NO. 20070099

STATE OF NORTH DAKOTA

IN SUPREME COURT

Robert N. Haugenoe,

Appellant,

vs.

Workforce Safety and Insurance and Earl's Electric,

Respondents,

APPEAL FROM DECISION OF DISTRICT COURT AFFIRMING AGENCY RULING

Brief of Appellant

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II. WHETHER WSI WAIVED ANY SUBROGATION INTEREST IT CLAIMS BY FAILING TO PARTICIPATE IN THE LEGAL MALPRACTICE ACTION.

STATEMENT OF CASE

This is an appeal from the decision of the Williams County District Court, dated March 16, 2007, affirming the order of Workforce Safety & Insurance (WSI) which held that the Agency had a valid subrogation interest in the proceeds of a legal malpractice claim subsequent to an injury of a worker, pursuant to N.D.C.C. §65-01-09, (Addendum to this brief, p. 1), and despite objections that WSI did not participate in the legal malpractice lawsuit.

STATEMENT OF FACTS

1. Work Injury, May 19, 1999.

Robert Haugenoe was an employee of Earl's Electric when he was injured in a work accident on May 19, 1999. (See, Doctor's Report of Injury, App. 1, rec. 93 and Employer's Report of Injury, App., 2, rec. 94).[1] Haugenoe had been climbing an extension ladder, to check on voltage on a shop light, when the feet of the ladder slipped out. Haugenoe fell, and incurred serious injuries to his right and left wrist, right elbow, and right pelvis. (Worker's Claim for Injury, App. 3, rec. 95). Following the accident, Robert Haugenoe was seen by Dr. William S. Bambrick and was treated for a severely comminuted compound fracture of his right elbow and other injuries. (App. 67, rec. 355)

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[1] The reference to "rec." refers to the page number of the Certified Record on appeal to district court. See, Register of Actions (docket) (Appendix v) Entry 5. Much, but not all, of the record has been reproduced in the Appendix for the convenience of the Court.

2. Malpractice by Dr. Bambrick.

The malpractice by Dr. Bambrick is outlined in the medical report of Plaintiff's expert witness in the malpractice case, Dr. Dalton Carpenter. (App. 67, rec. 355).

After a few weeks, following the injury, Plaintiff referred himself to another orthopedist at the Billings Clinic. X-rays taken in Billings revealed incongruent alignment of the right elbow. Haugenoe was referred to the Mayo Clinic in Rochester, Minnesota. There, revision surgery was attempted on July 1, 1999. This was difficult because the malpractice caused the bone fragments to be severely malpositioned, and partially healed in a poor position. Good surgical alignment was obtained, but, as a result of the surgery, the patient developed a vascular necrosis on part of the elbow and post traumatic arthritis. Haugenoe then required further surgeries and an artificial elbow implant. He continues to have problems including multi-directional instability and regional pain syndrome. (Ibid).

Dr. Dalton Carpenter concluded that Dr. Bambrick was negligent in his care and treatment of Haugenoe. In the opinion of Dr. Carpenter, had Haugenoe been properly treated by Dr. Bambrick, it was more probable than not that the patient would not have required multiple additional surgeries, including an elbow replacement, and a much better result would have been obtained. (Dr. Carpenter

report, App. 67, rec. 355).

3. Medical Malpractice Lawsuit.

The Haugenoes initially hired Attorney Donald L. Peterson to represent them in the medical malpractice lawsuit.

Peterson entered into an agreement also with WSI to pursue the action on its behalf, pursuant to N.D.C.C. §65-01-09, as well as the Haugenoes. (App. 7, rec. 236). In the Agreement with WSI, Peterson agreed that the attorney's fees and costs would be prorated in accordance with that statute, and also agreed to contact the Bureau for its approval before incurring any costs exceeding $1.000.00.

Unfortunately, Peterson never obtained an expert witness for the medical malpractice case. On July 19, 2002, the District Court dismissed Haugenoe's entire complaint on the grounds that the statutory period for submitting an admissible expert opinion had expired under N.D.C.C. §28-01-46. Even after several extensions had been allowed, the expert opinion was never forthcoming. (Dr. Carpenter was retained by subsequent counsel for the legal malpractice action).

Peterson also failed to advise the clients on a timely basis that he was unable to obtain expert testimony. Instead, Peterson misled his clients into thinking that he had or would obtain proper and timely expert testimony. (Expert Opinion, Keith Miller, October 11, 2005, App. 63, rec. 360).

Peterson appealed the decision of the medical malpractice suit to the North Dakota Supreme Court. In a decision dated June 6, 2003, in Haugenoe v. Bambrick, 2003 ND 92, 663 N.W.2d 175, this Court rejected the appeal with respect to the expert opinion issues, pointing out an expert opinion was necessary. 2003 N.D. 92, ¶ 12.

The North Dakota Supreme Court did reverse, however, on the issue of informed consent, noting that the language of N.D.C.C. §28-01-46, at that time, did not apply to alleged failure to obtain informed consent. Ibid, ¶ 18.

Shortly after this, Peterson's license to practice law was suspended. See, In Re Disciplinary Action against Donald Peterson, 2004 ND 101, 680 N.W.2d 238. Peterson was later disbarred. 2004 N.D. 205, 689 N.W.2d 364.

At that point in time, attorney Paul Sortland began representing the Haugenoes on finishing the medical malpractice case. WSI was duly informed of the situation and the problems with pursuing an informed consent case. WSI was told that the Haugenoes would settle for $10,000.00. (See, letter, June 23, 2004, App. 29, rec. 246, and letter to WSI from Sortland, August 4, 2004, App. 42, rec. 261). After deduction of attorney's fees and its share of costs, WSI was paid a subrogation interest of $3,507.13, on the $10,000.00 settlement. (See, App. 56, rec. 277 and App. 57, rec. 278).

4. Legal Malpractice Lawsuit.

A legal malpractice action was then commenced by the Haugenoes against Peterson, the following year, in 2005, alleging that his negligence caused the loss of the medical malpractice action. Plaintiffs' legal expert, Keith Miller, a Moorhead, Minnesota attorney, had extensive experience in the pursuit of medical malpractice cases opined that Peterson deviated from the standard of care. Miller testified that the standard of care required Peterson to obtain an admissible expert's opinion on a timely basis as required by N.D.C.C. §28-01-46. (See, expert report, Keith Miller, October 11, 2005, App. 63, rec. 360).

