

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20090243

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STATE OF NORTH DAKOTA

Marlys Zimmerman,)	Supreme Court Case No. 20090243
)	
Appellant,)	
)	
vs.)	
)	
North Dakota Workforce Safety)	
and Insurance,)	
)	
Appellee,)	
)	
and)	
)	
Baptist Home, Inc.,)	
)	
Respondent.)	
)	

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**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

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**APPEAL FROM ORDER ON APPEAL DATED JUNE 10, 2009,
AFFIRMING FINAL ORDER OF WORKFORCE SAFETY AND INSURANCE
DATED FEBRUARY 17, 2009, AND FROM JUDGMENT ENTERED JUNE 18, 2009
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE ROBERT O. WEFALD**

+++++

Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544

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STATEMENT OF THE ISSUE

[1] Does the five year limitation on partial disability benefits in N.D.C.C. § 65-05-10(2) require receipt of those benefits to be for a continuous period of five years before they are terminated?

STATEMENT OF THE CASE

[2] In November of 2000, Marlys Zimmerman (“Zimmerman”) submitted a claim for a work-related injury with North Dakota Workers Compensation Bureau (n/k/a North Dakota Workforce Safety and Insurance (“WSI”), relating to an injury which occurred on November 11, 2000, while employed by The Baptist Home, Inc., Bismarck, North Dakota, as a registered nurse. (App. 120) The claim for a lumbar spine injury was accepted by WSI. (App. 121)

[3] WSI issued an Order Awarding Partial Disability Benefits on July 31, 2006. (WSI App. 1-8) Zimmerman requested reconsideration (WSI App. 9-14) from WSI’s July 31, 2006, Order, but subsequently withdrew her hearing request. (WSI App. 15) On March 27, 2008, WSI notified Zimmerman that her temporary partial disability benefits would be discontinued effective April 22, 2008, as she will have received five years of partial disability benefits. (WSI App. 16) On May 30, 2008, WSI issued its Order discontinuing partial disability benefits after April 22, 2008, because Zimmerman had received five years of partial disability benefits. (App. 171-172) Zimmerman requested rehearing. (App. 173-175) It was agreed that the issue specified for hearing, a question of law, would be considered on briefs and a stipulated record. (App. 176-177)

[4] Briefs were submitted by Zimmerman (C.R.¹ 1006-1012) and WSI (C.R. 1013-

¹ “C.R.” refers to the Certificate of Record on Appeal to District Court filed pursuant to N.D.C.C. § 28-32-44 dated April 1, 2009.

1024), along with a Reply Brief by Zimmerman. (C.R. 1025) On February 17, 2009, ALJ Rosellen Sand issued her Findings of Fact, Conclusions of Law and Final Order. (App. 185-192)

[5] On March 18, 2009, Zimmerman appealed to the District Court, Burleigh County, North Dakota. (App. 50-51) On June 10, 2009, the District Court, the Honorable Robert O. Wefald, issued an Order on Appeal, affirming the decision of ALJ Sand. (App. 110-113) Order for Judgment was entered June 17, 2009, and Judgment June 18, 2009. (App. 114-115) Notice of Entry of Judgment was served July 15, 2009. (App. 116) On August 19, 2009, Zimmerman filed her appeal to this Court. (App. 117)

STATEMENT OF THE FACTS

[6] On November 11, 2000, Zimmerman sustained a work-related injury to her lumbar spine while employed as a registered nurse at the Baptist Home in Bismarck, North Dakota. (App. 120) Upon WSI's acceptance of the claim, Zimmerman began receiving temporary total disability benefits dating back to November 14, 2000. (App. 179) Temporary total benefits were paid from November 14, 2000 through November 19, 2000. (App. 179) On November 20, 2000, Zimmerman began receiving temporary partial disability benefits. (App. 179) Zimmerman continued to receive temporary partial disability benefits, off and on, from November 20, 2000, until February 23, 2005. (App. 179-182) In other words, there were some time periods between November 20, 2000 and February 23, 2005, where Zimmerman received no disability benefits whatsoever as her earnings for those periods exceeded 90% of her pre-injury wage and thus she was not entitled to any disability benefits. However, at no time between November 20, 2000 and February 23, 2005, did Zimmerman receive anything other than

temporary partial disability benefits. (App. 179-182) On December 20, 2005, Zimmerman again began receiving temporary total disability benefits. (App. 182)

