ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20050196

20050196

Ronald Stein,)
)
Appellant,)
)
v.)
)
Workforce Safety & Insurance and)
Motor Coach Industries, Inc.,)
)
Appellees.)

****

APPELLANT STEIN'S BRIEF

****

Appeal from Judgment dated April 1, 2005
Pembina County District Court Civil No. 34-04-C-00158
The Honorable Laurie A. Fontaine, Presiding

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I. STATEMENT OF CASE

This is a dispute regarding proper calculation of Stein's "Average Weekly Wage"[1] (AWW), for purposes of determining the amount of his total disability benefits. It arises directly out of Stein's civil action for "Request for Writ of Mandamus," resulting in a Judgment requiring Workforce Safety & Insurance (WSI) to "... recalculate the total disability benefits of Ronald Stein and issue an appealable Order . . ." App. 31-32. The crux of the dispute is whether Stein is entitled to total disability benefits based upon his AWW of only $520.00 per week (based upon WSI's notice of decision on September 6, 2000; Hr. Ex.[2] 13; CR[3] 161) or whether Stein's total disability benefits should be based upon his AWW of $751.51 (based on his earnings when he last worked; Stein Affidavit 2(O); App. 28-29).

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[1]"'Average Weekly Wage' means the weekly wages the employee was receiving from all employments at the date of first disability." N.D.C.C. § 65-01-02(5); the "average weekly wage (AWW) amount is required in order to calculate the amount of total disability benefits to be paid to the disabled worker under N.D.C.C. § 65-05-09 (total disability benefits are based upon two-thirds of the AWW of the disabled employee, subject to a minimum of 60 percent and the maximum of 110 percent of the average weekly wage in the state).

[2]"Hr. Ex." refers to "Stipulated Hearing Exhibits", Exs. 1-35; stipulated to by the parties and included in the Certificate of Record (Doc. No. 5) at pp. 1-115, inclusive.

[3]"CR" refers to "Certificate of Record on Appeal to District Court" dated October 27, 2004. Doc. No. 5. The "CR" is, "The agency record of proceedings . . ." required to be compiled by the administrative agency upon appeal of a final administrative decision to District Court. N.D.C.C. § 28-32-44.

Prior to the writ of mandamus Judgment (App. 31), WSI refused to even afford Stein with an appealable order regarding the average weekly wage dispute, let alone pay him the additional disability benefits he asserts are due. App. 24.

Essential to a complete understanding of the background of this case, therefore, is a plenary understanding of the writ of mandamus action. Accordingly, Stein compiled copies of the relevant docket entries in the civil mandamus action (including "Stein's Appendix" provided to the ALJ with the administrative brief; CR 135-260). In particular, the Court's attention is drawn to the first and second memorandum opinions and orders granting writ of mandamus per Hon. Georgia Dawson, District Judge, dated May 28, 2003 and August 6, 2003, respectively. CR 230 and 250, respectively. Ultimately, Judge Dawson granted **both** counts of Stein's Request for Writ of Mandamus and Judgment was entered accordingly. (". . . Count One of the Writ of Mandamus requiring the North Dakota Workers' Compensation Bureau to recalculate the total disability benefits of Ronald Stein and issue an appealable order is GRANTED. . ."). App. 31. It is noteworthy that in the mandamus action WSI extensively, if unsuccessfully, briefed its argument that Stein was **not** entitled to recalculation of his average weekly wage. CR 218-225.

WSI did not appeal from the Judgment of the District Court (see CR 259) and, therefore, the Judgment of the Court in the mandamus action is final. See *res judicata* Law and Argument, IV(D), *infra*.

As required by the Judgment of Writ of Mandamus, WSI issued its "Order Establishing Average Weekly Wage" dated November 5, 2003 (Hr. Ex. 25; CR 41-52). Stein, through counsel, made timely "Request for Rehearing" on December 4, 2003 (Hr. Ex. 29; CR 56). ALJ Seaworth was assigned to the case upon request for appointment of an ALJ and it was agreed by the parties and the ALJ that the matter would be determined on briefs and stipulated exhibits of the parties. Hr. Ex. 35; CR 112.

Stein submitted his hearing brief on April 9, 2004 (CR 116-134), together with "Stein's Appendix" (CR 135-260). WSI submitted its hearing brief on April 29, 2004 (CR 261-275) with its "appendix" attached (CR 276-305). Stein filed a reply brief on May 20, 2004. CR 306-14. ALJ Seaworth issued "Recommended Findings of Fact, Conclusions of Law and Order" dated August 26, 2004. App. 42-48. On September 1, 2004, WSI issued its final "Order" adopting the "Recommended Findings of Fact and Conclusions of Law of the Administrative Law Judge" and the "Recommended Order of the Administrative Law Judge . . . as the final Order . . . of WSI." App. 49. Stein timely served and filed "Notice of Appeal" (App. 2) and "Specifications of Error" (App. 4) with the District Court, both dated September 27, 2004. The Certificate of Record was filed by WSI counsel on October 27, 2004. Doc. No. 5. The Court issued its "Memorandum Opinion and Order" on March 30, 2005, affirming the final order of WSI. App. 50. Judgment was entered on April 1, 2005

(App. 53) and Notice of Entry of Judgment served on April 4, 2005 (App. 54) Timely appeal was taken to this Court on June 2, 2005. App. 55.

