

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

<b>State of North Dakota by and through Workforce Safety and Insurance,</b>  <b>Appellant,</b>  <b>vs.</b>  <b>Isai Avila,</b>  <b>Appellee,</b>  <b>and</b>  <b>SM Fencing &amp; Energy Services, Inc.,</b>  <b>Respondent.</b>	<b>Supreme Court No.: 20190386</b> <b>Dunn County District Court</b> <b>Civil No.: 2019-CV-00042</b>  <b>ORAL ARGUMENT REQUESTED</b>
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**BRIEF OF APPELLANT NORTH DAKOTA AND ADDENDUM  
WORKFORCE SAFETY AND INSURANCE**

**APPEAL FROM DISTRICT COURT JUDGMENT DATED OCTOBER 31, 2019,  
AND SEPTEMBER 25, 2019, MEMORANDUM OPINION AND ORDER  
AFFIRMING ALJ'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
FINAL ORDER OF ADMINISTRATIVE LAW JUDGE BENJAMIN E. THOMAS  
DATED APRIL 4, 2019  
DUNN COUNTY DISTRICT COURT  
SOUTHWEST JUDICIAL DISTRICT  
THE HONORABLE JAMES D. GION**

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### **STATEMENT OF THE ISSUES**

[1] Whether the ALJ erred in construction and application of N.D.C.C. § 65-05-12.2(11) which only allows for the greater of an award of permanent partial impairment benefits under the American Medical Association's Guides to the Evaluation of Permanent Impairment or an the award under N.D.C.C. § 65-05-12.2(11).

### **REQUEST FOR ORAL ARGUMENT**

[2] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellant Workforce Safety and Insurance ("WSI") requests oral argument. This appeal involves an issue of statutory construction and application of N.D.C.C. § 65-05-12.2 regarding awards of permanent partial impairment benefits. The issue to be addressed is construction and application of N.D.C.C. § 65-05-12.2(11) which provides for permanent impairment awards when there is a "scheduled injury." Oral argument is important to understand how awards of permanent partial impairment are determined and the differences between an impairment awarded based on a combined whole person impairment rating, a scheduled injury award under N.D.C.C. § 65-05-12.2(11), and an award when there is a combined whole body impairment for the same or multiple work related injuries under N.D.C.C. § 65-05-12.2(10) and 65-05-12.2(11).

### **STATEMENT OF THE CASE**

[3] Appellee Isai Avila ("Avila) sustained an injury on February 11, 2015, for which WSI accepted liability and awarded benefits. (C.R.<sup>1</sup> 1-5) The injuries sustained in included visual loss and a head injury. (C.R. 5) WSI subsequently accepted for some

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<sup>1</sup> "C.R." refers to Certificate of Record on Appeal to District Court dated May 22, 2019, filed pursuant to N.D.C.C. § 28-32-44.

additional diagnoses related to the eye, head injury, headaches, a facial bone fracture and cervical spine. (C.R. 6-7, 9, 10-12)

[4] On January 30, 2017, WSI issued a Notice of Decision awarding permanent impairment benefits for the loss of vision of the left eye under N.D.C.C. § 65-05-12.2(11). (Appx. 29) Avila requested reconsideration from that award contending it was “too low.” (Appx. 30) WSI then issued an Administrative Order on April 5, 2017. (Appx. 31-36) Avila requested a hearing from that Order. (Appx. 37)

[5] During the rehearing process the claim was again reviewed by the impairment auditor. (Appx. 80) Based on the review it was determined that Avila undergo an impairment evaluation for permanent impairment. (Appx. 80) After the evaluations were conducted, WSI issued a Notice of Decision on April 4, 2018, confirming no additional award of permanent impairment benefits was due. (Appx. 38-39) Avila disagreed and requested reconsideration. (Appx. 40-42) WSI then issued its May 23, 2018 Order Denying Further Permanent Impairment Benefits. (Appx. 43-49) Avila requested rehearing. (Appx. 50) The matter was set on for hearing on the issue of whether Avila had established entitlement to additional permanent impairment benefits in connection with his February 11, 2015, work injury. (C.R. 56)

[6] Avila and WSI agreed to submit the issue to the ALJ on a stipulated record and written briefs because Avila was not challenging the percentages of impairment that had been determined in the evaluations. (C.R. 729-731) Following briefing, on April 4, 2019, ALJ Benjamin E. Thomas (“ALJ Thomas”) issued Findings of Fact, Conclusions of Law and Order. (Appx. 51-60) The ALJ concluded Avila was entitled to the scheduled injury award for the vision loss (100 PIM previously awarded under N.D.C.C. § 65-05-

12.2(11)) “as well as for the whole body ratings under the sixth edition of the AMA Guides to the Evaluation of Permanent Impairment as follows: 1% for the cervical spine; 1% for the TMJ and facial bone impairment; 1% for acoustic nerve injury; and 12% for traumatic brain injury.” (Conclusion of Law #9, Appx. 57; Order, Appx. 58)

[7] WSI appealed the decision of ALJ Thomas to the District Court, Dunn County, North Dakota. (Appx. 61-63) On September 25, 2019, the Honorable James D. Gion, Dunn County District Court, issued a Memorandum Opinion and Order Affirming the ALJ’s Order. (Appx. 64-71) Order for Judgment was entered October 30, 2019, with Judgment entered October 31, 2019. (Appx. 72-73)