Keith Miller testified that attorney Peterson was negligent by never obtaining an admissible expert's opinion as required by N.D.C.C. §28-01-46, though he was retained well in advance of the two year statute of limitations. (See, Expert Report of Keith Miller, App. 63, rec. 360).

Miller concluded that a reasonable, careful, and prudent lawyer in the practice of law in North Dakota would have obtained a qualified expert's review of Mr. Haugenoe's medical records (including radiographic studies), within the time period allowed by N.D.C.C. §§28-01-18(3) and 28-01-46. In the alternative, the attorney needed to at least advise his clients of his inability to obtain such a review sufficiently in advance of their deadlines to afford them a realistic chance of obtaining substitute counsel. (Miller Expert Report, Page 2, App. 64, rec. 360).

5. WSI Fails to Participate in Legal Malpractice Lawsuit.

On December 15, 2005, Sortland advised WSI that Haugenoe had commenced a legal malpractice suit against Donald Peterson. In this letter, Sortland pointed out to WSI that N.D.C.C. §65-01-09 provides for subrogation only when pursuing a claim for injury or death. It was asserted that this legal malpractice case was substantially different from the previous medical malpractice action and argued that WSI had no right of subrogation to this claim. Citations to references from other cases were supplied in this letter to WSI. (See, letter of Paul Sortland, App. 72, rec. 284).

WSI did not respond to this notice or otherwise participate in the legal malpractice claim. After receiving no answer, Sortland then wrote again to WSI, in a letter dated March 17, 2006 (App. 75, rec. 286). In this letter, Sortland again asked that WSI not pursue any additional subrogation " . . . as this case is no longer pursuing a claim for injury or death." In response, WSI, in its letter of March 24, 2006 (App. 77, rec. 288), did assert that it had a lien through WSI. At the same time, however, no retainer agreement was ever forwarded from WSI to Sortland, and, unlike in the previous medical malpractice action, WSI did not make any promises to share in the payment of ongoing expenses. Ibid. Unlike the medical malpractice action, WSI never asked for the status of the case or sought any records or update whatsoever.

In a subsequent letter to WSI, Sortland wrote again to WSI on March 27, 2006. (App. 79, rec. 290). Again, there was no response to the letter. Sortland then wrote to WSI on March 30, 2006, advising WSI that the matter was scheduled for mediation on April 19, at Fargo, North Dakota. (App. 81, rec. 292).

On April 7, 2006, Sortland again wrote to WSI, concerning the recent North Dakota Supreme Court case of Toso v. Workforce Safety, asserting that a case could be made that damages in a legal malpractice action do not arise out of the initial work injury. Again, WSI was reminded about the mediation session at Fargo on April 19. (App. 82, rec. 293).

The only response received from WSI was a letter of April 11, 2006 (App. 84, rec. 295), where WSI stated the agency would not attend the mediation. WSI also asserted that there was no point in its attending the settlement conference, as WSI had no authority to settle or compromise the agency's interests, nor did WSI have any authority to participate in the client's "decision making process." Ibid.

At the mediation session of April 19, 2006, in Fargo, separate settlement agreements were reached with Donald Peterson and with his law firm. The law firm agreed to pay $20,000.00 for what was called a Pierringer-Bartels Release (App. 89, rec. 300). Paragraph 7 of this agreement stipulated that, "The parties agree that the payment herein mandated shall be in payment for damages suffered by Plaintiff for the medical and legal malpractice and not by damages arising from

the initial work injury."

The separate agreement with attorney Donald Peterson called for binding arbitration, subject to a high-low agreement, as per the stipulations of the agreement dated April 19, 2006 (App. 85, rec. 296). In Paragraph 10, the parties agreed to cooperate in drafting an ultimate settlement agreement pursuant to the holding of Toso v. Workforce Safety & Insurance, to avoid the Workforce Safety & Insurance subrogation lien. (App. 87, rec. 296).

An arbitration hearing was held at Grand Forks, North Dakota, on May 5 and 8, 2006. Pursuant to the stipulation, the arbitrators determined that damages for the malpractice were $650,000.00. (App. 101, rec. 312). This was in addition to the $20,000.00 already paid by the law firm.

6. WSI Asserts Lien.

On May 8, 2006, WSI issued an Order Asserting a Subrogation Lien for the full amount it had paid, less the $3,507.13 previously received in the initial settlement with Dr. Bambrick. (App. 93, rec. 305).

The WSI Subrogation Recovery Worksheet (App. 135), shows a total settlement in the legal malpractice case of $670,000.00. Of this, WSI claimed a total maximum subrogation interest, of one-half, of $335,000.00.

WSI claimed expenses, after the previous deduction, of $251,453.10. This provided a recovery of thirty eight percent. Hence, WSI's portion of costs was

$19,206.40. Ibid.

WSI allowed thirty three and one third percent to Haugenoe's counsel for attorney's fees of $83,809.32, and also deducted its thirty eight percent of its share of the costs of litigation, of $50,543.15, or $19,206.40, leaving a net recovery to WSI of $148,437.38. Ibid.

Pursuant to agreements between the Haugenoes and WSI, this $148,437.38 was retained by WSI, while preserving Claimant's right to appeal. (App. 146, rec. 346).

A timely notice of request for hearing was submitted. (See, Notice of Request for Hearing, May 30, 2006, App. 108, rec. 137). Haugenoe unsuccessfully attempted to resolve the dispute with WSI, pursuant to the North Dakota Administrative Code §92-01-02-11.1. Haugenoe was then issued a Certificate of Completion from the Office of Independent Review on May 19, 2006. (App. 102). Haugenoe then timely issued a notice of hearing on May 30, 2006. (App. 108, rec. 137).

A telephonic pretrial was held on July 20, 2006, during which the parties agreed to submission of this matter on written briefs. The administrative law judge issued its Notice of Hearing, and Specification of Issues, on July 21, 2006. (App. 159, rec. 145).

