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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20020270

ANNA MARIE BACHMEIER, PERSONAL REPRESENTATIVE OF THE ESTATE OF RANDY BACHMEIER, DECEASED APPELLANT VS. THE NORTH DAKOTA WORKERS COMPENSATION BUREAU. AND NORDIC FIBERGLASS, INC. APPELLEES.	SUPREME COURT NO.: 20020270

APPEAL FROM THE ORDER DATED SEPTEMBER 9, 2002, BY THE HONORABLE DONOVAN FOUGHTY, JUDGE OF THE RAMSEY COUNTY DISTRICT COURT AND THE SEPTEMBER 12, 2002, JUDGMENT ENTERED ON SEPTEMBER 12, 2002, RAMSEY COUNTY, NORTHEAST JUDICIAL DISTRICT CIVIL NO. 02-C-00144

APPELLANT'S BRIEF

DIETZ & LITTLE LAWYERS

KATHRYN L. DIETZ (ID# 03213)
ATTORNEY AT LAW
2718 GATEWAY AVENUE
SUITE 302
BISMARCK, ND 58501

ATTORNEYS FOR APPELLANT
(701) 222-1761

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I. STATEMENT OF ISSUE

Did the Bureau err as a matter of law in determining whether there was actual wage loss related to the work injury, when it failed to consider material medical evidence that Bachmeier was at all relevant times, since his last employment, disabled from gainful employment as a result of his work-related injury?

II. STATEMENT OF THE CASE

This appeal arises from the North Dakota Workers Compensation Bureau's (hereafter Bureau) May 13, 2002, Order (Appendix 147-148 (hereafter App.)) which essentially adopts a Temporary Administrative Law Judge's (hereafter TALJ) April 24, 2002, Recommended Finding [sic] of Fact, Conclusions of Law, and Order (App. 136-146). The Bureau determined that Randy Bachmeier (hereafter Bachmeier) did not meet the burden of proof for a successful reapplication under Section 65-05-08(1), N.D.C.C. The Bureau found that although there was a significant change in Bachmeier's condition attributable to the work injury, Bachmeier did not suffer an actual wage loss caused by the significant change because he was unemployed at the time of the change and had not been seeking work. Bachmeier's evidence at hearing that his medical condition precluded employment during the relevant period was not deemed legally relevant. The personal representative of Bachmeier's estate appealed the Bureau's Order to the District Court and the District Court summarily affirmed the decision of the Bureau, without issuing an opinion, by Order Affirming May 13, 2002, Order (App. 2), Judgment was entered accordingly on September 12, 2002, (App. 4), and an appeal was taken to this Court.

III. STATEMENT OF THE FACTS

Bachmeier filed a claim with the Bureau for a January 10, 1994, work injury to his low back (App. 7). In July of 1995, Bachmeier had surgery for a herniated disc at the L4-5 level (App. 67). On May 21, 1996, the Bureau issued an Amended Order Denying Further Disability and Rehabilitation Benefits (App. 12-14). Finding of Fact V of the Findings of Fact from this Order sets forth that Bachmeier "is capable of working four 10-hour days per week" (App. 13). Finding of Fact VI of the Order sets forth that Bachmeier had returned to work at a job at Nordic Fiberglass meeting his physical limitations (App. 13). That Order went on to conclude that absent a significant change in medical condition due to the work injury, further disability and vocational rehabilitation benefits were denied (App. 14). Bachmeier's employment at Nordic Fiberglass was terminated effective May 23, 1996 (two days after the Order was signed cutting off further disability and rehabilitation benefits) (App. 131 (Hearing Transcript p. 51, ll. 10-12)).

