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20070367

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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JANET VON RUDEN APPELLEE, VS. NORTH DAKOTA WORKFORCE SAFETY & INSURANCE FUND, APPELLANT, AND MID DAKOTA CLINIC, RESPONDENT.	SUPREME COURT CASE NO.: 20070367

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAR 13 2008
STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

APPEAL FROM ORDER REVERSING APPELLANT'S DENIAL OF PARTIAL DISABILITY BENEFITS DATED SEPTEMBER 1, 2007 AND ORDER FOR JUDGMENT AND JUDGMENT DATED OCTOBER 19, 2007
BURLEIGH COUNTY DISTRICT COURT - SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD JORGENSEN PRESIDING

DIETZ & LITTLE LAWYERS

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A. Did WSI correctly apply the provisions of N.D.C.C., Section 65-05-10(2) in terminating Janet Von Ruden's TPD benefits?

B. Did WSI provide adequate pre-termination notice to Ms. Von Ruden?

II. STATEMENT OF THE CASE

On August 2, 1994, Workforce Safety & Insurance (WSI) ordered that Janet Von Ruden would receive temporary partial disability benefits (TPD) "until further order of the Bureau" (Appendix pp. 26-31 (App.)). On December 15, 2005, Ms. Von Ruden received a Notice of Intention to Discontinue/Reduce Benefits, which told her, for the first time, that WSI was applying the five-year TPD benefits cap under N.D.C.C. Section 65-05-10(2) to her (App. p. 51). Ms. Von Ruden objected to WSI's intention to terminate her TPD benefits, informing WSI that she simply wasn't able to hold down a "viable job" and, consequently, should continue receiving disability benefits (App. p. 52). WSI ignored Ms. Von Ruden's response, just as it ignored its own claims analysts' analyses and assurances, and issued an order terminating Ms. Von Ruden's TPD benefits on January 19, 2006 (App. pp. 53-60).

Ms. Von Ruden appealed WSI's order and a formal hearing was held before Janet Demarais Seaworth, Temporary Administrative Law Judge, on September 28, 2006 (App. pp. 61-66). TALJ Seaworth issued recommended findings of fact, conclusions of law and order on October 27, 2006 affirming WSI's order (App. pp. 82-87). The gist of TALJ Seaworth's opinion was that Claims Analyst Myrna Wetch had not discussed the five-year TPD cap with Ms. Von Ruden and, consequently, had not waived its application; and that there was no clear and

convincing medical evidence "beyond a reasonable doubt" that Ms. Von Ruden was limited to working less than twenty-eight hours per week (App. pp. 82-87). WSI accepted TALJ Seaworth's recommendations with minor modifications, principally, concluding that Ms. Von Ruden was not entitled to either partial or total disability benefits, despite Dr. Ralph Dunnigan's opinion that she was not gainfully employable (App. pp. 95-96; App. 75 [HT p. 36 ll. 22-25]). Following WSI's issuance of a Final Order, Ms. Von Ruden requested reconsideration, and WSI denied that request (App. pp. 102-103). Ms. Von Ruden then appealed to the District Court (App. pp. 104-108).

After reviewing the briefs of the parties, the certified record of the administrative proceedings and the sworn testimony of Assistant Attorney General Timothy Wahlin in a parallel proceeding, the District Court, Honorable Donald Jorgenson presiding, determined that WSI had failed to provide Ms. Von Ruden with adequate pre-termination notice of a change in medical condition and ordered her TPD benefits reinstated. WSI has appealed from that decision.

III. STATEMENT OF FACTS

Janet Von Ruden was working as a radiologic technician at Mid Dakota Clinic in Bismarck when she suffered a low back injury on March 31, 1994 (App. p. 25). Ms. Von Ruden, who had worked at Mid Dakota for more than eighteen years when she got hurt, was assisting a patient who suddenly gave way, putting all her weight on Ms. Von Ruden (id.). Ms. Von Ruden experienced an immediate onset of low back pain, and was taken off work by her treating doctor, William Roen, MD (App. p. 73 - [HT p. 25, ll. 11-20]). Ms. Von Ruden tried a number of conservative therapies, including physical therapy and a TENS unit before Dr. Thomas

Spagnolia implanted a dorsal column stimulator in 1999 (App. p. 73 - [HT p. 26, ll. 11-23]). Eventually, Ms. Von Ruden developed pain from the stimulator, itself, and had it removed (App. p. 73 -[HT p. 27. ll. 6-11]). Afterwards, Ms. Von Ruden was forced to rely on pain medications and duragesic patches for her low back symptoms and chronic radiculopathy (App. p. 73 [HT p. 27 l. 12 - p. 28 l. 1]).

