four cases, Flink v. North Dakota Workers Compensation Bureau, 1998 ND 11, 574 N.W.2d 784 (N.D. 1998), Johnson v. North Dakota Workers Compensation Bureau, 484 N.W.2d 292 (N.D. 1992) and Cridland v. North Dakota Workers Compensation Bureau, 1997 ND 223, 571 N.W.2d 351 (N.D. 1997)

and Kerzman v. North Dakota Workers Compensation Bureau, 1999 ND 44, 590 N.W.2d 888, as authority which precludes the action taken by the Bureau in this case. Such arguments are in error.

First and foremost, the arguments proffered by Witcher relating to the action taken by the Bureau in this case being an abuse of due process rights is a misapplication of prior precedents. When this Court has discussed due process rights in cases such as Flink, it is because the Court recognized a special procedural protection when the Bureau is attempting to discontinue ongoing disability benefits. See Gregory v. North Dakota Workers Compensation Bureau, 1998 ND 94, 578 N.W.2d 101 (N.D. 1998); Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988); Kallhoff v. North Dakota Workers Compensation Bureau, 484 N.W.2d 510 (N.D. 1992). However, “[t]hose same protections do not apply to a one time lump-sum award of disability benefits for a short, closed period of time.” Nemec v. North Dakota Workers Compensation Bureau, 543 N.W.2d 233, 238 (N.D. 1996).

Payment of permanent partial impairment benefits are not ongoing in nature, nor is the Bureau required to provide a “pretermination notice” relating to payment of these benefits. Rather, permanent impairment benefits are more akin to a “one time lump-sum award” as referenced in Nemec. Accordingly, because no due process rights were implicated, there was no violation of the same by the Bureau and Witcher is not entitled to the benefits she seeks. See also Saakian v. North Dakota Workers Compensation Bureau, 1998 ND 227, 587 N.W.2d 166 (N.D. 1998) (discussing Flink).

As for the Cridland and Johnson decisions and the requirement that the Bureau specify its intent to offset the overpayment of permanent partial impairment benefits on its

“own motion”, Witcher misconstrues what occurred in this case. In this regard, the Bureau’s Final Order provides:

In the present case, however, Witcher’s benefits were re-calculated as a result of decisions by the North Dakota Supreme Court that required that the benefits be re-calculated. The re-calculation was not, like in Cridland, an attempt by the Bureau to “relitigate issues that were or should have been decided in a prior formal adjudicative proceeding.” Cridland at 358.

Furthermore, if the concept of res judicata were to prevent the Bureau from reducing the amount of Witcher’s “scheduled injuries” overpayment, the same concept would prevent Witcher from claiming additional benefits for her “whole body” award. In fact, the concept of res judicata does not apply to either the Bureau’s overpayment or underpayment of benefits in this case.

(App. p. 115-116) As noted above, this is not a case where the Bureau on its “own motion” was attempting to reduce Witcher’s permanent partial impairment benefits. Witcher was aware of the reason for the recalculation of the permanent impairment benefits and the results of that recalculation. The Bureau’s Orders clearly outline the calculation of the amount of permanent impairment benefits due as a result of the recalculation and the amount of the previous awards which were deducted. See App. p. 94-97. Furthermore, if payment of benefits in accordance with an erroneous edition of the AMA Guides, as determined by the Supreme Court in McCabe, is not an “erroneous adjudication,” what is?

Witcher further attempts to read some type of “notice” requirement into N.D.C.C. § 65-05-29 and/or N.D.C.C. § 65-05-04 in order for the Bureau to recoup the overpayment of permanent partial impairment benefits in this case. There is no such “notice” requirement.

N.D.C.C. § 65-05-29 simply requires the recipient to “repay it” or the Bureau to “recoup” any unpaid amount from future payments.

In Johnson, 484 N.W.2d 292, the Bureau reviewed the file and subsequently discontinued ongoing disability benefits and dismissed the claim. 484 N.W.2d at 293. The Court construed both N.D.C.C. § 65-05-04 and 65-05-29, because the Bureau in Johnson reviewed its initial determination to pay benefits and determined it had done so in error. 484 N.W.2d at 296. No further benefits would be paid if the claim was dismissed so an Order was issued for Repayment of benefits paid in error. This is in contrast to this case where the overpayment pursuant to the erroneous adjudication could be recouped via an offset against a payment to be made contemporaneously. Similarly, the only “notice” discussed in Cridlund and Kerzman, again related to the notices of intent to discontinue ongoing disability benefits, not as Witcher argues, notice that the Bureau would be seeking recoupment of an overpayment. See Cridlund, 1997 ND 223, ¶ 7, 571 N.W.2d at 353; Kerzman, 1999 ND 44, ¶ 16, 590 N.W.2d at 893. Again, no such “notice” is required in the case of lump sum awards, such as with awards of permanent impairment benefits. See Nemec, 543 N.W.2d at 238.