Dr. Anthony Rayer in Devils Lake had been Bachmeier's regular doctor, and he treated Bachmeier prior to and following his July 1995 back surgery performed by Dr. Daniel Schmelka. However, once Dr. Schmelka, a Grand Forks neurosurgeon, became involved, the Bureau contacted Dr. Rayer and informed him that Dr. Schmelka was now Bachmeier's primary physician and that Dr. Schmelka was the only one who could refer Bachmeier to other physicians, fill out disability statements, etc. (App. 104). Nevertheless, Dr. Rayer did the preoperative physical on Bachmeier on June 29, 1995 (App. 47, p. ll) and saw Bachmeier post-surgically to remove surgical staples, do follow-up

(App. 48, p. 15), and again in the ER for his back pain when Dr. Rayer took him off work on an emergency basis for several days on April 1, 1996 (App. 118). Dr. Rayer did not regularly begin to see Bachmeier for his back problems again until 1999 as a result of the Bureau's refusal to recognize Dr. Rayer as a treating physician or pay for his treatment of Bachmeier (App. 105).

Bachmeier filed a reapplication for disability benefits in July of 1995 immediately following the July 3, 1995, laminectomy, foraminotomy, hemifacetectomy and removal of herniated disc surgery at L4-5 on the left performed by Dr. Schmelka (App. 10). The Bureau re-instated disability benefits during the immediate post-surgical period (App. 11), but by September 1995, it was apparent that, from among the thousands of active claims at the Bureau, Bachmeier's claim had been flagged for special attention by Pat Traynor, the executive director of the Bureau. Traynor had been talking personally to Ken Severinson of Nordic Fiberglass about Bachmeier (App. 108-109). It is clear from the employer's records that the employer wanted Bachmeier off benefits, or working, or fired and that they were very actively communicating with the Bureau and Bachmeier's Bureau "approved" doctors to that effect (App. 108, 110-111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, & 130). Full disability benefits were reinstated following Bachmeier's surgery only through October 15, 1995, when Bachmeier was ordered back to work part time at Nordic Fiberglass (App. 8-11, 110-111).

Bachmeier continued to complain of severe post-surgical pain to his neurosurgeon, Dr. Schmelka, as he attempted to work part time. Dr.

Schmelka did not believe additional surgery was indicated and he lost patience with Bachmeier's reported symptoms of continued severe pain (App. 68, 69-70), and unilaterally referred Bachmeier to a Dr. Leslie Schutz in Minot in January of 1996 (App. 71). (Remember that the Bureau would only pay for medical services from someone to whom Dr. Schmelka chose to refer.)

Dr. Schutz saw Bachmeier initially on February 29, 1996. (App. 75-78) and a week later, after discussing the case with Nordic Fiberglass, she approved his full-time return to work (App. 79-80). On March 29, 1996, Dr. Schutz wrote a memo of a phone conversation to the effect that she spoke with Bachmeier and the employer and was advised by Bachmeier that he was trying to work but the new TENS unit she prescribed was not giving relief from pain. The employer told her Bachmeier had only worked 10.75 out of 50 hours scheduled and continued to call in sick with back pain (App. 81). On April 12, 1996, Dr. Schutz examined Bachmeier for a third time, as his left leg had given out at work causing him to fall. She indicated that his previous back problem was aggravated (App. 82-83). On April 30, 1996, at her fourth and final regular appointment with Bachmeier she reaffirmed that "he should be able to do" the job presented by the employer to her for 10 hour days (App. 84). She stipulated that he was to use a chair for part of the day (whatever that means), take a 5 minute break after every hour to sit down, and/or to do back stretches as indicated. He was to avoid bending by lifting only one pedestal at a time, and not placing it on the floor, but rather on the table he was working on (App. 84).

Based upon Dr. Schutz's release, the Bureau issued the May 21, 1996, Amended Order Denying Further Disability and Rehabilitation Benefits (indicating that Bachmeier could work 4 10-hour days) (App. 12-14). Two days later, on May 23, 1996, Nordic Fiberglass fired Bachmeier on the basis that he was written up for not working all of his scheduled hours on March 27, 1996, April 4, 1996, and April 8, 1996, after the Dr. Schutz full-time release (App. 129-130). The write-up on March 27, 1996, says that Bachmeier could not handle the pain working so many hours and he wanted to see the doctor (App. 126). The write-up on April 4, 1996, says Bachmeier worked but left early complaining he could not take the pain (App. 127). The employer refused to recognize Dr. Rayer's opinion in the ER on April 1, 1996, that Bachmeier needed to be off work (App. 118, 127). The employer told Bachmeier that they "have to" go by Dr. Schutz's full-time release instead (App. 118, 127). The write-up on April 8, 1996, similarly reflects that Bachmeier left before the end of his shift due to pain (App. 128).