Although Ms. Von Ruden was unable to return to work as a radiologic technologist, in January of 2000, she began working part-time as a liturgy coordinator at the Cathedral of the Holy Spirit Church in Bismarck. As Ms. Von Ruden explained,

> They allowed me to come and do my work whenever I was able to do it. If I was not up to par one day, I just called in and said I'll be there the next day. If I was having a bad day when I was there, I went home. They basically worked around me.

(App. p. 72 - [HT p. 24]; App. p. 73 - [HT p. 28]; App. p. 74 - [HT p. 29 l. 4]). Ms .Von Ruden was never able to work more than fifteen hours per week as a liturgy coordinator and often was unable to work even that much (App. p. 74 - [HT. p. 29 ll. 15-19]).

While employed as a liturgy coordinator, Ms. Von Ruden received temporary partial disability (TPD) benefits from the North Dakota Workers Compensation Bureau (NKA Workforce Safety & Insurance or WSI). In June of 2001, two separate claims analysts at WSI, Laurie J. and Evette B, concluded that the five-year cap prescribed for TPD benefits under N.D.C.C. Section 65-05-10(2) did not apply to Ms. Von Ruden because she had not been released to return to more that fifteen hours of work per week and the statute required a release of more than twenty-eight hours per week for the cap to apply (App. p. 46). In early 2003, Ms. Von Ruden began questioning whether working up to

fifteen hours per week in pain was worth the strain it was causing on her marriage (App. p. 74 - [HT p. 29 l. 21 - p. 30 l. 5). Ms. Von Ruden contacted her new claims analyst at WSI, Myrna W., who told her,

> [E]verything is fine, you can quit whatever (sic whenever) you want because you haven't been able to work up past 15 hours a week and that's not - I don't remember her terminology - a viable job or something like that. It wasn't viable employment or something.

(App. p. 74 - [HT. p. 30 ll. 13-18]).

When she was asked what effect quitting her part-time job would have on Ms. Von Ruden's TPD benefits, Myrna W. replied, "[N]othing] would change. Everything was fine with Workers Comp whether I was working or not. ... Otherwise I wouldn't have quit." (App. p. 74 - [HT. p. 30 l. 24 - p. 31 l. 7]). Myrna W. confirmed her telephone advice to Ms. Von Ruden in a Note Pad entry dated February 18, 2003 (App. p. 47).

After her telephone conversation with her claims analyst, Ms. Von Ruden asked for and received written confirmation of her entitlement to continuing TPD benefits.

> I asked her for a letter. That was when I was - before I quit work. I asked her for the letter so that I was positive that I had everything straight, that quitting work wouldn't affect my payments.

(App. p. 74 - [HT p. 31 l. 24 - p. 32 l. 3]). Ms. Von Ruden reiterated that,

> Because she said it was okay to quit and nothing would be affected, I quit my job so that I was free to go on the road with him [her husband].

(App. p. 74 - [HT. p. 32 ll. 21-23]). In response to Ms. Von Ruden's request for written confirmation of her entitlement to continuing TPD benefits, Ms. Wetch responded on February 19, 2003:

> In response to your recent request for verification on continued disability benefits, you would be entitled to temporary partial disability benefits based upon your earnings capacity of $150.00 per week or your actual earnings, whichever is the higher, for as long as we have verification of your continued disability which is directly related to your work injury of March 23,1994. If your restrictions change and your doctor releases you to more hours, your payment could change as we would base it upon your actual earnings wherein you are working greater than the 15 hour you previously worked.

(App. p. 48).

As to whether her treating doctor considered her fifteen hours per week work as a liturgy coordinator to be "viable employment, Ms. Von Ruden testified,

> Dr. Dunnigan thought I was always totally disabled. He knew how I was working at Cathedral and how they kind of form-fitted the job for me, so he didn't even consider that much of an employment.

(App. p. 75 - [HT p. 35 ll. 22-25]). Finally, as to whether her TPD benefits might be reduced or terminated for any reason other than a return to "viable employment," Ms. Von Ruden testified,

> Well, they assured me that I would continue receiving that same amount of money . . . (indefinitely) was what I was led to believe.

(App. p. 76 - [HT p. 39, ll. 2-5]).