[7] On January 9, 2006, WSI initiated vocational rehabilitation services. (C.R. 56, 143) WSI approved a vocational rehabilitation plan (C.R. 176-185) which found she had transferrable skills to return to work as an office nurse and customer service representation. (Id.) These job goals were based on her functional capacity evaluation taken January 11-12, 2005, which found her capable of full time employment at a light level of release. (C.R. 799-803) On May 2, 2006, Zimmerman was notified that her temporary total disability benefits would be discontinued effective May 23, 2006, and that beginning May 24, 2006, she would be paid partial disability benefits based on an earnings capacity of \$569.60 per week. (C.R. 59) WSI issued an Order Awarding Partial Disability Benefits on July 31, 2006. (WSI App. 1-8) Zimmerman requested reconsideration (WSI App. 9-14) from WSI's July 31, 2006, Order, but subsequently withdrew her hearing request. (WSI App. 15)

[8] Pursuant to WSI's Order, Zimmerman again began receiving temporary partial disability benefits beginning May 24, 2006. (App. 182) WSI noted in its claim file that through February 23, 2005, Zimmernan had received 1125 days of partial disability benefits and she would be eligible for partial disability through April 22, 2008. (C.R. 60) On March 27, 2008, WSI notified Zimmerman that her temporary partial disability benefits would be discontinued effective April 22, 2008, as she will have received five years of partial disability benefits. (WSI App. 16) On May 30, 2008, WSI issued its Order discontinuing partial disability benefits after April 22, 2008, because Zimmerman had received five years of partial disability benefits. (App. 171-172) Zimmerman

requested rehearing. (App. 173-175) It was agreed that the issue specified for hearing was a question of law and could be considered on briefs and a stipulated record. (App. 114-115)

[9] After submission of briefs by Zimmerman (C.R. 1006-1012; 1025) and WSI (C.R. 1013-1024), ALJ Rosellen Sand issued her Findings of Fact, Conclusions of Law and Final Order on February 17, 2009. (App. 186-192) ALJ Sand found that N.D.C.C. § 65-05-10(2) was ambiguous and looked to legislative history for the proper construction. (App. 187-189) After doing so, she concluded that the legislative intent in enacting N.D.C.C. § 65-05-10(2) was to limit temporary partial disability benefits by aggregating the periods an individual was paid temporary partial disability benefits to total five years. (Conclusion of Law #2, App. 190) Therefore, she affirmed WSI's May 30, 2008, Order, which terminated Zimmerman's partial disability benefits as she had received a total of five years of the same. (App. 191)

[10] Zimmerman appealed ALJ Sand's decision to the District Court on March 18, 2009. (App. 50-51) In her Specification of Error, Zimmerman asserted Finding of Fact #7 was in error, as well as Conclusions of Law 1, 2, 3 and 4. Finding of Fact #7 provides as follows:

7. None of the periods for which Ms. Zimmerman received temporary partial disability benefits lasted for a continuous five years. However, by April 22, 2008, Ms. Zimmerman has been paid temporary partial disability benefits for five years.

(App. 190) Conclusions of Law 1, 2, 3 and 4 provide as follows:

1. A statute is ambiguous if it is subject to different interpretations Subsection 65-05-10(2) of the North Dakota Century Code is ambiguous and it is therefore necessary to resort to extrinsic aids to resolve the ambiguity and determine its meaning.