[8] WSI has appealed from the District Court Decision and Judgment to this Court. (Appx. 75-76)

### **STATEMENT OF FACTS**

[9] Avila sustained injuries on February 11, 2015, when he fell on ice and landed on his face for which he filed a claim for benefits with WSI. (C.R. 1) WSI accepted liability for the claim and awarded benefits. (C.R. 5) WSI’s initial acceptance was for vision loss/eye injury and an unspecified concussion. (Id.) WSI subsequently accepted for some additional diagnoses, including OS retina central occlusion artery and OD myopia (C.R. 6) tension headache (C.R. 7) maxillary bone fracture (C.R. 9), cervical strain (C.R. 11), traumatic brain injury/temporomandibular joint disorder/left eyebrow laceration; subdural and epidural hemorrhage (C.R. 11), and total loss of vision in one eye. (C.R. 12) WSI denied liability for anxiety and depression/adjustment disorder/anxiety or ADHD. (C.R. 8)



[10] On January 26, 2017, the claim was audited/reviewed by WSI relating to a permanent impairment award for the vision loss under N.D.C.C. § 65-05-12.2(11). (Appx. 77-79) The audit confirmed that Avila “would qualify for an impairment award per the Scheduled Injury subsection of the Law as per the documentation of Dr. Wojciechowski, there is No Light Perception in the left eye.” (Appx. 78) A “scheduled injury” award relates to an award of permanent impairment benefits for any of the conditions set forth in N.D.C.C. § 65-05-12.2(11). The auditor also noted that under the AMA Guides, loss of vision of an eye would equate to a 16% whole person impairment, which equates to a 15 permanent impairment multiplier of 15 under N.D.C.C. § 65-05-12.2(10). (Appx. 78) However, under the “scheduled injury” subsection of the law, a loss of vision of an eye equates to a permanent impairment multiplier award of 100. See Appx. 79; N.D.C.C. § 65-05-12.2(11)(designating for loss of vision of an eye which equals or exceeds 20/200 corrected – 100 permanent impairment multiplier). The audit recommended an award of 100 permanent impairment multiplier for loss of vision of the left eye under N.D.C.C. § 65-05-12.2(11). (C.R. 62)

[11] WSI issued a Notice of Decision Awarding Permanent Impairment Benefits consistent with the permanent impairment multiplier of 100 under N.D.C.C. § 65-05-12.2(11) which equated to a total award of \$34,000.00. (Appx. 29) Avila requested reconsideration as he believed the impairment was “too low.” (Appx. 30) WSI then issued its Administrative Order dated April 5, 2017, regarding the permanent impairment award of 100 PIM for loss of vision of the left eye under N.D.C.C. § 65-05-12.2(11). (Appx. 31-36) Avila requested rehearing. (Appx. 37)

[12] The claim was again reviewed by the impairment auditor on June 22, 2017 in connection with the rehearing process. (Appx. 80) Based on the review it was determined that Avila should undergo an evaluation for permanent for the accepted head injury, left eye, facial bones and cervical spine because “it is unlikely; however, not impossible that the IW would reach an impairment great enough, according to the 6<sup>th</sup> Edition of the Guides in regards to the work related injury which would result in an additional monetary impairment award.” (Appx. 80) What the auditor is referring to is that if the combined impairment for the loss of vision and the other accepted conditions from the work injury would result in an impairment of greater than 35% whole person, Avila would be entitled to an additional award of permanent impairment benefits. (Appx. 78) A combined whole person impairment of 35% would equate to a permanent impairment multiplier of 100 under N.D.C.C. § 65-05-12.2(10). A combined whole person impairment of 36% would equate to a permanent impairment multiplier of 110 under N.D.C.C. § 65-05-12.2(10). Under N.D.C.C. § 65-05-12.2(11) “if any of the amputations of losses set out in this subsection combine with other impairments for the same work-related injury or condition, the organization shall issue an impairment award based on the greater of the permanent impairment multiplier allowed for the combined rating established under the sixth edition of the American medical association’s “Guides to the Evaluation of Permanent Impairment” or the permanent impairment multiplier set forth in this subsection.”

[13] A referral was made for an evaluation for the head injury (neuropsych), left eye, facial soft tissue and cervical spine. (C.R. 44) Avila underwent those permanent impairment evaluations. (Appx. 71-82, 83-89, 99-117) A further audit was performed

relating to the permanent impairment evaluation reports. (Appx. 118-128) Based on that audit it was determined Avila had the following impairments under the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, which combined equaled a 29% whole person impairment:

16% loss of vision in left eye

12% traumatic brain injury (under Central Nervous System chapter)

1% for cervical spine

1% for facial disfigurement

1% for facial bone/hearing

(Appx. 118-128) Under N.D.C.C. § 65-05-12.2(1), a 29% whole person impairment would entitle Avila to a permanent impairment multiplier of 45. However based on the scheduled injury provision for the loss of vision (N.D.C.C. § 65-05-12.2(11)), Avila had already been awarded 100 permanent impairment multiplier. (Appx. 129) Thus, WSI determined Avila was not entitled to a further award of permanent impairment benefits. (Appx. 128) Avila was awarded the greater impairment of 100 permanent impairment multiplier under N.D.C.C. § 65-05-12.2(11) rather than the combined whole person impairment of 29% under N.D.C.C. § 65-05-12.2(10) for his work related conditions as a result of the injury of February 11, 2015.