II. STATEMENT OF THE FACTS

The facts regarding the average weekly wage issue are set out completely in Stein's Request for Writ of Mandamus pleadings (Stein's App.) and which includes, at Ex. A, the "Affidavit of Ronald Stein in Support of Request for Writ of Mandamus" (App. 25-30). The essential facts are not in dispute.

Stein seeks to have his total disability benefits (his entitlement to which is otherwise not in dispute) calculated based upon the higher wages he earned **after** he returned to work on August 14, 2000. App. 26-29. Stein Affidavit at 2(F)-(O).

The following undisputed facts are essential to Stein's contention that he is entitled to an AWW calculation based upon his more recent earnings prior to his current disability:

1. Stein injured his left knee on April 8, 1997 while employed by Motor Coach Industries (MCI) in Pembina and WSI accepted liability and paid **initial** total disability benefits from **April 16, 1997 through September 28, 1997**; CR 180-81 (WSI Answer, ¶ ¶ 2 and 5); and see Hr. Exs. 1, 4, 7 and 30 (CR 1, 4, 7 and 58-59);
2. Stein returned to work with MCI on **September 29, 1997** and **continued to work for two years and nine months** until he **again**

became disabled on July 28, 2000; CR 58 and CR 151 (listing of claims payments) and CR 181 (WSI Answer at ¶ ¶ 6 and 7);

3. Stein's **second** period of disability lasted from **July 28, 2000 through August 13, 2000**; he received total disability benefits **during that time** and returned to work at MCI on **August 14, 2000** (App. 26; Stein Affidavit, 2E and F);

4. **After** Stein returned to work on **August 14, 2000**, he received **both** of the following notices from WSI on the **same** day:

   A. September 6, 2000 notice from Claims Analyst Heinle of WSI that Stein's AWW "... **before you were injured** [sic][4] has been determined to be $520.00 ..." per week; emphasis added (App. 22).

   B. September 6, 2000 "Notice of Intention to Discontinue/Reduce Benefits" from Claims Analyst Heinle advising Stein that his total disability benefits would be discontinued ". . . effective 8/13/00, . . ." because he had ". . . returned to employment on 8/14/00" (App. 13);

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[4]Stein was "injured", of course, on April 10, 1997 (CR1), making the September 6, 2000, Claims Analyst Heinle letter confusing, at best.

5. Stein worked from **August 14, 2000 to November 3, 2000**, when he again reapplied for total disability benefits and his total disability benefits were reinstated, via stipulation, effective January 1, 2002 (Hr. Exs. 14, 19 and 30; CR 14, 19, 20-31 and 58-59);

6. Stein is disabled, both for Workers' Compensation and Social Security disability purposes, since November 3, 2000, and remains so disabled (App. 28; Stein Affidavit at 2(M);

7. **After Stein's benefits were reinstated on November 3, 2000,** Stein wrote WSI a letter (on July 16, 2001) requesting the reason why his ". . . benefits would not reflect on my earnings from the previous year prior to November 3, 2000" (App. 28; Stein Affidavit at 2(K));

8. Stein was informed by letter of July 19, 2001 (CR 18) (despite the fact that the wages he made after he returned to work were much higher) that because he "did not ask for reconsideration" of the September 6, 2000 letter (CR 12) from WSI regarding his AWW, his "average weekly wage will stay at $520.00" (CR 18);

9. **It is undisputed that the average weekly wage Stein earned in 2000 was $700.51 per week.** Hr. Ex. 21; CR 35-36 (based on W-2 2000 wages of $36,426.64 ÷ 52 = 701.51);[5] (*id*));

10. Rather than paying disability benefits based upon two-thirds of his actual and undisputedly higher wage he earned in 2000, ($700.51 per week), WSI continued to assert that Stein was bound by the $520.00 AWW he made ". . . **before** [he] was **injured** [sic] . . ." "This was calculated by multiplying your hourly wage rate of 13.00 by 40 (number of hours worked per week [sic]"); App. 22; but see CR 35-36 showing W-2 wages for 2000 at $36,426.64, i.e., $700.51 per week or $17.51 per hour!