At the request of the Bureau, Dr. Schutz saw Bachmeier one last time on June 26, 1996, (about 2 months after he was fired), for the limited purpose of assessing his permanent partial impairment (expressed as a percentage), so that the Bureau could make the appropriate monetary award (App. 85-87). Dr. Schutz did note that Bachmeier had been fired "on the basis that he was unable to perform duties as requested" (App. 85). She indicated that Bachmeier stated that his pain had remained the same despite being off work (App. 85). Dr. Schutz was not asked to by the Bureau and did not address his current ability to work, but it is clear from her report that Bachmeier had significant

pain and very limited lumbar flexibility (App. 86). She also noted continued radiculopathy "with decreased left sided reflexes as well as sensation" (App. 86).

On September 17, 1997, Bachmeier was seen for a full evaluation by Dr. William Klava, with the Rehabilitation Medicine Department at Meritcare Hospital (App. 88-90). Dr. Klava concluded, "I do believe the patient has persistent pain that is limiting him from returning to his previous work role" (App. 90).

The Bureau directed Dr. Melissa Ray to do a new permanent partial impairment evaluation on Bachmeier, and she did so on December 18, 1997, (App. 91-97). Dr. Ray did an extensive evaluation and concluded, "I believe he is in a significant amount of pain" (App. 96). Interestingly, Dr. Ray concluded Bachmeier had a 28% whole person impairment for the low back injury and a 12.25% lower extremity impairment for radiculopathy (App. 97). When Dr. Schutz had performed her permanent partial impairment evaluation on Bachmeier on June 26, 1996, (about a year and a half earlier), she had determined Bachmeier had only a 10% whole person impairment (App. 87).

On January 20, 1999, Bachmeier filed an application for Social Security Disability (App. 19). Because of the lack of medical documentation in the several years preceding his application, Social Security scheduled Bachmeier to undergo an evaluation for the agency on May 26, 1999, with Dr. Ronald Bergom at Altru Clinic in Grand Forks (App. 72-74). Dr. Bergom did a thorough evaluation concluding, "[t]his gentleman is disabled for any job requiring prolonged standing, lifting, pushing, or pulling." (App. 74). Dr. Bergom noted that Bachmeier had

continuing nerve root irritation into his left leg (App. 73).

By 1999, Bachmeier had found his way back to Dr. Rayer, his home-town physician (App. 49, p. 19). Dr. Rayer completed a functional capacity assessment form on April 11, 2000, for the Social Security Disability case indicating that Bachmeier was at less than sedentary capacity (completely disabled from regular employment) (App. 55-62). Furthermore, Dr. Rayer, in an effort to get to the bottom of Bachmeier's continued difficulties, directed Bachmeier to have a new MRI on April 27, 2000 (App. 63). Prior to the MRI, Dr. Rayer expressed in an April 11, 2000, letter that, "[t]here is a significantly realistic possibility that the first surgery done by Dr. Schmelka might not have been extensive enough to control his symptoms. . . ." (App. 54). The new MRI insisted upon by Dr. Rayer revealed that at L4-5 (the level at which surgery had been performed in 1995), there was disc space narrowing, retrolisthesis, reactive endplate changes, considerable fibrosis, some mass effect on the dural sac, a question of disc fragment but could all be fibrosis, degenerative change of facets, and mild central canal stenosis (App. 63). These post-surgical changes at L4-5 were by themselves bad news, but in addition, the new MRI revealed that the bulge at L5-S1 (revealed by both the 1994 mylegram and 1994 CT scan) (App. 64, 66), was a large central herniated nucleus pulposus with mass effect upon dura (App. 63). Dr. Rayer, the home-town physician, was clearly proven right that the surgery Dr. Schmelka did on Bachmeier at L4-5 back in 1995, was not extensive enough and did not address the problem coming from the L5-S1 level. On July 13, 2000, Bachmeier's attorney for the Social Security Disability case, helped him file the

Reapplication for benefits with the Bureau that is the subject matter of this case (App. 15).