[14] WSI then issued a Notice of Decision on April 4, 2018, confirming no additional award of permanent impairment benefits was due. (Appx. 38-39) Avila disagreed and requested reconsideration. (Appx. 40-42) WSI then issued its May 23, 2018 Order Denying Further Permanent Impairment Benefits. (Appx. 43-49) Avila again requested rehearing. (Appx. 50) The matter was set on for hearing on the issue of

whether Avila had established entitlement to additional permanent impairment benefits in connection with his February 11, 2015, work injury. (C.R. 56)

[15] Avila and WSI agreed to submit the issue to the ALJ on a stipulated record and written briefs because Avila determined he would not challenge the percentages of impairment for the conditions that had been evaluated for permanent impairment. (C.R. 729-731) A briefing schedule was set. (C.R. 732-733) Briefs were submitted to the ALJ. (C.R. 734-739, 740-748) On April 4, 2019, ALJ Thomas issued Findings of Fact, Conclusions of Law and Order. (Appx. 51-60) ALJ Thomas concluded Avila was entitled to the scheduled injury award for the vision loss (100 PIM awarded under N.D.C.C. § 65-05-12.2(11)) “as well as for the whole body ratings under the sixth edition of the AMA Guides to the Evaluation of Permanent Impairment as follows: 1% for the cervical spine; 1% for the TMJ and facial bone impairment; 1% for acoustic nerve injury; and 12% for traumatic brain injury. (Conclusion of Law #9, Appx. 57; Order, Appx. 58) The ALJ’s analysis was as follows:

5. Avila argues that he sustained “one work accident but suffered numerous bodily injuries” arising from that accident. (Claimant’s Brief, p.5) As such, Avila argues § 65-05-12.1(11) is not controlling because the statute only refers to impairments for the same “work-related injury or condition.” That argument has merit because, clearly, the scheduled injury award of 100 PIM was based on Avila’s loss of vision, only. The 29% WP permanent impairment award involved additional “injuries or conditions.” Moreover, Avila is not seeking a duplicate award of benefits for his loss of vision. Instead, Avila seeks only “the scheduled award of 100 PIM due to his vision loss alone, together with an award for the separate work-related injuries or conditions, namely, ‘1% for the cervical spine (R.50, finding 9; 1% for TMJ and facial bone impairment (R.50, finding 10); 1% for acoustic injury (R.50, finding 11); and 12% for TBI (R.50, finding 12).’”

6. The plain language of N.D.C.C. § 65-05-12.2(11) states that it is only applicable to losses that combined with other impairments for the same work-related injury or condition. Clearly, the injuries that Avila sustained to his brain, spine and face are not the “same” as the injury that he

sustained to his left eye. Moreover, if N.D.C.C. § 65-05-12.2(11) was applied to Avila's case, as WSI proposes, the practical effect would be that Avila would receive no permanent impairment benefits whatsoever for injuries that he sustained to his brain, cervical spine and face.

...

8. Avila had one work accident but suffered numerous bodily injuries. Each injury must be compensated separately. A portion of Avila's 29% AMA Guides impairment was based on Avila's loss of vision in left eye. (Ex. 39, p. 118) Since this is the "same work-related injury or condition" for which Avila received the 100 PIM scheduled injury award, the "loss of vision in left eye" component of the 29% WP impairment must be subtracted from the 29% impairment award for purposes of determining Avila's entitlement to additional permanent impairment benefits.

9. For the reasons stated above, Avila is entitled to the scheduled award of PIM due to the vision loss alone as well as for the whole-body ratings under the sixth edition of the AMA Guides to the Evaluation of Permanent Partial Impairment as follows: 1% for the cervical spine; 1% for the TMJ and facial bone impairment; 1% for acoustic nerve injury; and 12% for traumatic brain injury.

10. N.D.C.C. § 65-05-12.2(11) applies to cases involving "impairments for the same work-related injury or condition." In the present case, the additional PPI benefits sought by Avila are not "for the same work-related injury or condition." As such, N.D.C.C. § 65-05-12.2(11) is not applicable.

(Appx. 56-58)

[16] WSI filed an appeal of the decision of ALJ Thomas to the District Court, Dunn County, North Dakota. (Appx. 61-63) The District Court issued its Memorandum Opinion and Order Affirming the ALJ's Order on September 25, 2019. (Appx. 64-71) The District Court stated that: [w]hile the Court understands WSI's argument and sees their logic, the Court finds the ALJ's interpretation to better comport with the plain language of the statute." (Appx. 71) It is from this decision and the Judgment entered pursuant to this decision that WSI has taken this appeal. (Appx. 75-76)

## **LAW AND ARGUMENT**

### **A. SCOPE OF REVIEW ON APPEAL.**

[17] There are no factual disputes in this appeal; rather, it only involves a question of law, specifically construction and application of N.D.C.C. § 65-05-12.2(11). “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. In addition, “[t]he 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).