11. Subsequently, Stein, through his attorney, demanded that WSI either pay benefits in accordance with his actual wages **or** issue an appealable order regarding the AWW issue (CR 38-39);

12. The response was a letter from WSI's attorney, Timothy J. Wahlin, of June 27, 2002 as follows:

> "I am in receipt of your June 25, 2002, letter demanding 'that the Bureau either calculate and pay benefits based

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[5]Stein earned these W-2 wages in 2000 despite his periods of disability of July 28, 2000 through August 13, 2000 and November 3, 2000 through December 31, 2000 (see nos. 2, 3, and 5, *supra*); and see N.D.C.C. § 65-01-02(5)(g) and Law and Argument IV(F), *infra*.

> upon my client's actual wage or issue an administrative order that my client may appeal.'
>
> This is to inform you that **we will be doing neither.**" App. 24 (underscore in original; emphasis added).

Subsequently, Stein filed his successful for Writ of Mandamus action and WSI was compelled to issue an appealable "Order Establishing Average Weekly Wage" and did do so on November 5, 2003 (App. 33-41). Stein's administrative and judicial appeals followed.

III. ISSUE PRESENTED

Did WSI err, as a matter of law, in refusing to recalculate Stein's average weekly wage (AWW) after he returned to work earning an undisputedly substantially higher weekly wage and, subsequently, once again became disabled?

IV. LAW AND ARGUMENT

A. This case presents only issues of law under the North Dakota Workers' Compensation Act, not material disputes of fact, and because the Act is remedial, it must be construed to afford relief and avoid forfeiture with a view of extending its benefits to Stein.

Quite simply, WSI relies upon an anachronistic **September 6, 2000** letter (App. 22) as establishing Stein's average weekly wage (and thus, his disability benefits) despite the fact that Stein had returned to work and earned wages substantially higher! These essential facts are not in dispute. Rather, the issue presents solely a question of law as to whether, given this undisputed fact, there is any

merit to WSI's legal argument that it does not have to pay total disability benefits based upon the undisputedly higher average weekly wage Stein had earned prior to his most recent period of disability.

Questions of law are fully reviewable. E.g., *Shiek v. N.D. Workers Comp. Bureau*, 1998 ND 139, ¶ 16, 582 N.W.2d 639 (*Shiek I*); citing *Jensen v. N.D. Workers Comp. Bureau*, 1997 ND 107, ¶ 9, 563 N.W.2d 112. Fundamentally, "We construe statutes to avoid absurd and ludicrous results, and if possible, to give meaning to all provisions of a statutory scheme." *Shiek v. N.D. Workers Comp. Bureau*, 2001 ND 166, ¶ 17, 634 N.W.2d 493 (*Shiek II*). As the undisputed facts in this case illustrate, WSI's argument regarding the average weekly wage issue in this case is entitled to absolutely no deference.

It was for the benefit of the injured worker that the Act was passed. *Kallhoff v. N.D. Workers' Comp. Bureau*, 484 N.W.2d 510, 513 (N.D. 1992). Further, and irrespective of the repeal of the so-called "liberal construction" of the Act (see N.D.C.C. § 65-01-01 (1995), N.D. Sess. Laws ch. 605, § 1), this Court has consistently made it clear that it will continue to construe the Act to "avoid forfeiture and afford relief." *See Shiek II*, *supra*, at ¶ 26, wherein this Court reaffirmed that, "The Workers' Compensation Act is remedial legislation, and we construe it to afford relief and avoid forfeiture with a view of extending its benefits to all who fairly can be brought within its provisions"; citing *Ash v. Traynor*, 2000 ND 75, ¶ 8, 609

N.W.2d 96. *See also Zueger v. N.D. Workers' Comp. Bureau,* 1998 ND 175, ¶ 12, 584 N.W.2d 530 (*citing Kallhoff, supra*).

In fact, "Perhaps the greatest travesty of the 1995 amendments was to deny the injured employee liberal construction under the Workers Compensation Act. Anderson & DeLoss, Are Employees Obtaining "Sure and Certain Relief" Under the 1995 Legislative Enactments of the North Dakota Workers' Compensation Act?, 72 N.D. L. Rev. 349, 378 (1996). This law review article was cited, with approval, in *Gregory v. N.D. Workers' Comp. Bureau,* 1998 ND 94, ¶ 27, 578 N.W.2d 101.

