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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota by and through North Dakota Workforce Safety and Insurance, Plaintiff and **Appellee,** **vs.** **Boechler, P.C., a North Dakota Professional Corporation, and Jeanette Boechler, individually,** Defendants and**Appellants.**	**Supreme Court No.: 20210225** **Cass County District Court** **Civil No.: 09-2020-CV-2097** **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT JUDGMENT DATED JUNE 11, 2021
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE TRISTAN VAN de STREEK

Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544
janderson@nilleslaw.com
ATTORNEYS FOR APPELLEE

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STATEMENT OF THE ISSUES

[1] Whether the imposition of penalties under N.D. Admin. R. 92-01-02-14(7) for failure to timely submit payroll reports; under N.D.C.C. § 65-04-33(6)(c) for failure to respond to requests to supply information; and N.D.C.C. § 65-04-33(6)(a) for failure to submit payroll report violate procedural due process, substantive due process, or the excessive fines clause under the North Dakota and United States Constitutions.

[2] Whether the District Court's correctly dismissed Count II of Plaintiff's Complaint related to personal liability of Jeanette Boechler under N.D.C.C. § 65-04-26.1 without prejudice.

REQUEST FOR ORAL ARGUMENT

[3] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellee Workforce Safety and Insurance ("WSI") requests oral argument. This appeal involves constitutional challenges to imposition of penalties by WSI on employer accounts and application of N.D.C.C. § 65-04-26.1 regarding Notice to be issued prior to imposition of personal liability for unpaid premiums. WSI believes oral argument will assist the Court in understanding the factual background and rationale for imposition of the penalties and legal issues on appeal.

STATEMENT OF THE CASE

[4] On March 6, 2020, WSI commenced a collection action against Boechler, P.C. and Jeanette Boechler by service of a Summons and Complaint. (Appx. 8-10) The action sought collection of unpaid workers compensation premium in the amount of $261.99 for the period July 1, 2018, through June 30, 2019, plus penalties for failure to respond to requests for documentation by WSI to utilize in the reconciliation of the account, penalty for failure to submit a payroll report, and advance premium for the period July 1, 2019, through

June 30, 2020. WSI sought entry of judgment for personal liability against Defendant Jeanette Boechler for unpaid premiums and penalties under N.D.C.C. § 65-04-26.1. Lastly, WSI sought an injunction pursuant to N.D.C.C. § 65-04-27.1 to preclude operating Boechler, P.C. with employees without workers compensation coverage. An Answer to the Complaint was served in which Appellants admitted Paragraphs I, II and II of Count 1 of WSI's Complaint, but denied all other allegations. (Appx. 11)

[5] WSI filed a Motion for Summary Judgment. (Appx. 12-31) Following additional time for discovery, Appellants submitted a response to WSI's Motion. (Appx. 60-74) WSI submitted a Response to the Memorandum opposing summary judgment, with an additional Affidavit in Support. (Appx. 75-145)

[6] On February 24, 2021, the District Court, the Honorable Tristan Van de Streek entered an Order Granting in Part Motion for Summary Judgment. (Appx. 32-44) The Court granted summary judgment on Count I of WSI's Complaint for unpaid premiums, penalties, and interest in the amount of $11,661.99; denied summary judgment on Count II as to personal liability under N.D.C.C. § 65-04-26.1; and granting summary judgment on Count III of WSI's Complaint seeking injunctive relief. (Id.)

[7] Following a court trial held April 20, 2021, on Count II of WSI's Complaint (Appx. 6), and post-trial briefing (Appx. 146-156), the Court entered its Order Clarifying Dismissal of Count II regarding personal liability under N.D.C.C. § 65-04-26.1(3) without prejudice. (Appx. 56) Order for Judgment and Judgment were entered June 11, 2021. (Appx. 57-59) This appeal followed. (Appx. 157-160)

STATEMENT OF FACTS

[8] Boechler, P.C. had failed to submit a payroll report to WSI since 2004. (Appx. 92) In October of 2018, after attempting to contact Boechler, P.C. and Jeanette Boechler regarding the payroll report for the employer account, WSI processed the account for the period July 1, 2017 to June 30, 2018, using data submitted to Job Service of North Dakota. (Appx. 92, 113) A Premium Billing Detail outlining the reconciliation and advance premium billing for the advance period July 1, 2018, to June 30, 2019, in the amount of $250.00 accompanied the notice. (Appx. 114)

[9] On June 17, 2019, Boechler, P.C. was notified that its annual payroll reporting period July 1, 2018, to June 30, 2019, was due by July 31, 2019. (Appx. 95, 105) Further reminders were sent on August 5, 2019, and August 19, 2019. (Appx. 95, 106, 107) On August 20, 2019, Boechler, P.C. was notified that the account had been assessed a $100 payroll penalty for failure to timely submit its payroll report. (Appx. 108, 121)