[18] 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. “When the meaning of the statute is clear on its face, there is no room for construction.” Baity ¶ 12, 687 N.W.2d at 718. As this Court has reaffirmed on numerous occasions:

When a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442 N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). See also Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 19, 584 N.W.2d 530, 535 (J. VandeWalle, dissenting). Also, when a statute is clear and unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. § 1-02-05; see Bjerke v. North Dakota Workers Compensation Bureau, 1999 ND 180, 599 N.W.2d 329. Therefore, the foregoing principles should guide proper construction of N.D.C.C. § 65-05-12.2(11).

**B. THE ALJ DID NOT PROPERLY CONSTRUE AND APPLY N.D.C.C. § 65-05-12.2(11) AND THEREFORE THE ALJ’S DECISION OF APRIL 4, 2019, MUST BE REVERSED.**

[19] The extent of Avila's permanent impairment is not in dispute. Avila did not submit any evidence to refute the percentages of permanent impairment determined under the AMA Guides to the Evaluation of Permanent Impairment, 6<sup>th</sup> edition, that being: 16% loss of vision in left eye; 12% traumatic brain injury (under Central Nervous System chapter); 1% for cervical spine; 1% for facial disfigurement; 1% for facial bone/hearing.

[20] Under North Dakota law, permanent impairment is required to be determined under the American medical association's "Guides to the Evaluation of Permanent Impairment," Sixth Edition. N.D.C.C. § 65-05-12.2(5); Workforce Safety and Insurance v. Beaulieu, 2018 ND 213 ¶ 15, 917 N.W.2d 211. After the impairment for each accepted condition is determined, these amounts are "combined" under the AMA Guides Combined Values Chart, to determine the percentage of whole body impairment. See AMA Guides, 6<sup>th</sup> Edition, at pp. 604-606; Shiek v. North Dakota Workers Compensation Bureau, 2002 ND 85 ¶ 20, 643 N.W.2d 72 (noting that "the amount of a whole-body permanent impairment award must be based on the combined value of all the claimant's whole-body permanent impairments, even if the impairments are to different body parts."). That whole body impairment percentage then determines the amount of permanent impairment multiplier in N.D.C.C. § 65-05-12.2(10) for calculation of the impairment award. See Shiek, 2018 ND 213 ¶ 23, 643 N.W.2d 721 (discussing how impairments for different body parts are combined in order to determine amount of permanent impairment award). In this case, the combined whole body impairment for the vision, head injury, cervical spine, facial disfigurement, facial bone/hearing impairments was 29% whole person:



PHYSICIAN: 29%

In order to calculate Mr. Avila's total impairment rating, one, therefore, combines the 16% whole person impairment from the visual system with the 12 percent whole person impairment rating from the central nervous system traumatic brain injury disorder, with the 1 percent whole person impairment rating from the cervical spine, with the 1 percent impairment rating to the facial disfigurement abnormality, and the 1 percent whole person impairment from the hearing issues. When one performs this algebraic function utilizing the combined values table in the rear of the Guides, this equates to a 29 whole person permanent partial impairment rating. . . . .

AUDIT: 15% WP (vision/left eye) C 12% WP (CNS) = 26% WP (cervical) = 27% WP C 1% WP (facial disfigurement/scar) = 28% WP C 1% WP (facial bone/hearing) = 29% WP

(Appx. 127) Applying a 29% whole person impairment to N.D.C.C. § 65-05-12.2(10), it would equate to a permanent impairment multiplier of 45. (Appx. 129) WSI did not award additional permanent impairment benefits to Avila because he had already received 100 PIM under N.D.C.C. § 65-05-12.2(11). (Appx. 129)

N.D.C.C. § 65-05-12.2(11) provides, in pertinent part:

**If any of the amputations or losses set out in this subsection combine with other impairments for the same work-related injury or condition, the organization shall issue an impairment award based on the greater of the permanent impairment multiplier allowed for the combined rating established under the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment" or the permanent impairment multiplier set forth in this subsection.**

(Emphasis supplied.) WSI's awarded permanent impairment under N.D.C.C. § 65-05-12.2(11) because it was the "greater of" the impairment under that statute (100 permanent impairment multiplier) rather than the "combined rating" for all impairments under the 6<sup>th</sup> edition for the February 11, 2015, work related injury (29% whole person which equated to 45 permanent impairment multiplier).

[21] The ALJ concluded that Avila was entitled to both the scheduled injury award under N.D.C.C. § 65-05-12.2(11) and an amount equal to the combined impairments for the other conditions from the work injury that had been evaluated (less the amount for the vision loss). The ALJ's award is inconsistent with N.D.C.C. § 65-05-12.2(11) which provides for an award based on the "greater of the permanent impairment multiplier allowed for the combined rating established under the sixth edition of the American medical association's 'Guides to the Evaluation of Permanent Impairment' or the permanent impairment multiplier set forth in this subsection." Therefore, ALJ's decision, therefore, must be reversed.

[22] N.D.C.C. § 65-05-12.2(11) provides for awards of permanent impairment benefits for certain "scheduled injuries." The statute outlines awards for amputations as well as loss of vision and loss of an eye. The statute provides that if an evaluation for an amputation or loss of an eye or vision results would result in an award that is less than the permanent impairment multiplier identified in that schedule, WSI "shall pay an award equal to the permanent impairment multiplier" set out in that schedule. An example of how this works can be taken from this case.

