

ORIGINAL

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20030129

Martin J. Zander, )  
)  
Plaintiff-Appellant, )  
)  
vs. )  
)  
North Dakota Workers )  
Compensation Bureau, )  
)  
Defendant-Appellee. )

Supreme Court Case No. 2003-129

District Court Case No. 02-C-3222

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUL 23 2003

STATE OF NORTH DAKOTA

**BRIEF OF APPELLEE**

Appeal from Judgment of Burleigh County District Court Dated April 10, 2003, Affirming Bureau Order Dated November 4, 2002, Adopting the Recommended Order of the Administrative Law Judge Affirming the Order Denying Reopening of a Close Claim Dated December 11, 2001, and Appeal from Final Administrative Order Dated November 4, 2002

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### STATEMENT OF THE ISSUES

- I. Zander Has Not Established By Clear And Convincing Evidence His 1991 Work Related Injury Is The Sole Cause Of His Current Low Back Condition.
- II. N.D.C.C. §65-05-35 Was Properly Applied To Zander's Claim And Does Not Operate To Abrogate A Vested Right to Benefits.
- III. The Application Of N.D.C.C. §65-05-35 To Zander's Claim Does Not Violate Zander's Due Process Rights Under The United States Constitution Or The North Dakota Constitution.
- IV. The Application Of N.D.C.C. §65-05-35 To Zander's Claim Does Not Violate Zander's Equal Protection Rights Under The United States Constitution Or The North Dakota Constitution.

### **STATEMENT OF THE CASE**

This case involves an appeal by Martin Zander (Zander) of a District Court Judgment affirming a North Dakota Workers Compensation (Workers Compensation) Order which established Martin Zander had not demonstrated, by clear and convincing evidence, that his 1991 work injury is the sole cause of his current back condition (Zander Appendix 45).

An evidentiary hearing was held on September 24, 2002, in which the specified issues were addressed. The Administrative Law Judge (ALJ) determined there was not clear and convincing evidence Zander's 1991 work injury was the sole cause of Zander's current back condition. Id. at 14.

Zander appealed to the District Court, which affirmed the decision of Workers Compensation. Id. at 45. Zander has now appealed to the North Dakota Supreme Court. Id. at 46.

### **STATEMENT OF THE FACTS**

At issue in this case is whether claimant Martin Zander has complied with N.D.C.C. §65-05-35 in rebutting the closed claim presumption. N.D.C.C. §65-05-35 provides claims are presumed closed if Workers Compensation has not paid any benefits or received a demand for payment of any benefits for a period of four years. The statute explicitly states a claim may not be reopened for payment of any further benefits unless the presumption is rebutted by clear and convincing evidence the work injury is the sole cause of the current symptoms.

Zander filed a claim for Workers Compensation benefits for a work related injury that occurred on February 25, 1991 (CR 001). Zander was employed by Nelson International as a diesel mechanic and injured his lower back when he was installing a clutch assembly in a semi truck. Id.

Zander initially treated with Dr. Hart and Dr. Mattheis throughout 1991 and 1992. During that period he appeared to be progressing fairly well with conservative therapy. On September 9, 1991, Zander underwent a CT scan of his lumbar spine which revealed spinal stenosis (CR 071). On September 24, 1991, Zander underwent an MRI of his lumbar spine which revealed a herniated disc at L4-5 (CR 072). In May 1992, Zander's back and leg symptoms seemed to worsen (CR 076). Zander continued to treat periodically for the L4-5 disc problem and on August 19, 1993, he underwent an L4-5 partial hemilaminectomy with excision of L4-5 disc (CR 078-082).

Workers Compensation paid Zander temporary total disability ("TTD") benefits from August 18, 1993, through September 6, 1993, while he was off

work due to his surgery. Workers Compensation provided notice to Zander that his TTD benefits would be discontinued on September 6, 1993, because he returned to work on September 7, 1993 (CR 018).