After the 2000 MRI, Dr. Michael Martire was asked by Dr. Rayer to do a consultative exam on Bachmeier and he did so on February 6, 2001 (App. 98-101). Dr. Martire indicated that the L5-S1 disc bulge initially seen in 1994 "has since herniated causing a left S1 radiculopathy, which I feel is accounting for some of his present left leg pain" (App. 98-101). Dr. Martire saw a causal progression between the L5-S1 bulge and the eventual herniation. In his letter of April 9, 2001, in referring to the L5-S1 disc level Dr. Martire says:

> I agree there is no herniation on the 8/9/94 report. However, there was a bulge. Please note the difference between a bulge versus herniation is just a matter of degree of protrusion of the disk.
>
> . . .
>
> The fact that the patient never had any significant relief of his left leg pain after surgery on 7/3/95 certainly does raise the possibility that his referred leg pain could have all along been due to an L5-S1 disk bulge, which has now since herniated causing left S1 radiculopathy.

(App. 102)

It is important to remember that the physicians who have seen Bachmeier, even Dr. Schutz back in 1996, when she released him for work, noted the continued radiculopathy "with decreased left-sided reflexes as well as sensation" (App. 86). Instead of discounting Bachmeier's reports of pain and symptoms, the outcome could have been much better if (as Dr. Rayer when he was back in charge) testing had been done to identify the continued problem at the L5-S1 level, rather than the employer/Bureau/Dr. Schutz colluding to railroad Bachmeier out

of the system in 1996.

Dr. Anthony Rayer, Bachmeier's treating physician for a number of years, was deposed on August 21, 2001, in connection with this case. Some of the highlights of Dr. Rayer's testimony from the deposition transcript are as follows:

> A. I, I believe that his, his, his continuing and worsening symptoms were reflective of the fact that he had two discs when he was initially operated upon.
>
> One was identified and removed, and the other was allowed to continue on and get worse.
>
> I think they were both present at the time of the initial surgery.

(App. 50, p. 41, ll. 16-24)

> . . . his surgery never -- his initial surgery, never made him functional again as it should have.
>
> He, he never, he never did well after his surgery, as, as I was able to identify and put together. He just simply never did well.
>
> And it's, it's almost categorical, people almost always improve after, after correct -- a, a corrective and correctly performed back surgery.
>
> He just -- he never had that, that, that degree of relief and so we're faced with a guy that had surgery at L4-5 and then he continues to have pain and problems. And then we find out that he's got something else at L5-S1.

(App. 50, p. 44, ll. 2 - 18).

> A. That basically his pain remained the same. He still had a lot of pain and it was primarily low back pain going into this leg.
>
> Q. Stemming from --
>
> A. His initial injury.
>
> A. Levels?
>
> A. That -- well, it appears to me that he's had -- that he

had injuries at, at 4-5 and S1.

Q. All along?

A. All along.

(App. 51, p. 55, ll. 1-12).

Q. What Mr. Bachmeier has been diagnosed as having in the 2000 MRI, is not an extruded herniated disc. Is that right?

A. That's right.

Q. So, so it truly is a difference between the degree of the bulge, in terms of being a, a bulge in -- back in '9, what, 5 and 6, and a, and a herniation now. Is that right?

A. That's right.

(App. 52, p. 59, ll. 17-25).

And I, I guess it's my prem -- my premise that it appears to me, from looking at the data, the, the clinical course and the subsequent course, and so forth of what's happened to Mr. Bachmeier, that, that his problem was a bit more extensive than initially was appreciated.

And, and, I guess I'd have to say that, that all these answers kind of stem from that, that his problem was initially very likely at two levels. And addressing one level did nothing to relieve his symptoms and allow him to return to work.

(App. 53, p. 68, ll. 2-14).

In summary then, Dr. Rayer's opinion is that Bachmeier had the L5-S1 problem all along after the 1994 injury and that is why he never really did well after his L4-5 surgery in 1995 (much to the frustration of his neurosurgeon, Dr. Schmelka).