[23] When the claim was initially reviewed by the permanent impairment auditor for eligibility for a scheduled injury award for the loss of vision, the auditor noted that the loss of vision impairment under the AMA Guides would be 16% whole person.<sup>2</sup> (Appx. 78) If one were to apply that impairment to N.D.C.C. § 65-05-12.2(10), a 16% whole person impairment would equate to an award of 15 permanent impairment multiplier. However, because the permanent impairment multiplier is higher under

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<sup>2</sup> This was confirmed to be the amount under the AMA Guides when the evaluation of permanent impairment was conducted. (Appx. 112, 126)

N.D.C.C. § 65-05-12.2(11) for the loss of vision, i.e., 100 permanent impairment multiplier, Avila was awarded that amount by WSI under that subsection. (Appx. 79)

[24] The permanent impairment audit noted that the Avila would need to exceed an impairment of 35% whole person to be entitled to a further award. (Appx. 78) A 35% whole person impairment would equate to 100 PIM under N.D.C.C. § 65-05-12.2(10). What the auditor was referring to, and quotes in that audit, is the part of N.D.C.C. § 65-05-12.2(11) quote above. The plain language of N.D.C.C. § 65-05-12.2(11) provides that when a “loss” set out in that statute “combines with other impairments for other conditions for the same work-related injury,” WSI can award either the permanent impairment multiplier under N.D.C.C. § 65-05-12.2(11) (as it did in this case), or the permanent impairment multiplier allowed for the “combined rating” established under the sixth edition of the AMA Guides, whichever is higher. In this case, the “combined rating” for all impairments, including that of the loss of vision, equates to 29% whole person, or an award of 45 permanent impairment multiplier under N.D.C.C. § 65-05-12.2(10). Because the award under N.D.C.C. § 65-05-12.2(11) is greater than an award for all the combined impairments for the injury, WSI awarded the 100 permanent impairment multiplier under that provision. WSI’s construction and application of N.D.C.C. § 65-05-12.2(11) is consistent with its plain language and how permanent impairments for work injuries are combined under the AMA Guides in order to determine a whole body impairment for an award.

[25] But for enactment of N.D.C.C. § 65-05-12.2(11), Avila would have received an award of 45 permanent impairment multiplier under N.D.C.C. § 65-05-12.2(10) for his combined 29% whole person impairment for all of his work related

conditions for his injury of February 11, 2015. However, because he has an injury that is set out in N.D.C.C. § 65-05-12.2(11), Avila was entitled to the greater of what his combined whole person impairment would be for all conditions or the scheduled injury award. Avila is not entitled to both, as the ALJ concluded. The plain language of N.D.C.C. § 65-05-12.2(11) is clear that it is the higher of the two that is awarded. Under the ALJ's construction, Avila would receive the 100 PIM for his vision loss under N.D.C.C. § 65-05-12.2(11) and an additional permanent impairment for the combined impairment for the brain injury (12%) combined with the cervical spine (1%), combined with the 1% for the facial disfigurement/scar, combined with the 1% for the facial bone/hearing, for a combined rating of 15% whole person. A 15% whole person impairment equates to 10 PIM under N.D.C.C. § 65-05-12.2(10). It is only because those conditions combine to an impairment of greater than 14% which is the threshold for an award under N.D.C.C. § 65-05-12.2(10). If those impairments had combined for an impairment less than 14%, even under the ALJ's construction no additional compensation would be due.

[26] In his decision, the ALJ focused on and makes a distinction between work related injury or condition and a work-related incident, and contends that if N.D.C.C. § 65-05-12.2(11) applied the statute would have said "incident." (Conclusion of Law #7, Appx. 56) What the ALJ has done in construing and applying N.D.C.C. § 65-05-12.2(11), however, is to completely ignore the plain language of the statute which where it states that if any "loss" under N.D.C.C. § 65-05-12.2(11) **combine with other impairments** the injured worker receives only the **greater of** the impairment under N.D.C.C. § 65-05-12.2(11) or the "combined rating established under the sixth edition of the American

medical association's 'Guides to the Evaluation of Permanent Impairment' or the permanent impairment multiplier set forth in this subsection." (Emphasis supplied.) The ALJ's decision does not consider and apply all of the words of the statute. In this case, the vision loss combined with other impairments for this same work related injury of February 11, 2015. As a result, Avila has a combined 29% whole person impairment under the AMA Guides to the Evaluation of Permanent Impairment. In this situation, Avila is entitled to the greater of the impairment for the vision loss under N.D.C.C. § 65-05-12.2(11) of 100 permanent impairment multiplier or the combined rating under the sixth edition of the AMA Guides, which is 29% whole person or an award of 45 permanent impairment multiplier. WSI awarded the greater impairment of 100 permanent impairment multiplier. Statutes are interpreted "as a whole to harmonize" and give "meaning and effect to every word, phrase and sentence" in the statute. Witcher, 1999 ND 225 ¶ 11, 602 N.W.2d at 708; First State Bank v. Moen Enterprises, 529 N.W.2d 887, 891 (N.D. 1995). The ALJ's interpretation violates this principle.

