20110159

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 9, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edith Johnson, Appellant, v. Workforce Safety & Insurance, Appellee.	Supreme Court No. 20110159 Grand Forks County Civil No. 18-2010-cv-02000

Appeal From Judgment

Dated April 20, 2011

District Court, Northeast Central Judicial District

Grand Forks County, North Dakota

The Honorable Sonja Clapp, Presiding

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

[1] This is an appeal from a district court judgment in which the district court, Hon. Sonja Clapp presiding, affirmed the Administrative Law Judge (ALJ) Norman G. Anderson's Final Order and dismissed Edith Johnson's claim for benefits from Workforce Safety & Insurance. The ALJ dismissed Edith Johnson's claim for benefits as a sanction for her failure to comply with a discovery order, which had purported to compel her to respond to discovery requests related to issues other than the one specified by the parties' stipulation and adopted by the ALJ. The overall issue on appeal is whether the ALJ erred by deciding the case based on issues that were not before him.

STATEMENT OF THE CASE

[2] On May 26, 2009, Edith Johnson was working as a bank teller at Bremer Bank in Gilby, North Dakota, when she was held at gunpoint, forced to the floor, and handcuffed by a team of bank robbers. She suffered post-traumatic stress disorder (PTSD) as a result of this incident. On July 9, 2009, Bremer Bank filed a Workforce Safety & Insurance (WSI) claim on Ms. Johnson's behalf. WSI denied the claim because, as stated in its Notice of Decision Denying Benefits:

> You did not sustained [sic] a physical injury. Per NDCC 65-01-02(b)(1), a compensable injury does not include a "mental injury arising from mental stimulus."

(Post-Hearing Reply Brief in Support of Petition for Alternative Writ of Mandamus at 4, A. at 77.)

[3] Edith Johnson appealed the denial of benefits. WSI, through its counsel, proposed and drafted a stipulation of issues for the hearing on Ms. Johnson's appeal. The stipulation was signed by Johnson's attorney and by the ALJ, Norman G. Anderson, on January 20, 2010. The issue to which the parties stipulated and the ALJ agreed was:

> Whether WSI correctly applied N.D.C.C. Section 65-01-02(10)(b)(10) in determining that Edith A. Johnson's PTSD is a mental injury arising from a mental stimulus and thus not a compensable injury.

(Stipulation, A. at 57; Order dated June 1, 2010 at 2, A. at 61; Order for Continuance and to Amend Specification of Issues, A. at 21.)

[4] At the time the ALJ adopted the stipulated issue proposed by WSI and agreed to by Johnson, an evidentiary hearing to decide that issue had been set for May 27, 2010. (Order for Continuance and to Amend Specification of Issues, A. at 21.) Johnson and her

attorney relied on the stipulated issue in preparing for the evidentiary hearing. Nevertheless, after nearly four months had gone by, WSI filed a motion to compel discovery responses that were not relevant to that sole, stipulated issue. (Order dated June 1, 2010 at 2, A. at 61.) Johnson timely filed her response to the motion to compel along with a motion for protective order. (Response to Motion to Compel and Motion for Protective Order, A. at 44.) The ALJ continued the May 27, 2010 hearing date and re-wrote the issue in the case to conform to WSI's motion to compel. (Order dated June 1, 2010 at 3-4, A. at 62-63.) The ALJ did not rule on Johnson's motion for a protective order.

[5] Because the order compelling discovery responses was not an appealable, final order, Johnson sought protection from the district court in Grand Forks County. She filed a petition for a writ of mandamus by which the ALJ would be ordered to abide by the stipulation of the parties that had been accepted and entered as an order in the administrative proceeding. (Petition for Alternative Writ of Mandamus, A. at 67.) The district court initially granted the petition in preliminary fashion, vacated the order compelling discovery responses, and set a hearing date. (Alternative Writ dated June 17, 2010, A. at 72.) Subsequent to the hearing, on September 14, 2010, the district court denied the petition. (Memorandum Decision and Order Denying Writ of Mandamus, A. at 82.)