[10] Still not having received a payroll report, on October 10, 2019, WSI sent correspondence to Boechler, P.C. seeking information. (Appx. 109) Boechler, P.C. was to provide the requested information by October 23, 2019. (Appx. 109) No response was received. On January 24, 2020, Boechler, P.C. was notified that due to failure to submit the requested information, WSI was assessing penalties of $100 for each day until the request was satisfied. (Appx. 126) Penalties in the amount of $2,300.00 were assessed on December 2, 2019 (Appx. 93, 124) and $4,000.00 on January 6, 2020, for failure to provide the information requested in the October 10, 2019, correspondence under N.D.C.C. § 65-04-33(6)(c). (Appx. 93-94, 127)

[11] Boechler, P.C. having not responded to requests for supplying information requested by WSI, and again not submitting a payroll report, WSI then billed the account for reconciled resulting in additional premium due for the period July 1, 2018 to June 30, 2019, of $11.99, with an advance premium billed for the period July 1, 2019, through June 30, 2020. (Appx. 93, 116) An additional policy period penalty of $5,000.00 was assessed under N.D.C.C. § 65-04-33(6)(a) for failure to submit a payroll report.

[12] Boechler, P.C. paid the premium of $250.00 for the payroll period ending June 30, 2019. (Appx. 93) The amounts sought in Count I of WSI's collection action, which were awarded by the Court, were as follows:

> $11.99 for addition premium due for payroll period ending 6/30/2019
> $250.00 for advance premium for period 7/1/2019 to 6/30/2020
> $100.00 penalties for late payroll reports assessed 8/3/2019 and 8/18/2019
> $6,300.000 compliance penalties for failure to respond to 10/10/2019 request for information from WSI
> $5,000 penalty under N.D.C.C. § 65-04-33(6)(a) for failure to furnish payroll report

(Appx. 57)

[13] In Count II of its Complaint, WSI sought to hold Jeanette Boechler personally liable under N.D.C.C. § 65-04-26.1. WSI asserted that an unappealed April 30, 2015, Notice of Decision – Personal Liability (Appx. 29) was res judicata as to personal liability of Jeanette Boechler. (Appx. 9, 29). The Court determined that the Notice of Decision issued on April 30, 2015, did not apply because it was res judicata only to matters adjudicable at the time of that decision, and the matter before the Court was for a period of approximately three or more years after that Notice of Decision was issued. (Appx. 41)

[14] The Court also rejected WSI's alternative argument that because Jeanette Boechler admitted she was the sole attorney, officer, and shareholder of Boechler, P.C., liability under N.D.C.C. § 65-04-26.1 should attach. (Appx. 42) The Court agreed that the record "strongly suggests" Jeanette Boechler was personally liable, but because N.D.C.C. § 65-04-26.1 requires issuance of a decision under N.D.C.C. § 65-04-32, the Court could not initially determine whether Jeanette Boechler is personally liable. (Appx. 42-43) Following trial before the Court on this issue, the Court determined that the Notice provision under N.D.C.C. § 65-05-26.1(3) was not satisfied. (Appx. 56) Thus, the Court dismissed Count II without prejudice. (Appx. 56)

[15] As to Count III of WSI's Complaint, injunctive relief under N.D.C.C. § 65-04-27.1, the Court granted WSI's Motion for Summary Judgment and entered Judgment enjoining Boechler, P.C. "from the employment of employees in hazardous employment within the state of North Dakota until such time as Defendant Boechler, P.C. has fully complied with the North Dakota Workers Compensation Act including payment of premiums, penalties and interest as awarded in this action." (Appx. 58)

[16] Boechler, P.C. and Jeanette Boechler have appealed from the District Court's Judgment entered June 11, 2021. (Appx. 157-158)

LAW AND ARGUMENT

I. SCOPE OF REVIEW ON APPEAL.

[17] Whether the District Court properly granted summary judgment is a question of law which this Court reviews de novo. Wenco v. EOG Resources, Inc., 2012 ND 219 ¶ 8, 822 N.W.2d 701. This Court's standard for reviewing a District Court's grant of summary judgment is well-established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Markgraf v. Welker, 2015 ND 303, ¶ 10, 873 N.W.2d 26 (quoting Hamilton v. Wolf, 2012 ND 238, ¶ 9, 823 N.W.2d 753.

[18] On appeal, Appellants assert constitutional challenges under substantive due process, procedural due process, and excessive fines. In Fenske v. Fenske, 542 N.W.2d 98, 100 (N.D. 1996), this Court stated:

> The first step in raising a constitutional claim is articulation of the specific constitutional provisions violated. City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994). Persuasive authority and reasoning must support constitutional claims. Wisdom v. State ex rel. N.D. Real Estate Com'n, 403 N.W.2d 19 (N.D. 1987). A party raising a constitutional challenge "should bring up his heavy artillery or forego the attack entirely." So. Valley Grain Dealers v. Bd. of Cty. Com'rs, 257 N.W.2d 425, 434 (N.D. 1977); See Eklund v. Eklund, 538 N.W.2d 182 (N.D. 1995).

