IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard Tedford,	)	Supreme Court Case No. 20060320
	)	
Appellee,	)	
	)	
vs.	)	
	)	
Workforce Safety and Insurance,	)	
	)	
Appellant.	)	
	)	

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REPLY BRIEF OF APPELLANT WORKFORCE SAFETY AND INSURANCE

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APPEAL FROM MEMORANDUM OPINION DATED JULY 13, 2006, AMENDED JUDGMENT ENTERED AUGUST 10, 2006, AND ORDER AWARDING N.D.C.C. § 28-32-50 ATTORNEY'S FEES AND COSTS DATED JANUARY 16, 2007
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE GEORGIA DAWSON

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I. THE RULE OF LIBERAL CONSTRUCTION SHOULD NOT COME INTO PLAY IN THIS CASE.

As Tedford correctly notes, this Court in Gregory v. North Dakota Workers Compensation Bureau, 1998 ND 94, 578 N.W.2d 101, did not resort to the rule of "liberal construction" in making its determination. The simple reason for this is that what the statute at issue in Gregory called for was clear – discontinuance of disability benefits when the injured worker became age 65. The Court thus simply analyzed whether applying the statute to Gregory's claim impaired a vested right or valid obligation to pay those benefits. "Liberal construction does not mean we can ignore the terms or the intent of the provisions within the Act." Effertz v. North Dakota Workers' Compensation Bureau, 481 N.W.2d 218, 221 (N.D. 1992). The statute under consideration in this case, N.D.C.C. § 65-05-09.2, requires the same analysis – does application of N.D.C.C. § 65-05-09.2 impair a valid obligation to pay benefits.[1] As such, no resort to liberal construction is required.

Tedford relies upon an Attorney General Opinion for the proposition that "liberal construction" must be applied in this case inasmuch as his claim predates the 1995 amendments which repealed the same. However, in Saari v. North Dakota Workers' Compensation Bureau, 1999 ND 144 ¶ 16 fn. 3, 598 N.W.2d 174, this Court noted whether the rule of liberal construction could be applied "depends on the statute interpreted and whether vested rights would be altered." Here, there is no claim that vested rights would be altered by application of N.D.C.C. § 65-05-09.2. In addition, as more specifically set out below, application of N.D.C.C. § 65-05-09.2 also does not

impair a "valid obligation." Thus, the Court need not resort to the rule of liberal construction in this case, and the District Court erred in doing so.

II. N.D.C.C. § 65-05-09.2 DOES NOT IMPAIR A VALID OBLIGATION AS DEFINED UNDER PRIOR CASE LAW.

Tedford contends that the legislative intent of N.D.C.C. § 65-05-09.2 is not clear that it should apply to claims such as his where he was receiving benefits at the time of its enactment. WSI respectfully disagrees. Subsection (4) specifically states: "This section applies to **an employee who becomes entitled to and receives social security retirement benefits after June 30, 1989, or who receives social security retirement benefits that have been converted from social security disability benefits by the social security administration after June 30, 1989.**" (Emphasis supplied.) The statute contains no exceptions for employees who had been receiving benefits. If an employee begins receiving social security retirement benefits or, as Tedford, social security retirement benefits that have been converted from social security disability benefits, after June 30, 1989, the offset applies.

The issue that the Court must resolve, therefore, is whether an application of N.D.C.C. § 65-05-09.2 to Tedford impairs a valid obligation to pay benefits. If one considers how this Court has interpreted what constitutes a "valid obligation," the answer must be that such application would not impair such obligation.

In Saari, 1999 ND 144, 598 N.W.2d 174, this Court considered an argument as to whether application of 1995 amendments to the permanent partial impairment statutes would impair a valid obligation to pay those benefits. In holding that it did not, this Court stated:

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[1] There is no contention in this case that application of N.D.C.C. § 65-05-09.2 impairs a