[6] On September 23, 2010, WSI filed a motion for sanctions for noncompliance with the ALJ's order compelling discovery responses. (Notice of Motion and Motion for Sanctions for Failure to Comply With Discovery Order, A. at 85.) In response, Johnson

filed a request for reconsideration of the ALJ's June 1, 2010 order on October 7, 2010. (Claimant's Motion to Reconsider, A. at 87.) Johnson's motion to reconsider expressly relied on the arguments she had made in the writ of mandamus proceeding. Ibid. As a sanction for noncompliance with the discovery order, the ALJ dismissed Johnson's claim for benefits on October 27, 2010. (Order dated October 27, 2010, A. at 88.)

[7] Edith Johnson then appealed to the district court in Grand Forks County. (Notice of Appeal to District Court, A. at 92; Specifications of Error, A. at 94.) The district court affirmed the ALJ's decision on April 7, 2011 and entered judgment thereon on April 20, 2011. (Order Denying Appellant's Appeal and Specifications of Error, A. at 95; Judgment dated April 20, 2011, A. at 104.) This appeal follows from that judgment.

STATEMENT OF FACTS

[8] Edith Johnson lives in Gilby, North Dakota, a small town in Grand Forks County. On May 26, 2009, she was employed at Bremer Bank in Gilby as a teller. On that day, two armed robbers entered the bank. One of them pointed a gun at Ms. Johnson and forced her to the ground, where he handcuffed her. She has been diagnosed with PTSD as a result of the incident. She has been forced by her PTSD to retire from her employment with Bremer Bank. Her employment there ended on October 1, 2009.

[9] On the date of the robbery, Bremer Bank's employees were covered by WSI for workplace injuries. WSI benefits are the exclusive remedy for injured workers in North Dakota. On July 9, 2009, Bremer Bank filed a claim with WSI on Johnson's behalf. That claim was denied on the grounds that Johnson's PTSD was a "mental injury arising from mental stimulus" and therefore not covered by WSI.

[10] As explained in the statement of the case, supra, Johnson went through an administrative appeal process in her attempt to obtain WSI benefits for her PTSD. The procedure during that administrative appeal process forms the relevant core of facts to this appeal. Edith Johnson is not appealing to this Court the issue of whether the PTSD that she suffered as a result of being held at gunpoint and forcibly handcuffed was a mental injury arising from mental stimulus, as that issue was never decided below. She is, rather, appealing from the ALJ's failure to decide that issue after she, WSI, and the ALJ all agreed that it was the sole issue for decision.

[11] Prior to June 1, 2010, everyone was in agreement regarding the issue presented for the ALJ's decision:

> Per N.D.C.C. § 65-01-02(10)(b)(10), a compensable injury does not include a 'mental injury arising from mental stimulus.

(Appellant's Brief in District Court at 8, R. at Document No. 16) (quoting a July 16, 2009 statement of Tamera D., a WSI Claims Adjuster).

> [A] mental injury arising from a mental stimulus is not compensable.

Ibid. (quoting a September 10, 2009 statement of Anne Jorgenson Green, a WSI Special Assistant Attorney General.)

> WSI concluded you suffered a mental injury, PTSD, which arose out of a mental stimulus.

Ibid. (quoting a December 1, 2009 statement made by Paul Hilz of the WSI Decision Review Office to Edith Johnson.)

> Whether Edith Johnson suffered a "mental injury arising from a mental stimulus."

Ibid. (quoting the January 14, 2010 statement of the issue in the case made by Lolita G. Romanick, the WSI Special Assistant Attorney General who handled the case below.)

> A mental injury arising from a mental stimulus is not covered.

Ibid. (quoting a public statement made about the case by Bryan Klipfel, Director of WSI, on July 13, 2010 on the News & Views With joel Heitkamp radio program on the station KFGO.)