In considering constitutional challenges, it must be remembered that "[a]n act of the legislature is presumed to be correct, valid, and constitutional, and any doubt about its constitutionality must, where possible, be resolved in favor of its validity." State v. Burr,

1999 ND 143 ¶ 9, 598 N.W.2d 147, citing Southern Valley Grain Dealers Ass'n v. Board of County Comm'rs of Richland County, 257 N.W.2d 425, 434 (N.D. 1977). This presumption of constitutionality is conclusive unless the party bringing the challenge "clearly demonstrates that it contravenes the state or federal constitution." Olson v. Bismarck Parks and Recreation Dist., 2002 ND 61 ¶ 11, 642 N.W.2d 864. This Court exercises "great restraint" to declare legislation unconstitutional. Teigen v. State, 2008 ND 88 ¶ 7, 749 N.W.2d 505. A legislative enactment cannot be declared unconstitutional unless at least four members of this Court so decide. N.D. Const. Art. VI, § 4.

[19] Because this is a question of law, it is fully reviewable on appeal. Burr, 1999 ND 143 ¶ 9, citing Moran v. Dep't of Transp., 543 N.W.2d 767, 769 (N.D. 1996).

II. THE IMPOSITION OF PENALTIES IS NOT VIOLATIVE OF SUBSTANTIVE OR PROCEDURAL DUE PROCESS.

[20] In responding to WSI's Motion for Summary Judgment on the issue of premium and penalties due on the Boechler, P.C. account, Appellants raised only legal issues. There were no disputes of facts raised. If only questions of law are asserted, summary judgment is appropriate. American State Bank & Trust Co. of Williston v. Sorenson, 539 N.W.2d 59, 61 (N.D. 1995). The District Court considered the arguments advanced by Appellants on these constitutional issues and held that WSI complied with the statutory requirements of Title 65, WSI correctly assessed penalties under the statutory scheme as authorized by the North Dakota Legislature, and there were no procedural or substantive due process violations. (Appx. 36-38) This Court should affirm that decision.

[21] Appellants' first argument is they were entitled to some form of an administrative hearing relating to the imposition of the penalties assessed on the account. For this proposition they cite only Foster v. United States EPA, 2015 WL 5786771 (S.D.

W.Va. Sept. 30, 2015). The quoted portion of Foster in Appellants' Brief relates *only* to the procedural due process issue. The law quoted in Foster outlines the "general rule," but does not specifically address why in this case entitlement to an administrative hearing before imposition of penalties was required. The District Court found otherwise. (Appx. 36-38)

[22] In seeking collection of unpaid premiums, penalties and interest, the Legislature had authorized WSI to bring suit for those amounts. N.D.C.C. § 65-04-24 provides:

> The organization shall notify an employer of the amount of premium, assessment, penalty, and interest due the organization from the employer. If the employer fails to pay that amount within thirty days, the organization may collect the premium, assessment, penalties, and interest due by civil action.

Thus, the Legislature has authorized WSI to bring a direct collection action for unpaid penalties assessed on an employer account, rather than requiring WSI to issue a Notice of Decision or Administrative Order under N.D.C.C. § 65-04-32.

[23] As to the claim that failure to provide an administrative hearing before imposition of these statutorily authorized penalties violates due process, it must be noted that "a statute does not create an entitlement for due process purposes if the statute confers discretion on the governmental agency or official without providing objective criteria for and limitations upon that discretion. Whedbee v. North Dakota Workforce Safety & Ins. Fund, 2014 ND 79, ¶ 11, 845 N.W.2d 632 quoting Ennis v. Williams County Board of Comm'rs, 493 N.W.2d 675, 678 (N.D. 1992)(citations omitted). These are such discretionary penalties. See N.D.C.C. § 65-04-33(5)(c); 65-04-33(6)(e).

[24] In Ueckert v. United States, 581 F. Supp. 1262 (D.N.D. 1984) that court considered a challenge to a civil statutory tax penalty assessed against the taxpayer. The

statutory penalty is assessed when many or all lines on the tax return are not filled in. Among the claims asserted by the taxpayer was that a pre-assessment hearing must be provided. In rejecting that argument, the court stated as follows:

> Procedural due process is a flexible concept and does not always require a hearing before property is taken. Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1975). This Court must balance three factors to determine when a hearing is required: (1) the private interest affected by official action, (2) the risk of erroneous deprivation through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest. Id. at 335, 96 S.Ct. at 903.
>
> The government has a powerful interest in the prompt collection of revenue. No matter how burdensome taxes are, they are necessary to effectively run the government. Tax collection is inherently repressive and voluntary collection may be even more repressive than compulsory collection. But, to make voluntary collection effective, it is self-evident that a considerable level of authority must exist in our tax collectors.
>
> This governmental interest is checked with appeal procedures to protect the private interest in retaining certain property. These procedures are adequate to prevent erroneous determinations that a tax return is frivolous; and a pre-assessment hearing would add little to the accuracy of the IRS determinations. The availability of post-assessment procedures has been the critical factor validating tax enforcement procedures. Bob Jones University v. Simon, 416 U.S. 725, 747, 94 S.Ct. 2038, 2051, 40 L.Ed.2d 496 (1973); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). Thus, immediate assessment of the penalty under § 6702 is constitutional under the due process clause. . . .

Ueckert, 581 F. Supp. at 1265-1266.