Zander followed up with Dr. Hart on November 22, 1993. At that time, Zander indicated he was doing well, had a little achiness in his back, but his leg pain was pretty much gone (CR 087). Dr. Hart recommended Zander continue with his rehabilitation and strengthening program and schedule a recheck in three months. Id.

After Dr. Hart determined Zander had reached maximum medical improvement, Zander underwent a permanent partial impairment (PPI) evaluation by Dr. Ward on June 25, 1994. Dr. Ward noted Zander did not have any numbness, weakness, or particular pain radiation at the time of the evaluation (CR 106-109). Pursuant to the evaluation, Zander was given a 5% whole person impairment. Id. On July 28, 1994, Workers Compensation issued an Order Awarding Permanent Partial Impairment Benefits awarding a 5% whole body permanent partial impairment for his lumbar spine (CR 019-021).

After 1994, Workers Compensation did not receive any further record regarding additional medical treatment received by Zander until seven years later in July 2001. Zander treated with Dr. Robertson on July 31, 2001, complaining of low back and left leg pain. It was noted in the treatment records Zander had been doing relatively well since his 1993 surgery, but recently started having problems with low back and left leg pain (CR 110). X-rays taken at the July 31,



2001 appointment showed mild disc narrowing at L4-5 and minimal spondylosis (CR 073).

As a result of that treatment, Zander requested payment of medical expenses on his claim. On August 1, 2001, Workers Compensation wrote to Zander informing him because he had not treated for his 1991 work injury and there had not been any activity on his claim in over four years, his claim was presumed closed (CR 022). Workers Compensation further informed Zander he needed to provide clear and convincing evidence establishing his current condition is solely caused by his original 1991 work injury. Id.

Zander underwent an MRI on August 10, 2001, as recommended by Dr. Robertson (CR 074). The MRI showed degenerative disc disease at multiple levels, but no evidence of a new herniated disc. Id.

On August 13, 2001, Zander followed up with Dr. Robertson with continued complaints of back and leg pain (CR 112). Dr. Robertson reviewed the recent MRI and opined Zander is destined to have problems with his back and leg due to the scarring from his original surgery and recommended conservative treatment. Id.

In an attempt to reopen his claim, Zander wrote to Workers Compensation on August 29, 2001, explaining he felt the medical treatment he received in 2001 for his back and leg pain was still from his 1991 work injury (CR 026). He explained since his surgery in 1993 his pain had never resolved and had progressively worsened. Id. At that time he provided Workers Compensation with the 2001 treatment records from Dr. Robertson (CR 027-030).

Due to the amount of time that had passed since Zander's 1993 surgery and the treatment received in July 2001, Workers Compensation referred Zander's claim to Dr. Terry Wolff, a Workers Compensation Physician Advisor, for an independent review. After reviewing Zander's treatment records, Dr. Wolff opined there was not sufficient medical evidence identified in the treatment records from 1991 through 2001 to suggest the 1991 work injury is the sole cause of the current symptoms (CR 032-033). With Dr. Wolff's opinion to further substantiate Workers Compensation's position, Workers Compensation wrote to Zander on October 18, 2001, informing him the recent information still did not provide clear and convincing evidence his current condition was solely caused by the 1991 work injury (CR 034-035).

Zander submitted another physician's opinion from Dr. Ariell Nygaard dated October 30, 2001, to Workers Compensation in support of reopening his claim (CR 038). Dr. Nygaard initially felt Zander's current difficulties were related to his previous work injury based on a reasonable degree of medical certainty, but recommended further testing in order to be certain (CR 036-037).