[27] The language of N.D.C.C. § 65-05-12.2(11) when it refers to the amputation or losses set out in that subsection combining with "other impairments for the same work-related injury or condition" plainly refers to the combining issue to arrive at a whole body impairment for the work injury in order to compare what the impairment award would be under N.D.C.C. § 65-05-12.2(10) if utilizing the impairments determined under the AMA Guides with what the award is under N.D.C.C. § 65-05-12.2(11). Further, referring to work related injury or condition is consistent with Shiek, 2002 ND 85 ¶ 24, 643 N.W.2d 721, in which this Court held that WSI must determine a "single combined whole-body impairment percentage" for all impairments.

[28] WSI's construction and application of N.D.C.C. § 65-05-12.2(11) is consistent with the plain language of the statute. The ALJ failed to consider each and every word within the statute and substituted a word that does not exist in the statute in an effort to reach the result he did. The Court has noted that deference is given to the interpretation of the administrative agency responsible for enforcement of that, as long as that interpretation does not contradict the statutory language. Industrial Contractors, Inc. v. Taylor, 2017 ND 183 ¶ 22, 899 N.W.2d 680. Applying the foregoing principles to construction, therefore, requires that this Court reverse the District Court's Decision, which had affirmed the ALJ's April 4, 2019, Findings of Fact, Conclusions of Law and Order of April 4, 2019 and enter its Order affirming WSI's May 23, 2018, Order which awarded 100 permanent impairment multiplier for Avila's work related injury of February 11, 2015, under N.D.C.C. § 65-05-12.2(11).

### **CONCLUSION**

[29] For the foregoing reasons, WSI requests that the Court reverse the decision of the District Court which affirmed the ALJ decision dated April 4, 2019 because that decision is not in accordance with the law. WSI requests that this Court enter its Order affirming WSI's award of 100 PIM under N.D.C.C. § 65-05-12.2(11).

DATED this 14<sup>th</sup> day of January, 2020.

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### **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals twenty (22).

DATED this 14<sup>th</sup> day of January, 2020.

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## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

<b>State of North Dakota by and through Workforce Safety and Insurance,</b>  <p style="text-align: center;"><b>Appellant,</b></p> <p style="text-align: center;">vs.</p> <b>Isai Avila,</b>  <p style="text-align: center;"><b>Appellee,</b></p> <p style="text-align: center;">and</p> <b>SM Fencing &amp; Energy Services, Inc.,</b>  <p style="text-align: center;"><b>Respondent.</b></p>	<b>Supreme Court No.: 20190386 Dunn County District Court Civil No.: 2019-CV-00042</b>  <p style="text-align: center;"><b>ORAL ARGUMENT REQUESTED</b></p>
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**BRIEF OF APPELLANT NORTH DAKOTA AND ADDENDUM  
WORKFORCE SAFETY AND INSURANCE**

**APPEAL FROM DISTRICT COURT JUDGMENT DATED OCTOBER 31, 2019,  
AND SEPTEMBER 25, 2019, MEMORANDUM OPINION AND ORDER  
AFFIRMING ALJ'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
FINAL ORDER OF ADMINISTRATIVE LAW JUDGE BENJAMIN E. THOMAS  
DATED APRIL 4, 2019  
DUNN COUNTY DISTRICT COURT  
SOUTHWEST JUDICIAL DISTRICT  
THE HONORABLE JAMES D. GION**

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**65-05-11. Maximum and minimum compensation allowances - Total and partial disability.**

Repealed by S.L. 1969, ch. 558, § 6.

**65-05-12. Permanent impairment - Compensation - Time paid.**

Repealed by S.L. 1995, ch. 624, § 2.

**65-05-12.1. Permanent impairment.**

Repealed by S.L. 1995, ch. 624, § 2.

**65-05-12.2. Permanent impairment - Compensation - Time paid.**

A permanent impairment is not intended to be a periodic payment and is not intended to reimburse the employee for specific expenses related to the injury or wage loss. If a compensable injury causes permanent impairment, the organization shall determine a permanent impairment award on the following terms:

1. The organization shall calculate the amount of the award by multiplying thirty-five percent of the average weekly wage in this state on the date of the impairment evaluation, rounded to the next highest dollar, by the permanent impairment multiplier specified in subsection 10.
2. The organization shall notify the employee by certified mail, to the last-known address of the employee, when that employee becomes potentially eligible for a permanent impairment award. After the organization has notified the employee, the employee shall file, within one hundred eighty days from the date the employee was notified, a written request for an evaluation for permanent impairment. Failure to file the written request within the one hundred eighty-day period precludes an award under this section.
3. An injured employee is entitled to compensation for permanent impairment under this section only for those findings of impairment that are permanent and which were caused by the compensable injury. The organization may not issue an impairment award for impairment findings due to unrelated, noncompensable, or pre-existing conditions, even if these conditions were made symptomatic by the compensable work injury, and regardless of whether section 65-05-15 applies to the claim.
4. An injured employee is eligible for an evaluation of permanent impairment only when all conditions caused by the compensable injury have reached maximum medical improvement. The injured employee's doctor shall report to the organization the date an employee has reached maximum medical improvement and any evidence of impairment of function the injured employee has after that date. If the report states that the employee is potentially eligible for a permanent impairment award, the organization shall conduct a review and provide notice to the employee as provided by subsection 2. If the injured employee files a timely written request under subsection 2, the organization shall schedule an impairment evaluation by a doctor qualified to evaluate the impairment.
5. A health care provider evaluating permanent impairment shall include a clinical report in sufficient detail to support the percentage ratings assigned. The organization shall adopt administrative rules governing the evaluation of permanent impairment. These rules must incorporate principles and practices of the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment" modified to be consistent with North Dakota law, to resolve issues of practice and interpretation, and to address areas not sufficiently covered by the guides. Subject to rules adopted under this subsection, impairments must be evaluated under the sixth edition of the guides.
6. The organization shall deduct, on a permanent impairment multiplier basis, from an award for impairment under this section, any previous impairment award under the workers' compensation laws of any jurisdiction.