Plainly and simply, all that the Bureau did was determine the correct amount of permanent partial impairment benefits due to Witcher based upon the percentages of impairment found after the recalculation pursuant to McCabe, consistent with her appeal of the previous Bureau Order. **Witcher does not dispute the percentages on which her awards are now based.** From the amount due for the undisputed percentages of impairment, the Bureau subtracted what Witcher had already received in benefits pursuant to previous Orders, no more, no less. In the end, Witcher received exactly what she was

entitled to in permanent impairment benefits. Accordingly, the Bureau's Final Order should be affirmed.

D. Entitlement to Attorney's Fees is Governed by Subsequent Statutory Amendments.

Witcher contends that entitlement to attorney's fees is governed by the law in effect on the date of her injury. This Court has stated on numerous occasions, most recently in Saari, 1999 ND 144 ¶ 10, that "[u]nless otherwise provided, the statutes in effect on the date of injury govern workers' compensation benefits." In the case of attorney's fees, the legislature has "otherwise provided." In 1995, the North Dakota Legislature enacted amendments to N.D.C.C. § 65-02-08, relating to payment of attorney's fees. Specifically, the statute now provides:

The bureau shall pay an injured employee's attorney's fees and costs from the bureau general fund. Except for an initial determination of compensability, an attorney's fee may not exceed twenty percent of the amount awarded, subject to a maximum fee set by administrative rule. The bureau shall pay an attorney's fees when:

1. The employee has prevailed in binding dispute resolution under section 65-02-20; or
2. The employee has prevailed after an administrative hearing under chapter 28-32.

N.D.C.C. § 65-05-02 (1995). In enacting the 20 percent fee cap, the Legislature "has made its legislative intention crystal clear. The Legislature was seeking to control costs within the workers compensation system and reduce unwarranted litigation." Little v. Traynor, 1997

ND 128. ¶22. 565 N.W.2d 767, 774 (N.D. 1997). As to when the amendments were to take effect, the Legislature further provided:

"Effective date. This Act applies to any request for arbitration, hearing, or appeal taken from an administrative order issued after August 1, 1995."

1995 N.D. Laws ch. 614, § 7. Quite clearly, this statute governed Witcher's request for reconsideration from both the March 26, 1998, Order Denying Additional Permanent Partial Impairment Benefits, and Amended Order Awarding Permanent Partial Impairment Benefits of May 12, 1998, as both of her "requests for hearing" were taken from an "administrative order issued after August 1, 1995." Id.

In order for Witcher to prevail on her argument that she is entitled to attorney's fees under the law in effect on the date of her injury, she must establish that there is either a "vested right" or "valid obligation" to pay attorney's fees under the North Dakota Workers Compensation Act on that date of injury which precludes application of the 1995 amendments to N.D.C.C. § 65-02-08. As set forth below, there is neither a "vested right" nor "valid obligation" as defined under North Dakota law, to attorney's fees on the date of injury.

In discussing what constitutes a "vested right", this Court in Dunham Lumber Co. v. Gresz, 2 N.W.2d 175, 179 (N.D. 1942), stated:

A vested right is generally defined as an immediate or fixed right to present or future enjoyment and one that does not depend upon an event that is uncertain.

"The right must be absolute, complete, and unconditional, independent of a contingency." Baird v. Chamberland, 282 N.W. 219, 223 (N.D. 1940). However, a "right is contingent,

not vested, when it comes into existence only on an event or condition which may not happen." Wirtz v. Nestos, 200 N.W. 524, 530 (N.D. 1924).