In its Recommended Findings of Fact, Conclusions of Law, and Order of

November 15, 2006, the Administrative Law Judge held that Workforce Safety had a subrogation interest on the damages recovered by Robert Haugenoe, and denied the allegation that WSI had waived its subrogation interest in the claim. (See, Recommended Findings of Fact, Conclusions of Law, and Order, November 15, 2006, App. 163, rec. 426).

Pursuant to the request of WSI counsel, Conclusion 5 was stricken, but otherwise the recommended order of the administrative law judge was adopted, as amended, as the final order of Workforce Safety and Insurance, on December 13, 2006. (See, Order, App. 173, rec. 439).

7. Proceedings in District Court.

A timely appeal was served and filed in Williams County District Court pursuant to Chapters 38-32 and 65-10 of the North Dakota Century Code. (See, Notice of Appeal, January 10, 2007, App.187). WSI prepared a certificate of record which constituted the record before the district court. (App. 193). See also, Register of Actions (docket sheet), Entry 5. Haugenoe also timely submitted Specifications of Error on January 10, 2007. (App. 189).

The Notice and Order for Judicial Review was signed by the district court on February 5, 2007, App. 215. The certificate of record was filed February 2, 2007. App. 193. The matter was submitted on briefs to the district court, at Williams County. There was no hearing or oral argument.

Haugenoe's memorandum to the district court was submitted on February 23, 2007, and filed on February 26, 2007. The brief of Workforce Safety and Insurance was dated March 14, 2007, and filed on March 14, 2007.

The court ruled in favor of WSI in its one page order of March 16, 2007 (App. 264). This ruling was also affirmed by the Order for Judgment dated March 22, 2007 (App. 266).

In its Order for Judgment, the district court did not address any of the issues raised by Haugenoe or WSI in their respective briefs. Rather, the court, in a one page decision simply wrote:

> "After reviewing the case law submitted in the parties' briefs, I agree with the analysis of the Administrative Law Judge and accordingly, affirm the final order of WSI in concluding that N.D.C.C. 65-01-09 applies in this matter."

Order, March 16, 2007 (App. 264).

This was affirmed in the Order for Judgment of March 22, 2007 (App. 266).

Notice of entry of judgment was provided on March 26, 2007 by the Special Assistant Attorney General for Workforce Safety and Insurance. (App. 268).

This appeal, dated March 29, 2007, was timely filed with Williams County District Court. This brief is submitted in accordance with the time parameters set forth by the North Dakota Supreme Court in its Notice of Filing of April 2, 2007. (App. 270).

ARGUMENT

STANDARD OF REVIEW

The standard of review in an appeal from the determination of an administrative agency is found in N.D.C.C. §28-32-46, and §28-32-49.

In his Specifications of Error, (App. 189), Haugenoe claims that (1) the Order is not in accordance with the law; (5) the findings of fact made by the agency were not supported by a preponderance of the evidence; (6) the conclusions of law and order of the agency are not supported by its findings of fact; and (7) the findings of fact made by the agency did not sufficiently address the evidence presented to the agency. See, N.D.C.C. §28-32-46.

An agency's decisions on questions of law are fully reviewable. Jones v. North Dakota State Bd. of Med. Exam'rs, 2005 N.D. 22, ¶ 10, 691 N.W.2d 251; Huff v. North Dakota State Bd. of Med. Exam'rs, 2004 N.W. 225, ¶ 8, 690 N.W.2d 221.

The court utilizes the "preponderance of the evidence" standard to apply the weight-of-the-evidence test to the factual findings of administrative agency. The court does not make independent findings of fact or substitute its judgment for that of the agency, but determines whether or not a reasoning mind reasonably could have determined that the factual conclusions reached were proved by a weight of evidence from the entire record. Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220

(N.D. 1979).

N.D.C.C. §28-32-49 provides that the judgment of the district court may be reviewed in the Supreme Court on appeal in the same manner. Under this standard of review, the Court should reverse the determination of the district court where there are no facts to sustain the findings or conclusions of the Administrative Law Judge, and where the conclusions of the Administrative Law Judge are in error. The Court must also reverse under the "preponderance of evidence" standard where there are no facts to justify the findings of the administrative agency. Power Fuels, supra.

I. WSI DOES NOT HAVE A SUBROGATION INTEREST IN A SUBSEQUENT LEGAL MALPRACTICE ACTION.

A. Subrogation Statute, N.D.C.C. §65-01-09.

This appeal arises because WSI claims a subrogation lien in the $670,000.00 of damages which the Haugenoes were awarded in their legal malpractice action for the negligence of attorney Donald Peterson.

The subrogation statute, N.D.C.C. §65-01-09, (Addendum p. 1, to this brief), which establishes the subrogation rights of Workforce Safety, does not give WSI a lien over a subsequent legal malpractice action. It is clear that the statute applies only to the original work injury, and not a subsequent separate action. arising out of subsequent legal injuries.

The first part of the statute speaks to the basic subrogation interests:

> When an injury or death for which compensation is payable under provision of this title shall have been sustained under circumstances creating in some person other than the Organization a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person.

In its Conclusions of Law, the Administrative Law Judge found that Haugenoe sustained three separate and distinct, although related injuries as a result of the fall from the ladder. First was the comminuted fracture of his right elbow, second, as a result of Dr. Bambrick's medical malpractice, and third, because of his attorney's legal malpractice. (See, Conclusions of Law, ¶ 2).

The Administrative Law Judge held, "[e]ach of those injuries is compensable within the meaning of the statute." (Conclusions, ¶ 3). Haugenoe appeals this determination as legally incorrect. There is no compensation "payable" for legal malpractice under the terms of the North Dakota Workers Compensation statute. The Administrative Law Judge's decision, as confirmed by the Order of WSI, fails to explain this discrepancy.

While it is true, as Conclusion # 3 states, that "WSI paid benefits related to the aggravation and complication of the injury of Haugenoe's fractured right elbow . . ." it does not follow that WSI paid benefits for the harm caused by the negligent attorney. The paragraph further states, "As a result of their negligence,

Haugenoe's former lawyers were legally liable to pay damages for the compensable injury caused by Dr. Bambrick's improper medical treatment." That, of course, begs the question. Haugenoe's former lawyers were not liable to pay for damages caused by the compensable injury. Rather, Haugenoe's former lawyers were liable for their failure to pursue the medical malpractice claim, which is, of course, something completely separate and different from the "injury or death for which compensation is payable under the provisions of this title . . . ."