One of the tests Dr. Nygaard recommended was a left L5 selective nerve root block or L4-5 discogram. Id. The necessity of this test was reviewed and denied by the Utilization Review Department of Workers Compensation because Dr. Nygaard did not provide sufficient information on how and if this test would change the management of Zander's current medical condition (CR 040-041). In a request for reconsideration to receive the selective nerve root block or discogram, Zander submitted another letter from Dr. Nygaard dated November

26, 2001, to further explain the necessity of the selective nerve root block or discogram (CR 042). In that letter, Dr. Nygaard opined Zander's current difficulties are a direct result of his previous work related injury and L4-5 discectomy, history, continued intermittent symptomatology and absent re-injury (CR 046). Dr. Nygaard further stated he did not agree with the previous interpretation of the radiology report which stated degenerative disc disease existed at all levels, but believed the disc changes were restricted to the L4-5 area (CR 045). However, Dr. Nygaard did not state in that letter the 1991 work injury was the sole cause of Zander's current symptoms. Of overriding importance is Dr. Nygaard's deposition testimony where, despite his letter opinions, he testified he could not say there is clear and convincing evidence Zander's 1991 work injury was the sole cause of his current condition (Workers Compensation Appendix 7-8). In fact, Dr. Nygaard testified the significant pain Zander is experiencing comes from the L5-S1 level, not the L4-L5 level involved in Zander's 1991 work injury. Id. at 5.

The requested L5 selective nerve root block was eventually performed on February 13, 2002. That test revealed degenerative disc disease, post laminectomy and lumbar radiculopathy (CR 124). The requested discography was also performed on June 19, 2002, which showed "significant leakage and positive concordant left-sided low back pain..." (CR 133). The disc injured in 1991, L4-5, showed "no pain or pressure until 2.5 cc, mild pressure sensation in the mid low back. At 2.5 cc, he did not have any left-sided low back, buttock, or leg pain." Id.

Dr. Ian Fyfe also rendered an opinion in this case. Initially, Dr. Fyfe opined Zander's history was consistent with his current problems emanating from his 1993 (sic) injury (CR 061). In his deposition, Dr. Fyfe appeared to suggest there was clear and convincing evidence Zander's 1991 work related injury was the sole cause of his current symptoms (Workers Compensation Appendix 13). Upon follow up questioning, however, Dr. Fyfe stated there was a possible combination of causes for Zander's current condition. Id. at 4. Most importantly, Dr. Fyfe recognized there are several sources for Zander's pain. Id. at 15.

Workers Compensation issued its Order Denying Reopening of a Closed Claim (Order) on December 11, 2001 (Zander Appendix 5). On February 8, 2002, Zander requested a hearing on the Order (CR 134). On September 24, 2002, an evidentiary hearing was held in front of the ALJ. Subsequent to the close of that hearing and subsequent to the issuance of the final Order, dated November 4, 2002, Zander petitioned Workers Compensation for reconsideration. The basis for the request was a report by Dr. Sena Kihtir dated September 20, 2002. Dr. Kihtir's report was available on the date of the hearing, but Zander failed to present the evidence to the ALJ or to Workers Compensation for consideration (CR 162-165). Due to the untimeliness, and on the grounds the opinions contained in the report produced no meaningful affect on the ALJ's determination, Workers Compensation denied the Petition for Reconsideration by way of Order dated December 18, 2002 (Zander Appendix 37).

### **LAW AND ARGUMENT**

The North Dakota Supreme Court has expressed on many occasions that courts shall defer to findings of fact made by Workers Compensation, and that determinations made by Workers Compensation are presumed to be correct. Perman v. North Dakota Workers Compensation Bureau, 458 N.W.2d 484, 487 (N.D. 1990). A decision of Workers Compensation must be affirmed 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 conclusion of law, or its decision violates the claimant's constitutional rights or deprives the claimant of a fair hearing. Meljie v. North Dakota Workers Compensation Bureau, 2002 ND 174, 653 N.W.2d 62. In deciding whether Workers Compensation's findings of fact are supported by a preponderance of the evidence, the Court is to exercise restraint and may not make independent findings of fact or substitute its judgment for Workers Compensation's. Instead, the Court's review of Workers Compensation's findings of fact is limited to determining whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record. Myhre v. North Dakota Workers Compensation Bureau, 2002 ND 186, 653 N.W.2d 705.

In this case, Workers Compensation's finding that Zander's 1991 work injury is not the sole cause of his current low back condition is supported by the evidence. As such, this Court is to exercise restraint and affirm Workers Compensation's decision.

