ORIGINAL

Supreme Court No. 20050143

State of North Dakota

20050143

In Supreme Court

LANIS TOSO,
Employee-Appellant,

vs.

WORKFORCE SAFETY AND INSURANCE FUND,
Employer-Respondent.

An Appeal from a Final Order of WSI dated August 13, 2004; Order and Judgment Affirmed on March 1, 2005 in Cass County District Court, Case No. 09-04-C-02921, the Honorable John C. Irby, Presiding

EMPLOYEE-APPELLANT'S PETITION FOR REHEARING

MACKENZIE & DORNIK, P.A.
Reed K. Mackenzie (MN ID #66011)
150 South Fifth Street, Suite 2500
Minneapolis, MN 55402
(612) 335-3500

and

ARNASON LAW OFFICE
Joel Arnason (ND #03743)
301 North Third Street, Suite 300
P.O. Box 5296
Grand Forks, ND 58203
(701) 775-0654

Attorneys for Employee-Appellant

NILLES LAW FIRM
Jacqueline S. Anderson (ND #05322)
P.O. Box 2626
Fargo, ND 58108
(701) 237-5544

Attorney for Employer-Respondent

2006 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

INTRODUCTION

Pursuant to Rule 40 of the Rules of Appellate Procedure, claimant and appellant Toso respectfully petitions for rehearing on the grounds that the Court has misapprehended the findings and decision of the Administrative Law Judge (ALJ) and therefore failed to address the legal issue presented by the parties to this Court.

A. The Majority Opinion Erroneously Characterizes the Decision of the Administrative Law Judge

The majority opinion dated April 3, 2006 states the ALJ's recommended decision found that the settlement damages arose out of the work injury. This is an incorrect description of the findings. First, the matter was submitted to the ALJ on stipulated facts that did not require or permit her to make any independent findings. The sole issue presented to the ALJ was a legal issue, namely, whether the WSI right to recovery related to all benefits paid by WSI or only those caused by the negligent third party. While the "findings of fact" state "the damages sustained by Mr. Toso from the medical malpractice resulted from his work injury", that is simply an acknowledgment of the obvious – that the work injury provided the occasion for the malpractice to occur. It is not a finding on the critical issue, namely, whether the damages paid by WSI were caused by the malpractice or whether they were the inevitable result of the original work injury. Indeed, the ALJ's Conclusions of Law make that clear in Paragraph 4, 5 and 6 (Employee-Appellant's Appendix page 6) when she states that if WSI has paid medical expenses or lost wage benefits because of a work injury, it is entitled to

reimbursement of those expenses from any amount recovered the third party tortfeasor.

Second, the ALJ could not have made or intended to make any more specific finding about the third party settlement because there is no evidence in the record that would permit a finding that any of the medical expenses or lost wage benefits arose in whole or in part from the medical negligence.

Third, the only evidence in the record on this issue supports the claim of Mr. Toso that the medical expense and wage loss resulted from the initial injury and not from the malpractice. That evidence consists of the expert disclosures in the third party action in which plaintiff's expert, Dr. Coetzee, states that the surgery he performed was that same surgery that should have been done because the pipe crushed Mr. Toso's foot, just delayed because of the failure to make the timely diagnosis. Record, p. 67-68, especially para. 1 on 68. Dr. Stavenger's expert, Dr. Simonett, opined that all of the damages, whether for medical expenses or wage loss or anything else, were the inevitable result of the original injury and not any malpractice. Record, p. 77-80. In addition, it is obvious from the record that medical expenses for the initial hospitalization and treatment occurred before Dr. Stavenger was involved in the case and therefore could not have been caused buy him.