[12] When the administrative appeal was commenced, the ALJ prepared the following statement of issues:

> 1) Whether WSI correctly applied N.D.C.C. § 65-01-02(10)(b)(10) in determining that Edith A. Johnson's PTSD is

a mental injury arising from a mental stimulus and thus not a compensable injury, and

2) Whether WSI correctly applied N.D.C.C. § 65-01-02(10)(a)(6) in determining that Edith A. Johnson's PTSD is not a compensable work injury because it is a mental/psychological condition preexisting the alleged work injury.

(Order dated June 1, 2010 at 2, A. at 61.) WSI proposed and Edith Johnson ratified a stipulation by which the ALJ would strike the second issue and leave for decision only the first. Ibid. The ALJ adopted the stipulation and, on January 20, 2010, "[o]rdered that the specification of issues in this matter is amended to strike issue 2)." (Order for Continuance and to Amend Specification of Issues, A. at 21.) In the same order, the ALJ continued the hearing date to May 27, 2010, at 9:00 a.m. Ibid.

[13] WSI made discovery requests seeking, in part, "information regarding preexisting conditions and employment records." (Order dated June 1, 2010 at 2, A. at 61.) Johnson did not provide this information because it was not relevant to the sole issue to be decided in the case. Ibid. WSI responded with a motion to compel discovery. Ibid. In support of its motion to compel, WSI argued that a "Specification of Issues can not [sic] abrogate a statutory provision, here N.D.C.C. § 65-01-02(10)(a)(6), which would preclude compensability for Johnson's pre-existing [sic] psychological and/or psychiatric conditions, if any." (Brief in Support of Motion to Compel Discovery Responses at 3, A. at 28.)

[14] In granting WSI's motion to compel, the ALJ decided, notwithstanding the sole issue before him being whether Edith Johnson's injury was a mental injury caused by a mental stimulus, that "[s]he still must show that her PTSD is a compensable injury." (Order dated June 1, 2010 at 3, A. at 62.) He proceeded to explain that it was an issue in

the case "whether claimant had a preexisting mental condition related to her PTSD." Ibid. The ALJ also discussed the requirement, for a preexisting condition, that "the worker must establish that the work injury substantially accelerated the progression or substantially worsened the severity of the preexisting condition." (Id. at 4 n.2, A. at 63.) He then concluded that Edith Johnson's "employment records and any disability records are relevant to the issue of a preexisting mental condition related to her PTSD and are also relevant in the event of an aggravation award." (Id. at 4, A. at 63.)

[15] The ALJ then relied on its newfound statement of issues in finding that, "[t]hus stated, [the issue] is broad enough to allow claimant to argue for benefits under all available statutory theories and also encompass WSI's position that claimant's PTSD is not a compensable injury under § 65-01-02(10)(b)(10) and § 65-01-02(10)(a)(6)." (Order dated June 1, 2010 at 4-5, A. at 63-64.) He recognized that this statement of issues abrogated the stipulation of the parties that he had previously adopted. (Id. at 4, A. at 63.) As a result of its newly-expanded statement of issues, the ALJ ordered that WSI's discovery requests were relevant to the issues and compelled Ms. Johnson to respond to them, including among other things providing authorizations for release of her medical records for the 21-1/2-year period from January 1, 1989 through June 1, 2010. (Id. at 5, A. at 64.)

[16] Because of a lack of other remedy apparent to her, Johnson sought a writ of mandamus from the district court in Grand Forks County, by which the ALJ would be required to abide by the stipulation that he had adopted as his order. (Petition for Alternative Writ of Mandamus at 5, A. at 71.) The district court initially granted Johnson

a writ in preliminary form (Alternative Writ, A. at 72) but later, on September 14, 2010, denied her petition because it found she had a remedy at law, having not yet exhausted her administrative remedies (Memorandum Decision and Order Denying Writ of Mandamus at 3, A. at 82).