2. The Legislative intent in enacting N.D.C.C. § 65-05-10(2) was to limit temporary partial disability payments by aggregating the periods an individual was paid temporary partial disability benefits to total five years.

3. In the aggregate, Ms. Zimmerman has received five years of temporary partial disability benefits. Therefore under 14 § 65-05-10(2) she is not entitled to receive further partial disability benefits after April 22, 2008.

4. WSI's May 30, 2008, order denying Ms. Zimmerman partial disability benefits after April 22, 2008, was proper and should be upheld.

(App. 190) Judge Wefald affirmed ALJ Sand's decision, stating: "The Court is asked to decide the question, what does "the continuance of partial disability, not to exceed a period of five years" mean? The Court notes the operative work is not "continuous," as argued by Zimmerman, but rather is "continuance." The Court finds the interpretation of this statute by WSI is not unreasonable. (App. 113) This appeal followed. (App. 117)

LAW AND ARGUMENT

I. SCOPE OF REVIEW ON APPEAL.

[11] On appeal, this Court reviews the decision of the agency. Thompson v. Workforce Safety and Insurance, 2006 ND 69 ¶ 9, 712 N.W.2d 309. The District Court's decision, however, is entitled to respect. Zander v. Workforce Safety and Insurance, 2003 ND 193 ¶ 6, 672 N.W.2d 668, citing Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96 ¶ 6, 664 N.W.2d 884.

[12] This appeal turns on interpretation of statutory language contained in N.D.C.C. § 65-05-10(2). "Questions of law, including the interpretation of a statute, are fully reviewable." Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. "The primary objective of statutory construction is to ascertain the intent of the legislature." Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶

11, 602 N.W.2d 704, 708; Ash v. Traynor, 2000 ND 75 ¶ 6, 609 N.W.2d 96, 98. In doing so, courts look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 12, 687 N.W.2d 714 717; Goodleft v. Gullickson, 556 N.W.2d 303, 306 (N.D. 1996). Statutes are construed “as a whole to harmonize and give meaning to each word and phrase.” Baity ¶ 12, 687 N.W.2d at 717; Witcher, ¶ 11, 602 N.W.2d at 78; Ash, ¶ 6, 609 N.W.2d at 99.

[13] A statute is ambiguous when it is “susceptible to differing but rational meanings.” Ash ¶ 6, 609 N.W.2d at 96, citing Werlinger v. Champion Healthcare Corp., 1999 ND 173 ¶ 44, 598 N.W.2d 820. “Although courts may resort to extrinsic aids to interpret a statute if it is ambiguous,” it must “look first to the statutory language, and if the language is clear and unambiguous, the legislative intent is presumed clear.” McDowell v. Gille, 2001 ND 91 ¶ 11, 626 N.W.2d 666, 671. If, however, a statute is ambiguous, “extrinsic aids may be used to construe the statute to determine legislative intent, including the object sought to be obtained, the legislative history and the administrative construction of the statute.” Reopelle v. Workforce Safety and Insurance, 2008 ND 98 ¶ 15, 748 N.W.2d 722; N.D.C.C. § 1-02-39. “The practical application of a statute by the agency enforcing it is entitled to some weight in construing the statute, especially where the agency interpretation does not contradict clear and unambiguous statutory language.” Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992); see also Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989); Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469

(N.D. 1992). See also Houn v. Workforce Safety and Insurance, 2005 ND 115 ¶ 4, 698 N.W.2d 271 (noting administrative construction of statute entitled to some deference).