The universe of injuries contemplated by this statute clearly does not include damages caused by subsequent legal malpractice. At the time of injury, there was no "legal liability" of Peterson to pay for these damages "in respect thereto," Rather, that obligation of the attorney arose subsequently and separately.

In this case, Peterson, the attorney, was not responsible for the work injury of May 19, 1999. The negligence of the attorney did not take place until much later. Consequently, it cannot be stated, with any logic, that "an injury . . . for which compensation is payable . . . shall have been sustained under circumstances creating in [the attorney] . . . a legal liability to pay damages in respect thereto, . . ."

Statutory interpretation is a question of law. The primary objective in interpreting a statute is to determine the Legislature's intent. Amerada Hess Corp. v. State Ex Rel. Tax Comm'r., 2005 N.D. 155, ¶ 12, 704 N.W.2d 8. Words in a

statute are given their plain, ordinary and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. §01-02-02. The language of the statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence. N.D.C.C. §§01-02-03 and 01-02-38(2). In North Dakota, the statute is construed to give effect to all provisions, so that no part of the statute is rendered inoperative or superfluous. N.D.C.C. §01-02-38(2) and (4). Sandberg v. American Family Insur. Co., 2006 N.D. 198, ¶ 9, 722 N.W.2d 359, 362.

Under any plain reading of the statute, WSI does not have a lien on a subsequent legal malpractice action.

B. Other States' Statutes and Decisions.

Other states have also concluded that their worker's compensation insurers do not have a subrogation lien over a subsequent legal malpractice action. In Iowa, Sladek v. Kmart Corp., 493 N.W.2d 838 (Iowa 1992), it was held that the Iowa statute did not authorize the imposition of a worker's compensation lien against legal malpractice proceeds. In Sladek, the Court considered a similar statute which granted subrogation rights in recoveries obtained by the employees, to the extent the employees have been paid Worker's Compensation benefits for the same injuries.

Looking at the Iowa statute, which is somewhat similar to North Dakota's,

the Court held that the condition precedent to indemnity rights granted in that section was not met, because the legal malpractice recovery "was not from a third party who caused her injuries." 493 N.W.2d at 840. The Court held that it must construe the statute as it was written, rather than as what might have been written. The Court also held that it would not be an absurd result, and clearly followed the statute. Ibid.

In a more recent decision, ATS, Inc. v. Listenberger, 111 S.W.3d 495 (Mo. App. 2003), the Missouri Court, acting in a case of first impression, also held that there was no subrogation interest in a subsequent legal malpractice case. It held that while Missouri law applied a subrogation interest to the settlement of a medical malpractice action, this applied to professionals who aggravated the employee's original injury. It pointed out that a legal malpractice claim differed significantly from a medical malpractice claim in that the attorneys' failure to properly pursue the personal injury action did not "physically aggravate" the original bodily injury to the employee, and did not add to the employer's worker's compensation liability. 111 S.W.3d at 500.

In Smith v. Long, 505 N.W.2d 429 (Wis. App. 1993), the Wisconsin Supreme Court reached the same result. In the Smith case, analyzing statutory language very similar to that in North Dakota, the court held that, although the legal malpractice action was based in tort, it was because of the worker's injury or

death, so there is no right to reimbursement from the settlement proceeds. While some other states, under different statutory formulas, have reached a different decision, the language of the North Dakota statute mandates the same result as in Wisconsin. Since the previous attorney did not cause the injury of Robert Haugenoe, and the incident, itself, did not create any liability for the previous attorney, the statute seems fairly clear. Under the North Dakota statutes, there can be no subrogation interest by WSI in a subsequent legal malpractice action.

In Michigan, in the case of Ramsey v. Kohl, 231 Mich. App. 556, 591 N.W.2d 221 (1998), appeal denied, 595 N.W.2d 853 (1999), the Michigan Court of Appeals looked at language very similar to North Dakota's and concluded that the statute does not provide for the imposition of a worker's compensation lien on the proceeds of the plaintiff's legal malpractice action against defendants. 591 N.W.2d 225.

In its brief to the district court, WSI cited the federal case arising out of Illinois, Williams v. Katz, 23 F.3d 190 (7th Cir. 1994), for support, noting that the Illinois language was virtually identical to North Dakota statute.

However, WSI failed to note that Williams v. Katz has not been followed in subsequent Illinois state court decisions. Since then, all Illinois courts have refused to follow the Williams v. Katz decision. See, for example, Woodward v. Pratt, Bradford & Tobin, P.C., 291 Ill. App.3d 807, 684 N.E.2d 28 (Ill. App.

1997), Mosier v. Warren E. Danz, P.C., 302 Ill. App.3d 731, 706 N.E.2d 83 (Ill. App. 1999), and Eastman v. Messner, 302 Ill. App. 526, 707 N.E.2d 49 (Ill. App. 1998). Consequently, it is clear that worker's compensation insurers do not have a lien on subsequent legal malpractice claims in Illinois.

Other states have also explicitly refused to follow the federal decision in Williams v. Katz, including Michigan, Ramsey v. Kohl, 231 Mich. App. 556, 591 N.W.2d 221 (1998), and Pennsylvania, Graham v. Liberty Mutual Group, unpublished, 1998 WL 961376 (Ed. Pa. 1998).

The majority of jurisdictions appear now to have held that Worker's Compensation does not have a lien on subsequent legal malpractice actions.

In the case of Head v. Continental Cas. Co., 931 So.2d 1192 (La. App. 2006), it was decided that the injury that obligated the Workers Compensation insurer to pay the claimant was separate from the alleged legal malpractice and, therefore, the insurer had no right to subrogation. 931 So.2d at 1194. In construing language somewhat similar to the North Dakota statute, the Court noted that, "Simply put, the alleged legal negligence . . . did not cause an injury to [the claimant] that obligated [the Workers Compensation insurer] to pay any benefits, nor did it aggravate the physical injury which created the obligation." That is identical to the situation we have here.