**I. Zander Has Not Established By Clear And Convincing Evidence His 1991 Work Related Injury Is The Sole Cause Of His Current Low Back Condition.**

In order for a claim to be reopened which, by statute, has been presumed closed, Zander must show with clear and convincing evidence his 1991 work injury is the sole cause of his current symptoms.

N.D.C.C. §65-05-35 states, in relevant part:

1. A claim for benefits under this title is presumed closed if the bureau has not paid any benefit or received a demand for payment of any benefit for a period of four years.
2. A claim that is presumed closed may not be reopened for payment of any further benefits unless the presumption is rebutted by **clear and convincing evidence** that the work injury is the **sole cause** of the **current symptoms**.
- ...
4. This section applies to all claims for injury, irrespective of injury date.

(emphasis added.)

Zander has the burden of proof in establishing his right to receive benefits. Meljie v. North Dakota Workers Compensation Bureau, 2002 ND 174, 653 N.W.2d 62. Zander has not sustained his burden by demonstrating, by clear and convincing evidence, his 1991 work injury is the sole cause of his current symptoms. Clear and convincing evidence is evidence which leads to a firm belief or conviction the allegations are true. In the Matter of Adoption of J.W.M., 523 N.W.2d 372, 378 (N.D. 1985) (citing In the Matter of Adoption of A.M.M., 529 N.W.2d 864 (N.D. 1985)). In this case, there must be evidence which leads to a firm belief or conviction that Zander's 1991 work injury is the sole, cause, not just a substantial cause, of his current symptoms. Several doctors have rendered

their opinions in this case but none have made the requisite link that Zander's 1991 work injury is the sole cause of Zander's current symptoms.

Dr. Nygaard, an orthopedic surgeon, treated Zander for his current symptoms. According to Dr. Nygaard, Zander has degenerative changes at the L5-S1 level, which were not related to the 1991 work injury (Workers Compensation Appendix 2-3). In addition, Dr. Nygaard testified there are also some facet arthritic changes at the L5-S1 level which are not related to the 1991 work injury. There is also scarring from the L1-L2 level which could contribute to Zander's pain. The cause of the scarring at this level is unknown. Id. at 4. According to Dr. Nygaard, the preliminary discogram performed by Dr. Kihtir indicates the significant pain is coming from the L5-S1 disc, not the L4-5 disc which was the disc injured in the 1991 work injury. Id. at 5. Dr. Nygaard clearly stated he cannot link the current L5-S1 disc problems and pain to the 1991 work injury. Id. at 6. Dr. Nygaard cannot state one particular cause of Zander's pain.

Q: Would it be fair to say that at this point there are several things that could be causing Mr. Zander's pain?

A: Exactly. That's exactly what I feel.

Id. at 7.

Overall, Dr. Nygaard testified he could not, to a reasonable degree of medical certainty, say there was clear and convincing evidence Zander's 1991 low back injury is the sole cause of Zander's current condition. Id. at 8.

Dr. Fyfe also treated Zander for his current low back condition. In his deposition Dr. Fyfe stated there could be factors other than the 1991 work injury which are contributing to Zander's pain. Id. at 14. In fact, Dr. Fyfe testified there

are several sources of Zander's pain, for example, the disc degeneration at several levels. Id. at 10. As Dr. Fyfe stated, "...there are several areas where the pain can be coming from. Yes." Id. at 11. Dr. Fyfe also testified most of Zander's problems center around the L4-5 level or S1 level but that there is no way to prove those problems are caused by the 1991 work injury or whether it's a natural aging process. Id. at 12. Dr. Fyfe opined a combination of causes exists and there could be other contributing factors to Zander's current symptoms aside from his 1991 work injury. Id. at 14-16. The result is Dr. Fyfe cannot conclusively state what is causing Zander's pain. Id. at 16. Dr. Fyfe's opinion does not provide clear and convincing evidence Zander's 1991 work injury is the sole cause of Zander's current symptoms. More importantly, Dr. Fyfe's opinion is there are contributing factors to the current condition which by definition proves the 1991 work injury is not the sole cause of Zander's current condition.