[25] As the District Court held, in Chapter 65-04 of the Century Code, the Legislature authorized WSI to charge and fix the rates of premium for employers (N.D.C.C. § 65-04-01), specify methods for employers to provide information to WSI (N.D.C.C. § 65-04-06), collect information from employers (N.D.C.C. § 65-04-13), and impose penalties and interest (N.D.C.C. § 65-04-22, 65-04-33). WSI's imposition of those penalties is within

its discretion. There is a significant government interest in ensuring employers timely submit payroll reports and pay their premiums. This is necessary to ensure the integrity of the Workers Compensation Fund. In addition to penalizing employers for failure to pay premiums and/or failure to submit payroll reports, WSI is authorized to bring injunction proceedings to "ensure fair and equitable contributions to the workforce safety and insurance fund among all employers, and to protect the workforce safety and insurance fund." N.D.C.C. § 65-04-27.1(1)(a).

[26] In the exercise of WSI's discretion to impose these penalties, no pre-assessment administrative hearing is required. Even in the case of discontinuance of disability benefits for a workers compensation claimant, this Court had held a pre-termination hearing is not required. Sjostrand v. North Dakota Workers Compensation Bureau, 2002 ND 125, 649 N.W.2d 537. The Boechler account was assessed an administrative penalty akin to "late fees" for failure to submit a timely report, statutory penalties for failure to timely respond to WSI's request for information, and a penalty for not filing a report at all. It is not a situation where there is likelihood of a question whether the event took place, and a full administrative hearing would bring that to light. These are clear-cut issues of failing to meet deadlines to take the required action. Thus, an administrative hearing would not have been of any further value in assessment of the penalties. If there was a clear defense to the imposition of the penalties, that could be raised in the collection action after the penalties were imposed. Even in this case there was no assertion that Boechler in fact submitted a report or did respond to WSI's inquiries. Had such issues of fact been asserted, the District Court could not have entered summary

judgment. Instead, Appellants raised only issues of law challenging whether WSI could impose the penalties.

[27] The Legislature saw fit to authorize WSI to impose penalties for failure to take certain actions and then bring this action for collection of premium and penalties due. The Legislature correctly believed a post-imposition review of the process in a collection action such was brought here is sufficient to meet due process under the rationale of Ueckert.

[28] This Court has stated that in matters left to agency expertise, "an agency decision is entitled to appreciable deference." North Dakota State Board of Medical Examiners-Investigative Panel B v. Hsu, 2007 ND 9 ¶ 42, 726 N.W.2d 216; see also Kasprowicz v. Finck, 1998 ND 4 ¶ 14, 574 N.W.2d 564 (stating "leaving the manner and means of exercising an administrative agency's powers to the discretion of the agency implies a range of reasonableness within which the agency's exercise of discretion will not be interfered with by the judiciary."); Cass County Electric Co-op, Inc. v. Northern States Power Co., 518 N.W.2d 216, 220 (N.D. 1994) (id.). The penalties assessed on this account by WSI are objectively reasonable considering the actions and clear statutory authority given WSI to impose the same. The undisputed facts demonstrate that the actions of Boechler, P.C. violated the statutes under which the penalties were imposed. As the District Court properly held, "a pre-assessment hearing determining whether WSI correctly assessed its penalties under the statutory scheme would add little to the accuracy of WSI's determinations." (Appx. 38) The legislative scheme, therefore, did not violate procedural due process.

[29] As to substantive due process, although not quoted in Appellants' Brief, the Foster case did articulate what is required for such violation, stating as follows:

> The protection afforded by the substantive component of Fifth Amendment due process "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' " United States v. Salerno, 481 U.S. 739, 746 (1987)(internal citations omitted). "[S]ubstantive due process [protections] have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 510 U.S. 266, 271-72 (1994). "In a due process challenge to executive action, the threshold question is whether the behavior of the governmental official is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." County of Sacramento v. Lewis, 523 U.S. 833, 847 n. 8 (1998); see e.g., Rochin v. California, 342 U.S. 165, 172 (1952) (forcible stomach pumping of suspect in an effort to produce swallowed evidence "shock[ed] the conscience" and was held to be a violation of substantive due process.). This is a high standard not easily met. As the Eighth Circuit explained in Golden ex rel. Balch v. Anders:
>
> > Substantive due process is concerned with violations of personal rights [...] so severe [...] so disproportionate to the need presented, and [...] so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience.
>
> 324 F.3d 650, 652-53 (8th Cir. 2003)(internal quotation marks omitted).

As to substantive due process, this Court has stated as follows:

> When reviewing substantive due process arguments not involving fundamental rights, we look to see if the State acts in an arbitrary or unreasonable manner in exercising its police power. Id. at 133. To declare a statute unconstitutional on substantive due process grounds, "it must appear that the Legislature had no power to act in the particular matter or, having power to act, that such power was exercised in an arbitrary, unreasonable, or discriminatory manner and that the method adopted has no reasonable relation to attaining the desired result." Menz v. Coyle, 117 N.W.2d 290, 299 (N.D.1962).