[17] Shortly after Johnson's petition for a writ of mandamus was denied, WSI made a motion to the ALJ for sanctions on September 23, 2010. (Notice of Motion and Motion for Sanctions for Failure to Comply With Discovery Order, A. at 85.) In response to the motion for sanctions, Johnson timely filed a motion to reconsider the June 1, 2010 order by which she was compelled to respond to WSI's discovery requests, supported by the arguments she had made to the district court in seeking a writ of mandamus. (Claimant's Motion to Reconsider, A. at 87.) The ALJ granted the motion for sanctions against Edith Johnson for not responding to the discovery requests regarding the expanded statement of issues, specifically entering the sanction of dismissal of Johnson's claim for benefits. (Order dated October 27, 2010 at 3, A. at 90.) Notwithstanding Johnson's timely response, the ALJ explicitly stated, as the introduction to his decision, that Johnson "did not file a response to WSI's motion for sanctions." (Id. at 2, A. at 89.)

ARGUMENT

A. Introduction

[18] The issue on appeal is whether the ALJ abused his discretion in abrogating the stipulation and order that set the issue for decision and then basing his order dismissing Edith Johnson's claim for WSI benefits on her failure to provide discovery that is not relevant to the stipulated issue. The Supreme Court has jurisdiction of this appeal from the judgment of the district court in the underlying appeal from the WSI order. N.D.C.C. § 28-32-49. On appeal, this Court reviews WSI's decision, not the decision of the district court. Lawrence v. N.D. Workers Compensation Bureau, 2000 ND 60, ¶ 11, 608 N.W.2d 254 (citing Vernon v. North Dakota Workers Comp. Bur., 1999 ND 153, ¶ 8, 598 N.W.2d 139).

[19] In administrative proceedings, the hearing officer may issue discovery orders in accordance with the North Dakota Rules of Civil Procedure. N.D.C.C. § 28-32-33(2). Rulings on discovery matters are appealable, but only after the agency's final order is entered. Ibid. The rulings relevant to this appeal are the ALJ's June 1, 2010 order by which the stipulated issue was expanded and Edith Johnson was ordered to provide discovery responses relevant only to matters outside the stipulated issue and his October 27, 2010 order dismissing Johnson's claim as a discovery sanction.

[20] As further explained below, WSI was estopped by signing and filing a stipulation of issues from arguing that other issues were relevant to the ALJ's decision. The ALJ erred not only in allowing WSI to make that argument but also in abrogating the stipulation of issues. The ALJ further erred in concluding that Edith Johnson did not respond to WSI's motion for sanctions, and compounded these errors by dismissing

Johnson's claim for benefits without allowing her so much as a hearing to show cause why the case should not be dismissed.

B. Standard of review and nature of proceeding

[21] The standard of review for discovery orders calls for this Court to decide whether the judicial officer—here, the ALJ—abused his discretion in granting or denying the discovery order. In re J.S.L., 2009 ND 43, ¶ 18, 763 N.W.2d 783 (citing Forster v. West Dakota Veterinary Clinic, Inc., 2004 ND 207, ¶ 40, 689 N.W.2d 366). "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner[,] when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." State v. Blunt, 2011 ND 127, ¶ 10, 799 N.W.2d 363 (citing City of Fargo v. Levine, 2008 ND 64, ¶ 5, 747 N.W.2d 130). See also Thompson v. Schmitz, 2011 ND 70, ¶ 18, 795 N.W.2d 913 (quoting Brandt v. Somerville, 2005 ND 35, ¶ 23, 692 N.W.2d 144).