Dr. Wolff, a physician advisor for Workers Compensation, also provided an opinion in this case. Citing several factors, Dr. Wolff concluded there is not clear and convincing evidence Zander's 1991 work injury is the sole cause of Zander's current low back condition (CR 032-033). The end result is Dr. Wolff's testimony Zander's 1991 work injury is not the sole cause of Zander's current condition (Workers Compensation Appendix 18).

Zander relies on a letter from Dr. Sena Kihitir dated September 20, 2002 (CR 162-165). The hearing in this matter was held four days later on September 24, 2002. At that time, the letter was available to Zander to offer at the hearing for consideration by the ALJ. Zander failed to present the opinion. Moreover,



Zander did not submit this letter to Workers Compensation until his Petition for Reconsideration dated December 3, 2002, almost a month after the final Order had been issued (Zander Appendix 34 and 37). Therefore, the opinion is untimely, is not admissible evidence in this appeal, and is improperly before this Court as evidence. In the alternative, if the opinion was admitted for consideration, it does not outweigh the numerous medical opinions outlined above, nor does it state there is clear and convincing evidence Zander's 1991 work injury is the sole cause of his current condition.

There has not been a single medical opinion demonstrating there is clear and convincing medical evidence Zander's 1991 work injury is the sole cause of his current condition. It is Zander's burden to prove such, which he has failed to do. Workers Compensation's decision is, therefore, supported by the evidence and the Judgment affirming Workers Compensation's Order dated November 4, 2002, must be affirmed.

**II. N.D.C.C. §65-05-35 Was Properly Applied To Zander's Claim And Does Not Operate To Abrogate A Vested Right to Benefits.**

Normally, the statute in effect on the date of an injury governs Workers Compensation benefits, unless the Legislature has provided otherwise. Loberg v. North Dakota Workers Compensation Bureau, 1998 ND 64, ¶9, 575 N.W.2d 221. The North Dakota Legislature in drafting N.D.C.C. §65-05-35 did provide otherwise, clearly mandating the current version "applies to all claims for injury, irrespective of injury date." As such, the 1991 statute in effect on the date of Zander's original work injury does not apply. Instead, the current version of N.D.C.C. §65-05-35 applies which requires Zander to present clear and

convincing evidence his 1991 work injury is the sole cause of his current condition.

In an attempt to circumvent the legislative intention, Zander has argued he has a vested right in application of the 1991 law. A statute can operate retrospectively but not if doing so would abrogate a vested right. Saari v. North Dakota Workers Compensation Bureau, 598 N.W.2d 174, 178 (ND 1999) (citations omitted) (emphasis added). “A vested right is an immediate or fixed right to present or future enjoyment that does not depend upon an event that is uncertain.” Id. at 178. Zander’s right to benefits is not a vested right since his right to benefits is not immediate or fixed and it depends on an uncertain event, therefore, the current version of N.D.C.C. §65-05-35 applies to his claim for benefits in accordance with the Legislature’s clear intention.

When there is a gap in benefits there is no on-going expectation or vested right in continued benefits. In an analogous situation, the North Dakota Supreme Court, when considering which law applies to a reapplication for benefits, ruled the law in effect on the date of injury does not control. Tangen v. North Dakota Workers Compensation Bureau, 2000 ND 135, 613 N.W.2d 490 (emphasis added).

Tangen argued N.D.C.C. §65-05-08(1) was not in effect at the time of his 1992 work injury and, it was, therefore, inapplicable to his claim. Workers Compensation argued the law in effect at the time of Tangen’s reapplication for benefits was applicable. The Court reasoned by its very nature a “reapplication” only arises after benefits are discontinued. In other words, when there is a lapse

in benefits an injured worker must reapply for benefits. At that time, a new analysis of a claimant's entitlements to benefits occurs. Accordingly, benefits are not guaranteed and there cannot be a "vested" right in benefits.

