ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20040096

20040096

Esther Baity,

Appellant,

v.

Workforce Safety & Insurance and Case New Holland (f/k/a Case IH/Steiger Tractor),

Appellees.

****

APPELLANT BAITY'S REPLY BRIEF

****

Appeal from Judgment dated February 4, 2004
Cass County District Court Civil No. 09-03-C-02519
The Honorable Cynthia Rothe-Seeger, Presiding

Mark G. Schneider, ND ID #03188
Mark G. Schneider, PLLC
815 Third Avenue South
Fargo, ND 58103
(701) 235-4481

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

"Appellant Baity's Brief" was dated and served June 9, 2004. The "Brief of Appellee Workforce Safety & Insurance" was dated and served on July 12, 2004, via Affidavit of Service by Mail. The following constitutes "Appellant Baity's Reply Brief", with every effort made not to duplicate the law and argument in her brief in main.

LAW AND ARGUMENT IN REPLY

A. WSI's argument entirely misses the sole relevant issue in this case.

WSI's brief, both in its recitation of the facts and its legal argument, entirely misses the sole relevant issue in this case. The issue is **not** that WSI has the authority and power to declare Baity at "permanent total disability" status (see WSI argument, *passim*). Rather, the issue is whether WSI can **ignore** its obvious statutory duty to determine **when** Baity became permanently and totally disabled. See Baity main brief at p. 7-8. Nowhere in this record - - or even in WSI's argument - - has anyone asserted that Baity was **not** "permanently totally disabled" effective July 1, 2001, i.e., the first date that she otherwise became eligible for "supplementary benefits." On the contrary, WSI employee Kocher admitted in his testimony that there was absolutely no evidence to show that Baity was **not** "permanently totally disabled" as of July 1, 2001. Baity main brief at 14-15; and see App. 74/23 through 75/11. Of course, this is exactly the conclusion that ALJ Schultz made (see Conclusion 13; App. 119) - - and that was never specifically rejected by WSI in its final order.

Further:

> "The finding that Baity is permanently and totally disabled as of September 11, 2002, is arbitrary and capricious since the September 11, 2002 date is unrelated to Baity's medical or vocational status and simply reflects the date the committee met and determined Baity's status." ALJ Conclusion 12; App. 119; and see Baity's "Specifications of Error", ¶ II, dated September 10, 2003; App. 4-5.

Moreover, ALJ Schultz also specifically concluded - - a conclusion that was not rejected by WSI - - that:

> "Baity had no control over when the committee met. The committee had sole discretion when they [sic] were to meet. **There was no significant change in Baity's medical or vocational status from July 1, 2001 to September 11, 2002.**" App. 118; Conclusion 9; emphasis added.

The focus of WSI upon its otherwise irrelevant right to "declare" the "permanent total disability status" is peculiar enough, but its ignoring of its **own policy** that clearly put a priority on timely determining **when** a worker, such as Baity, becomes "permanently totally disabled" (and thus entitled to "supplementary benefits") is downright bizarre! The only excuse WSI argues for ignoring its own policy (which ". . . give[s] a priority to claims where the injured workers weekly compensate [sic] rate had fallen below the current minimum average weekly wage")[1] is that this was simply a ". . . 'goal' they were not always able to meet . . ."! *Id.*

---

[1]WSI brief at 13.

WSI goes on to rehash undisputed facts in a vain effort to have this Court "re-try" the determination on whether Baity is "permanently and totally disabled." WSI brief at 12-16.[2] Again, that issue is not before the court nor can it be. It is undisputed that Baity **is** "permanently totally disabled." The only question is whether she was disabled as of the first date she was eligible for "supplementary benefits" on July 1, 2001 or whether she is bound by the purely arbitrary and capricious decision of WSI not to pay her supplementary benefits until the date the committee met to "declare" her PTD status. See Statement of the Facts, Baity brief at 1-9.

