

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

<p>State of North Dakota, by and through Workforce Safety and Insurance,</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">vs.</p> <p>Isai Avila,</p> <p style="text-align: center;">Appellee,</p> <p>SM Fencing & Energy Services, Inc.,</p> <p style="text-align: center;">Respondent.</p>	<p>SUPREME COURT NO. 20190386</p> <p>Dunn County District Court Civil No.: 2019-CV-00042</p>
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BRIEF OF APPELLEE ISAI AVILA

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 ALJ Thomas correctly determined that the injured worker, Isai Avila, is entitled to both a “scheduled” Permanent Partial Impairment award for loss of use of an eye, and also a whole body award for additional bodily injuries to the face, acoustic nerve, and central nervous system not accounted for in the schedule injury for vision loss alone.

LAW AND ARGUMENT

[2] The essential facts of the case are not in significant dispute. Avila suffered devastating injuries on February 11, 2015, when he slipped and fell on his face. WSI accepted his claim for benefits in connection with: total loss of vision in the left eye (R. 5-6; 12); tension headache (R. 7); maxillary bone fracture (R. 9); cervical strain (R. 10); traumatic brain injury [TBI], subdural and epidural hemorrhage, and TMJ disorder (R. 11). WSI issued a Notice of Decision Awarding Permanent Partial Impairment (PPI) on January 30, 2017 (Appellant Appendix 29), and an Administrative Order on April 5, 2017, awarding benefits in the sum of \$34,000.00 for loss of vision in the left eye. (Appellant Appendix 31-33).

[3] The award was issued as a scheduled impairment award due to loss of vision of an eye of 100 weeks under N.D.C.C. § 65-05-12.2(11), which provides that:

[a]n amputation of a finger or toe at the level of the distal interphalangeal joint or proximal to that joint ... which is determined to result in a whole body impairment of less than sixteen percent and which is not identified in the following schedule, is payable as a sixteen percent impairment. ... If an ... amputation results in an award that is less than the permanent impairment multiplier identified in the following schedule, [WSI] shall pay an award equal to the permanent impairment multiplier set out in the following schedule:

<u>For Loss of</u>	<u>Permanent Impairment Multiplier Of</u>
An Eye	150
Vision of an Eye which Equals or exceeds 20/20 corrected	100

N.D.C.C. § 65-05-12.2(11).

[4] N.D.C.C. § 65-05-12.2(11) further provides that the higher of the multiplier for the amputations under this subsection, or an award under the 6th Edition of the AMA Guides applies:

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 added)

N.D.C.C. § 65-05-12.2(11).

[5] Avila requested a hearing. (Appellant Appendix 37). To resolve the pending PPI dispute, WSI then offered Avila an impairment evaluation. (R. 23; 26-29). Avila was examined by Dr. Ferguson for visual defect (Appellant's Appendix 81-82), a psychiatrist, Dr. Patra, for TBI (Appellant's Appendix 83-98), and Dr. Martin for additional impairments including injuries to the cervical spine, facial bone and facial nerves (tinnitus and hearing loss), and central nervous system (traumatic brain injury). (Appellant's Appendix 99-113).

[6] Dr. Martin, WSI's go-to PPI evaluator, rated the additional impairments at 1% for the cervical spine (Appellant's Appendix 107-108); 1% for TMJ and facial bone impairment (Appellant's Appendix 108-109); 1% for acoustic nerve injury (tinnitus and hearing deficit) (Appellant's Appendix 109-110); and 12% for TBI. (Appellant's Appendix 110-112). Dr. Martin noted that using the AMA Guides only—that is without

accounting for the ‘scheduled award’ under the North Dakota statute—the total PPI rating is 29% of the whole body. (Appellant’s Appendix 112).

[7] WSI issued its Administrative Order on May 23, 2018 (Appellant’s Appendix 43-47), finding the additional impairments as above identified:

1% for the cervical spine (Appellant’s Appendix 45, finding 9);
1% for TMJ and facial bone impairment (Appellant’s Appendix 45, finding 10);
1% for acoustic nerve injury (Appellant’s Appendix 45, finding 11); and,
12% for TBI (Appellant’s Appendix 45, finding 12).