II. N.D.C.C. § 65-05-10 PROVIDES FOR A CUMULATIVE LIMIT OF FIVE YEARS OF PARTIAL DISABILITY BENEFITS.

[14] Zimmerman’s position is that because she has not received five “continuous” years of partial disability benefits, she remains eligible for additional benefits under N.D.C.C. § 65-05-10. WSI calculated the total cumulative/aggregate amount of partial disability benefits received by Zimmerman and discontinued those benefits after she had received a cumulative total of five years of partial disability benefits. Before the ALJ, both Zimmerman and WSI argued the statute in question, N.D.C.C. § 65-05-10(2) was unambiguous and the rules of statutory construction supported their interpretation of the statute. ALJ Sand concluded that the statute was ambiguous, and therefore it was appropriate to look to extrinsic aids, particularly the legislative history. (App. 188) After doing so, ALJ Sand determined that the legislative intent in enacting N.D.C.C. § 65-05-10(2) was to limit partial disability benefits by aggregating the periods an individual was paid those benefits to total five years. (App. 190) While WSI continues to believe that N.D.C.C. § 65-05-10(2) unambiguously provides for a five year aggregate limit on partial disability benefits, the ALJ’s construction also supports WSI’s discontinuance of partial disability benefits in Zimmerman’s claim. Accordingly, WSI’s decision to discontinue Zimmerman’s partial disability benefits as she had been paid, in the aggregate, five years of the same, should be affirmed.

N.D.C.C. § 65-05-10 provides:

If the injury causes temporary partial disability resulting in decrease of earning capacity, the disability benefit is sixty-six and two-thirds percent of the difference between the injured employee’s average weekly wages before

the injury and the employee's wage earning capacity after the injury in the same or another employment. . . .

1. The benefits provided by this section are available to any otherwise eligible worker, providing the loss of earning capacity occurs after July 1, 1989. . . .
2. Benefits must be paid during the continuance of partial disability, not to exceed a period of five years. The organization may waive the five-year limit on the duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 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 less than twenty-eight hours per week because of the compensable work injury. . . .

(Emphasis supplied.) The first sentence of N.D.C.C. § 65-05-10(2) provides that partial disability benefits are payable “during the continuance of partial disability.” The plain meaning of that phrase is that as long as the injured worker remains partially disabled, benefits under that subsection are payable. However, the next phrase of that sentence goes on to limit those partial disability benefits by stating “not to exceed a period of five years.” Reading the plain language of the statute as a whole, which one is required to do under the rules of statutory construction, it is clear that regardless of the duration of an injured worker's partial disability, those benefits may not exceed five years. See Gross v. North Dakota Department of Human Services, 2002 ND 161 ¶ 8, 652 N.W.2d 354 (noting courts are to construe statutes as a whole giving meaning to each word and phrase); State Bank of Kenmare v. Lindberg, 436 N.W.2d 12, 15 (N.D. 1989)(noting statutes must be read as a whole and to give meaning and effect to every provision). The plain language of the statute, when read in context, therefore, supports WSI's interpretation. See Kroh v. American Family Ins., 487 N.W.2d 306, 310 (N.D. 1992)(discussing construing statutes as a whole and in context); Wheeler v. Gardner, 2006 ND 24 ¶ 16, 709 N.W.2d 908)(id.).

[15] Zimmerman’s argument focuses only on the first sentence of subsection 2, and, as the District Court recognized, replaces the word “continuance” with the word “continuous” to support her argument that benefits “not to exceed a period of five years” must be continuous. In order to make that argument palatable, however, it is necessary to place the word “continuous” within the statute thus: “not to exceed a period of five continuous years.” Zimmerman’s argument assumes that the clock on five years of partial disability benefits, so to speak, starts again after any break in partial disability benefits. In other words, if an individual receives a year of uninterrupted/continuous partial disability benefits, and for a month receives either no benefits or total disability benefits, and the injured worker’s earnings again qualify him/her for partial disability benefits, the clock would start again ticking for a new five year period upon resumption of payment of partial disability benefits again. Thus, under Zimmerman’s scenario, only after an injured worker receives five continuous years of partial disability, would he/she be precluded from further partial disability benefits under N.D.C.C. § 65-05-10(2).