City of Fargo v. Stensland, 492 N.W.2d 591, 594 (N.D. 1992). When fundamental rights are not at issue, statutes withstand challenge on a substantive due process basis if the state

identifies a "legitimate state interest that the legislature could rationally conclude was served by the statute." Hoff v. Berg, 1999 ND 115 ¶ 13, 595 N.W.2d 285, quoting Alexander v. Whitman, 114 F.3d 1392, 1403 (3d. Cir. 1997).

[30] The North Dakota workers compensation act has been judicially recognized as a valid exercise of police power. Federal Farm Mortgage Corp. v. Berzel, 69 N.D. 760, 291 N.W. 550 (1940). The act created a monopolistic fund through which claims for benefits are paid. Id. The Legislature clearly has a legitimate interest in ensuring the integrity of that fund, by requiring employers to properly report payroll to WSI and paying their premiums. The Legislature could rationally conclude penalties would be an appropriate tool to ensure compliance by employers and that employers would not ignore WSI requests for information in its exercise of the powers authorized by WSI to administer the act. Thus, it would not be a violation of substantive due process. This Court should so conclude. See Haff v. Hettich, 1999 ND 94 ¶ 30, 593 N.W.2d 384 (rejecting substantive due process challenge where there is a reasonable relation to legitimate legislative purpose).

III. THE IMPOSITION OF PENALTIES TO THE BOECHLER, P.C. ACCOUNT DID NOT VIOLATE THE EXCESSIVE FINES PROVISIONS OF THE FEDERAL OR STATE CONSTITUTION.

[31] Appellants also contend that WSI's imposition of the penalties in this case violates the Excessive Fines provision of the North Dakota and Federal Constitutions. In Stoner v. Nash Finch, Inc., 446 N.W.2d 747, 755 (N.D. 1989), this Court stated: "The excessive fines clauses of the federal and state constitutions are virtually identical, and Nash Finch has posited no reasons for interpreting the state excessive fines clause differently from its federal counterpart." As was the case in arguments to the District Court, Appellants rely exclusively on the dissent of Justice Crothers in Black Hills

Trucking, Inc., 2017 ND 284, 904 N.W.2d 326, for its position that the penalties imposed in this case constitute a violation of the excessive fines clause. When considering this issue, the District Court rejected the assertion the penalties violated the excessive fines clause and granted WSI summary judgment. (Appx. 41) This Court should affirm that decision.

[32] The fines at issue in Black Hills Trucking were $950,000. Justice Crothers dissented from the majority opinion because he was concerned about notice of the daily penalties assessed. What the majority of this Court held regarding the issue in Black Hills Trucking, was as follows:

> Black Hills argues the penalties assessed against it are unconstitutionally excessive in violation of N.D. Const. art. I, § 11.
>
> The parties agree that, because of the similarities between the state and federal excessive fines clauses, this Court should analyze the issue under United States v. Bajakajian, 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), where the United States Supreme Court held the federal excessive fines clause is violated if the fine "is grossly disproportional to the gravity of a defendant's offense." The two considerations identified by the Supreme Court for judging constitutional excessiveness are: 1) "judgments about the appropriate punishment for an offense belong in the first instance to the legislature;" and 2) "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." Id. at 336, 118 S.Ct. 2028.
>
> Here, the legislature through its enactment of N.D.C.C. § 38–08–16(1), has authorized a civil penalty "not to exceed twelve thousand five hundred dollars for each offense, and each day's violation is a separate offense." "Generally, a sentence within the statutory sentencing range is neither excessive nor cruel." State v. Gomez, 2011 ND 29, ¶ 28, 793 N.W.2d 451; see also State v. Flohr, 310 N.W.2d 735, 738 (N.D. 1981) (where sentence was authorized by statute, it did not violate the state excessive fines clause). In imposing the penalty, the Commission explained in its order:
>
> > Contrary to the ALJ's conclusion, the Commission believes the penalty it seeks to assess is appropriate and

> constitutional. The Commission is charged with the orderly control of the State's oil and gas resources, which includes the protection of the State and its citizens from these types of reckless and detrimental violations to the environment. Although the harm from Black Hill's illegal dumping may not be readily quantifiable, the illegal dumping of saltwater is a legitimate and obvious harm and the levying of penalties against companies that damage the environment but refuse to clean their illegal spills, may deter future illegal activities in the future. See, e.g., Towers v. City of Chicago, 173 F.3d 619, 625 (7th Cir. 1999). A penalty is not unconstitutional simply because it may serve as a deterrent. The Commission takes these issues so seriously that the Commission sought a criminal conviction against [the truck driver] for the February 14, 2014 incident.
>
> Black Hills argues there is no proportionality between the size of the fine and the harm suffered by the public. According to Black Hills, this is evidenced by the Commission's estimation of the spills to range "from a few gallons to a hundred gallons" and the lack of requests for remediation from the Department and local officials. Because the Commission did not quantify the volume of saltwater discharged and did not present evidence of the amount of harm to the environment caused by the discharges, Black Hills argues the fine is unconstitutional.
>
> The party challenging the constitutionality of governmental actions bears the heavy burden of producing evidence showing why the actions are unconstitutionally defective. See, e.g., State v. Francis, 2016 ND 154, ¶ 18, 882 N.W.2d 270; Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 756 (N.D. 1978). The fine imposed by the Commission is authorized under N.D.C.C. § 38–08–16(1). If the volume of saltwater discharged and the resulting environmental harm are "minimal" in this case as Black Hills suggests, it had the burden to establish these facts. Black Hills presented no evidence on these issues, and consequently, it has not established the fine is unconstitutionally excessive.