[8] However, WSI deducted the entire number of weeks (100) for his vision loss under the schedule from the additional numbers of weeks that would compensate him for his other impairments. (Appellant’s Appendix 46, conclusion of law 3). WSI found that an award solely under the AMA Guides would have resulted in an award of 29% whole body, for a permanent impairment multiplier (PIM) of 45; from this WSI concluded that the law allows it to deduct the prior PIM award just for vision loss, cancelling out any need to award for permanent impairment losses of function of the cervical spine, facial bones and nerves and traumatic brain injury. WSI argues that under N.D.C.C. § 65-01-12.2(11), the scheduled loss which “combine[s] with other impairments *for the same work-related injury or condition,*” the award may not exceed the higher of rating under the AMA Guides, or the scheduled impairment. (Here, just for loss of vision).

[9] WSI’s strained legal construction of the statute zeros out Avila’s additional impairments of the cervical spine, facial bones, facial nerves and traumatic brain injury. Determination of this issue depends on construction of the term “injury or condition,” that are to be combined with a scheduled injury under N.D.C.C. § 65-01-12.2(11). As a factual matter of course, it is not disputed that *Avila does have additional injuries to the body that are not compensated* under WSI’s interpretation. *The 100 PIM award under the schedule is*

only in connection with his vision loss. The issue comes down to the definition of injury: is it just the claim filing, or is it the bodily injuries?

[10] WSI's construction of the statute does not make sense. The legislature has valued Mr. Avila's vision loss alone at 100 PIM. And he is not double dipping by also receiving an award for admittedly different impairments: to the cervical spine, facial bones, facial nerves and traumatic brain injury. As the loss of vision alone is valued at 100 PIM, it follows that WSI's award does not compensate him for the additional losses. An individual without these additional impairments would receive this same PIM of 100 weeks *just for vision loss*.

[11] Dr. Ferguson, Dr. Patra and Dr. Martin rated a number of injuries, including to the Central Nervous System at 12% whole body. (Appellant's Appendix 110-111). As Dr. Martin noted, the injury to the Central Nervous System is rated under Chapters 13 and 14 of the Guides. The categories to evaluate in determining impairment require evaluation are: (1) level of Consciousness and Awareness under Table 13-4 and episodic Loss of Consciousness or Awareness under Table 13-5; (2) Alteration of Mental Status, Cognition, and Integrative Functioning under Table 13-8; (3) and Influence on Behavior and Mood under Table 13-10.

[12] This final category is especially complicated, because the doctors must evaluate impairments due to all brain-related mood issues, including its causative role in Post-Traumatic Stress Disorder. Moreover, this PPI rating is largely dependent on its effect on his Activities of Daily Living under Table 13-10. This rather subjective scoring of ability to participate in ADL's is liable to interpretation, but based on his limited abilities and reliance on family, it is readily apparent that he has significant impairment in brain function.

Avila is profoundly disabled, and WSI has itself stipulated that Avila need not even search for work. (See R. 30-40; *see especially* paragraph 2 at R. 38). However, Avila's treating doctor is unfortunately not familiar enough with the Guides and has not offered a rating. Thus, the factual record supports an additional whole-body rating of 12% due to TBI.

[13] The Court, in *Shiek v. North Dakota Workers Compensation Bureau*, 2002 ND 85, 643 N.W.2d 721, noted that the focus must be on the various injuries to the body, not on whether the entire claim arose from one accident:

When the Legislature switched to a whole-body impairment system in 1995, its intent was to *increase the amount of benefits for the most severely impaired workers*, but decrease the amount of benefits for less severely impaired workers and eliminate benefits for workers whose whole-body impairments fell below 16 percent. *See Saari*, 1999 ND 144, ¶ 8, 598 N.W.2d 174. However, as illustrated by the following two examples, under the interpretation of N.D.C.C. § 65-05-12.2(7) advanced by the Bureau in this case, some of the most severely impaired workers would never receive the full amount of permanent partial impairment benefits to which they are entitled *simply because their impairments happened to develop at different times and did not affect the same body part*.