For purposes of this appeal, perhaps the most critical deposition testimony from Dr. Rayer is as follows:

Q. You know, from the point when you first saw Randy Bachmeier in December of 1994, up until the present; at any point where you saw and examined Mr. Bachmeier, would he have been capable of full-time competitive employment?

A. No.

(App. 51, p. 53, ll. 18-24).

On July 11, 2000, Bachmeier filed a Worker's Notice of Reapplication claiming his condition had worsened since he was cut off in 1996 (back pain and numbness in left leg) (App. 15). Several weeks later, Social Security issued a favorable decision finding that Bachmeier met the Social Security definition of disability and could not be expected to work. (App. 16-31).

On December 12, 2000, the Bureau issued its Order Denying Reapplication (App. 32-43). That Order asserted that Bachmeier failed to meet his burden of proof in 2 of the 3 criteria set forth in Section 65-05-08(1), N.D.C.C., as necessary for a successful Reapplication. Specifically, the Bureau found that there was no significant change in his compensable medical condition, and that Bachmeier did not suffer an actual wage loss caused by a significant change since he had been unemployed since 1996 when the Bureau terminated his benefits by Order (when it was determined that he could work 10-hour days at Nordic Fiberglass) (App. 40-41).

On January 3, 2001, Bachmeier filed a Request for Hearing on the Order Denying Reapplication. (App. 46). A hearing was held on November 15, 2001.

Prior to a recommended decision being issued by the TALJ appointed to hear the case, Randy Bachmeier died (cause of death natural and apparently unrelated to the compensable work injury) (App. 132). A personal representative for the estate was appointed (App. 134) and formally substituted as the proper party in the Workers

Compensation administrative matter so that there could be a resolution as to the Bureau's liability to the estate for a disability benefit, pursuant to Bachmeier's Reapplication, through the date of Bachmeier's death. (App. 135)

On April 24, 2002, the TALJ issued his Recommended Finding of Fact [sic], Conclusions of Law, and Order in the case (App. 136-146). The decision agreed with the Bachmeier estate's position on the hotly contested issue as to whether Bachmeier did have a significant change for the worse in his compensable medical condition sometime after disability benefits were discontinued on March 20, 1996, but more than 30 days prior to the date of his Reapplication on July 13, 2000, (App. 146, 159). (Pursuant to Section 65-05-08(1), N.D.C.C., disability benefits may only be paid retroactive to 30 days before the filing of the Reapplication). However, the TALJ determined that an actual wage loss caused by the significant change in the compensable medical condition had not been shown as required by statute, and that therefore there was no entitlement to disability benefits pursuant to Bachmeier's July 11, 2000, Reapplication (App. 146, 159). The Bureau adopted the TALJ's recommended decision by Order dated May 13, 2002 (App. 147-148).

The personal representative of the Bachmeier estate filed her Notice of Appeal and Specifications of Error in a timely manner bringing the issue of wage loss before the District Court. The District Court simply affirmed the decision without any substantive opinion, and an appeal was taken to this Court.

IV. LEGAL ARGUMENT

THE BUREAU ERRED AS A MATTER OF LAW IN DETERMINING WHETHER THERE WAS ACTUAL WAGE LOSS RELATED TO THE WORK INJURY, WHEN IT FAILED TO CONSIDER MATERIAL MEDICAL EVIDENCE THAT BACHMEIER WAS AT ALL TIMES, SINCE HIS LAST EMPLOYMENT, DISABLED FROM GAINFUL EMPLOYMENT AS A RESULT OF HIS WORK-RELATED INJURY.

Section 65-05-08(1), N.D.C.C., states:

> 1. When disability benefits are discontinued, the bureau may not begin payment again unless the injured employee files a reapplication for disability benefits on a form supplied by the bureau. In case of reapplication, the award may commence no more than thirty days before the date of reapplication. Disability benefits must be reinstated upon proof by the injured employee that:
>
> a. The employee has sustained a significant change in the compensable medical condition;
>
> b. The employee has sustained an actual wage loss caused by the significant change in the compensable medical condition; and
>
> c. The employee has not retired or voluntarily withdrawn from the job market as defined in section 65-05-09.3.