Black Hills Trucking, 2017 ND 284 ¶¶ 24-28. As the District Court determined, just as in Black Hills, the penalties at issue here imposed on Boechler, P.C. were authorized by the Legislature through enactment of Title 65. (Appx. 40)

[33] An employer is statutorily required to submit an annual payroll report for WSI to determine the amount of premium due for the succeeding 12-month period. N.D.C.C. § 65-04-19(2). There was no dispute as to the fact that no payroll report was submitted by Boechler, P.C. for the 2018-2019 reporting period. In fact, WSI records reflected that Boechler, P.C. had not timely submitted a payroll report since 2004. (Appx. 92) WSI first administratively imposed penalties for late filing of payroll reports in the amount of $100.00 under N.D. Admin. R. 92-01-02-14(7) when the payroll reports were not received. (Appx. 93, 106, 107, 108, 121) These minimal penalties for failing to submit the statutorily required reports do not meet the definition of excessive fines as outlined in Black Hills Trucking.

[34] After Boechler, P.C. failed to submit the required payroll report, WSI then asked for payroll and other documents from which WSI could determine the payroll for the reporting period "to ensure [WSI] accurately evaluate the risks and exposures your business has in North Dakota." See Letter of October 10, 2019 (Appx. 109). Under N.D.C.C. § 65-04-33(6)(c), when WSI requests information from an employer, after 30 days WSI is statutorily authorized to impose penalties of $100.00 per day for failure to respond. WSI notified Boechler, P.C. that this penalty would be imposed, and Boechler, P.C. still failed to submit the required documents. See Letter of December 3, 2019 (Appx. 124, 126). As this Court confirmed in Black Hills Trucking, judgments about the appropriateness of penalties are for the Legislature. N.D.C.C. § 65-04-33(6)(c) provides as follows:

> If the employer fails or refuses to provide the records within thirty days of a written request from the organization, the employer is subject to a penalty of five thousand dollars and a penalty not to exceed one hundred dollars for each day until the organization receives the records.

Thus, the Legislature has authorized WSI to assess the $100.00 per day penalties for failure to timely respond to requests by WSI for information and a $5,000.00 penalty for failure to provide records. WSI imposed only the penalty of $100.00 per day through January 6, 2020, for failure to provide the requested documentation, even though it was authorized to impose an additional fine. Under the rationale of Black Hills Trucking, these fines do not constitute excessive fines in violation of the Constitution. See id.

[35] Lastly, because Boechler, P.C. did not provide the statutorily required payroll report, WSI applied the statutorily authorized penalty under N.D.C.C. § 65-04-33(6)(a) of $5,000.00. Again, the Legislature has seen fit to provide WSI with what it determines to be the appropriate penalties for employers that fail to submit the required payroll information and fail to respond to WSI's requests for that information. Under the majority rationale in Black Hills Trucking, these statutorily authorized penalties do not constitute excessive fines. The time, effort and resources utilized by WSI in asking Defendants to do what every employ in the State of North Dakota must do, that being submit an annual payroll report warrants WSI exercising its discretion to apply the statutory penalties found in N.D.C.C. § 65-04-33 and N.D. Admin. R. 92-01-02-14. As this Court confirmed in Black Hills Trucking, in the context of whether it is appropriate and reasonable for WSI to assess these penalties for failure to provide the requested documentation, the Court must consider that the Legislature granted WSI the responsibility to "maintain adequate financial reserves to ensure the solvency of the fund and the payment of future benefit obligations . . ." N.D.C.C. § 65-04-02. The Legislature has also recognized that it is WSI's responsibility to "protect the lives, safety, and well-being of wageworkers" and "to ensure fair and equitable contributions to the workforce

safety and insurance fund among all employers . . . ." N.D.C.C. § 65-04-27.1(1)(a). Overall, the purpose of the WSI law is to protect the "prosperity of the state" by ensuring the "workers injured in hazardous employments, and for their families and dependents, sure and certain relief . . . ." N.D.C.C. § 65-01-01. Thus, the integrity of the Fund and ensuring the Fund can meet the obligations to injured workers are important interests that WSI is charged with and these statutory penalties help deter employers from ignoring its statutory requirements to timely report its payroll for WSI to calculate premiums due, and to require employers to respond when WSI is exercising its duties to ensure that employers are properly reporting employees. WSI must ensure, therefore that employers, who get the benefit of abolishment of civil actions and civil claims for relief for personal injuries of employees, pay their premiums to protect their employees should they become injured. As this Court in Black Hills Trucking, confirmed, penalties are not unconstitutional if they are to act as a deterrent. Id. ¶27. The Legislature appropriately permits WSI to assess these statutory penalties when an employer fails to submit the required reports and fails to respond to WSI's reasonable requests for the information.