In the first example, assume the Bureau determines, through four different permanent impairment evaluations each made at different times, that a claimant has a left-leg impairment of 15 percent whole-body, a right-leg impairment of 15 percent whole-body, a left-arm impairment of 15 percent whole body, and a right-arm impairment of 15 percent whole-body, all caused by compensable injuries. Under the interpretation of N.D.C.C. § 65-05-12.2(7) advanced by the Bureau in this case, *none of these impairments would be combined because they arose at different times and were to different body parts*. Therefore, each of these impairments *would be viewed separately and this claimant would never receive an award for the work-related impairments*, see N.D.C.C. § 65-05-12.2(10) (providing for an award of zero weeks for an impairment of one to fifteen percent), despite the fact that the claimant suffers from a combined whole-body impairment of 48 percent, see AMA Guides, at 322 (Combined Values Chart). Under N.D.C.C. § 65-05-12.2(10), a claimant with a 48 percent whole-body impairment rating is entitled to an award of 230 weeks. *Shiek*, 2002 ND 85 at ¶21-22 (emphasis added).

[14] The *Shiek* Court noted the complexity of the PPI statutes and held that

whole-body ratings should be utilized so as to fully compensate injured workers. WSI may read *Shiek* as support for its theory that the whole-body rating is the focus here, and that prevents Avila from receiving his scheduled award for vision loss and also his numerous other impairments. But *Shiek* did not address a schedule award in conjunction with additional impairments (impairments that would not be compensated under WSI's interpretation). And the *Shiek* Court did point to two other crucial and cardinal principles: that *the most severely injured should receive the lion's share* of the PPI benefit and that *each separate body part injured in one accident* should be rated for impairment.

[15] *Avila had one work accident but suffered numerous bodily injuries. Each injury must be compensated separately: the vision loss under the schedule, and the injuries to the cervical spine, facial bones and facial nerves, and traumatic brain injury under the Guides.* WSI argues that Avila is double dipping. This is wrong. Avila has suffered other bodily injuries not compensated by the 100 PIM schedule award attributable to loss of vision of an eye which equals or exceeds 20/200 corrected. The statute provides for a PIM of 100 solely for vision loss. Any worker suffering such vision loss (including those without additional impairments) are also entitled to this award. *The legislature has valued vision loss alone highly, at 100 PIM.* The statute does not preclude an additional award for his other losses. The subsection merely directs that "other impairments *for the same work-related injury or condition,*" must be combined. Avila's visual loss schedule award does not include the other permanent impairments he suffered in this accident.

[16] The record shows that Avila suffered the following bodily injuries in this one accident: the ALJ found that Avila is entitled to the scheduled award of 100 PIM due to his

vision loss alone, and the undisputed whole-body ratings under the 6th Edition of the AMA Guides to the Evaluation of Permanent Partial Impairment: 1% for the cervical spine; 1% for TMJ and facial bone impairment; 1% for acoustic nerve injury; and 12% for TBI—central nervous system. (Appellant Appendix 53-54, finding 10).

[17] The ALJ found: “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.” (Appellant Appendix 57-58, Conclusion of Law #10). Precisely so.

[18] The District Court also found this argument persuasive and affirmed. (Appellant Appendix 64-71). The North Dakota Supreme Court should defer to the ALJ determination that while Avila filed one injury claim, he suffered more than one bodily injury. The Court should accordingly affirm the decision of the District Court which had affirmed the decision of ALJ Thomas.

Respectfully submitted this 12th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

[19] The undersigned, as attorney for the Claimant/Appellee in the above matter, hereby certifies, in compliance with N.D.R.App.P. 32, that the above brief was prepared with proportionally spaced, 12-point font typeface, and the total number of words in the above Brief, including footnotes, but excluding words in the table of contents, table of authorities, this certificate of compliance, and the certificate of service, totals 2,108 words.

Dated February 12, 2020.

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CERTIFICATE OF SERVICE

[20] I hereby certify that on February 12, 2020, I filed and served the following documents on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25 and 31:

- 1. Appendix to the Brief of Appellee Isai Avila; and**
- 2. Brief of Appellee Isai Avila**

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