There is **no** evidence in the record but that, as found by ALJ Schultz, Baity was permanently and totally disabled as of July 1, 2001, i.e., the first date she was eligible for supplementary benefits. See argument, *supra*. The "clincher" - - if there need be one - - is that WSI admitted (see Baity's brief at 13) it violated its own internal procedures for giving priority to totally disabled workers, such as Baity, to **ensure** that

---

[2]Baity's counsel is unclear as to what the purpose is of n. 4 (at p. 14) of the WSI brief or what it means and, whatever it means, its relevance to the issue at bar. Suffice it to say, the attribution to Baity's attorney set forth in the footnote was actually made by a WSI in-house attorney, Dave Thiele. CR 90. Attorney Thiele simply misapprehended what Baity's counsel had stated in the "September 19, 2002 correspondence to Cynthia Gabel" that Thiele was responding to. *Id.* Compare Thiele's attribution at CR 90 with Baity's counsel's discussion at CR 87, i.e., Baity's focus throughout has always been WSI's duty to not only "declare" PTD status but also to determine **when** that PTD status began in order to ensure appropriate payment of "supplementary benefits."

they would receive "supplementary benefits" at the earliest possible time! And see App. 112 (ALJ Findings 8-10).

B. WSI's tardy argument regarding "legislative acquiescence" has no merit.

Although WSI did not raise the issue at either the administrative level or the district court level, WSI now argues for the first time that the "legislature is presumed to know the construction of its statutes by the executive departments of this State and the failure to amend the statute indicates legislative acquiescence in that construction." WSI brief at 12 (citing and quoting from *Effertz v. N.D. Workers Comp. Bureau*, 525 N.W.2d 691 (N.D. 1994)).

As a threshold matter, WSI did not raise this argument in its brief to the District Court and, therefore, WSI is precluded from raising the issue for the first time on this appeal. *E.g., Matrix Properties v. TAG Investments*, 2002 ND 86, ¶ 37, 644 N.W.2d 601.

In *Effertz*, as in the instant case, this Court was dealing with the Workers' Compensation Bureau's interpretation of the "supplemental benefits" statute. *Effertz, supra*, at 693. While this Court did state the rule of "legislative acquiescence" quoted by WSI *(Matrix, supra)* that statement was coupled with this Court's conclusion that, "The [statutory] language conforms to the Bureau's interpretation and **leaves no doubt** that the legislature intended the [construction that the Bureau gave to the supplementary benefits statute]." *Id.* at 694: emphasis added.

However, where, as here, the construction of the statute by WSI is directly at odds with the clear and unambiguous language of the statute itself, the holding in *Effertz* has no application whatsoever. *See also Shiek v. N.D. Workers Comp. Bureau,* 1998 ND 139, ¶ 17, 582 N.W.2d 639 (legislative intent of a clear and unambiguous statute is found solely in the statutory language itself). *See also United Hospital v. D'Annunzio*, 514 N.W.2d 681, 684 (N.D. 1994):

> "When an act of the legislature is **ambiguous**, we give weight to the practical and contemporaneous construction of the statute by the attorney general and the officers charged with administering the statute." *Id.*; emphasis added.

There is nothing whatsoever ambiguous about the "eligibility for supplementary benefits" statute (N.D.C.C. § 65-05.2-01 (1991); and see Baity main brief, n. 1).

Of course, it is disingenuous, at best, for WSI to suggest that there is "legislative acquiescence" to WSI policy when, in fact, **WSI has not followed it,** i.e., ignoring its own "supplemental benefit review procedure" (App. 30). See ALJ Findings 8 and 9 (App. 112); Baity brief at 9.

Finally, even if room could be found that the "supplementary benefits" statute is, somehow, "ambiguous", this ambiguity (contained in the remedial legislation that is the Workers Compensation Act) must be construed to afford relief and avoid forfeiture with a view of extending benefits to all who fairly can be brought within its provisions. Baity brief at 16-19.

WSI's legal counsel has an impossible task in trying to defend her client's rejection of the completely unassailable recommended findings of fact, conclusions of law and recommended order of ALJ Schultz. Not surprisingly, then, there is absolutely nothing in WSI's brief that in any manner - - on either a factual or legal basis - - justifies the purely arbitrary and capricious action of WSI in Baity's case.

C. Baity's motion for, and WSI's response to, motion for N.D.C.C. § 28-32-50 attorney's fees on appeal to the Supreme Court.

Concurrent with her appeal, Baity filed with this Court a motion (with brief) for attorneys fees under the state "Equal Access to Justice Act" (N.D.C.C. § 28-32-50). WSI responded with a "Brief in Opposition to Appellant's Motion for Attorney's Fees on Appeal under N.D.C.C. § 28-32-50" on July 12, 2004.