7. An injured employee is not entitled to a permanent impairment award due solely to pain.
8. Other than an award identified in subsection 11, an award may not be issued unless specifically identified and quantified within the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment".
9. If an employee dies, the right to any compensation payable pursuant to an impairment evaluation previously requested by the employee under subsection 2, which remains unpaid on the date of the employee's death, survives and passes to the employee's dependent spouse, minor children, parents, or estate, in that order. If the employee dies, only those findings of impairment which are objectively verifiable such as values for surgical procedures and amputations may be considered in a rating for impairment. Impairment findings not supported by objectively verifiable evidence may not be included in a rating for impairment. The deceased employee's dependents or representatives shall request an impairment award under this subsection within one year from the date of death of the employee.
10. If the injury causes permanent impairment, the award must be determined based on the percentage of whole body impairment in accordance with the following schedule:

Impairment:	Permanent impairment multiplier of:
1 to 13 percent	0
14 percent	10
15 percent	10
16 percent	15
17 percent	15
18 percent	20
19 percent	20
20 percent	25
21 percent	25
22 percent	30
23 percent	30
24 percent	30
25 percent	35
26 percent	35
27 percent	35
28 percent	40
29 percent	45
30 percent	50
31 percent	60
32 percent	70
33 percent	80
34 percent	90
35 percent	100
36 percent	110
37 percent	120
38 percent	130
39 percent	140
40 percent	150
41 percent	160
42 percent	170
43 percent	180
44 percent	190
45 percent	200
46 percent	210
47 percent	220
48 percent	230
49 percent	240

50 percent	260
51 percent	280
52 percent	300
53 percent	320
54 percent	340
55 percent	360
56 percent	380
57 percent	400
58 percent	420
59 percent	440
60 percent	465
61 percent	490
62 percent	515
63 percent	540
64 percent	565
65 percent	590
66 percent	615
67 percent	640
68 percent	665
69 percent	690
70 percent	715
71 percent	740
72 percent	765
73 percent	790
74 percent	815
75 percent	840
76 percent	865
77 percent	890
78 percent	915
79 percent	940
80 percent	965
81 percent	990
82 percent	1015
83 percent	1040
84 percent	1065
85 percent	1090
86 percent	1115
87 percent	1140
88 percent	1165
89 percent	1190
90 percent	1215
91 percent	1240
92 percent	1265
93 percent	1290
94 percent	1320
95 percent	1350
96 percent	1380
97 percent	1410
98 percent	1440
99 percent	1470
100 percent	1500

11. An amputation of a finger or toe at the level of the distal interphalangeal joint or proximal to that joint, or the thumb or the great toe at the interphalangeal joint or proximal to that joint, which is determined to result in a whole body impairment of less than fourteen percent and which is not identified in the following schedule, is payable as a fourteen percent impairment. If an evaluation for the loss of an eye or for an

amputation results in an award that is less than the permanent impairment multiplier identified in the following schedule, the organization shall pay an award equal to the permanent impairment multiplier set out in the following schedule:

For amputation of:	Permanent impairment multiplier of:
A thumb	65
The second or distal phalanx of the thumb	28
The first finger	40
The middle or second phalanx of the first finger	28
The third or distal phalanx of the first finger	22
The second finger	30
The middle or second phalanx of the second finger	22
The third or distal phalanx of the second finger	14
The third finger	20
The middle or second phalanx of the third finger	16
The fourth finger	16
The middle or second phalanx of the fourth finger	12
The leg at the hip	234
The leg at or above the knee	195
The leg at or above the ankle	150
A great toe	30
The second or distal phalanx of the great toe	18
Any other toe	12
For loss of:	Permanent impairment multiplier of:
An eye	150
Vision of an eye which equals or exceeds 20/200 corrected	100

The award for the amputation of more than one finger of one hand may not exceed an award for the amputation of a hand. The award for the amputation of more than one toe of one foot may not exceed an award for the amputation of a foot. If any of the amputations or losses set out in this subsection combine with other impairments for the same work-related injury or condition, the organization shall issue an impairment award based on the greater of the permanent impairment multiplier allowed for the combined rating established under the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment" or the permanent impairment multiplier set forth in this subsection.