[16] However, if the statute required the five years of partial disability benefits be “continuous,” wouldn’t the statute state: “Benefits must be paid during the continuance of partial disability, not to exceed a period of five continuous years”? There is, quite simply, nothing in the statutory language that would require the payment of those benefits to be “continuous.” The Court cannot add words to a statute to give additional meaning to a statute. First National Bank v. RPB 2, LLC, 2004 ND 29 ¶ 17, 674 N.W.2d 1; Larson v. North Dakota Department of Transportation, 2005 ND 51 ¶ 11, 693 N.W.2d 39.

[17] In addition, Zimmerman’s construction ignores the second sentence of N.D.C.C. § 65-05-10(2), which reads: “The organization may waive the five-year limit on the duration of partial disability benefits” (Emphasis supplied.) This language also unambiguously provides that there is a “five-year limit on the duration” of the partial disability benefits provided for in the statute. Partial disability benefits are therefore “capped” at five years. Again, the statute does not say “five continuous years” of benefits; instead, it provides for a “five year limit on the duration.” Black’s Law Dictionary defines “duration” as: “Extent, limit or time. The portion of time during which anything exists.” “Limit” is defined as: “A bound; a restriction; a restraint’ a circumscription.” Black’s Law Dictionary, 5th ed., 1979. Using the commonly understood meaning of the words, therefore, the statute provides that partial disability benefits are limited to five years. See N.D.C.C. § 1-02-02.

[18] Finally, although this Court has not specifically addressed the argument advanced by Zimmerman, it has in the context of reviewing other cases looked at N.D.C.C. § 65-05-10 and recognized that the statute provides for a five year limit on those benefits. See Baldock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441, 447 (N.D. 1996) (discussing rehabilitation limitations and noting N.D.C.C. § 65-05-10 provides for partial disability payments “for up to five years”); Eagle v. North Dakota Workers Compensation Bureau, 1998 ND 154 ¶ 11, 583 N.W.2d 97 (discussing legislative determination of rehabilitation limitations including availability of partial disability benefits for up to five years); Reopelle, 2008 ND 98 ¶ 14, 748 N.W.2d 722 (concluding that the “plain language” of N.D.C.C. § 65-05-10 requires that the five-year limit on disability benefits applies “when an injured worker's partial loss of capacity to earn

wages happens after June 30, 1991”; Von Ruden v. Workforce Safety and Insurance, 2008 ND 166 ¶ 13, 755 N.W.2d 885 (noting claimant prohibited from receiving partial disability benefits for more than five years); Midthun v. Workforce Safety and Insurance, 2009 ND 22 ¶13, 761 N.W.2d 572 (stating “N.D.C.C. § 65-05-10(2) includes a five-year limitation on partial disability benefits, and clearly states that WSI ‘may waive’ that limitation only in certain circumstances”). Based on the Court’s description of the statute as being “unambiguous” and using its “plain language,” this Court has reiterated in each case that there is a “five year limit” on partial disability benefits under the workers’ compensation statutory scheme.

[19] This Court has stated that partial disability “contemplates at least three factors: First, there should be a physical disability; second the physical disability should be partial, or in other words, the employee should be able to work subject to the disability, and third, there should be an actual loss of earning capacity that is causally related to the disability.” Risch v. North Dakota Workers Compensation Bureau, 447 N.W.2d 308, 309 (N.D. 1989). “Partial disability benefits are provided to injured workers whose injuries cause temporary partial disability resulting in decrease of earning capacity.” Rodenbiker v. Workforce Safety and Insurance, 2007 ND 169 ¶ 19, 740 N.W.2d 831. Thus, following a work injury partial disability benefits provide a recognition that it may take some time before an injured worker is able to return to their original earning capacity. After returning to work following an injury, the injured worker may have “ups and downs” whereby sometimes he/she may work fewer hours than before the injury and gradually increase until earning what he/she did prior to the injury. Partial disability benefits compensate for those “down” periods. This is evident in Zimmerman’s claim