[36] Just as was the case in Black Hills Trucking, the constitutional challenge raised by Appellants must be rejected. "All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." Grand Forks Professional Baseball, Inc. v. North Dakota Workers Compensation Bureau, 2002 ND 204 ¶ 17, 654 N.W.2d 426. A party "must do more than merely assert that a statute is [unconstitutional] to appropriately raise a constitutional issue." Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 178 (N.D. 1993) (citation omitted). Accordingly, just

as the District Court did, this Court must reject the arguments of Appellants that the penalties imposed on the employer account of Boechler, P.C. for failing to timely submit required payroll reports, failing to respond to WSI's request for information, and failing to submit a payroll report do not constitute an excessive fine under the federal or state constitution.

[37] The role of this Court in reviewing the actions of WSI where it is exercising the discretion in assessing penalties on an employer account as provided by the Legislature is limited:

> Current thought supporting the view that judicial review of administrative agency decisions should be limited is contained in American Jurisprudence: The general frame of the power of judicial review is to keep the administrator within the valid statute which guides him and keep him from unreasonable excesses in the exercise of his function, and to ascertain whether there is warrant in the law and the facts for what the administrative agency has done, the court being limited to questions affecting constitutional power, statutory authority, and the basic prerequisites of proof. The primary limitation upon the power of the court to review is in regard to matters calling for the exercise of expert judgment which are committed to the discretion of the administrative agency. Thus, judicial review is extremely limited in regard to findings of fact and to expert judgments of an administrative agency acting within its statutory authority. The courts must not usurp the functions of the administrative agency nor intrude upon the domain which the legislature has entrusted to the agency. (footnotes omitted)

Geo. E. Haggart, Inc. v. North Dakota Workmen's Compensation Bureau, 171 N.W.2d 104, 111 (N.D. 1969), quoting, 2 Am.Jur.2d, Administrative Law § 613, at 454 (1962). A party challenging the constitutionality of state actions "bears the heavy burden of producing evidence showing why the actions are unconstitutionally defective." Black Hills Trucking, Inc., 2017 ND 284 ¶ 28, 904 N.W.2d 326, citing State v. Francis, 2015 ND 154 ¶ 18, 882 N.W.2d 270 (emphasis supplied); Newman Signs, Inc. v. Hjelle, 268

N.W.2d 741, 745 (N.D. 1978). Appellants have failed to establish that either WSI's actions or the Legislature's authorization of the penalties WSI may impose on this employer account are constitutionally defective. The penalties imposed are to ensure compliance and are clearly outlined within WSI's authority. "The powers and duties of [WSI] are defined by statute. Those who deal with it are presumed to know the law concerning its powers and limitations." Thompson v. North Dakota Workmen's Compensation Bureau, 66 N.W. 756, 268 N.W. 710, 712. Accordingly, this Court must reject this challenge.

IV. THE DISTRICT COURT PROPERLY DISMISSED COUNT II OF WSI'S COMPLAINT RELATING TO PERSONAL LIABILITY OF JEANETTE BOECHLER UNDER N.D.C.C. § 65-04-26.1 WITHOUT PREJUDICE.

[38] Following a Court trial held as to Count II, the District Court held, as it did in denying WSI's Motion for Summary Judgment, that the April 30, 2015, Notice of Decision issued by WSI was limited to the amount of $908.39 as referenced therein for a prior premium period. Thus, WSI could not rely on the April 30, 2015, Notice of Decision to provide the notice required under N.D.C.C. § 65-04-26.1(3) to hold Jeanette Boechler personally liable for the amounts claimed in this collection action. Although WSI has subsequently issued a Notice of Decision dated March 15, 2021, on the issue of personal liability of Jeanette Boechler, which included the policy periods covered by the amounts adjudicated as owing in this proceeding, at the time of trial that Notice was not yet final.

[39] At the trial of this matter, the Court issued a verbal decision reaffirming what it concluded in its Order on WSI's Motion for Summary Judgment that the April 30, 2015, Notice of Decision was not res judicata as to personal liability of Jeanette Boechler and that N.D.C.C. § 65-04-26.1 requires issuance of a Notice of Decision as a prerequisite to impose

personal liability. The Court indicated it believed it would dismiss Count II of WSI's Complaint without prejudice, and then asked for post-trial briefing on that issue. Following that post-trial briefing, the District Court issued an Order Clarifying Dismissal of Count II, holding the matter was not resolved on the merits, but rather the Court found a procedural deficiency in WSI's notice. (Appx. 56) Accordingly, the Court held that WSI "should be free to pursue its claim against Boechler in her personal capacity now that she has adequate notice." (Appx. 56) The Court thus dismissed Count II of WSI's Complaint without prejudice. Appellants have appealed from that decision.