12. If there is a medical dispute regarding the percentage of an injured employee's permanent impairment, all relevant medical evidence must be submitted to an independent health care provider who has not treated the employee and who has not been consulted by the organization in relation to the injury upon which the impairment is based. The organization shall establish a list of health care providers who have the training and experience necessary to conduct an evaluation of permanent impairment and to apply the sixth edition of the American medical association's "Guides to the Evaluation of Permanent Impairment". The organization shall define, by rule, the process by which the organization shall choose an independent health care provider or health care providers to review a disputed permanent impairment evaluation or rating. The decision of the independent health care provider or health care providers chosen under this process is presumptive evidence of the degree of permanent impairment of the employee which can only be rebutted by clear and convincing evidence. This subsection does not impose liability on the organization for an impairment award for a rating of impairment for a body part or condition the organization has not determined to be compensable as a result of the injury. The employee bears the expense of witness fees of the independent health care provider or health care providers if the employee disputes the findings of the independent health care provider or health care providers.
13. An attorney's fees are not payable unless there is a bona fide dispute as to the percentage of the employee's permanent impairment or unless there is a dispute as to

the employee's eligibility for an award for permanent partial impairment. An attorney's fees payable in connection with a permanent impairment dispute may not exceed twenty percent of the additional amount awarded upon final resolution of the dispute, subject to the maximum fees established pursuant to section 65-02-08.

14. An attorney may not seek or obtain from an employee through a contingent fee arrangement, or on a percentage basis, costs or fees payable in connection with the award or denial of compensation for permanent impairment. A permanent impairment award is exempt from the claims of creditors, including an employee's attorney, except as provided by section 65-05-29.
15. If an injured employee qualifies for an additional award and the prior award was based upon the number of weeks, the impairment multiplier must be used to compare against the prior award of weeks in determining any additional award.

**65-05-13. Scheduled injuries - Permanent loss of member - Compensation - Time compensation payable.**

Repealed by S.L. 1995, ch. 624, § 2.

**65-05-14. Scheduled injuries - Partial loss of use of member - Weekly compensation time - Compensation payable.**

Repealed by S.L. 1995, ch. 624, § 2.

**65-05-15. Aggravation awards.**

When a compensable injury combines with a noncompensable injury, disease, or other condition, the organization shall award benefits on an aggravation basis, on the following terms:

1. In cases of a prior injury, disease, or other condition, known in advance of the work injury, which has caused previous work restriction or interference with physical function the progression of which is substantially accelerated by, or the severity of which is substantially worsened by, a compensable injury, the organization shall pay benefits during the period of acute care in full. The period of acute care is presumed to be sixty days immediately following the compensable injury, absent clear and convincing evidence to the contrary. Following the period of acute care, the organization shall pay benefits on an aggravation basis.
2. If the progression of a prior compensable injury is substantially accelerated by, or the severity of the compensable injury is substantially worsened by a noncompensable injury, disease, or other condition, the organization shall pay benefits on an aggravation basis.
3. The organization shall pay benefits on an aggravation basis as a percentage of the benefits to which the injured worker would otherwise be entitled, equal to the percentage of cause of the resulting condition that is attributable to the compensable injury. Benefits payable on an aggravation basis are presumed to be payable on a fifty percent basis. The party asserting a percentage other than the presumed fifty percent may rebut the presumption with clear and convincing evidence to the contrary.
4. When an injured worker is entitled to benefits on an aggravation basis, the organization shall still pay costs of vocational rehabilitation, burial expenses under section 65-05-26, travel, other personal reimbursement for seeking and obtaining medical care under section 65-05-28, and dependency allowance on a one hundred percent basis.

**65-05-16. Death benefits payable.**

1. The organization may pay benefits under this chapter in the case of the death of an injured employee as the direct result of an injury sustained in the course of the injured employee's employment when:
  - a. If there has been no disability preceding death, the death occurs within one year after the date of the injury;

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

<b>State of North Dakota, by and through Workforce Safety and Insurance,</b>	<b>Supreme Court No. 20190386 Dunn Co. District Court Civil No.: 2019-CV-00042</b>
<b>Appellant,</b>	
<b>vs.</b>	<b>AFFIDAVIT OF ELECTRONIC SERVICE</b>
<b>Isai Avila,</b>	
<b>Appellee,</b>	
<b>and</b>	
<b>SM Fencing &amp; Energy Services, Inc.,</b>	
<b>Respondent.</b>	

STATE OF NORTH DAKOTA       )  
  )ss.  
COUNTY OF CASS                )

Melany J. Strendin, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that she served the attached:

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

**APPENDIX OF APPELLANT NORTH DAKOTA  
WORKFORCE SAFETY AND INSURANCE**

on the following persons:

**SM Fencing & Energy Serv., Inc.  
11074 32 E Street SW  
Dickinson, ND 58601**

by depositing in the United States Post Office at Fargo, North Dakota, on January 14, 2020, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address, and furthermore, upon:

**Dean J. Haas**

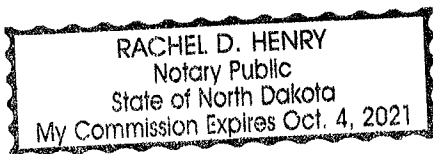
**dhaas@bismarcklaw.com**

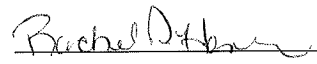
**VIA E-MAIL** to each person above named at the above e-mail address.

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

  
Melany J. Strendin

SUBSCRIBED AND SWORN to before me on January 14, 2020.



  
Notary Public