where there were periods of time where she received no partial disability benefits as her “earning capacity” met or exceeded her pre-injury earning capacity during those periods of time. See, e.g., May 13, 2001 to May 26, 2001; July 22, 2001 to December 8, 2001; May 26, 2002 to June 8, 2002; October 26, 2003 to November 8, 2003; January 8, 2004 to January 25, 2004; February 16, 2004 to February 26, 2004; July 18, 2004, to August 14, 2004; December 5, 2004 to January 1, 2005 (periods where Zimmerman did not receive partial disability benefits)(App. 179-184) Therefore, WSI’s construction is consistent with both the statutory language and the concept of partial disability benefits. See Ash, 2005 ND 75 ¶ 11, 609 N.W.2d 96 (construing ambiguous statute to further its purpose).

[20] Likewise, WSI is not construing N.D.C.C. § 65-05-10(2) to provide for a five year limit to receive partial disability benefits from the date of injury or from when the injured worker begins receiving those benefits. For example, in Ms. Zimmerman’s case, she began receiving partial disability benefits on November 20, 2000, and under such a construction would have five years from that date after which time partial disability benefits would cease, or approximately November 20, 2005. Rather, given the nature of a partial loss of earning capacity, WSI has calculated only those periods of time where partial disability benefits were paid up to a total of five years of benefits before such benefits are discontinued. Again, WSI’s construction is consistent with the rationale for awarding partial disability benefits.

[21] In Eagle, 1998 ND 154 ¶ 15, 583 N.W.2d 97, this Court considered both the five year limitation on partial disability benefits and the much shorter limitation on partial disability benefits found in N.D.C.C. § 65-05.1-06.1 in determining if there was a rational

basis for the distinction on duration of those benefits. This Court stated: “the Legislature could reasonably have concluded that workers who receive vocational retraining might acquire enhanced skills, enabling them to obtain better-paying jobs than injured workers who return to the same or a modified position. The Legislature reasonably could have concluded retrained employees not only should find employment in the field for which they were retrained within one year after completing the retraining program, but also may earn an amount near their pre-injury salary. It is not irrational for the Legislature to conclude retrained employees would not require the same amount of assistance returning to their pre-injury earnings capacities as injured workers who return to modified positions.”

[22] Under the workers’ compensation statutory scheme, injured workers who have successfully concluded a retraining program receive only one year’s worth of partial disability benefits. N.D.C.C. § 65-05.1-06.1(2)(h)(4). In that statute, the word “continuance” is not present, yet the rehabilitation statutes reference N.D.C.C. § 65-05-10 throughout. In interpreting N.D.C.C. § 65-05-10, in light of this Court pronouncements on the issues of partial disability benefits, it must be construed in conjunction with the provisions of Chapter 65-05.1. See Zueger v. North Dakota Workers Compensation Bureau, 1999 ND 175 ¶ 12, 584 N.W.2d 530 (stating in clarifying meaning of statute, it must be construed in context and considering other statutory provisions on the same subject); Boger v. North Dakota Workers Compensation Bureau, 1998 ND 131 ¶ 15, 581 N.W.2d 463 (stating in construing statutes on same subject, court makes every attempt to harmonize and give meaningful effect to each without rendering the other useless); Raboin v. North Dakota Workers Compensation Bureau, 1997 ND 221 ¶ 16, 571 N.W.2d

833 (id.). When that is done, it is apparent that there is no requirement that the payment of partial disability benefits be “continuous” for either the five years provided under N.D.C.C. § 65-05-10 or the one year provided under N.D.C.C. § 65-05.1-06.1(2)(h)(4). Rather, the statutes simply provide for a cumulative limit of those benefits.