[22] WSI proceedings are intended to be of a "limited adversarial" nature. Elter v. North Dakota Workers Compensation Bureau, 1999 ND 127, ¶ 26, 599 N.W.2d 315 (citing Frohlich v. North Dakota Workers Comp. Bureau, 556 N.W.2d 297, 301 (N.D. 1996)). Because WSI was created for the benefit of injured workers, "liberal construction resolves reasonable doubt in favor of the injured worker." Kallhoff v. North Dakota Workers' Compensation Bureau, 484 N.W.2d 510, 513 (N.D. 1992) (citing Morel v. Thompson, 225 N.W.2d 584 (N.D. 1975)). Such liberal construction—"in favor of the injured worker so as to avoid forfeiture and afford relief"—is the "longstanding tradition" of this Court. Ibid. (citing Balliet v. Workmen's Comp. Bureau, 297 N.W.2d 791, 794 (N.D. 1980)). At the very least, Edith Johnson is entitled to procedural fairness in her

appeal of WSI's denial of benefits. Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730, 737 (N.D. 1988).

C. WSI's discovery requests that led to dismissal of Edith Johnson's claim for benefits were not related to the sole issue before the ALJ

[23] Before discussing what issues were properly before the ALJ at any time, a clear understanding of the nature of WSI's discovery requests is helpful. Neither WSI, the ALJ, nor the district court determined that those discovery requests were related to the issue of whether Edith Johnson's PTSD was a mental injury caused by mental stimulus—the issue upon which WSI initially denied Johnson's claim and which WSI stipulated was the sole issue before the ALJ.

[24] The ALJ expressly recognized that the requests were not relevant to the stipulated issue: "[Johnson]'s employment records and any disability records are relevant to the issue of a preexisting mental condition related to her PTSD and are also relevant in the event of an aggravation award." (Order dated June 1, 2010 at 4, A. at 63) (emphasis supplied). These other issues are clearly outside the scope of the issue stated in WSI's stipulation of issues to the ALJ. Most strikingly, the first of them is identical to the issue that WSI sought for the ALJ to strike and the ALJ did strike from the specification of issues. (Order dated June 1, 2010 at 2, A. at 61) (noting that the issue of "[w]hether WSI correctly applied N.D.C.C. § 65-01-02(10)(a)(6) in determining that Edith A. Johnson's PTSD is not a compensable injury" was struck by the parties' stipulation and the ALJ's amended specification of issues) (emphasis supplied). (Cf. id. at 4-5, A. at 63-64) (suggesting that it was "WSI's position that [Johnson]'s PTSD is not a compensable injury under §65-01-02(10)(b)(10) and §65-01-02(10)(a)(6)") (emphasis supplied). It

defies logic for the ALJ to suggest that WSI's position is something that WSI expressly sought to strike as having ever been its position.

[25] There has never been a suggestion that the discovery requests at issue relate to whether Johnson's PTSD is a mental condition caused by a mental stimulus. Therefore, the only way that those discovery requests—or any ALJ action based on Johnson's failure to answer them as completely as WSI wishes—can be decisive is if the other issues, to which the requests relate, were properly before the ALJ. A decision based on irrelevant discovery requests is not a reasoned decision built upon a rational thought process—it is an abuse of discretion. Blunt, 2011 ND 127, ¶ 10.

D. Issues beyond the one to which the parties stipulated before the ALJ were not properly before the ALJ ab initio

[26] It is noteworthy that this cause does not ask the Supreme Court to decide whether Edith Johnson was properly denied benefits by WSI, whose denial was based on her injury being mental in both its nature and its cause. The proceeding before the ALJ was an appeal from that denial of benefits. This Court consistently recognizes that only issues raised both in the underlying action and on appeal can be considered on appeal. See, e.g., State v. Johnson, 2011 ND 48, ¶ 17, 795 N.W.2d 367 (citing State v. Egan, 1999 ND 59, ¶ 22, 591 N.W.2d 150). WSI's denial of benefits was based on only one issue.

[27] Without even addressing WSI's stipulation of issues or its attempt in a motion to compel to disregard that stipulation, then, issues other than the one stated in WSI's denial of benefits were not properly before the ALJ on appeal from that denial of benefits. WSI not only did not attempt to raise other issues in a timely manner, but rather

made deliberate efforts to ensure that other issues were not raised. The sole actual issue before the ALJ—the reason that WSI denied Edith Johnson's claim for benefits—has never been decided.