The remedial construction pronouncements by this Court are underscored by the fact that they are found in a 2001 case (*Shiek II, supra*, at ¶ 26), i.e., issued over six years **after** the Legislature amended N.D.C.C. § 65-05-01 regarding "liberal construction" in 1995. Again, whether it be called "liberal construction" or construction as required by the "remedial" nature of the Act, the result is the same: The Act **must** be construed to extend its benefit provisions to all whom can fairly be brought within them. The date a Court rules otherwise is the date that the same Court will be required to rule the Act unconstitutional as breaking the bargain of denial of access to court in return for "sure and certain relief." (§ 65-05-01). *Baldock v. N.D.*

Workers Comp. Bureau, 554 N.W.2d 441, 446, n.4 (N.D. 1996); and *Svedberg v. N.D. Workers Comp. Bureau*, 1999 ND 181, ¶ 19, n.2, 599 N.W.2d 323.[6]

B. WSI's argument that Stein ". . . was not entitled to a recalculation of his average weekly wage as he had not returned to work for a period of more than 12 calendar months since recalculation of the average weekly wage in September of 2000" (WSI Answer to Writ of Mandamus, ¶ 15), is without merit.

WSI previously, and unsuccessfully, argued in response to Stein's successful request for Writ of Mandamus that N.D.C.C. § 65-05-09(1) precludes recalculating Stein's AWW, despite the fact that his wages prior to his most current period of

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[6]Despite the fact that Stein made essentially the same argument regarding the "remedial purpose" of the Act in his brief to the ALJ (CR 123-25), citing **three** Supreme Court cases that **require** the Workers' Compensation Act, because it is "remedial legislation", to be construed to "afford relief and avoid forfeiture in view of extending its benefits to all who fairly can be brought within its provisions" (*Shiek II, Ash,* and *Zueger*) - - and despite the fact that all **three** of these cases occurred after the repeal of the so-called "liberal construction" (*id.*) - - the ALJ cavalierly dismissed Stein's argument as follows:

> "Mr. Stein provides no authority for his position, other than to argue that section 65-05-09 is unfair and the Workers Compensation Act should be construed so as to avoid forfeiture and afford relief. Section 65-01-01, N.D.C.C., provides however that Title 65 'may not be construed liberally on behalf any party to the action or claim.'" App. 46; Conclusion of Law 1.

Therefore, as a matter of law, the ALJ - - and thus WSI - - erred in rejecting the rule of law that the Workers Compensation Act, because it is "remedial" in nature, must be construed so as to avoid forfeiture and afford relief.

disability were indisputably - - and significantly - - higher than the AWW he had earned prior to his return to work. CR 183-84; WSI Answer, ¶ 17).

N.D.C.C. § 65-05-09, in its relevant parts, states as follows:

> "If an employee is disabled due to an injury, that employee's benefits will be based upon the employee's wage and the [WSI] benefit rates in effect on the date of first disability [however]
>
> 1. If an employee suffers disability but is able to return to employment for a period of **twelve consecutive calendar months or more**, that employee's benefits will be based upon the wage in effect at the time of the recurrence of the disability or upon the wage that employee received prior to the injury, **whichever is higher**. The [WSI] benefit rates are those in effect at the time of that recurrence." Emphasis added.

The legislative purpose of this statute couldn't be clearer, i.e., an injured worker will be **rewarded** with higher disability benefits, for returning to work for at least "twelve consecutive calendar months" and if he earns **more** than he did at the time of his "first disability." This salutary effect embraces both public policy and the remedial purposes of the Act.

First, it obviously embraces public policy to give an incentive to disabled workers to return to work and **not** to punish them if they return to work and receive higher wages only to, once again, suffer a period of disability.

Moreover, the requirement of an **initial** "twelve consecutive calendar months or more" return to work period is simply a **threshold** which demonstrates that the worker has, in fact, been able to return to substantial gainful activity for a

considerable period of time before, once again, succumbing to the disability of his work injuries.

In addition to public policy, rewarding of disabled workers, such as Stein, who have been able to return to work despite their disabilities - - only to become disabled yet again - - falls squarely within the remedial purpose of the Act which requires that the Act and all of its provisions be construed to afford relief and to avoid forfeiture. See Law and Argument IV(A) (*supra*, pp. 8-10) regarding "remedial" purpose and construction of the Workers' Compensation Act.

Here, of course, Stein **did** undisputedly return to work for over one year after his **first** period of disability - - he returned to work to MCI on September 29, 1997 and worked at MCI through July 27, 2000. CR 181; WSI Answer, ¶ 6-7. Thus, Stein **fulfilled** the **threshold** requirement of N.D.C.C. § 65-05-09(1), i.e., that he return "to employment for a period of twelve consecutive calendar months or more. . ." WSI, of course, chooses to ignore this undisputed fact and, instead, relies upon the otherwise irrelevant facts that Mr. Stein's **second** and **third** (and last) periods of disability occurred when he had not **again** "returned to work for a period of more than twelve calendar months." CR 183; WSI Answer, ¶ 15. Thus, WSI stands the remedial purpose of § 65-05-09(1) on its head. Instead of embracing the obvious legislative intent of rewarding injured workers who have disabilities and return to work for over twelve months, earning higher wages, but then suffer a subsequent period of

disability, WSI seeks to use the statute as a sword to cut the disabled worker's benefits rather than as a shield to protect them.