Under North Dakota law, attorney's fees cannot not "vest" at the time of his injury. At the time of injury, it is not even known what types of disputes, if any, an injured worker will have regarding claims for benefits from the Bureau. In reference to permanent impairment, it is unknown whether a permanent impairment will result,⁷ whether claimant will be awarded permanent impairment benefits or whether there will be a dispute over such benefits. Given these uncertainties, the right to attorney's fees simply cannot "vest" on the date of injury. "A right is not vested so long as something remains to be done to consummate it." Wirtz v. Nestos, 200 N.W. at 530. See also Schwarzkopf v. Sac County Board of Supervisors, 341 N.W.2d 1, 8 (Iowa 1983) (noting that there can be no vested right to a particular result in litigation); Division of Workers' Compensation, Bureau of Crimes Compensation, 420 So. 2d 887 (Fla. Dist. Ct. App. 1982)(concluding that "until judgment has been entered properly awarding fees, any right under a fee statute constitutes nothing more than an expectable interest--not a vested right."); In Re Certified Question, Fun 'n Sun RV, Inc. v. Michigan, 527 N.W.2d 468, 474 (Mich. 1994) (noting that "[a]s a general rule, vested rights are not created by a statute that is later revoked or modified by the Legislature if 'the Legislature did not covenant not to amend the legislation'").

It is clear, therefore, that under the provisions of the North Dakota Workers Compensation Act, the right to payment of attorney's fees is neither "fixed" nor "immediate"

⁷ Saari, 1999 ND 144, ¶ 14 (holding a "claimant's right to a PPI award does not vest on the date of injury or on the date of maximum medical improvement because more is necessary before entitlement to a PPI award is established."

upon the date of injury. There being no "vested right" to payment of attorney's fees prior to the August 1, 1995, the effective date of N.D.C.C. § 65-05-08, that statute governs Witcher's attorney's request for fees in connection with the March 26 and May 12, 1998, Orders in this case.

With respect to a "valid obligation," in Gregory, 1998 ND 94, 578 N.W.2d 101, this Court discussed the concept. Specifically, Gregory related to the application of 1995 amendments to N.D.C.C. § 65-05-09.3, wherein ongoing disability benefits were terminated upon age 65. This Court in Gregory held that because there was a "valid obligation to pay continued disability benefits when the 1995 amendments took effect", the statute could not be applied "to terminate the disability benefits of Gregory or other workers already receiving permanent total disability when the statute took effect." Gregory, 1998 ND 94, ¶ 33, 578 N.W.2d at 110. Gregory has no application to rights to attorney's fees.

First, Gregory related to discontinuance of ongoing disability benefits. In determining there was a "valid obligation" for receipt of disability benefits, this Court stated:

[W]e look to our prior precedents where we have concluded a worker currently receiving benefits had a significant property right in continuation of those benefits, and an expectation those benefits would continue. We have held the right to receiving continuing workers compensation disability benefits by a worker already receiving them is a property right subject to due process protection, and that the claimant has "a right to rely upon continuing, regular, ongoing payments." (Citations omitted) In Kallhoff v. North Dakota Workers' Compensation Bureau, 484 N.W.2d at 512-514, we

repeatedly stressed the reliance interest of a worker to continued disability benefits when we held that the 1989 retirement offset directive did not apply to one who was receiving disability benefits before 1989 but who turned 65 after the effective date of the statute.

Gregory, 1998 ND 94 ¶ 30, 578 N.W.2d at 109-110 (emphasis supplied). Quite clearly, the “valid obligation” is limited to the ongoing nature of disability benefits. As noted above, there is NO such “ongoing” nature with respect to attorney’s fees. Therefore, Gregory cannot, and should not, be applied to invalidate application of N.D.C.C. § 65-02-08 to a claim for attorney’s fees with respect to Orders issued after the effective date of that statute.

At the time Witcher submitted her Brief, she argued that the anticipated decision of this Court in Saari v. North Dakota Workers Compensation Bureau, Civil No. 98C143, would have application to the issue of vesting of attorney’s fees. That case was decided by this Court on July 29, 1999. 1999 ND 144.

Saari related to the issue of whether N.D.C.C. § 65-05-12.2 (1995) may be applied to entitlement to permanent impairment benefits when the **date of injury pre-dated** the effective date of the statute. Like Witcher in this case, Saari relied on the cases of Gregory v. North Dakota Workers Compensation Bureau, 1998 ND 94, 578 N.W.2d 101, Jensen v. North Dakota Workers Compensation Bureau, 1997 ND 107, 563 N.W.2d 112, and Heddon v. North Dakota Workmen’s Compensation Bureau, 189 N.W.2d 634 (N.D. 1971). See Saari 1999 ND 144, ¶ 17. In distinguishing those cases, the Court noted the fact that the legislature had “otherwise provided” that the challenged statute, N.D.C.C. § 65-05-12.2 (1995) apply prospectively to all claims and the Bureau was not attempting to reduce ongoing benefits. See Saari 1999 ND 144, ¶ 17.