Despite the conclusions of three different claims analysts that the five-year cap on TPD benefits would not be applied to her, despite the oral and written assurances of Myrna Wetch that she "would be entitled to temporary partial disability benefits . . . for as long as we have verification of (her), continued disability," and despite her reliance on the conclusions and communications of her claims analysts, Janet Von

Ruden's TPD benefits were terminated by formal order dated January 19, 2006, based solely on WSI's application of the five-year cap (App. pp. 53-60).

IV. LAW AND ARGUMENT

A. WSI did not correctly apply the provisions of N.D.C.C., Section 65-05-10-(2) in terminating Janet Von Ruden's TPD benefits.

Ms. Von Ruden asked the District Court for leave to adduce additional evidence, specifically, the sworn testimony of Timothy Wahlin, staff counsel for WSI. It is apparent from Mr. Wahlin's testimony that, contrary to WSI's assertions in the instant case, its claims analysts did, in fact, have the authority to waive the five-year cap on TPD benefits contained in N.D.C.C. Section 65-05-10(2) (App. p. 122-123) [Midthun Transcript (MT) p. 12 l. 20 - p. 13 l. 1]). Furthermore, it is apparent that, contrary to WSI's assertions in the instant case, the various claims analysts' analyses and assurances to Ms. Von Ruden were not mistaken, but rather represented the collective opinion of WSI's Claims Department at the time they were made (App. pp. 134-125 - [MT p. 24 l. 23 - p. 25 l. 6]). In other words, the terms of N.D.C.C. Section 65-05-10(2) did not change; only WSI's interpretation of those terms changed. Finally, it is apparent that Janet Von Ruden should have been granted a waiver of the five-year TPD benefits cap, even under WSI's "new and improved" interpretation.

N.D.C.C. Section 65-05-10(2) allows waiver in cases of catastrophic injury or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working fewer than twenty-eight hours per week as a result of the work injury. It is

abundantly clear that several different claims analysts concluded that Janet Von Ruden met these statutory requirements, and, indeed, she did. Throughout the approximate five-year period in which Ms. Von Ruden received TPD benefits, she was never released and never able to return to more than fifteen hours of work per week. If she wasn't working at the end of the five-year period, it was because she was told by her claims analyst that it didn't matter because she didn't have a "viable job" (Ap. p. 74 [HT p. 30 ll. 13-18]). Ms. Von Ruden satisfied the statutory requirements for waiver, just as a number of claims analysts concluded, despite TALJ Seaworth's conclusion to the contrary (App. p. 86 - [Conclusion of Law 3]).

Not only did Ms. Von Ruden satisfy the statutory requirements for waiver, she satisfied WSI's revised interpretation, as well. Mr. Wahlin testified regarding WSI's new statutory interpretation,

> The initial criteria has to be application of the statute, is there clear and convincing evidence below the 28 hours, is the injured worker remaining at work, and then finally whether or not the case has some sort of extraordinary circumstances involved with it, that means the waiver of the five year statute needs to take place in order that benefits be paid consistent with the intention on that statute. . . . There are a number of people out there that while being paid temporary partial disability benefits are being paid those benefits in such a manner that the reality of the situation is they would be temporary and total but for a doctor out there keeping them in the work force as a form of therapy. If that is the case, then to not waive the five years is to punish that individual who in reality is a temporary total disability recipient.

(App. pp. 117-118 - [MT p.7 l. 2 - p. 8 l. 2]). Of course, there is nothing in the terms of N.D.C.C. Section 65-05-10 that requires a waiver be based on the sort of "extraordinary circumstances" identified by Mr. Wahlin just as there is nothing in the statute that requires medical evidence beyond a reasonable doubt as required by TALJ Seaworth

(App. p. 86 - [Conclusion of Law 3]). The other criteria identified by Mr. Wahlin are contained in the statute. Ms. Von Ruden must demonstrate by clear and convincing medical evidence that she is unable to work as least twenty-eight hours per week (which she did to the satisfaction of WSI's Claims Department) and she must continue working (which she would have done but for her reliance on the assurances of Claims Analyst Myrna Wetch that the work she was performing wasn't "viable employment" and quitting it would not affect her continued receipt of benefits). Finally, there can be little doubt that Ms. Wetch's written assurance to Ms. Von Ruden that she "would be entitled to temporary partial disability benefits . . . for as long as we have verification of your continued disability" constitutes a waiver of the statutory five-year cap and was a promise of disability benefits for as long as she remained disabled, just as understood by Ms. Von Ruden. A waiver is simply a voluntary relinquishment of a known right or privilege. N.D.C.C. Section 65-05-10(2) does not require any particular formalities -- no bells or whistles. It does not require the waiver to be reviewed and approved by WSI's legal department. Repeated determinations by separate claims analysts that Janet Von Ruden met the statutory requirements for waiver and, thus, the five-year cap would not be applied to her certainly constitutes a knowing and intentional waiver. Telling Ms. Von Ruden, in writing, that she would continue to receive TPD benefits as long as she remained disabled, without limiting those benefits to a period of five years, constitutes a waiver of the five-year period.