There is **nothing** in the law, as WSI otherwise erroneously alleges, that says Stein must have ". . . returned to work for a period of more than twelve calendar months **since the recalculation of his average weekly wage. . .**" (CR 183; WSI Answer, ¶ 15); emphasis added. The **law** states the ". . . employee's benefits will be based upon the wage in effect **at the time of the recurrence of the disability. . .**" N.D.C.C. § 65-05-09(1); emphasis added.

Moreover, ". . . the recalculation of his average weekly wage in September of 2000" (CR 183) merely stands for the proposition that such an unappealed informal decision applies to all disability benefits receivable **up to that time**. *Lass v. North Dakota Workers' Comp. Bureau,* 415 N.W.2d 796, 800 (N.D. 1987) ("The res judicata effect of a Bureau [WSI] decision extends only to matters adjudicable at the time of that decision").

The remedial construction of the Act that requires all benefit provisions must be construed to avoid forfeiture and afford relief absolutely precludes WSI's tortured interpretation of § 65-05-09(1). See Law and Argument IV(A), *supra*. WSI construes this section of the law to require a "period of twelve consecutive calendar months or more" of work **each time** that the injured worker subsequently becomes disabled as a result of his original and disabling injury. On its face, such an interpretation strives

to avoid benefits, not afford them, and cannot survive scrutiny under the plain reading of the statute or the remedial construction of the Act.

This Court has at least twice admonished WSI that it may not add as conditions to compensability any conditions that are not present in the statute. *Loberg v. N.D. Workers' Comp. Bureau,* 1998 ND 64, ¶ 9, 575 N.W.2d 221; *Kroeplin v. N.D. Workmen's Comp. Bureau,* 415 N.W.2d 807, 810 (N.D. 1987). Yet, WSI continues its improper propensities in Stein's case. Imposing a 12 month requirement upon **each** subsequent period of disability is neither explicitly nor implicitly found in the law itself. WSI's § 65-05-09(1) argument to deprive Stein of the correct amount of his total disability benefits is, therefore, utterly without merit.

C. WSI's otherwise irrelevant argument that Stein did not appeal from an "informal decision" showing his average weekly wage at that time, is without merit.

WSI, "Alleges that Stein is not entitled to reopen the informal decision of September [6], 2000, regarding recalculation of his average wage[,] as he failed to exhaust his administrative remedies with respect to that calculation and is therefore not entitled to the relief sought in the petition for writ of mandamus." (CR 185; WSI Answer, ¶ 24). As a threshold matter, of course, this argument was unsuccessful with the District Court, i.e., Judge Dawson finding any alleged "failure to exhaust administrative remedies" was obviously not an impediment to Stein's right to

Mandamus relief. See App. 31-32; Mandamus Judgment. See Law and Argument, *infra*, IV(D).

Moreover, the application of *res judicata* notwithstanding, WSI's argument is utterly without merit. First, as a threshold matter, Stein had absolutely no **reason** to appeal from the September 6, 2000 AWW "informal decision." **He had returned to work and he had already been paid all of his disability benefits prior to returning to work.** See App. 25-30; Stein Affidavit, generally.

Secondly, nowhere either explicitly or implicitly did WSI inform Stein that it intended the September 6, 2000 AWW determination of $520.00 per week to apply to **future** disability benefits if Stein returned to work earning higher wages and, once again, became disabled. Thirdly, WSI fundamentally has the affirmative duty to fairly, justly and properly adjudicate all claims before it. *Claim of Bromley*, 304 N.W.2d 412, 415 (N.D. 1981). That duty surely includes adequately explaining to Stein that WSI intended its AWW determination to have binding effect, regardless of **future** increase in wages after a subsequent period of disability.

Most importantly, WSI ignores the black letter rule of law that, **"The res judicata effect of a Bureau [WSI] decision extends only to matters adjudicable at the time of that decision."** *Lass v. N.D. Workers' Comp. Bureau,* 415 N.W.2d 796, 800 (N.D. 1987); emphasis added. "To the extent that the bureau has attempted to

preclude any claim for benefits in the future . . ., its order is 'not in accordance with the law.'" *Id.*, 801.

In *Lass*, WSI attempted to preclude, on *res judicata* grounds, any opportunity for future medical benefits to Lass based upon a prior order denying all further benefits. *Id.*, 798. While the benefits at issue in *Lass* were medical benefits, the holding is no less applicable to the instant case where disability benefits are at stake. The principle is the same, i.e., WSI can't presume to adjudicate matters that have not yet occurred!