A reapplication of benefits is similar to reopening a claim due to the fact benefits have not been paid for a period of time. In addition, the injured worker is not guaranteed benefits without making the requisite showing for reinstatement of benefits. Only upon the requisite showing will benefits be reinstated. Like a reapplication situation, Zander does not have a vested interest in continued benefits since there has been a lapse in benefits. Since there is no vested right, the Legislature's specific mandate applies and the current version of N.D.C.C. §65-05-35 applies to Zander's claim, irrespective of injury date. The result is Zander must prove by clear and convincing evidence the sole cause of his current condition is his 1991 work injury, which he has repeatedly failed to do.

N.D.C.C. §65-05-35, regardless of which version is applied<sup>1</sup>, clearly states a claim is presumed closed (or inactive) if benefits are not paid or a demand for benefits has not made for four years. Zander did not demand

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<sup>1</sup> The 1991 version of N.D.C.C. §65-05-35 provides:

1. A claim for benefits under this title is presumed inactive if:
  - a. A doctor's report has been filed indicating the employee has reached maximum medical recovery; and
  - b. The bureau has not paid any benefit or received a demand for payment of any benefit for a period of four years.
2. A claim that is presumed inactive may not be reopened for payment of any further benefits unless the presumption is rebutted by a preponderance of the evidence. At a minimum, the employee shall present expert medical opinion that there is a causal relationship between the work injury and the current symptoms.
3. With respect to a claim that has been presumed inactive, the employee shall provided the bureau written notice of reapplication for benefits under that claim. In case of award of lost-time benefits, the award may commence no more than thirty days before the date of reapplication. In the case of award of medical benefits, the award may be for medical services incurred no more than thirty days before the date of reapplication.

payment for medical expenses for almost seven years. Therefore, his claim is presumed closed. If a claim is closed there isn't an "immediate or fixed right" to benefits. As such, applying the statute retrospectively cannot abrogate a vested right, since there is no ongoing entitlement to benefits.

Workers Compensation correctly applied the current version of N.D.C.C. §65-05-35, therefore, the Judgment affirming Workers Compensation's November 4, 2002 Order must be affirmed.

**III. The Application Of N.D.C.C. §65-05-35 To Zander's Claim Does Not Violate Zander's Due Process Rights Under The United States Constitution Or The North Dakota Constitution.**

A statute carries a strong presumption of constitutionality and the challenger must clearly show that "the statute contravenes the state or federal constitution." Baldock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441, 444 (N.D. 1996); Swenson v. Northern Crop Insurance, Inc., 498 N.W.2d 174, 178 (N.D. 1993) (stating "bring up the 'heavy artillery'. . . or forego the attack entirely.") Zander asserts N.D.C.C. §65-05-35 is unconstitutional, however, his argument consists of little over one page which does not equate to "heavy artillery." More importantly, N.D.C.C. §65-05-35 does not contravene state or federal constitution.

It is a claimant's right to rely upon continuing, regular, ongoing payments which triggers due process protections. Nemec v. North Dakota Workers Compensation Bureau, 543 N.W.2d 233 (N.D. 1996) (emphasis added). Zander's benefits were not continuing, regular, or ongoing, therefore, he does not

have a property right in those benefits and due process protections are not triggered.

In Nemec, Workers Compensation awarded Nemec disability benefits for her March 12, 1992 injury and simultaneously issued a Notice of Intention to Discontinue Benefits on March 17, 1992. Workers Compensation informed her the disability benefits would be terminated because her doctors stated she could return to work on March 18, 1992. Nemec appealed the Order discontinuing her benefits and the Order denying treatment after a specified date. Like Zander, Nemec argued her due process rights were violated since she had a property right in the benefits. The Court noted Nemec wasn't receiving benefits on a continuing basis when she was notified her benefits were terminated. Id. at 237. The Court stated the award was basically a lump sum award for a five day period. Id. The Court further stated claimants have "a right to rely on continuing, regular, and ongoing payments which triggers the due process protection under Nemec." Id. at 238 (emphasis added). Since Nemec wasn't relying on continuing, regular, and ongoing payments, the Court held due process protections did not apply. Id. (holding "those same protections do not apply to a one time lump sum award of disability benefits for a short, closed period of time.")