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment. . . . Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.

Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994). "A statute receives retroactive application when it operates on transactions which have occurred, or on rights or obligations which have existed, before its enactment." State v. J. P. Lamb Land Co., 401 N.W.2d 713, 717 (N.D. 1987).

In Chambers v. General Motors Corp., 375 N.W.2d 715 (Mich. 1985), the court addressed whether an employee could apply two "set off" or "coordination of benefits" statutes "to reduce its workers' compensation obligation with respect to payments made after the effective date of the provision, to workers whose injuries occurred prior to that date." Id. at 718. One of the statutes provided that an employer could set off its payment of workers' compensation benefits against employer-financed pension and social security benefits received by a disabled employee after the statute's effective date. Id. The employees' injuries occurred before the statute's effective date. Id. The court rejected the argument that the statute could not be applied to injuries occurring before the statute's effective date, stating:

The statute does not limit its application to cases where workers' compensation payments are made to an employee for injuries incurred after its effective date Nor does it contain any language indicating that it should not be applied when payments are being made for injuries that occurred prior to [its effective date].

Id. at 721.

The Chambers court then rejected the argument that "application of the coordination of benefits [statute] to workers compensation benefits for compensable periods after the effective date of the statute would constitute retrospective application simply because the liability is based upon an injury that occurred prior thereto." Id. at 722. The court explained:

. . . it is not contended that compensation benefits should be retroactively coordinated or reduced. Rather it is argued that the benefits of all disabled workers should be prospectively coordinated after the effective date of the enactment regardless of when they were injured While [the statute] may in some cases involve an antecedent event, such as an injury incurred prior to its effective date, by its clear language it operates only with regard to payments received and attributable to periods after its effective date.

Id. "A statute is not regarded as operating retrospectively because it relates to an antecedent event." Id. at 729. "Merely because some of the requisites for its application are drawn from a time antedating its passage[, a law is not] retrospective." Id.

Similarly, under N.D.C.C. § 65-02-08, the 20 percent cap on attorney's fees applies prospectively to "requests for arbitration, hearing, or appeal from an administrative order issued after August 1, 1995." The legislature did not intend, and the Bureau has not attempted to reach back and apply the statute to pending appeals on orders which pre-date the effective date of the statute, August 1, 1995, in an attempt to impose the fee cap retrospectively or discontinue ongoing benefits. See Saari, 1999 ND 144 ¶ 17. In this case, Witcher requested reconsideration of the Order Denying Additional Permanent Partial

Impairment Benefits of March 26, 1998, and specifically requested a formal hearing. See App. p. 89. After that Order was Amended on May 12, 1998, (App. p. 94) Witcher again requested reconsideration. (App. p. 98) Although Witcher's date of injury precedes the effective date of the statute, the statute operates prospectively with respect to the causes of action for attorney's fees from orders issued after that date, as the legislature intended. See Saari, 1998 ND 144, ¶17: Fairmount Township Bd. v. Beardmore, 431 N.W.2d 292, 295 (N.D. 1988) (rejecting vested rights retroactivity argument about an amended ordinance that did not require payment of costs before its effective date but only applied to future payment of future costs after its effective date); Chambers, 375 N.W.2d at 722 (noting application of statute was not retrospective merely because liability related to injury occurring prior to its effective date)

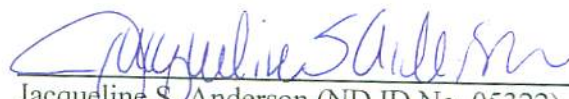
Therefore, because the legislature "otherwise provided" for application of the 1995 amendments to N.D.C.C. § 65-02-08, the same may be applied to Witcher's requests for reconsideration from the Orders of March 26, 1998 and May 12, 1998, as the Bureau concluded. See Saari, 1999 ND 144.

CONCLUSION

The Bureau respectfully requests this Court affirm the District Court's Order of March 12, 1999, and hold:

1. That the Bureau properly reduced Witcher's entitlement to permanent partial impairment benefits by her prior awards; and
2. That the 1995 amendments to N.D.C.C. § 65-02-08 apply to Witcher's attorney's claim for attorney's fees in connection with the appeals from the March 26 and May 12, 1998. Orders.

DATED this 23rd day of August, 1999.



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