Thus, in *Lass*, this Court unanimously and specifically rejected WSI's "finality of determination" statute (N.D.C.C. § 65-05-03) as precluding Lass' appeal. This is exactly the same provision that WSI erroneously relies upon in the instant case. CR 186-87; WSI Answer, ¶ 31. In short, a WSI decision is **not** entitled to the "same faith and credit as a judgment of court of record" (N.D.C.C. § 65-05-03) where it purports to preclude any additional benefits based upon future changes that were not known at the time of the decision (*Lass*, at 801):

> "To the extent that the bureau has attempted to preclude any claim for benefits in the future due to a change in Lass' condition, its order is 'not in accordance with the law.' Section 28-32-19(1), N.D.C.C. To the extent that the bureau has attempted to insulate from judicial review any future decision upon a claim for benefits based upon a change in Lass' condition, its order is ineffective. A bureau decision on review of a prior award pursuant to a subsequent application based upon a change in employee's condition may be appealed to the courts." *Id.*

It is significant that the *Lass* court made this common-sense ruling based, in part, upon the time-honored and still adhered to rule of law that all provisions of the Workers' Compensation Act must be construed "so its benefit provisions can be extended to all those who can fairly be brought within them." *Lass*, at 800.

Finally, prescient of the facts in the instant case, the *Lass* Court cited Professor Larson's observation that the purpose of a continuing jurisdiction statute (such as N.D.C.C. § 65-05-04):

> ". . . is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and **earnings prospects** at the time of hearing may be, that condition may later change markedly for the worse, or **may improve**, or may even clear up altogether." *Id.*; citing 3 *Larson's Workmen's Compensation Law* § 81.10, p. 15-528 (1983); emphasis added.[7]

Also, on its facts, WSI's argument completely ignores that Stein had **no way of knowing** that WSI would in the future violate his rights under N.D.C.C. § 65-05-09 in recalculating his average weekly wage. It must be borne in mind that until WSI actually advised Stein that it was not going to follow the law and would refuse to calculate his AWW (based upon his indisputedly higher earnings) but rather would

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[7]This entire Law and Argument in IV(C) (pp. 11-16), was made virtually verbatim to the ALJ at the administrative level. See Stein administrative brief at CR 128-131. Despite this overwhelming legal authority, once again the ALJ cavalierly dismissed Stein's argument, this time with one sentence: "To the extent Mr. Stein is asking for a recalculation of his average weekly wage determined on September 6, 2000, his failure to request reconsideration renders the notice of decision final and unappealable and he is not entitled to a recalculation of his average weekly wage." App. 48; Conclusion of Law 2.

rely on its prior and no longer relevant "informal" decision - - Stein did **not** have anything to "appeal." *See, Freezon v. N.D. Workers Comp. Bureau*, 1998 ND 23, 574 N.W.2d 577.

Again, Stein had to go to District Court to get a writ of mandamus to require WSI to even issue an appealable order in the first place! See "Order Awarding Lump Sum and Stipulation" dated June 3, 2002 (CR 20-28) and compare it with the instant "Order Establishing Average Weekly Wage" dated November 5, 2003 (App. 33-41) that was issued **only** because the District Court required WSI to issue it via writ of mandamus. The former does not even mention the **amount** of the average weekly wage and the latter, for the **first time,** provides a basis for Stein to appeal from the erroneous average weekly wage determination. *Id.*[8]

D. WSI's allegation that Stein failed to exhaust administrative remedies is barred by the doctrine of *res judicata*.

WSI did not appeal from the Judgment of the District Court granting Stein's Request for Writ of Mandamus and, therefore, the matter is final under the doctrine of *res judicata*. The issue as to whether Stein exhausted his administrative remedies

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[8]Moreover, WSI does not even attempt to address the utterly confusing actions of WSI in issuing **both** of the following notices on the same (September 6, 2000) day: (1) WSI's determination that Stein's AWW "**before you were injured** [sic] has been determined to be $520. . ." per week (App. 22); (2) WSI's "Notice of Intention to Discontinue/Reduce Benefits", advising Stein that his total disability benefits would be discontinued ". . . effective 8/13/00, . . ." because he had ". . . returned to employment on 8/14/00" (App. 23).

was an issue specifically raised and resolved in Stein's favor in the mandamus District Court proceedings. See Statement of the Case at 2 and Law and Argument IV(C) at 14, *supra*.

> "Res judicata, or claim preclusion, is the . . . sweeping doctrine that prohibits the relitigation of claims **or issues** that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction . . ." *Reed v. University of North Dakota*, 1999 ND 25, ¶ 9, 589 N.W.2d 880; emphasis added.

Moreover, the *Reed* court also succinctly explained the salutary purpose of the doctrine as follows:

> "Res judicata affords finality to the resolution of a legal dispute, which in turn increases certainty, discourages multiple litigation and conserves scarce judicial resources. *K & K Implement, Inc. v. First Nat'l Bank*, 501 N.W.2d 734, 737-38 (N.D. 1993)." *Id.*

The applicability of *res judicata* is also a question of law. *Reed*, at ¶ 10.