[28] The ALJ denied Edith Johnson benefits not because she was not entitled to them, but because she did not provide discovery related only to issues that were not properly before him. The ALJ's decision was therefore based on those issues, not on the one issue that he was tasked to decide. The ALJ cannot draw issues to his consideration when they were never raised by the parties. Because the ALJ's decision was based on issues not before him, it must be reversed.

E. The ALJ abused his discretion by abrogating the stipulated order setting the sole issue to be decided

[29] Although WSI argued that a specification of issue cannot act to "abrogate abrogate a statutory provision … which would preclude compensability for Johnson's pre-existing [sic] psychological and/or psychiatric conditions, if any," this argument was not addressed by the ALJ. Rather, the ALJ simply cast aside the specification of issue and ordered Edith Johnson to provide discovery responses that did not relate to it in any way. The ALJ's order compelling discovery was based on his belief that issues outside of the stipulated and ordered sole issue controlled the outcome of the case.

[30] Johnson is not arguing that a specification of error can abrogate a statute. That is not what happened here. Rather, WSI effectively waived arguments not relating to the sole issue that it insisted and stipulated existed for the ALJ's decision. If WSI did not waive other issues, then at the very least it was estopped from arguing those issues without first following appropriate procedures to have the ALJ once more amend the

specification of issue and giving Johnson an opportunity to prepare her case in light of the amended issues. It is procedurally unfair to change the issues in the case to conform with a motion to compel brought against the claimant and the ALJ abused his discretion in doing so, regardless of whether the issues could be amended under other legal standards.

1. WSI and the ALJ exceeded the scope of the limited adversarial proceeding to which Edith Johnson was entitled

[31] WSI did not deny Edith Johnson benefits because of any alleged preexisting condition. The sole reason for denial was because WSI classified Johnson's PTSD as a mental injury caused by a mental stimulus. WSI vociferously insisted throughout the proceedings before the ALJ that the sole issue was whether that was the case, going so far as to draft a proposed stipulation, which the ALJ adopted as his order, by which the issues would be limited to that one. The first time WSI mentioned the possibility of a preexisting condition was in its April 13, 2010 Motion to Compel Discovery. It goes beyond "minimal[ly] adversarial" for WSI to change its course after Johnson took reliance on its stipulated issue.

[32] The ALJ acted directly counter to the law of North Dakota, which mandates procedural fairness and a minimal adversarial proceeding, by allowing WSI to litigate issues that it had waived by stipulation. It is an abuse of discretion for the ALJ to enter a discovery order—compelling responses to discovery requests that were not related to the issue to which WSI stipulated—in the face of the legal standard that requires a minimal adversarial process and that doubts be resolved in Johnson's favor.

2. WSI waived issues outside its stipulation

[33] Even if the Court sees the way that WSI litigated this case as being within the procedurally fair, limited adversarial proceeding to which Edith Johnson was entitled as a matter of law, WSI should not be permitted to ignore its stipulation, upon which Johnson reasonably relied. Written stipulations are binding upon the parties who sign them. Rule 11.3, N.D.R.Ct. "Stipulations entered into dealing with important phases of a lawsuit cannot be lightly treated. They are solemn and binding obligations of the parties." Schott v. Enander, 15 N.W.2d 303, 307 (N.D. 1944). See also Rummel v. Rummel, 234 N.W.2d 848, 852 (N.D. 1975) ("Procedural stipulations are facilitating devices that simplify proof or condense procedural requirements in lawsuits.") That is precisely the reason WSI sought the stipulation of issues below. As recognized by the ALJ, "WSI was concerned that the wording of [the original] specification of issues could impose an unnecessary burden on WSI, and rather than address its concerns with the ALJ it chose to enter into a stipulation with [the] claimaint." (Order dated June 1, 2010 at 2, A. at 61.)