A detailed analysis of the subrogation interests is presented in the case of

Virginia Municipal Group - Self-Insurance Ass'n. v. Crawford, 66 Va. Cir. 236 (Va. Cir. Ct. 2004). The court held it was not inequitable to disallow subrogation, even if this was perceived as "double recovery" by the employee. The court stated that where the employee, "at his sole expense and risk" elected to bring a legal malpractice case against his attorney to attempt to recover damages arising from the attorney's failure to perform under the contract between them, did not provide the Workers Compensation carrier an equitable right to those proceeds. The court further held that it was the insurance carrier which was seeking a windfall out of the proceeds recovered by the employee from his legal malpractice firm, and not the employee. Such enrichment, the court found, was not "at the expense of [the carrier]." Ibid. There is nothing inequitable in allowing the employee to keep the proceeds of the legal malpractice claim.

C. Recent North Dakota Case Law.

The North Dakota Supreme Court recently looked at the applicability of subrogation with respect to a medical malpractice case. In Toso v. Workforce Safety & Insurance, 2006 ND 70, 712 N.W.2d 312, the Court rejected the proposition that WSI would not have a claim on damages arising out of a medical malpractice action.

In Toso, this Court looked at whether "the settlement damages arose out of the work injury." Ibid, ¶ 8. In practical terms, this Court in Toso really just

pointed out that the claimant had not satisfied his procedural requirements under the statute and under North Dakota rules.

This Court implied, however, that, had Toso structured his settlement agreement differently, the malpractice award would be exempt. In the settlement agreements with Haugenoe, the Defendants clearly agreed that the settlement amounts were for "damages suffered by Plaintiff for the medical and legal malpractice and not by damages arising from the initial work injury." (App. 89, rec. 300), and (App. 85, rec. 296). See also, Settlement Agreement, App. 140, rec. 343.

Hence, according to the plain wording of the statute, as well as case law in other jurisdictions, and the specific words of the settlement at question, there is no question but that WSI does not have a valid subrogation interest in the proceeds of the legal malpractice action. As will be seen below, WSI would not have a valid lien in any respect, because it did not "participate" in the prosecution of the legal malpractice claim.

Specifically, the Court stated, at ¶ 12:

> Although the statute provides WSI's subrogation interest may not be reduced by settlement, Toso had the opportunity to structure the settlement to indicate exactly what the damages covered. However, the record does not contain a settlement agreement and therefore gives us no information as to the type of damages the settlement award covered. N.D.C.C. §65-01-09. We are left to speculate as to whether Toso's settlement damages arose out of his initial work injury.

¶ 12, 712 N.W.2d at 315-316.

In this case, the settlement agreements reached by Haugenoe with the legal malpractice defendants are part of the record, and both of those agreements clearly state that the damages do not arise out of the work injury, but are separate and distinct and arise solely out of damages claimed in the malpractice actions.

In this case, unlike Toso, Haugenoe can show that the settlement damages did not arise out of the initial work injury. According to the statutes and case law, WSI cannot claim a lien in this subsequent legal malpractice action.

In this case, the parties reached a carefully constructed settlement agreement, which specifically stated that the settlement agreements were drafted, "consistent with the holding of Toso v. Workforce Safety & Insurance, 2006 WL8456929 (N.D.), to avoid the Workforce Safety & Insurance subrogation lien." (See, Mediated Settlement Agreement, App. 85, rec. 298).

In the ultimate settlement agreement, the parties also agreed that "The payments described herein will be payment for damages suffered by the Claimants, Robert N. Haugenoe and Tracey K. Haugenoe for the medical and legal malpractice, and not by damages arising from the initial work injury." (Settlement Agreement, June 22, 2006, ¶ 2.0, App. 143, rec. 346).

In analyzing the settlement agreements, the Administrative Law Judge disregarded these clauses as merely "self serving declarations." (See, Order, App.

171, rec. 434). The decision in Toso, however, specifically allows the parties to tailor their settlement agreements to avoid the subrogation statute, such as it may apply.

To the extent WSI claims it might be prejudiced by the settlement language, the Court in Toso held that such careful scrivening was certainly appropriate and proper to avoid the injustice caused by the subrogation claim. Furthermore, WSI exacerbated its own position by its blatant refusal, despite repeated invitations to participate in the mediation process. (See, letter from WSI, April 11, 2006, App. 84, rec. 295).

As this Court wrote, the appellant in Toso "had the opportunity to structure the settlement" but failed to apply this in Toso's case, because the record did not contain a settlement agreement. Here, those deficiencies are remedied, and there is no doubt, as in Toso, whether or not the settlement damages "arose out of his initial work injury." (See, Toso, ¶ 12, 712 N.W.2d at 316).

Under the circumstances of this case, a careful drafting of the settlement agreements is specifically in line with the recommendations of the North Dakota Supreme Court in Toso.

In Lawson v. N.D. Workmen's Compensation Bureau, 409 N.W.2d 344, 347 (N.D.1987), this Court emphasized that the purpose and intent of Title 69, N.D.C.C., is to protect the injured worker and ensure the prosperity of the State by

protecting its wage workers. The Court also held that "any ambiguity" in the statute "must be interpreted in the favor of the worker, . . . and in pursuit of the legislative intent providing a greater incentive to the injured worker to prosecute third party claims." Lawson, 409 N.W.2d at 347. Accordingly, it should be concluded that WSI does not have a subrogation interest in a legal malpractice action arising out of a failed medical malpractice action, subsequent to the compensable injury.

A close look at N.D.C.C. §65-01-09 shows that subrogation is held only against those who have liability against the original injury, and not for any other circumstance. The statute does not create a subrogation interest simply against any other person who is able to "pay damages." Rather, it is only against a person or other entity, which has a legal liability to pay damages for the original injury.

This is not a case where Haugenoe is seeking double recovery. Rather, it must be recognized that damages for legal malpractice are separate and distinct from malpractice, and certainly far different than the damages that could have been received from the original claim covered by Workforce Safety and Insurance. Indeed, there is no double recovery to Haugenoe, but quite simply, separate and distinct causes of action. There is no subrogation under this set of circumstances.