In her brief in support of motion, Baity asserted that WSI has the burden of proving that its position was "substantially justified" and WSI did not disagree in its reply brief. *And see Scarborough v. Principi*, _____ U.S. _____ 124 S. Ct. 1856, 1865-66 (2004). However, WSI has attempted to show substantial justification for its position adverse to Baity's. Therefore, as set forth in Baity's motion, "If WSI makes such an assertion, Baity will include her response in her reply brief to this Court." See Baity Motion at p. 2.

In its brief, WSI spends the first approximately 2 ½ pages arguing that this Court should rule that N.D.C.C. § 28-32-50 applies only to "appeals of other agency

decisions" and not to WSI decisions. WSI Motion brief, at 1-3. The singular arrogance of such an assertion notwithstanding, WSI's argument can be dismissed out-of-hand, to wit: "This section does not alter the rights of a party to collect any fees under other applicable law." N.D.C.C. § 28-32-50(4).[3] The legislative intent is thus clear and unambiguous and the legislative intent is conclusively presumed from the clear and unambiguous wording of the statute. *Shiek v. N.D. Workers Comp. Bureau*, 1998 ND 139, 582 N.W.2d 639.

Apparently recognizing the weakness of its argument, WSI next argues, in the alternative, that "WSI clearly acted with 'substantial justification' as that phrase has been interpreted by this Court." WSI Motion brief at 3. WSI's contention is that because it created ". . . specific procedures to provide for a comprehensive review of the claim [WSI] certainly was 'substantially justified' in its position in this case"! *Id.* at 4. This argument might have some merit if, in fact, WSI **followed** its own "specific procedures" - - it did not. It is uncontested, through the testimony of Charles Kocher, a member of the "Cyclic Review Committee," that the "specific procedures" to which WSI alludes in its brief **were not followed.** It is clear that had WSI followed its own policy, Baity would have been awarded the full supplementary benefits to which she was entitled, i.e., effective July 1, 2001. See Baity brief, Law and Argument, at pp. 12-14 and WSI's "Supplemental Benefit Review Procedure" at App. 30.

---

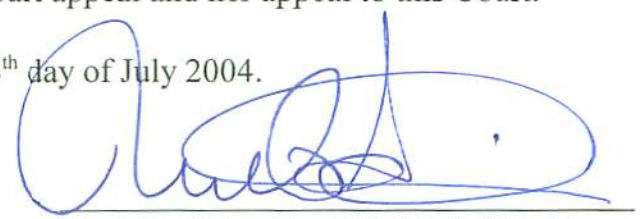
[3]The entire statute is included as Attachment "B" to Appellant Baity's brief.

CONCLUSION

Therefore, the District Court's Judgment (App. 135) must be reversed, WSI's final Order dated August 19, 2003 (App. 121-26) must be reversed, and the case remanded to WSI with instructions to declare Baity at "permanent total disability" status effective July 1, 2001 and to calculate and pay the "supplementary benefits" due her accordingly.

MOREOVER: WSI's two briefs dramatically underscore the inescapable conclusion that WSI's arbitrary and capricious actions are not remotely "substantially justified", within the meaning of North Dakota's "Equal Access to Justice Act" statute (N.D.C.C. § 28-32-50(1); and see September 10, 2003 "Specifications of Error" at ¶ 7 (App. 6-7). Therefore, Baity prays that this Court find in her favor and order the District Court, upon remand, to determine and award reasonable attorney's fees and costs to Baity for both her District Court appeal and her appeal to this Court.

Respectfully submitted this 28th day of July 2004.



Mark G. Schneider, ND ID #: 03188
Mark G. Schneider PLLC
815 Third Avenue South
Fargo, ND 58103
(701) 235-4481

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20040096

Esther Baity, Appellant, v. Workforce Safety & Insurance and Case New Holland (f/k/a Case IH/Steiger Tractor), Appellees.	)	**AFFIDAVIT OF SERVICE BY MAIL**

Cindy Norton, being first duly sworn, deposes and says that she is of legal age and that on July 28, 2004, she served the attached:

Appellant Baity's Reply Brief

by placing a true and correct copy thereof in an envelope addressed as follows:

Jacqueline S. Anderson
Special Assistant Attorney General
P.O. Box 2626
Fargo, ND 58108

and depositing the same, with postage prepaid, in the United States mail at Fargo, North Dakota.

Cindy Norton

Subscribed and sworn to before me this 28th day of July 2004.

Notary Public
County of Cass, State of ND
My Commission Expires:

ANDREA STARR
Notary Public
State of North Dakota
My Commission Expires July 20, 2010