The reasoning in Nemec is applicable to Zander's claim for benefits. Zander's benefits were not continuing, regular, or ongoing. Zander had not received any type of benefit for almost seven years. Since Zander was not receiving any benefit, he had no expectation to continue to receive them. Like Nemec, Zander did not have a property right in benefits he was not continuing to

receive, and had not for years. As such, due process protections are not triggered.

In support of Zander's due process violation claim, he cites Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988), for the proposition Workers Compensation must give notice prior to terminating benefits and give an injured worker an opportunity to respond prior to the termination of benefits in order to satisfy due process requirements. Beckler is easily distinguished. In short, Beckler dealt with the termination of ongoing disability benefits and whether notice was necessary when Workers Compensation terminates benefits. Like Nemec, however, Zander's benefits were not continuing, regular and ongoing. There was a gap of almost seven years where Zander failed to assert a claim for benefits. As such, Nemec is more akin to Zander's claim and Beckler is not controlling.

Even if Zander some how had a property right in benefits which were not continuing, ongoing, or regular, Workers Compensation did not "terminate" his benefits. As such, due process protections, such as notice prior to terminating the benefits and an opportunity to respond, were not necessary. Zander's benefits ended by operation of law which is easily distinguished from termination of benefits by Order. Workers Compensation did not engage in any affirmative act to terminate Zander's benefits. Zander's failure in not making a claim for benefits for almost seven years is what lead to his claim being statutorily presumed closed. Since Workers Compensation did not terminate Zander's benefits, rather his benefits ended by operation of law due to his failure to make

a claim for benefits, Workers Compensation did not violate Zander's due process rights.<sup>2</sup>

N.D.C.C. §65-05-35 does not violate Zander's due process rights since he does not have a vested right, or property interest in benefits which are not continuing, ongoing, and regular. If Zander had a vested, or property right in the benefits, since the benefits ended by operation of law and were not terminated, Workers Compensation did not need to provide Zander with notice his benefits had ended in order to satisfy due process requirements.

Zander has failed to bring the heavy artillery and prove N.D.C.C. §65-05-35 is unconstitutional, therefore, the Judgment affirming Workers Compensation's Order dated November 4, 2002, must be affirmed.

**IV. The Application of N.D.C.C. §65-05-35 to Zander's Claim Does Not Violate Zander's Equal Protection Rights Under the United States Constitution or the North Dakota Constitution.**

As noted, *infra*, legislative enactments are imbued with a strong presumption of constitutionality and that presumption is conclusive unless it is clearly shown the statute contravenes state or federal law. Baldock v. N.D. Workers Compensation Bureau, 554 N.W.2d 441, 444 (N.D. 1996). The equal protection clause does not forbid classifications, but it does prevent lawmakers from treating persons differently who are in all relevant respects alike. Id. N.D.C.C. §65-05-35 on its face creates no classification of any type, particularly

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<sup>2</sup> Zander contends he was not given notice prior to the "termination" of his benefits. Zander, however, is charged with notice of N.D.C.C. §65-05-35. "Every person generally is charged with knowledge of the provisions of statutes and regulations and must take notice thereof." Gonzalez v. Tounghian, 2003 ND 121, ¶ 20. Accordingly, Workers Compensation had no affirmative duty to make him aware of the statute prior to the expiration of the four year period.

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suspect classifications. In fact, all injured workers receiving benefits under the Workers Compensation Act (the Act) are subject to the provisions of N.D.C.C. §65-05-35. Since all injured workers are treated alike there is not even a classification to analyze, and Zander's equal protection argument fails on its face.

If there is a classification and the statute is challenged on equal protection grounds, the Court uses one of three standards depending on the right which is allegedly infringed. The Court applies strict scrutiny when a fundamental right is being infringed; intermediate scrutiny when an important substantive right is involved; and a rational basis if there is no fundamental or important substantive right involved. Baldock at 445.