Fourth, the majority opinion suggests that Toso "had the opportunity to structure the settlement to indicate exactly what the damages were." (Majority Opinion p. 4) We suggest that any such agreement between Toso and third party defendant Stavenger would have been of little interest to, and certainly not

binding on, WSI. Toso attempted to enter into such an agreement with WSI prior to the settlement, an agreement that would have had meaning, but WSI was unwilling to consider such an agreement. Without WSI's willingness to participate in such discussions, Toso's characterization of the agreement would have been pointless. See Grey Bear v. North Dakota Department of Human Services, 2002 ND 139, 651 N.W.2d 611 (2002).

Fifth, WSI never challenged Toso's position that the medical expenses and wage loss were due to the original injury and not the malpractice. They asserted that this issue was irrelevant as a matter of law. The only position WSI took on the issue was to state that if it was determined that WSI's right of recovery was limited to recovery of payments caused by the malpractice, then the case should be remanded so WSI could have the opportunity to address that issue. See, for example, Brief of Appellee, p. 10, fn.3. The majority opinion states that the employee has the burden "to prove that the settlement damages caused by the alleged third-party negligence did not arise out of his initial work injury." Majority Opinion, page 4. That is a curious statement in a case where the majority opinion does not acknowledge that that is even a relevant issue. Ordinarily, the party seeking reimbursement, in this case WSI, has the burden of proving it is entitled to a share of the third party proceeds. But in the posture of this case where the issue presented to the Court is whether the legal right is WSI to recover is limited to damages caused by the third party's negligence, the Court ought to decide that issue. If the legal decision is the one urged by Toso, and if

the Court believes the record is unclear, the better procedure is to remand the case with instructions as to such issues as the burden of proof.

B. The Majority Opinion Fails to Address the Legal Issue Presented by the Parties

Because the majority opinion focuses on the "finding of fact" of the ALJ, it leaves undecided the very important legal issue of the extent of WSI's right of subrogation under N.D.C.C. §65-01-09. This is a matter of some importance, not only to the parties, but to other potential litigants. Although outside of the record of this case, it can be represented to the court that Toso's counsel has heard from counsel for other employees who are looking to the decision of this case before deciding whether to proceed with third party medical malpractice actions. If the position of WSI is upheld, cases like Toso's will likely not be brought because the net recovery for the employee will not make pursuing them a prudent business decision for the employee or the employee's lawyer.

CONCLUSION

We urge the court to reconsider this matter by concluding that the right of WSI to reimbursement is limited to compensation paid to Toso for damages caused by the third party negligence of Dr. Stavenger. We ask that that case then be remanded for an evidentiary hearing on whether the compensation WSI paid to Toso is attributable to the aggravation of the original injury caused by Dr. Stavenger and, if so, the amount.

Respectfully submitted,

DATED: April 17, 2006.

MACKENZIE & DORNIK, P.A.

By: _____

REED K. MACKENZIE MN ID# 66011
Attorneys for Employee-Appellant
150 South Fifth Street, Suite 2500
Minneapolis, MN 55402
Telephone: 612-335-3500

and

JOEL ARNASON ND ID# 03743
Attorney for Employee-Appellant
301 North 3rd Street, P.O. Box 5296
Grand Forks, ND 58201

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 510 Marquette Building, Suite 222 On the Skyway, Minneapolis, MN 55402. That on **April 17, 2006**, he prepared the **Employee-Appellant's Petition for Rehearing,** case number **20050143**, and served same upon the following attorney(s) or responsible person by enclosing 1 copy of same in a properly addressed envelope for shipment via **U.S. Mail-Express Mail overnight delivery.**

NILLES LAW FIRM
Jacqueline S. Anderson
P.O. Box 2626
Fargo, ND 58108

Subscribed and sworn to before me on
April 17, 2006

PATTY K. WATLEY
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2010

Notary Public

Signed

BACHMAN
LEGAL PRINTING
Phone (612) 339-9518 ▪ (800) 715-3582
Fax (612) 337-8053 ▪ www.bachmanprint.com
510 Marquette Avenue
222 On The Skyway
Minneapolis, MN 55402