[34] In North Dakota, criminal defendants can knowingly waive their right to cross-examination, State v. Olson, 554 N.W.2d 144, 146-147 (N.D. 1996); their right to subpoena witnesses, State v. Slapnicka, 376 N.W.2d 33, 35 (N.D. 1985); their right to a jury trial, State v. Haugen, 384 N.W.2d 651, 653-654 and n.1 (N.D. 1986); their right to appeal, State v. Kraft, 539 N.W.2d 56, 56-57 (N.D. 1995); their right against self-incrimination, State v. Jenson, 333 N.W.2d 686, 696 (N.D. 1983); their right to a speedy trial, State v. Wunderlich, 338 N.W.2d 658, 661 (N.D. 1983); their right to counsel, City

of Fargo v. Rockwell, 1999 ND 125, ¶ 7, 597 N.W.2d 406; and their Miranda rights, North Carolina v. Butler, 441 U.S. 369 (1979).

[35] Similarly, in a civil action, parties can waive their affirmative defenses, Leet v. City of Minot, 2006 ND 191, ¶ 5, 721 N.W.2d 398; personal jurisdiction, Larson v. Dunn, 474 N.W.2d 34, 38-39 (N.D. 1991); lack of service of process, Farm Credit Bank of St. Paul v. Stedman, 449 N.W.2d 562, 564-565 (N.D. 1989); the right to a jury trial, Keller v. Darling, 298 N.W.2d 789, 791 (N.D. 1980); proper venue, Gegelman v. Reiersgaard, 273 N.W.2d 703, 706 (N.D. 1979); and the statute of limitations, Regan Farmers Union Co-op v. Hinkel, 437 N.W.2d 845, 847 (N.D. 1989).

[36] Notwithstanding that parties in true adversarial proceedings such as criminal prosecutions (where, if anything, the criminal defendant is owed constitutional protection from waiving his rights but nevertheless can waive them) and civil actions can waive all of these rights and others, agreeing with the ALJ's conclusion below requires first accepting that WSI, in a proceeding where it is legally barred from being fully adversarial, cannot waive issues—or, as here, can waive issues and then surprise the claimant by litigating them after waiver. That conclusion defies logic. A rational thought process carried out by a reasoning mind cannot reach the conclusion that WSI is incapable of waiving issues of coverage when much greater issues—the right to counsel and the right to a fair trial, for instance—can be waived by any other litigant. WSI argued that a stipulation cannot abrogate a statute. That is not Edith Johnson's position here. WSI's stipulation did not abrogate a statute, but rather waived some of the arguments it could have made under that statute. This waiver no more abrogates a statute

than a criminal defendant's waiver of the right to a jury trial abrogates the United States Constitution.

[37] A rational thought process can reach only one conclusion in light of the law and the facts of this case: WSI was capable of waiving issues outside of the one to which it stipulated, it did waive those other issues through considerable effort on its own part to enter a stipulation to that effect, and it cannot un-waive issues that it has waived after the claimant and her attorney reasonably relied on the waiver. The ALJ abused his discretion by allowing WSI to retract its waiver of those issues at any stage of the proceedings, much less a late stage after Johnson relied on the stipulation and at a time when WSI was making a motion to compel that fell squarely outside the stipulated issue.

F. The ALJ abused his discretion by dismissing Edith Johnson's claim for WSI benefits as a discovery sanction

[38] Edith Johnson's WSI benefits for her work injury were not denied because she was not entitled to them. They were denied simply because she did not provide sufficient discovery responses to WSI on issues that were not properly before the ALJ. If the Supreme Court determines that those issues were not properly before the ALJ, then as explained supra his decision must be reversed because he abused his discretion in deciding the case and entering discovery orders based on issues that were not before him.