> Saari relies on several cases to support his argument he is entitled to the higher PPI award. Each case, however, is distinguishable. Gregory v. North Dakota Workers Compensation Bureau, involved the Bureau's attempt to discontinue ongoing disability benefits the claimant had been receiving, not because his medical condition had changed, but because he had turned age 65. The Court in Gregory II, 1998 ND 94 ¶¶ 32-33, 578 N.W.2d 101, concluded because the claimant had a significant reliance interest in those ongoing benefits and the Bureau had a valid obligation to pay them, the Bureau's attempt to cancel them at age 65 impaired that obligation. In this case, the Bureau does not seek to cancel PPI benefits Saari was previously receiving. Jensen, 1997 ND, ¶¶ 11-12, 563 N.W.2d 112, involved an unsuccessful attempt by the Bureau to apply a statutory amendment to deny past disability benefits to which the claimant already had a vested right. In this case, the Bureau's application of the new PPI law does not affect any past benefits to which Saari had a vested right, but only benefits to be paid after the effective date of the new law. Heddon v. North Dakota Workmen's Compensation Bureau, 189 N.W.2d 634 (N.D. 1971), involved a Bureau attempt to apply a legislative amendment requiring workers compensation benefits be used to defray nursing home costs of a claimant to a person who had previously had her claim determined. The Court ruled in favor of the injured worker because there was no express declaration the statute was intended to be applied retroactively, and if it had been applied retroactively, it would have impermissibly reduced the worker's ongoing benefits. Heddon, 189 N.W.2d at 637-38. Here, N.D.C.C. § 65-05-12.2 was clearly intended to apply to all PPI determinations after its effective date, "irrespective of injury date." 1995 N.D. Sess. Laws ch. 624, § 3, and the Bureau is not attempting to reduce Saari's ongoing benefits. The thread connecting *Gregory II, Jensen* and *Heddon* is **the Bureau was not permitted to retroactively apply new legislation to discontinue or reduce benefits the claimants had been receiving, or already had a vested right in receiving.** These cases do not support Saari's argument claimants are automatically entitled to the highest benefit available, regardless of the circumstances.

Saari ¶ 17, 598 N.W.2d 174 (Emphasis supplied.) What Tedford's arguments misconstrues is the significance of the fact that when N.D.C.C. § 65-05-09.2 was enacted in 1989, it is undisputed Tedford was receiving temporary total disability benefits, **not** permanent total disability benefits. (C.R. 87) Statutory enactments cannot impair a valid obligation to continue paying benefits a claimant was "already receiving." Gregory, 1998

"vested right."

ND 94 ¶ 32, 578 N.W.2d 101. N.D.C.C. § 65-05-09.2 applies only to permanent total disability benefits. Tedford was not receiving permanent total disability benefits at the time of the enactment of N.D.C.C. § 65-05-09.2. WSI thus had no "valid obligation" to continue to pay that Tedford was not even receiving at the time.

This Court has made it clear that a claimant's benefit status may change over time. Snyder v. North Dakota Workers Compensation Bureau, 2001 ND 38 ¶9, 622 N.W.2d 712, 717. Therefore, Tedford could not have had any "expectation" that he would receive "unreduced" permanent total disability benefits. Whether Tedford would remain disabled, whether he would be at some point be determined permanently and totally disabled, and whether he would reach the age of 65 and become eligible for social security retirement benefits all were unknown in 1989 at the time N.D.C.C. § 65-05-09.2 was enacted. Therefore, when N.D.C.C. § 65-05-09.2 was enacted, Tedford had no right to claim permanent total disability benefits or social security retirement benefits. His receipt of such benefits were subject to a number of contingencies, making it unknown whether the statute would ever apply to Tedford's claim at all. See Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 16, 687 N.W.2d 714 (noting evaluation must take place before entitlement to permanent total benefits can be made). Because Tedford's right to collect permanent total disability benefits did not arise at the time of his work injury or at any time prior to enactment of N.D.C.C. § 65-05-09.2, and he was entitled to such benefits only if subsequent contingencies occurred, N.D.C.C. § 65-05-09.2 applies to his receipt of social security retirement benefits. See Tangen v. North Dakota Workers Compensation Bureau, 2000 ND 135 ¶¶ 15-16, 613 N.W.2d 490, 494. Therefore, because no "valid obligation" existed in 1989 to pay benefits to Tangen, N.D.C.C. § 65-

05-09.2 could not impair such obligation and thus there is no prohibition against application of that statute to Tedford's claim. See id.; Saari, 1999 ND 144 ¶ 14, 598 N.W.2d 174 (noting more is required before entitlement to benefit is established).

III. THE ISSUES RELATING TO THE "HEUER" CASE WERE EXPLAINED IN WSI'S FINAL ORDER AND DO NOT CHANGE THE RESULT IN TEDFORD'S CLAIM.

When this matter was briefed to the administrative law judge, Tedford infused into the case the claim of Harold Heuer, by attaching a copy of an administrative order issued in Heuer's claim to his brief. (Tedford's Appx.) The ALJ, in part, relied on the Heuer Order in issuing her recommended decision, stating: "The fact that WSI chose not to pursue litigation of the applicability of the social security offset to Heuer's situation, without a more detailed explanation than that provided in the Heuer order or in WSI's hearing brief in this matter, lends credence to Tedford's argument that WSI's interpretation has an absurd result when applied to disabled workers like Tedford and Heuer, who started receiving total disability benefits before July 1, 1989 (regardless of whether those benefits were temporary total or permanent total), and who had an uninterrupted stream of total disability benefits up through the time they started receiving social security retirement benefits at some point after June 30, 1989." (Appx. p. 50) Claims Director Ehli, in her Memorandum Opinion discussing the administrative law judge's recommended decision stated that the "ALJ erred in considering" the issues relating to the Heuer claim. (Appx. p. 56)

In the Final Order rejecting the recommended decision of the administrative law judge, WSI detailed the background of its decision to forego further litigation in the Heuer claim (which background the ALJ found was lacking in the brief submitted to her).