The parties are in agreement there is no fundamental right involved, therefore, strict scrutiny could not be applied even if there was some classification involved.

Zander argues he has an "important substantive right; and that is the right to continue to receive vested benefits..." which requires intermediate review. Zander was entitled to, and did receive Workers Compensation benefits. Zander, however, does not have a vested right in benefits since the benefits ended by operation of law due to his failure to make a demand for benefits for over four years. Zander also does not have a vested right in benefits for a claim that is presumed closed. Regardless of which version of N.D.C.C. §65-05-35 applies, the claim is closed and there can be no expectation to benefits. Moreover, provided Zander makes the requisite showing, which thus far he has not, his benefits will be reinstated. That is not to say, however, he has a vested right in



those benefits. Since there is no vested interest in continued benefits, there is no property right, or important substantive right. Concordantly, it is improper to apply an intermediate level of review when scrutinizing N.D.C.C. §65-05-35.

The proper review for the Court to apply is a rational basis standard. Using that standard, the Court must uphold the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental concern. Baldock at 445. For review under a rational basis standard the Legislature does not need to articulate the purpose or rationale supporting a classification if there is an identifiable purpose which the Legislature may have considered. Id. at 446.

The governmental purpose of N.D.C.C. §65-05-35 is easily identified. An injured worker is entitled to benefits under the Act if it is determined his injury is compensable. However, the government has an interest in finality and efficiency in administering these claims. Without a provision such as N.D.C.C. §65-05-35 claims would remain open indefinitely and frustrate the administrative process. Secondly, an injured worker continues to be entitled to benefits as long as he regularly makes claims for benefits and those benefits are related to his compensable work injury. It is only when an injured worker does not make a claim for benefits for four years that N.D.C.C. §65-05-35 requires an injured worker to prove by clear and convincing evidence his work injury is the sole cause of his current condition. N.D.C.C. §65-05-35 does not operate as a complete foreclosure of benefits. Zander's benefits lapsed not because Workers Compensation terminated them, but because he did not make a claim for

benefits. Upon the requisite showing benefits will be reinstated. The governmental interests of efficiency and finality are rationally related to the provisions of the closed claim presumption.

Zander has failed to prove N.D.C.C. §65-05-35 discriminates in an unconstitutional manner. Thus, N.D.C.C. §65-05-35 does not violate the equal protection clauses of the United States and North Dakota Constitutions and Workers Compensation's Order must be affirmed.

### **CONCLUSION**

For the foregoing reasons, the Judgment affirming Workers Compensation's Order dated November 4, 2002 must be affirmed.

Dated this 23rd day of July, 2003.



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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Martin Zander, )  
)  
Plaintiff -Appellant, )  
)  
v. )  
)  
North Dakota Workers )  
Compensation Bureau, )  
)  
Defendant-Appellee. )

**AFFIDAVIT OF MAILING**

STATE OF NORTH DAKOTA )  
) ss.  
COUNTY OF BURLEIGH )

The undersigned being first duly sworn upon oath, deposes and says: That she is a citizen of the United States over the age of eighteen years and not a party to nor interested in the above entitled action, and that on July 23, 2003 she placed in the United States mail at Bismarck, North Dakota, a true and correct copy of the following document(s):

**Brief of Appellee and Appendix of North Dakota Workers Compensation**

That copies of the above papers were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

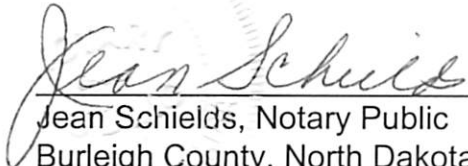
Steve Latham  
Attorney at Law  
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Bismarck, ND 58502-2056

Legal Department  
ND Workers Compensation Bureau  
500 East Front Avenue  
Bismarck, ND 58504

That to the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the party to be served.

  
Brenda K. Vitek

Subscribed and sworn to before me today, July 23, 2003.

  
Jean Schields, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 4/25/08