The Bureau argued that Bachmeier had not sustained a significant change in the compensable medical condition through the hearing process but accepted the TALJ's decision that Bachmeier had indeed sustained a significant worsening of his compensable medical condition. The Bureau never argued at any point through the hearing process that Bachmeier had retired or voluntarily withdrawn from the job market, pursuant to Section 65-05-08(1)(c), N.D.C.C. Rather, the Bureau argued that Bachmeier didn't show actual wage loss caused by the significant

change to his compensable medical condition pursuant to Section 65-05-08(1)(b), N.D.C.C, and the TALJ agreed. The TALJ stated in his opinion, "I found the Bureau's argument convincing." (App. 145). The TALJ stated his understanding of the Bureau's position,

> [A] claimant who continues to work or at least to seek employment until such time as his worsened medical condition requires him to stop working or seeking employment, has an actual wage loss either in the form of the wages he stops receiving when he must stop working, or in the form of potential wages from jobs he was not hired for due to his medical condition. But, that one who is neither working nor seeking employment at the time his medical condition worsens has no actual wage loss because [sic] has not stopped receiving wages as a result of his changed medical condition, since he was not receiving any prior to the change. He also has not proved any lost potential wages from bing [sic] turned down for employment due to his changed medical condition, because he made no effort to secure other employment and therefore was never not hired for any job due to his medical condition.

(App. 145) The TALJ went on to explain,

> [U]nder claimant's interpretation, one who decides to simply remove himself from the work force until such time as his compensable medical condition worsens to the point that he can no longer obtain work should be able to make a reapplication and collect for his lost earning capacity.
>
> . . .
>
> Additionally, common sense dictates that one cannot be said to have lost, as the result of a change in medical condition, something which he neither had nor was seeking to obtain prior to the change in medical condition. Therefore I am convinced that claimant has not proved an actual wage loss caused by the significant change in his compensable medical condition. Accordingly, I concluded that while claimant has suffered a significant change in his compensable medical condition, claimant has failed to prove an actual wage loss caused by that significant change in his compensable medical condition.

(App. 146) The TALJ's reasoning and subsequent determination is based upon an incorrect understanding of the law. Under the TALJ's legal interpretation, if a claimant at any time voluntarily leaves employment or

is discharged, then becomes unquestionably totally disabled (thus making job applications pointless), there is no set of facts which would allow such a claimant's reapplication for disability benefits to be granted. This erroneous legal interpretation allowed or even required the TALJ/Bureau to ignore the uncontradicted and overwhelming medical evidence indicating that Bachmeier was unable to engage in competitive employment since his questionable discharge from employment in 1996. This is contrary to this Court's decision which clearly requires the factfinder to examine the individual circumstances of each case. Wendt v. North Dakota Workers Compensation Bureau, 467 N.W.2d 720, 728 (ND 1991), says that, "a discharge for just cause does not automatically bar an employee from receiving disability benefits." In Wendt this Court, stated at p. 728, "Wendt may reapply for disability benefits any time in the future when he can demonstrate a causal connection between his disability and a loss of earning capacity." The evidence in the instant case is uncontradicted that Bachmeier has been totally disabled and certainly not capable of working 10-hour days, since his last employment. The law does not require Bachmeier to have performed a job search when it would have been an absurd academic exercise. Under Wendt, the issue is not why a claimant became unemployed but, rather, why he remained unemployed. Unfortunately, the TALJ never addressed this real question after determining that Bachmeier's termination must have been appropriate because the 1996 Order indicating that he could have worked 10-hour days 2 days prior to his firing was res judicata, and Bachmeier never looked for work after that.

Finding of Fact 9, states that:

> The greater weight of the evidence shows that claimant was able to perform his job duties at the time he was terminated from his employment but that he chose not to do so.

(App. 140)

Finding of Fact 10 states that,

> The greater weight of the evidence shows that the claimant was terminated from his employment for reasons unrelated to his compensable work.