[40] As plead in WSI's Complaint, WSI sought to hold Jeanette Boechler personally liable under N.D.C.C. § 65-04-26.1 based on an unappealed Notice of Decision issued April 30, 2015. In rendering its decision denying WSI's claim, the District Court did not determine the merits of whether Jeanette Boechler was personally liable for the unpaid premiums and penalties of Boechler, P.C. Rather, the Court rejected WSI's claim that the April 30, 2015, Notice of Decision was Notice under N.D.C.C. § 65-04-26.1(3) and was res judicata because it was unappealed. The Court held that because it referenced a prior amount of unpaid premium, not the current amount of unpaid premium, it was not sufficient Notice under N.D.C.C. § 65-04-26.1(3). As a result, there was no determination on the merits as to whether Jeanette Boechler fell within the criteria of N.D.C.C. § 65-04-26.1(1) to be held personally liable. The Court's ruling relates to a procedural issue of whether the requisite Notice had been provided under N.D.C.C. § 65-04-26.1(3) and whether the Notice issued on April 30, 2015, was res judicata.

[41] In Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, 729 N.W.2d 101, this Supreme Court considered whether claims were barred by the

result in a prior action and appeal. Id. ¶ 5. As part of that appeal, the Court discussed when a dismissal is to be made with prejudice, quoting with approval from Costello v. United States, 365 U.S. 265 (1961), as follows:

> At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In Haldeman v. United States, 91 U.S. 584, 585-586, 23 L.Ed. 433, which concerned a voluntary nonsuit, this Court said, 'there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively.' A similar view applied to many dismissals on the motion of a defendant. In Hughes v. United States, 4 Wall. 232, 237, 18 L.Ed. 303, it was said: 'In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on the merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, **or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit**.' [Citations omitted.] (Emphasis supplied.)

Riverwood, 2007 ND 36 ¶ 31. In this case, the District Court correctly determined there was no "adjudication on the merits" of Jeanette Boechler's personal liability under N.D.C.C. § 65-04-26.1(1). Rather, the District Court's determination was based on a procedural issue, specifically, that the April 30, 2015, Notice of Decision was not res judicata and did not provide the required Notice under N.D.C.C. § 65-04-26.1(3). In analogous situations, this Court has indicated that a dismissal can be without prejudice and the plaintiff may be able to cure the defect, if there is no other legal bar to the claim. See Rodenburg v. Fargo-Moorhead Y.M.C.A., 2001 ND 139 ¶ 12, 632 N.W.2d 407 (noting dismissal without prejudice final when plaintiff cannot cure defect). The most common defect that may be cured is if a statute of limitations has not run. See Jaskoviak v. Gruver, 2002 ND 1 ¶ 8, 638

N.W.2d 1 (noting dismissal without prejudice final when plaintiff barred by two-year statute of limitations).

[42] The procedural defect determined by the District Court was that the Notice of Decision issued in April of 2015 was not effective as required under N.D.C.C. § 65-04-26.1(3). However, this defect can be cured by WSI because the statute of limitations had not run on this collection action. See N.D.C.C. § 28-01-16(2) (identifying actions having a six-year statute of limitations including those based upon liability created by statute). As confirmed by this Court in Grand Forks Professional Baseball, Inc. v. North Dakota Workers Compensation Bureau, 2002 ND 204, 654 N.W.2d 426, WSI may pursue separate actions against the employer and against individual officers and directors. Thus, the District Court correctly dismissed Count II without prejudice because WSI should be able to pursue Jeanette Boechler, individually, if Boechler, P.C. does not pay the amount of premiums and penalties because District Court's decision did not reach the issue of Jeanette Boechler's personal liability "on the merits" under N.D.C.C. § 65-04-26.1(1).

CONCLUSION

[43] For the foregoing reasons, WSI respectfully requests that this Court affirm the Judgment entered against Appellant Boechler, P.C. in the amount of $11,661.99 for unpaid premiums and penalties and affirm the District Court's dismissal of Count II of WSI's Complaint as to personal liability of Jeanette Boechler, individually, under N.D.C.C. § 65-04-26.1 without prejudice.

DATED this 6th day of December, 2021.

/s/ Jacqueline S. Anderson

Jacqueline S. Anderson (ND ID# 05325)
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108-2626
(701) 237-5544
janderson@nilleslaw.com
ATTORNEYS FOR APPELLEE

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant, 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 Appellee was prepared with proportional typeface and the total number of pages in the above Brief totals 30.

DATED this 6th day of December, 2021.

/s/ Jacqueline S. Anderson

Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General for
Workforce Safety and Insurance
201 North 5th Street, Ste. 1800
PO Box 2626
Fargo, ND 58108
T/N: 701-237-5544
janderson@nilleslaw.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota by and through North Dakota Workforce Safety and Insurance, Plaintiff and **Appellee,** **vs.** **Boechler, P.C., a North Dakota Professional Corporation, and Jeanette Boechler, individually,** Defendants and **Appellants.**	**Supreme Court No.: 20210225** **Cass County District Court** **Civil No.: 09-2020-CV-2097** **AFFIDAVIT OF ELECTRONIC SERVICE**

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

[1] Laurie A. Grimm, 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 APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

on the following persons:

David C. Thompson **dct@rrv.net**

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

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

Laurie A. Grimm

SUBSCRIBED AND SWORN to before me on December 6, 2021

Notary Public

BRENDA JO BRUNELLE
Notary Public
State of North Dakota
My Commission Expires June 18, 2023

cc.: Jennifer Fender, ND WSI
Acct. No.: 099222
Nilles File No.: 19-300.121