

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

A. WSI'S CONSTRUCTION AND APPLICATION OF N.D.C.C. §65-05-12.2(11) IS CONSISTENT WITH HOW THIS COURT HAS PREVIOUSLY INTERPRETED LAW ON PERMANENT IMPAIRMENT AWARDS RELATING TO COMBINING IMPAIRMENTS RESULTING FROM AN INJURY TO DETERMINE A WHOLE BODY IMPAIRMENT.

[1] The focus of this appeal is N.D.C.C. § 65-05-12.2(11) and specifically the following language: **“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.) What this Court must consider is whether the ALJ’s construction of the above cited language does not apply to Avila’s permanent impairment award because his vision impairment under N.D.C.C. § 65-05-12.2(11) did not “combine with other impairments for the same work related injury or condition . . .”

[2] The ALJ concluded that the other impairments that Avila sustained (cervical, TMJ, facial bone, acoustic nerve, and TBI) were not the “same” as the injury he sustained to his left eye. (Conclusion of Law #6, Appx. 56) That is true. However, the vision loss, which is an impairment under N.D.C.C. § 65-05-12.2(11) did **combine with impairments** for the same work related injury, that being the work injury of February 11, 2015. The ALJ’s construction (which Avila argues is correct) is that the language of the statute would have to say same “incident” rather than injury to support WSI’s

construction. However, neither the ALJ nor Avila explain when the remainder of the statute would apply, specifically, when an injured worker would get the greater of the award under N.D.C.C. § 65-05-12.2(11) or the **combined rating** under the AMA Guides. This is because the construction effectively reads those words out of the statute. Statutes must be construed as a whole and give meaning and effect to every word, phrase and sentence. Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225, 602 N.W.2d 704.

[3] Avila implies in his Brief to this Court that WSI's construction of N.D.C.C. § 65-05-12.2(11) would be inconsistent with how this Court has construed other statutes relating to permanent impairment. This is not the case.

[4] In Shiek v. North Dakota Workers Comp. Bureau, 2002 ND 85, 643 N.W.2d 721, this Court considered whether WSI must combine all impairments to different body parts into one single whole-body impairment rating when the impairments, "caused by work-related injuries from the same accident, are determined at two different permanent impairment evaluations and result in awards based on two different permanent impairment award systems." Id. ¶ 17. Shiek specifically discussed combining impairments from scheduled injuries and impairments for other body parts from the same injury, precisely the issue here. This Court concluded that "when a claimant who has received a prior permanent impairment award is later determined to have a subsequent permanent impairment, the Bureau must first in accordance with subsection 6 and 10 of N.D.C.C. § 65-05-12.2, determine the whole-body impairment for each condition and then **combine the claimant's prior and subsequent impairment percentages into a single combined whole-body impairment percentage . . .**" Id. ¶ 24 (emphasis supplied).

[5] Avila did not just sustain a vision impairment as a result of the February 11, 2015, work injury. He also sustained injuries that resulted in other impairments for other body parts and conditions as a result of that same February 11, 2015, work injury. It is undisputed that Avila has a combined 29% whole body impairment under the AMA Guides for his scheduled injury (vision) and his other impairments from other injuries as a result of the same February 11, 2015, work injury. By the plain language of N.D.C.C. § 65-05-12.2(11), Avila should receive the greater of the permanent impairment multiplier for the combined rating under the AMA Guides (29% or 45 permanent impairment multiplier) **or** the permanent impairment multiplier under subsection (11) (100 permanent impairment multiplier). No other construction makes sense.

[6] While Avila contends that WSI's construction would leave some of his impairments uncompensated, but for the scheduled injury provision, N.D.C.C. § 65-05-12.2(11), Avila would have only received 45 permanent impairment multiplier. Further, another injured worker that has other impairments in addition to a scheduled injury like Avila that do not reach the threshold for an award of 14% whole person would also have uncompensated impairments. By way of illustration, Avila has a combined whole body impairment for the other injuries sustained on February 11, 2015: brain injury (12%) combined with cervical spine (1%), combined with facial disfigurement/scar (1%), combined with facial bone/hearing (1%) equals 15% whole body impairment. A 15 percent whole body impairment equates to 10 permanent impairment multiplier. However, if Avila had only sustained the brain injury and a 12% impairment in addition to his vision impairment, he would have a 26 percent whole body impairment for his combined impairment of 16% for vision and 12% for brain injury. A 26% whole person

impairment would equate to a 35 permanent impairment multiplier which again is less than the impairment under N.D.C.C. § 65-05-12.2(11) of 100 permanent impairment multiplier for the vision loss. However, in that scenario, because the impairment for the brain injury was only 12%, Avila would not be entitled to a further impairment award because it is below the threshold for an award. N.D.C.C. § 65-05-12.2(10).

[7] The focus of Title 65 is compensable injuries not “incidents.” “Permanent impairment” is defined as a “loss of or loss of use of a member of the body existing after the date of maximum medical improvement and includes disfigurement resulting from an injury.” N.D.C.C. § 65-01-02(25)(emphasis supplied). “If a compensable injury causes permanent impairment,” WSI is required to determine permanent impairment under the terms outlined in N.D.C.C. § 65-05-12.2. “Section 65-05-12.2, N.D.C.C., provides the terms for WSI to determine a permanent impairment award when an injured employee’s compensable injury causes permanent impairment.” Workforce Safety and Insurance v. Beaulieu, 2018 ND 213 ¶ 14, 917 N.W.2d 211. To claim that the word “incident” needs to be in N.D.C.C. § 65-05-12.2(11) to support WSI’s construction and application of that statute is inconsistent with Title 65 and without support in law. The Court must reject the construction applied by the ALJ, and reverse that decision.

CONCLUSION

[8] 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 26th day of February, 2020.

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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 Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals eight (8).

DATED this 26th day of February, 2020.

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Respondent.

**Supreme Court No. 20190386
Dunn Co. District Court
Civil No.: 2019-CV-00042**

**AFFIDAVIT OF
ELECTRONIC SERVICE**

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:

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

on the following persons:

**SM Fencing & Energy Serv., Inc.
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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

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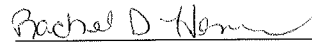
VIA E-MAIL to each person above named at the above e-mail address.

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 February 26, 2020.



Notary Public