(App. 140). In his Discussion, the TALJ explained the basis for his findings is the now res judicata Order issued by the Bureau at the time these events occurred in 1996:

> The next question is whether he has lost wages as a result. The evidence shows that with the approval of vocational consultants, the employer, Dr. Schutz and the claimant himself, he was released to return to work with his former employer in a modified position four ten hour days with restrictions. The Amended Order Denying Further Disability and Rehabilitation Benfits [sic] specifically indicates Claimant was capable of working 10 hour days, with additional restrictions, as of May 21, 1996. In spite of this res judicata determination, claimant failed to follow through in his modified job and after having received reprimands from his employer for attendance was terminated from employment with Nordic Fiberglass on May 23, 1996, only two days after the issuance of that order.

(App. 142)

The Bureau has argued that regardless of Bachmeier's disability from work later, when he was fired on May 23, 1996, it is res judicata that he was capable of working 10 hour days because of the final Amended Order Denying Further Disability and Rehabilitation Benefits dated May 21, 1996. This argument was accepted on its face by the TALJ who then determined as a matter of law that, since Bachmeier never sought or obtained employment after that, he could not show actual wage loss. This faulty legal approach allowed the TALJ to

completely ignore all of the medical evidence after May of 1996, which definitively established that Bachmeier actually had more than just a problem going on at L4-5 in 1996, he had a problem at L5-S1 as well, all along. The Bureau had argued at hearing that Bachmeier's now clear L5-S1 problem was not related to the 1994 injury, but the TALJ disagreed and the Bureau has accepted the TALJ's decision in that regard. The reality is that we have far better medical evidence now than existed in May of 1996 to appreciate why Bachmeier continued to be so symptomatic. Bachmeier needed to prove that he had actual wage loss due to the compensable injury for his reapplication to be accepted. This record does that, and suggestions in the record that Bachmeier was magnifying symptoms throughout the post-May 1996 years before his death are clearly shown to be misplaced after the compelling evidence provided by the April 27, 2000, MRI clearly showing a large herniated disc at L5-S1 with mass effect upon dura (App. 63). The Bureau has produced no expert medical opinion taking issue with Dr. Rayer's opinion that Bachmeier was disabled throughout the entire period of time since his termination in 1996. Obviously Dr. Rayer questions the appropriateness of Dr. Schutz's release of Bachmeier to full-time work in March and April of 1996, but this appeal really only needs to address Bachmeier's actual wage loss as of a result of his compensable medical condition after his termination in May 1996.

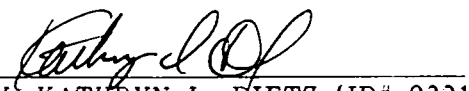
V. CONCLUSION

The Bureau's acceptance of the TALJ's opinion that there is no actual wage loss because it is res judicata that he could work in May, 1996, and he must then have chosen not to work thereafter since he did

not apply for jobs, is misplaced. There should have been an examination of the post May 1996 medical evidence which amply demonstrates Bachmeier's compensable medical disability which would obviously have resulted in wage loss. Wendt v. North Dakota Workers Compensation Bureau, id. at 728, only requires that a causal connection between disability and loss of earning capacity be shown. There is certainly no legal requirement as was applied in this case that the claimant has to have been working at the time the disability strikes, or at least to have been looking for work, and if not, no further examination of the facts is necessary. The Bureau Order should be reversed and the Bureau should be directed to accept the re-application and pay appropriate disability benefits to Bachmeier's estate per the statute from 30 days prior to the filing of the Reapplication (July 13, 2000) until Bachmeier's death.

Respectfully submitted this 4 day of November 2002.

DIETZ & LITTLE LAWYERS



BY: KATHRYN L. DIETZ (ID# 03213)
ATTORNEY AT LAW

ATTORNEYS FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501
(701) 222-1761

CERTIFICATE OF SERVICE

I, Kathryn L. Dietz certify that on the 4th day of November 2002, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

NORDIC FIBERGLASS INC
PO BOX 737
DEVILS LAKE ND 58301

MS JACQUELINE S ANDERSON
SPECIAL ASSISTANT ATTORNEY GENERAL
NILLES HANSEN & DAVIES LTD
1800 RADISSON TOWER
201 NORTH FIFTH STREET
P O BOX 2626
FARGO ND 58108

BY: _____
KATHRYN L. DIETZ (ID# 03213)