[23] In the case of partial disability benefits under N.D.C.C. § 65-05-10, those benefits are limited to five years. Zimmerman may not want to accept that fact, but the plain language of the statute and the entire statutory scheme of workers compensation, including the vocational rehabilitation statutes, support WSI’s construction. As this Court has stated:

It is for the legislature, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the legislature's intent. State ex. rel. Stenehjem v. Free Eats.com, Inc., 2006 ND 84 ¶ 12, 712 N.W.2d 828 *cert denied* --- U.S. ---, 127 S. Ct. 383, 166 L.Ed. 2d 270. The function of the courts is to interpret the law, not to legislate, “regardless of how much we might desire to do so or how worthy an argument.” CybrCollect, 2005 ND 146 ¶ 23, 703 N.W.2d 285; Doyle v. Sprynczynayk, 2001 ND 8 ¶ 16, 621 N.W.2d 353. As we have noted, “[i]f the rule is wrong, the legislature has ample power to change it, but the duty of the judiciary is to enforce the law as it exists.” CyberCollect at ¶ 23; Doyle, at ¶ 16.

Olson v. Workforce Safety and Insurance, 2008 ND 59 ¶ 23; 747 N.W.2d 71.

[24] Finally, Zimmerman contends that ALJ Sand’s construction using legislative history is in error. However, Zimmerman’s arguments are premised on taking statements from the legislative history out of context. Zimmerman relies on statements of Pat Mayer at page 22 of legislative history on a question posed by the conference committee relating to a wholly different statute and proposed limitation on payment of disability benefits, that being N.D.C.C. § 65-05-08 and an amendment which provided that no disability benefits were to be paid for disability when the duration was “less than five consecutive

calendar days.” (App. 77) Those statements have nothing whatsoever to do with the amendment at issue to 65-05-10 and any attempt to do so simply is a distortion of the record.

[25] As it pertains to the legislative history relied upon by ALJ Sand in her decision, in her arguments to support her construction of N.D.C.C. § 65-05-10, Zimmerman misconstrues the comments of the committee. The bill being discussed in the conference committee contained numerous changes to many, many statutes, not only in Chapter 65 governing workers’ compensation, but other sections as well. To see the final contents of the bill as passed see 1991 N.D. Laws ch. 714. As such, the comments that Zimmerman relies upon for her argument that the decrease in partial disability benefits applied only to injured workers that had received formal retraining were in reference to a separate provision which was being amended in N.D.C.C. § 65-05.1-06.1, which reduced the partial disability benefits payable following completion of a retraining program from five to one year. See 1991 N.D. Laws ch. 714 § 59. However, the amendment being discussed in the conference committee at the citation relied upon by Zimmerman did not pertain to N.D.C.C. § 65-05-10. Instead, as ALJ Sand noted, the comments clearly reference that the partial disability benefits payable under N.D.C.C. § 65-05-10 are calculated based on the aggregate, not a “continuous” requirement, exactly how WSI has interpreted the five year. (App. 106) It is this fact that ALJ Sand correctly relied upon to give reference to how the legislature interpreted/intended that the limitation of partial disability benefits was to be calculated. (App. 188) Therefore, ALJ Sand’s decision to affirm WSI’s discontinuance of Zimmerman’s partial disability benefits is in accordance with the law and should be affirmed. See Johnson v. Department of Transportation, 2004

ND 148 ¶ 5, 683 N.W.2d 866 (noting when appeal involves interpretation of statute, agency decision is affirmed when in accordance with the law).

CONCLUSION

[26] For the foregoing reasons, WSI respectfully requests this Court affirm WSI's decision that Zimmerman's partial disability benefits under N.D.C.C. § 65-05-10 are limited to an aggregate of five years, which the District Court in its decision dated June 10, 2009, affirmed.

DATED this 22nd day of October, 2009.

Respectfully submitted,

/s/ Jacqueline S. Anderson
Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General for
Workforce Safety and Insurance
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544

CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, North Dakota Workforce Safety and Insurance Fund, and the author of the Brief of Appellee North Dakota Workforce Safety and Insurance Fund hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 4,532 words from the portion of the brief entitled “Statement of the Case” through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 22nd day of October, 2009.

/s/ Jacqueline S. Anderson
Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General for
Workforce Safety and Insurance
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544