Therefore, Stein has demonstrated - - and there is no WSI argument to the contrary - - that any issue of Stein's alleged failure to exhaust administrative remedies is simply not before the Court, because that issue was finally decided in Stein's favor in the Writ of Mandamus proceeding and, because of *res judicata*, cannot be raised now.[9]

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[9]The *res judicata* effect of the District Court's mandamus decision, i.e., precluding any latter day argument by WSI that Stein failed to exhaust his administrative remedies, was **completely ignored** by the ALJ in the recommended decision (App. 42-48).

E. N.D.C.C. § 65-05-09 clearly and unambiguously supports Stein's position and to the extent, if any, there could be "any doubt" that "doubt" must be resolved in favor of the injured worker for whom the Act was passed.

Not surprisingly, WSI argued to the ALJ that its reading of the statute results in a clear and unambiguous meaning entirely favorable to WSI's argument. CR 269; WSI brief at p. 9. However, compare Stein's argument to the ALJ that:

> WSI construes this section of the law to require a "period of twelve consecutive calendar months or more" of work **each time** that the injured worker subsequently becomes disabled as a result of his original and disabling injury. On its face, such an interpretation is absurd and cannot survive scrutiny under the plain reading of the statute or the remedial construction of the Act. CR 128; Stein brief at 11; emphasis in original.

Furthermore, it is **not** true that the remedial purpose of the Workers' Compensation Act will be applied" **only** if there is an ambiguity in the statute", as argued by WSI. CR 270; WSI brief at p. 10; emphasis in original; citing, *In the Matter of Juran and Moody, Inc.*, 2000 ND 136, ¶ 6, 613 N.W.2d 503, 506. *Juran and Moody, supra*, is **not** a workers compensation case and in no manner is relevant to the off-repeated maxim this Court that the Workers' Compensation Act is "remedial" and, therefore, must be construed to afford relief and avoid forfeiture. See Law and Argument IV(A), *supra*.

On the contrary, this Court has specifically held that "any doubt" as to interpretation of a statute must be resolved ". . . in favor of claimants, consistent with our traditional liberal construction of workers' compensation law." *Kallhoff v. N.D.*

Workers' Comp. Bureau, 484 N.W.2d 510, 513 (N.D. 1992). Even after repeal of the so-called "liberal" construction of the Act, the Supreme Court has repeatedly ruled that the Workers' Compensation Act must be construed with the same broad and remedial effect. *See, e.g., Zueger v. N.D. Workers' Comp. Bureau*, 1998 ND 175, ¶ 12, 584 N.W.2d 530 (citing *Kallhoff, supra*). See also Law and Argument IV(A), *supra*.

To support its absurd interpretation that an injured worker must have a consecutive period of 12 months of work after **each** period of disability, WSI relies (without reciting any authority), upon its interpretation of the word "recurrence" in the statute. CR 268-69; WSI brief at 8-9. The ALJ, also without citing any authority, parroted the erroneous WSI argument. App. 45; Conclusion 1. However, there is absolutely nothing in the word "recurrence" which supports WSI's strained interpretation. If, indeed, § 65-05-09 used the phrase "**any** recurrence" of the disability rather than "**the** recurrence", perhaps there might be some leeway to entertain WSI's argument (emphasis added). It does not. See Law and Argument IV(B), *supra*. At best, WSI's argument raises some arguable, if minute, degree of "doubt." That "doubt", of course, **must** be resolved in favor of the injured worker for whom the Act was passed. *Kallhoff, supra*.

In summary, N.D.C.C. § 65-05-09 does not, on its face, support the tortured interpretation of WSI but, even to the extent that it arguably could be viewed as

raising "doubt" as to its application, that "doubt" must be resolved in Stein's favor. *Id.*

F. Stein's correct weekly temporary total disability benefit must be based upon his undisputed W-2 calendar year 2000 wages of $36,426.64 and as directed by N.D.C.C. § 65-01-02(5).

Indeed, it is absurd for WSI to rely upon an AWW determination that undisputedly - - and that it knows full well - - does not accurately reflect the actual earnings of this disabled worker at the time of his most recent disability.