(Appx. p. 60-63) As WSI's Final Order explained, there were a number of different factual scenarios of various claims that were pending a determination on whether N.D.C.C. § 65-05-09.2 could be applied to offset social security retirement benefits. Because litigation was pending on application of N.D.C.C. § 65-05-09.2 in a Lowell Carlson claim, WSI determined not to proceed with litigation on the Heuer claim. (Tedford Appx. 4) The decision to repay benefits on the Heuer claim under that Order did not contemplate that N.D.C.C. § 65-05-09.2 could not be applied to the claim; rather, it was decided not to pursue litigation any further on that claim and to await the decision in the Carlson claim. (Id.) Tedford's claim, in fact, was placed on hold pending the Carlson claim. (C.R. 97)

WSI makes no argument that because Tedford agreed not to proceed with litigation on this claim until resolution of the Carlson case, that he should be somehow bound by that decision and his arguments advanced herein are "absurd" given that the position advanced by the claimant in Carlson did not prevail. The decision by WSI not to proceed further on Heuer and await the results in Carlson before proceeding with the appeal in this case requires the same analysis. Tedford's claim should be decided on the merits, and the position taken by WSI on the claim decided on the merits, not based on an different claim on which WSI chose not to proceed with litigation.

IV. WSI HAS ESTABLISHED ITS POSITION WAS SUBSTANTIALLY JUSTIFIED THEREBY PRECLUDING AN AWARD OF ATTORNEY'S FEES TO TEDFORD UNDER N.D.C.C. § 28-32-50.

When this Court decided in Rojas v. Workforce Safety and Insurance, 2006 ND 221, 723 N.W.2d 403, it stated that N.D.C.C. § 28-32-50 would not apply to "all" WSI

cases, but only those "rare cases when WSI's actions lack substantial justification." Id. ¶ 17. This is not one of those "rare" cases.

This case is essentially one of statutory interpretation – a legal question on application of a statute to particular facts. In such cases, as WSI pointed out, under the federal standard adopted by North Dakota for "substantial justification," an agency's position meets that legal standard if the agency is "substantially, (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Cyber Collect, Inc. v. North Dakota Department of Financial Institutions, 2005 ND 146 ¶ 34, 703 N.W.2d 285, quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988).

Relying on WSI's decision not to proceed in a separate claim (Heuer) and advanced arguments in this claim (after the claim was placed on hold pending a decision in another claim (Carlson) for the proposition that WSI's position is not substantially justified simply does not make legal sense under the standard articulated for what constitutes "substantial justification." N.D.C.C. § 28-32-50 was not promulgated to restrict administrative agencies from making credible advancements of existing case law such as WSI has done in this case. See Service Oil, Inc. v. State, 479 N.W.2d 815, 825 (N.D. 1992). As outlined in WSI's main Brief to this Court, the arguments advanced by WSI in this case meet that standard of "substantial justification." Accordingly, the District Court's award of attorney's fees under N.D.C.C. § 28-32-50 must be reversed. Service Oil, 479 N.W.2d at 825 (reversing award of attorney's fees where agency decision was found to meet standard of substantial justification on appeal).

CONCLUSION

For the foregoing reasons and as more fully outlined in Appellant's Brief to this Court, WSI respectfully requests the Court *reverse* the District Court's decisions of July 26, 2006, and January 16, 2007, and affirm its Final Order of October 24, 2005, in all respects.

DATED this 2nd day of April, 2007.

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STATE OF NORTH DAKOTA)
) AFFIDAVIT OF ELECTRONIC MAIL
COUNTY OF CASS)

RE: Richard Tedford v. Workforce Safety and Insurance
Supreme Court No. 20060320
Our File No.: 95214.1515

JENNIFER M. MJONESS, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Christine, North Dakota, not a party to nor interested in the action; that she served the attached:

REPLY BRIEF OF APPELLANT WORKFORCE SAFETY AND INSURANCE

on the following person:

Mark G. Schneider (Mark@schneiderlawfirm.com)
SCHNEIDER, SCHNEIDER & SCHNEIDER
815 3rd Avenue S
Fargo, ND 58103-1815

by electronic mail on April 2, 2007, to each person above named at the above email address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.

JENNIFER M. MJONESS

SUBSCRIBED AND SWORN TO Before me on April 2, 2007.

(SEAL) CHANTEL C. HOFFERT
Notary Public
State of North Dakota
My Commission Expires Aug. 24, 2012

NOTARY PUBLIC