Finally, WSI seems to believe that it has unlimited discretion to refuse to grant a waiver of the 5-year TPD benefits cap and to rescind

a waiver already granted even if, as in the instant case, a disabled worker meets the statutory requirements for a waiver. In Lass v. Workmen's Compensation Bureau, 415 N.W.2d 796 (N.D. 1987), this Court said WSI must exercise its continuing jurisdiction in reviewing entitlement to benefits if the facts warrant it, although such exercise is discretionary under N.D.C.C., Section 65-05-04. Similarly, in the instant case, when a disabled worker such as Janet Von Ruden demonstrates that she is working (or has assurance from her claims analyst that termination of employment will not affect her continued entitlement to benefits) and has long-term work restrictions of fewer than 28 hours per week verified by clear and convincing objective medical evidence, that disabled worker is entitled to an exercise of WSI's discretion. Either WSI must waive the 5-year cap or issue an appealable order explaining why the disabled worker is not entitled to a waiver. In the instant case, Janet Von Ruden satisfies all the requirements for a waiver except the "extraordinary circumstances" demanded by Mr. Wahlin, something clearly not contained in N.D.C.C., Section 65-05-10(2).

B. WSI failed to provide adequate pre-termination notice to Ms. Von Ruden.

The District Court was satisfied that Ms. Von Ruden met the statutory requirement for waiver of the 5-year cap on TPD benefits and that WSI, through its claims analysts, had, in fact, waived that cap (App. pp. 147-148). The Court further concluded that Ms. Von Ruden was entitled to continued TPD benefits absent a change in her circumstances (App. p. 150). That was, in essence, what Claims Analyst Myrna Wetch had promised Ms. Von Ruden in her letter dated February 19, 2003 (App. p. 48).

The District Court reasoned that, inasmuch as Ms. Von Ruden had an ongoing right to TPD benefits, absent evidence of changed circumstances, she was entitled to pre-termination notice of, what exactly, that evidence was. See: Beckler v. Workers Compensation Bureau, 418 N.W.2d 770; Rojas v. Workforce Safety & Insurance, 2005 ND 147, para. 11, 703 N.W.2d 299, 302.

Clearly, the District Court was right. Janet Von Ruden met the statutory requirements for waiver of the 5-year TPD benefits cap. Several different claims analysts determined that the cap would not be applied to her, in keeping with WSI's policies and practices. Ms. Von Ruden was assured, in writing, that she would continue to receive TPD benefits for as long as she remained disabled. WSI has offered no evidence that Ms. Von Ruden is no longer disabled. Finally, WSI terminated her TPD benefits without notice of a claimed change in her actual disability. WSI's actions are a textbook example of denial of due process.

V. CONCLUSION

Maybe, just maybe, WSI can revise its practices and procedures for waiving the five-year cap on TPD benefits under N.D.C.C. Section 65-05-10(2). There is no authority, however, for the Agency to apply new requirements not contained in the statute or to apply its new procedures to injured workers, such as Janet Von Ruden, who have already been granted waivers and assured that they will continue to receive disability benefits as long as they remain disabled. The several claims analysts who determined that Ms. Von Ruden met the statutory requirements for waiver were not mistaken. This is not a case

of mistake; it's simply a case of WSI adopting a new statutory interpretation and applying it retroactively. Ms. Von Ruden remains disabled, unable to return to "viable employment," and entitled to continuing disability benefits. Ms. Von Ruden asks this Court to affirm the District Court's decision, reverse WSI's final order and reinstate her entitlement to continuing disability benefits as long as she remains disabled, just as she was promised.

Respectfully submitted this 13th day of March, 2008.

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CERTIFICATE OF SERVICE

I, Stephen D. Little, certify that on the 13th day of March, 2008, a true and correct copy of the Appellee's Brief with an attached Certificate of Service by Mail were mailed to the following:

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