II. WSI WAIVED ANY SUBROGATION INTEREST IT CLAIMS BY FAILING TO PARTICIPATE IN THE LEGAL MALPRACTICE ACTION.

Even if WSI had a subrogation interest in this subsequent legal malpractice action, it waived its subrogation interest because it failed to participate in the lawsuit. Participation in the lawsuit, as it progresses, is mandated by the North Dakota statute if WSI is going to claim a subrogation lien. N.D.C.C. § 65-01-09 states any subrogation interest is waived if WSI does not participate in the action. The statute states, in pertinent part:

> However, if the Director chooses not to participate in an action, the organization has no subrogation interest and no obligation to pay fees or costs under the section and no lien.

The statute further states, later:

> If the action is brought by the injured employee, . . . the Organization shall pay fifty percent of the costs of the action, exclusive of attorneys fees, when such costs are incurred *as the action progresses* before recovery of damages. (Emphasis added).

In its Recommended Findings of Fact, Conclusions of Law, and Order for Judgment, as approved by WSI and affirmed by the district court, the Administrative Law Judge concluded that the evidence of record does not establish that WSI waived its statutory subrogation interests by failing to participate in the action against Haugenoe's former lawyers. (Conclusions, ¶ 6, App. 163, rec. 426). The Findings, as adopted by WSI go onto state, "The evidence shows no more than

an agreement to disagree and proceed with both Haugenoe's action against his former lawyers and for the determination of WSI's statutory subrogation interest exactly has been done."

This Conclusion is contrary to the facts as found by the Administrative Law Judge. There is absolutely nothing in the Findings of Fact which show any participation whatsoever by WSI in the ongoing legal malpractice litigation.

Here, even though WSI had notice of the action as of December, 2005 (Ex. 50), it did nothing to help or pay for the action. In the underlying medical malpractice case against Dr. Bambrick, for which WSI received its share of the proceeds from the $10.000.00 settlement, there was at least a retainer agreement and WSI promised to participate (App. 7, rec. 236). In this case, however, there was no such participation, no expenses paid, and therefore WSI is not entitled to any subrogation.

In Toso, the Court also examined the actions of WSI. It pointed out that, once a claimant gives notice to WSI that the claimant is going to pursue an action against a third party, WSI has certain legal obligations upon receiving notice of the third party action. The Court noted, "Once WSI receives notice of a third-party action, if WSI chooses to participate in the action to recover any damages under the subrogation statute, WSI is required to pay fifty percent of the costs of the action, including part of the attorneys fees as provided by the statute. WSI is

required to pay these costs even when there is no recovery of damages in the third-party action." Ibid, ¶ 13, 712 N.W.2d at 316.

Had the Haugenoes lost this case, it is doubtful that WSI would then admit that it had "participated" in the lawsuit, and paid Haugenoe its share of the costs or attorneys fees. The actions of WSI, in sleeping on its alleged rights should not be rewarded or condoned.

N.D.C.C. §65-01-09 requires active participation by WSI, not simply an "agreement to disagree" as recited by the Administrative Law Judge in Conclusion ¶ 6.

When dealing with attorney Donald Peterson in the medical malpractice action, that the retainer agreement offered to Peterson clearly indicated payment of costs (but requiring advance approval for costs in excess of $1,000.00). See, App. 6, rec. 235. See also, letter, August 27, 1999, from Worker's Compensation Bureau to Donald Peterson, App. 8, rec. 237. There was no similar agreement offered or provided to Haugenoe after WSI was informed of the pending legal malpractice claim.

The record in this matter reflects that the Haugenoes expended over $50,000.00 to pursue the action. See, Subrogation Recovery Worksheet, App. 135, rec. 338. At no time, during the course of these proceedings, did WSI ever offer to pay its fifty percent statutory obligation.

The statute does not allow WSI to "pick and choose" its participation in

these third party claims with 20-20 hindsight. If the WSI is going to participate, it must do so with an agreement with the attorney, which was never offered here, and by payment of fifty percent of the costs as the case progresses. Since that was not done, WSI has clearly waived any right to its subrogation interest, as a matter of law.

A review of legislative history is also helpful. From 1997 to 2003, the statute was silent with respect to malpractice litigation. In 1993, however, the Legislature added the following language:

> However, if the Director chooses not to participate in a healthcare malpractice action, the Fund has no subrogation interest and no obligation to pay fees or costs under this Section.

This was changed in 2003 to read simply as follows:

> However, if the Director chooses not to participate in an action, the Fund, has no subrogation interest and no obligation to pay fees or costs under this Section.

(See, Addendum p. 6).

It seems clear that the Legislature intended to give WSI full authority to not participate in any action, not just healthcare malpractice actions, to avoid the substantial expenses that it was required to pay. This is applicable to legal malpractice actions, as well as medical malpractice actions.

Again, any ambiguity in the statutes must be interpreted in favor of the worker and in pursuit of the legislative intent to provide a greater incentive to the

injured worker to prosecute third party claims. Lawson v. North Dakota Workmen's Compensation Bureau, 409 N.W.2d 344, 347 (N.D. 1987).

The findings and conclusions of the Administrative Law Judge, as adopted by WSI, and as affirmed by the district court point to no evidence of participation other than disagreement. (Conclusion # 6, App. 171). This is not sufficient. There are no facts which support the findings of participation by WSI. Under the statute, WSI has clearly waived its subrogation interest by its own inaction.

CONCLUSION

The decision of the district court provides no reason as to why the Order of WSI should be affirmed. The decision of the Williams County District Court should be reversed, and the original agency decision should also be reversed.

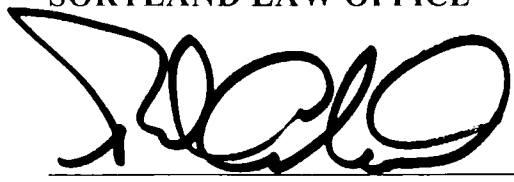
This Court should rule that WSI does not have a subrogation interest in the proceeds of a subsequent legal malpractice action. The legal malpractice defendant did not cause any of the injuries for which the worker received compensation by WSI. Legal malpractice claims are not claims which are "payable" under North Dakota's Workers Compensation statutes. In any event, WSI has waived any subrogation interest it had by its failure to participate in the action as it progressed.

The Findings and Conclusions of the Administrative Law Judge, as adopted by WSI, and as affirmed by the district court are contrary to the facts as found, and

contrary to the law of this State. Pursuant to N.D.C.C. §28-32-46, the action of the agency must be reversed. The $148,437.38 kept by WSI should be returned to Haugenoe.