[39] However, even if the Supreme Court determines that WSI was entitled to retract its stipulation and un-waive issues, that the ALJ was entitled to abrogate the stipulation of the parties and enter an order compelling Johnson to respond to issues that she was not prepared to respond to because of her reliance on the stipulated issue in the case, and that the ALJ could, within his discretion, make a decision in the case based on

issues that the parties stipulated were not at issue, reversal remains the only appropriate outcome in this appeal. The reason for this is simple: Doubts must be resolved in favor of Edith Johnson. Kallhoff, 484 N.W.2d at 513.

[40] WSI doubted that other issues were before the ALJ. Its employees and even its director all expressed doubt that anything other than whether Johnson's PTSD was a mental injury caused by mental stimulus was apropos to her claim for benefits. Edith Johnson certainly doubted that any other issue would be dispositive of her claim. All of those doubts were resolved by the ALJ against Johnson when he dismissed her claim for failure to provide discovery responses relevant only to issues other than the one that WSI raised in its original denial of her claim.

[41] The ALJ, by resolving doubts against Edith Johnson, violated the legal principles that bound him. His misinterpretation and misapplication of the law are an abuse of discretion that this Court should reverse. Blunt, 2011 ND 127, ¶ 10.

[42] Additionally, the ALJ resolved a further, critical doubt against Edith Johnson. In ordering the sanction that Johnson's claim be dismissed, the ALJ declared that she did not respond to WSI's motion for sanctions. (Order dated October 27, 2010 at 2, A. at 89.) In reality, Johnson filed a motion for reconsideration of the June 1, 2010 order that expanded the specification of issues in the case in response to WSI's motion. (Claimant's Motion to Consider, A. at 87.) The motion to reconsider referred to Johnson's petition for a writ of mandamus in the district court and supporting papers. Ibid. The case before the ALJ was supposed to be a minimally adversarial proceeding, designed for procedural fairness to Edith Johnson. The ALJ nevertheless doubted that

Johnson had responded to WSI's motion for sanctions and resolved that doubt not only against her, but in the most draconian way possible: by dismissing her claim for benefits in its entirety. This dismissal left Edith Johnson with absolutely no WSI coverage for her workplace injury without deciding her entitlement to that coverage.

CONCLUSION

[43] None of the treatment that Edith Johnson received from WSI or the ALJ resembles a minimally adversarial process that is procedurally fair. Such a process would not have allowed for WSI to renege on its stipulation after Johnson took reliance on it, for the ALJ to enter an order compelling discovery responses not relevant to the sole issue that the parties had stipulated to, or for the sanction of dismissal to be entered against Johnson for not complying with a discovery order that she had filed a pending motion for the ALJ to reconsider.

[44] Because the ALJ's dismissal of Edith Johnson's claim for WSI benefits was the product of multiple abuses of discretion and not supported by the law, and in particular because WSI stipulated to the sole issue for decision but reneged on its stipulation and the ALJ improperly allowed WSI to do so, the ALJ's order for dismissal should be reversed and his order compelling Edith Johnson to respond to discovery not relevant to the stipulated issue should be reversed.

[45] Because the ALJ's order of dismissal was based on discovery requests not relevant to the issue before him was an abuse of discretion that ignores North Dakota law, the cause should be remanded to the ALJ for proceedings to decide the one issue that everyone, prior to June 1, 2010, knew was decisive in the case: Whether Edith Johnson's post-traumatic stress disorder was a mental injury arising from a mental stimulus.

[46] At the very least, because the ALJ's order of dismissal was not procedurally fair to Edith Johnson, the cause should be remanded with instructions to the ALJ and to the parties regarding what the specification of issues will be so that Edith Johnson can

respond to WSI's discovery requests in light of the full set of issues that this Court determines the ALJ is permitted to decide.

Dated this 9th day of August, 2011.

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CERTIFICATE OF SERVICE

[47] I hereby certify that, on the 9th day of August, 2011, I served the foregoing document on the following by e-mail under Rule 25(c)(1)(D), N.D.R.App.P.:

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