WSI has never attempted to rebut - - nor can it - - that in the calendar year 2000 - - and despite his periods of disability - - Stein had W-2 wages of $36,426.64. CR 35-36; Hr. Ex. 21. And see previous yearly W-2 wages demonstrating a steadily progressing increase in annual income from year to year. 1997-2000 W-2s at CR 61-64; Ex. 32.[10]

Stein has calculated his AWW to be $700.51 based upon his 2000 W-2 income ($36,426.64 ÷ 52 = $700.51; this calculates to a weekly disability benefit of $467.00

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[10]Note that at CR 60; there is a computer document that purports to be "Ron Stein - Wage History from MCI Cyborg Payroll System." The "annual salary" listed for each year, however, is significantly less than the income shown on the W-2s for the corresponding years, e.g., 1999 W-2 is $34,477.97 (*id.* at 63) while the "annual salary" listed at p. 60 is only $26,699.00. The same holds true for 1998 and 2000 as well. *Id.* Obviously the W-2 information is the "best evidence" of the wages because it meets exactly the statutory definition of "wages" under the Act, to wit: "Wages" means an employee's remuneration from all employment reportable to the internal revenue service as earned income for the federal income tax purposes. N.D.C.C. § 65-01-02(31).

per week) App. 28-29; Stein Affidavit at 2(O). If anything, this is actually **less** than what his actual "weekly wage" would be if the weeks that he was disabled and unable to work were not included. It is clear that the "first applicable formula" for determining average weekly wage in Stein's case is , "A wage reasonably and fairly approximating the weekly wage lost by the claimant during the period of disability." N.D.C.C. § 65-01-02(5)(g). However, it is not necessary to put too "fine a point" on the calculation of AWW because the **maximum** temporary total disability benefit Stein is entitled to is ". . . a maximum of 110 percent of the average weekly wage in the state." N.D.C.C. § 65-05-09. The Court may take judicial notice that the average weekly wage[11] in the state, effective July 1, 2000 was $451.00. 110 percent of that figure is a maximum temporary total disability benefit of $497.00. In short, when taking out the periods of disability that Stein suffered in the calendar year 2000, he should be entitled to even a **higher** temporary total disability weekly benefit rate. However, the maximum additional weekly benefit he can receive (over the $467.00 disability benefits based upon his $700.51 AWW) is approximately $30.00 before he reaches the "maximum" benefit of $497.00.

At any rate, the Court is respectfully requested to reverse and remand for payment of temporary total disability benefits based upon Stein's W-2 wages of

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[11]"Average weekly wage in the state" means the determination made of the average weekly wage in the state by job service North Dakota on or before July 1st of each year, computed to the next highest dollar." N.D.C.C. § 65-01-02(6).

$36,426.64 for calendar year 2000 **or** calculation and payment of temporary total disability benefits by WSI based upon $36,426.64 of W-2 wages for 2000 divided by the number of days actually worked by Stein in 2000, **whichever is higher.** See AWW calculation formula at N.D.C.C. § 65-01-02(5).

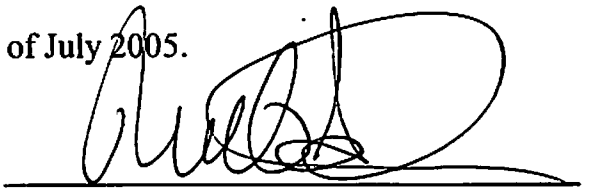
V. CONCLUSION

WSI tried to put Stein in a "box" by asserting that because he did not appeal from an anachronistic and erroneous AWW determination, that he was "stuck" with that misplaced determination forever - - and despite the fact that he subsequently returned to work earning a much higher average weekly wage. Such a tactic is not only absurd but is also a grossly improper attempt to minimize Stein's otherwise indisputable right to additional temporary total disability benefits based on the wages he was earning prior to his most recent period of disability. Further, WSI's antics stand the remedial purpose of the Act - - to avoid forfeiture and afford relief - - on its head. WSI has erred, as a matter of law, in its intentional and improper attempts to minimize Stein's temporary total disability benefits.

WSI's final Order of September 1, 2004 (App. 49) must be reversed and the case remanded to WSI for the purpose of calculating and paying temporary total disability benefits to Stein from and after January 1, 2002 (as otherwise agreed in the stipulation (CR 25, Item 4) based upon an average weekly wage of $700.51 **or** an average weekly wage determined by the number of days Stein actually worked in

calendar year 2000 divided into his gross W-2 wages for that year ($36,426.64) **whichever is larger.**[12]

Respectfully submitted this 1st day of July 2005.



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[12]See Law and Argument IV(F), *supra*.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20050196

Ronald Stein, Appellant, v. Workforce Safety & Insurance and Motor Coach Industries, Inc., Appellees.	)	**AFFIDAVIT OF SERVICE BY MAIL**

Andrea Starr, being first duly sworn, deposes and says that she is of legal age and that on July 1, 2005, she served the attached:

Appellant Stein's Brief

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

Jacqueline S. Anderson
Attorney at Law
P.O. Box 2626
Fargo, ND 58108

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

Andrea Starr

Subscribed and sworn to before me this 1st day of July 2005.

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

CINDY R NORTON
Notary Public
State of North Dakota
My Commission Expires Aug. 23, 2009