Respectfully Submitted this 11th day of May, 2007

SORTLAND LAW OFFICE



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ATTORNEY FOR CLAIMANT
ROBERT HAUGENOE

65-01-09. Injury through negligence of third person - Option of employee - Organization subrogated when claim filed - Lien created. When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the organization a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person. The organization is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The organization also has a lien to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid in compensation and benefits. The organization's subrogation interest or lien may not be reduced by settlement, compromise, or judgment. The action against such other person may be brought by the injured employee, or the employee's dependents in the event of the employee's death. Such action shall be brought in the injured employee's or in the employee's dependents' own right and name and as trustee for the organization for the subrogation interest of the organization. However, if the director chooses not to participate in an action, the organization has no subrogation interest and no obligation to pay fees or costs under this section and no lien. If the injured employee or the employee's dependents do not institute suit within sixty days after date of injury, the organization may bring the action in its own name and as trustee for the injured employee or the employee's dependents and retain as its subrogation interest the full amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents and retain as its lien the full amount it has paid in compensation and benefits. Within sixty days after both the injured employee and the organization have declined to commence an action against a third person as provided above, the employer may bring the action in the employer's own name or in the name of the employee, or both, and in trust for the organization and for the employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or the employee's dependents, or the employer as provided above, the organization shall pay fifty percent of the costs of the action, exclusive of attorney's fees, when such costs are incurred as the action progresses before recovery of damages. If there is no recovery of damages in the action, this shall be a cost of the organization to be paid from the organization's general fund. After recovery of damages in the action, the costs of the action, exclusive of attorney's fees, must be prorated and adjusted on the percentage of the total subrogation interest of the organization recovered to the total recovery in the action. The organization shall pay attorney's fees to the injured employee's attorney from the organization's general fund as follows:

1. Twenty-five percent of the subrogation interest recovered for the organization before judgment.

2. Thirty-three and one-third percent of the subrogation interest recovered for the organization when recovered through judgment entered as a result of a trial on the merits or recovered through binding alternative dispute resolution.

The above provisions as to costs of the action and attorney's fees are effective only when the injured employee advises the organization in writing the name and address of the employee's attorney, and that the employee has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages. If a claimant fails to pay the organization's subrogation interest and lien within thirty days of receipt of a recovery in a third-party action, the organization's subrogation interest is the full amount of the damages recovered, up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents. no costs or attorney's fees will be paid from the organization's subrogation interest and the organization's lien is the full amount of the damages recovered up to a maximum of the total amount it has paid. The organization's lien is created upon first payment of benefits. The lien attaches to all claims, demands, settlement proceeds, judgment awards, or insurance payable by reason of a legal liability of a third person. If the organization does not receive payment of its lien amount within thirty days of the payment of any recovery and if the organization has served, by regular mail, written notice of its lien upon the employee or the employee's dependents and upon the third person, the third person, the insurer of the third person, the employee or employee's dependents, and the attorney of the employee or employee's dependents are liable to the organization for the lien amount. A release or satisfaction of any judgment, claim, or demand given by the employee or the employee's dependents is not valid or effective against the lien. An action to collect the organization's lien amount must be commenced within one year of the organization first possessing actual knowledge of a recovery.

WORKERS' COMPENSATION

CHAPTER 602

HOUSE BILL NO. 1122

(Industry, Business and Labor Committee)
(Representative Ruby)
(Senator Klein)
(At the request of Workforce Safety and Insurance)

WSI SUBROGATION AND BENEFIT REIMBURSEMENT

AN ACT to amend and reenact sections 65-01-09 and 65-05-05 of the North Dakota Century Code, relating to subrogation and lien rights of the organization and reimbursement of benefits paid by the organization; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-01-09 of the North Dakota Century Code is amended and reenacted as follows:

65-01-09. Injury through negligence of third person - Option of employee - ~~Fund~~ Organization subrogated when claim filed - Lien created.

When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the ~~fund~~ organization a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person. The ~~fund~~ organization is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The organization also has a lien to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid in compensation and benefits. The organization's subrogation interest or lien may not be reduced by settlement, compromise, or judgment. The action against such other person may be brought by the injured employee, or the employee's dependents in the event of the employee's death. Such action shall be brought in the injured employee's or in the employee's dependents' own right and name and as trustee for the organization for the subrogation interest of the organization. However, if the director chooses not to participate in an action, the ~~fund~~ organization has no subrogation interest and no obligation to pay fees or costs under this section and no lien. If the injured employee or the employee's dependents do not institute suit within sixty days after date of injury, the organization may bring the action in its own name and as trustee for the injured employee or the employee's dependents and retain as its subrogation interest the full amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents and retain as its lien the full amount it has paid in compensation and benefits. Within sixty days after both the injured employee and the organization have declined to commence an action against a third person as provided above, the employer may bring the action in the employer's own name or in the name of the

employee, or both, and in trust for the organization and for the employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or the employee's dependents, or the employer as provided above, the organization shall pay fifty percent of the costs of the action, exclusive of attorney's fees, when such costs are incurred as the action progresses before recovery of damages. If there is no recovery of damages in the action, this shall be a cost of the organization to be paid from the organization's general fund. ~~When there is~~ After recovery of damages in the action, the costs of the action, exclusive of attorney's fees, must be prorated and adjusted on the percentage of the total subrogation interest of the organization recovered to the total recovery in the action. The organization shall pay attorney's fees to the injured employee's attorney from the organization's general fund as follows:

1. ~~Twenty percent of the subrogation interest recovered for the organization when legal action is not commenced.~~

~~2.~~ Twenty-five percent of the subrogation interest recovered for the organization ~~when action is commenced and settled~~ before judgment.

~~3.~~ 2. Thirty-three and one-third percent of the subrogation interest recovered for the organization when recovered through judgment entered as a result of a trial on the merits or recovered through binding alternative dispute resolution.

The above provisions as to costs of the action and attorney's fees ~~is~~ are effective only when the injured employee advises the organization in writing the name and address of the employee's attorney, and that the employee has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages. If a claimant fails to pay the organization's subrogation interest and lien within thirty days of receipt of a recovery in a third-party action, the organization's subrogation interest is the full amount of the damages recovered, up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents, ~~and~~ no costs or attorney's fees will be paid from the organization's subrogation interest and the organization's lien is the full amount of the damages recovered up to a maximum of the total amount it has paid. The organization's lien is created upon first payment of benefits. The lien attaches to all claims, demands, settlement proceeds, judgment awards, or insurance payable by reason of a legal liability of a third person. If the organization does not receive payment of its lien amount within thirty days of the payment of any recovery and if the organization has served, by regular mail, written notice of its lien upon the employee or the employee's dependents and upon the third person, the third person, the insurer of the third person, the employee or employee's dependents, and the attorney of the employee or employee's dependents are liable to the organization for the lien amount. A release or satisfaction of any judgment, claim, or demand given by the employee or the employee's dependents is not valid or effective against the lien. An action to collect the organization's lien amount must be commenced within one year of the organization first possessing actual knowledge of a recovery.

SECTION 2. AMENDMENT. Section 65-05-05 of the North Dakota Century Code is amended and reenacted as follows:

65-05-05. Payments made to insured employees injured in course of employment and to their dependents. The organization shall disburse the fund for

the payment of compensation and other benefits as provided in this chapter to employees, or to their dependents in case death has ensued, who:

1. Are subject to the provisions of this title;

2. Are employed by employers who are subject to this title; and

3. Have been injured in the course of their employment.

If an employee applies for benefits from another state for the same injury, the organization will suspend all future benefits pending resolution of the application. If an employee is determined to be eligible for benefits through some other state act, no further compensation shall be allowed under this title and the employee must reimburse the organization for the entire amount of benefits paid ~~if the award covers the same time period already reimbursed by the organization~~.

SECTION 3. APPLICATION. This Act applies to all claims regardless of the date of injury.

Approved March 9, 2005
Filed March 9, 2005

CHAPTER 564

HOUSE BILL NO. 1149

(Representative Froseth)
(Senator Mutch)
(At the request of the Workers Compensation Bureau)

WORKERS' COMPENSATION LAW REVISIONS

AN ACT to amend and reenact sections 65-01-09, 65-04-03.1, 65-04-04, 65-04-15, subsection 1 of section 65-04-26.1, subsections 1 and 2 of section 65-04-32, subsection 3 of section 65-04-33, sections 65-05-07.2, 65-05-28.1, 65-06-01, 65-06-02, 65-06-03, and 65-06-04 of the North Dakota Century Code, relating to the workers compensation bureau's subrogation interests and participation in third-party actions, elimination of the expiration date for the state entities account, employer certificates of coverage, release of information from employer files, personal liability for failure to pay premiums or file premium reports, notice of decisions issued by the workers compensation bureau affecting employer accounts, the penalty structure for failure to secure workers' compensation coverage, employer medical assessments, eligibility of an employer to select preferred providers to render medical treatment, and emergency and disaster volunteers and volunteer firefighters; to repeal section 65-04-19.2 and chapter 65-14 of the North Dakota Century Code, relating to state agency participation in the workers' compensation risk management program and the employee information program on hazardous substances; to provide an effective date; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-01-09 of the North Dakota Century Code is amended and reenacted as follows:

65-01-09. Injury through negligence of third person - Option of employee - Fund subrogated when claim filed. When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person. The fund is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The bureau's subrogation interest may not be reduced by settlement, compromise, or judgment. The action against such other person may be brought by the injured employee, or the employee's dependents in the event of the employee's death. Such action shall be brought in the injured employee's or in the employee's dependents' own right and name and as trustee for the bureau for the subrogation interest of the bureau. However, if the director chooses not to participate in ~~a health care malpractice~~ an action, the fund has no subrogation interest and no obligation to pay fees or costs under this section. If the injured employee or the employee's dependents do not institute suit within sixty days after date of injury, the bureau may bring the action in its own name and as trustee for the injured employee or the employee's dependents and retain as its subrogation interest the full amount it has

paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents. Within sixty days after both the injured employee and the bureau have declined to commence an action against a third person as provided above, the employer may bring the action in the employer's own name or in the name of the employee, or both, and in trust for the bureau and for the employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or the employee's dependents, or the employer as provided above, the bureau shall pay fifty percent of the costs of the action, exclusive of attorney fee, when such costs are incurred. If there is no recovery of damages in the action, this shall be a cost of the bureau to be paid from the bureau general fund. When there is recovery of damages in the action, the costs of the action, exclusive of attorney's fees, must be prorated and adjusted on the percentage of the total subrogation interest of the bureau recovered to the total recovery in the action. The bureau shall pay attorney fees to the injured employee's attorney from the bureau general fund as follows:

1. Twenty percent of the subrogation interest recovered for the bureau when legal action is not commenced.

2. Twenty-five percent of the subrogation interest recovered for the bureau when action is commenced and settled before judgment.

3. Thirty-three and one-third percent of the subrogation interest recovered for the bureau when recovered through judgment.

The above provisions as to costs of the action and attorney fees is effective only when the injured employee advises the bureau in writing the name and address of the employee's attorney, and that the employee has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages. If a claimant fails to pay the bureau's subrogation interest within thirty days of receipt of a recovery in a third party action, the bureau's subrogation interest is the full amount of the damages recovered, up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents, and no costs or attorney fees will be paid from the bureau's subrogation interest.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

I, Paul Sortland, of Sortland Law Office, located at 120 South Sixth Street, Suite 1510, Minneapolis, Minnesota, being first duly sworn upon oath, says that on May 11, 2007, I served the following documents:

a. **Brief of Appellant**

upon

Ms. Jacqueline S. Anderson
Nilles Law Firm
1800 Radisson Tower
201 North Fifth Street
P.O. Box 2626
Fargo, ND 58108-2626

Earl's Electric, Inc.
613 Fourth Avenue East
Williston, ND 58801-5523

the attorneys and parties in this action, by mailing to her/him copies thereof, enclosed in an box, postage prepaid, and by depositing the same in the FedEx at FedEx Kinkos at IDS Center in Minneapolis, Minnesota, to said attorneys and parties at the above-listed address, the last known address of said attorneys and parties.

Paul Sortland

Subscribed and sworn to before me
this 11th day of May, 2007.

Notary Public

HEATHER J. NICK
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2008