

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

VICKI LEWIS, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 THE NORTH DAKOTA WORKERS )  
 COMPENSATION BUREAU AND )  
 INVESTMENT CENTERS OF )  
 AMERICA, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

SUPREME COURT NO. 990300

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

DEC 2 1999

STATE OF NORTH DAKOTA

REQUESTED RECONSIDERATION OF THE SUPREME COURT'S  
ORDER ENTERED ON NOVEMBER 10, 1999

APPELLANT'S BRIEF

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## STATEMENT OF THE ISSUES

- I. Is the relief afforded by Rule 60(b), N.D.R.Civ.P. available in judicial appeals of administrative decisions?
- II. Did the District Court err in denying the Appellant's Motion for Relief from Judgment?

## INTRODUCTION

This brief is submitted in response to the Supreme Court's Order dated November 10, 1999, and pursuant to the parameters contained in correspondence dated November 17, 1999, from the Clerk of the Supreme Court. Since the Court has not seen Appellant Vicki Lewis' main brief, and since much of the same factual and legal discussion contained in Ms. Lewis' main brief bears on the above-identified issues, significant portions of the main brief are included.

## STATEMENT OF THE CASE

Vicki Lewis filed a claim for workers compensation benefits on December 21, 1996, citing June 13, 1996, as her date of injury (App. 54-55). The Workers Compensation Bureau dismissed Ms. Lewis' claim on June 20, 1997, determining that her injury was not work-related and, therefore, not compensable (App. 60-63). Ms. Lewis requested rehearing, and a formal hearing was held on May 4, 1998. The issue identified at the formal hearing was whether Ms. Lewis had suffered a compensable work injury (App. 121).

Temporary Administrative Law Judge Edwin F. Dyer III [hereafter ALJ], issued his Recommended Findings of Fact, Conclusions of Law and Order on June 2, 1998 finding that Ms. Lewis had, indeed, suffered a compensable injury (App. 70-86). Following receipt of ALJ Dyer's recommended decision, the Bureau's litigation counsel engaged in ex parte contacts with the Bureau (unknown to Ms. Lewis or her counsel) (App. 108-119) which resulted in the Bureau agreeing to the compensability of Ms. Lewis' claim but denying disability benefits after November 18, 1996, alleging that her unemployment was unrelated to her compensable injury (App. 87-90). Ms. Lewis petitioned for reconsideration on July 22, 1998, asserting that her inability to obtain suitable employment was a direct consequence of her compensable work-related injury (App. 91-102). The Bureau's litigation counsel again engaged in ex parte contacts (again unknown to Ms. Lewis or her counsel) (App. 116-119), and, as a result, the Bureau denied Ms. Lewis' petition for reconsideration on August 13, 1998 (App. 103-105).

Ms. Lewis appealed the Bureau's decision on September 1, 1998 (App. 106-107). This Court found the Bureau engaged in "systemic" violations of the law in its ex parte communications on December 22, 1998. Scott v. North Dakota Workers Compensation Bureau, 1998 ND 221, 587 N.W.2d 153. The District Court, the Honorable Thomas J. Schneider presiding, issued a Memorandum dated December 28, 1998, and an Order and Judgment affirming the Bureau's decision on January 13, 1999 (App. 3-5). Ms. Lewis then moved on February 9, 1999, to set aside the District Court decision under Rule 60(b), N.D.R.Civ.P. and sought reinstatement of the ALJ's decision, alleging Bureau fraud in not disclosing its "systemic" ex parte communications (App. 7-19). At this point, there was still no evidence of improper ex parte communications, only the presumption of "systemic" violations after Scott, supra. Despite the Bureau's objection, the District Court ordered the Bureau's ex parte communications to be disclosed in an Order dated February 24, 1999 (App. 33).

Since Ms. Lewis had sought reinstatement of the ALJ's decision and Judge Schneider had, instead, ordered the Bureau to disclose its ex parte contacts, the parties were unsure of the effect of the Court's ruling on Ms. Lewis' appeal (App. 34). Judgment had been entered on January 13, 1999 (App. 3-5), and depending on the effect of Judge Schneider's Order for Disclosure (App. 33), Ms. Lewis' 60-day time period for appealing the District Court's affirmance of the Bureau's Order of January 13, 1999, was running. Rule 60(b), N.D.R.Civ.P. provides that, "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation" (emphasis added).

Presumably, if the District Court can set a judgment aside, it can suspend its operation pending a final resolution. However, it was unclear to the parties what the effect of Judge Schneider's Order for Disclosure was on the earlier Judgment.

After the Bureau refused to cooperatively seek clarification of Judge Schneider's Order for Disclosure (App. 34), Ms. Lewis' counsel contacted the Judge on March 9, 1999, to find out, specifically, if the District Court had retained jurisdiction (or if the appeal clock was running) (App. 35). Judge Schneider replied on March 10, 1999, assuring the parties that the District Court would retain jurisdiction pending a substantive ruling on Ms. Lewis' 60(b) motion.

Following disclosure of the Bureau's ex parte communications, the District Court concluded that Ms. Lewis was not entitled to relief under Rule 60(b), N.D.R.Civ.P. (App. 47). The District Court reasoned that Ms. Lewis should have raised the issue of ex parte contacts in her Specification of Error on September 2, 1998 (App. 47). The District Court's order was served on Ms. Lewis on August 31, 1999 (App. 46), and she took this appeal of both the Order dated January 6, 1999, and the Order dated June 28, 1999 (App. 48).

#### STATEMENT OF FACTS

Vicki Lewis filed a claim for workers compensation benefits on December 21, 1996 (App. 54-55). Ms. Lewis had worked as an investment banker for Investment Centers of America (ICA), and had developed vocal cord nodules as a result of overusing her voice at work. Ms. Lewis noted on the "Worker's Claim for Injury," which she filed with the Bureau on December 21, 1996, that she had already lost 48 work days



due to her work-related injury. She also noted that she had been laid off by her employer, ICA, on November 18, 1996 (App. 55).

On November 5, 1996, Dr. Sue Karen Wink, M.D., attributed Ms. Lewis' condition to "continued overuse and stress" of her voice at work (App. 50). On December 18, 1996, Dr. Wink noted that Ms. Lewis would not be able to return to her occupation of investment banking and was disabled from "any form of work which would require using the voice six to eight hours a day" (App. 51-52). On December 24, 1996, Laura Lowe, MS/CCC, a speech/language pathologist at Medcenter One, noted that, if Ms. Lewis returned to work in her usual occupation, she might lose her voice entirely. Ms. Lowe stated, "This is a disabling condition which requires Ms. Lewis to seek employment in a field of work in which she would not use her voice or use her voice minimally" (App. 53).

On January 6, 1997, Debra Osowski, MA, the vocational rehabilitation consultant assigned by the Bureau, noted that Ms. Lewis had undergone surgery on her vocal cords on June 27, 1996, and had lost 60 days of work after her surgery. Ms. Lewis then worked in a modified position at ICA until November 18, 1996, when she was laid off. Prior to her lay-off, Ms. Lewis' position was modified to require only 2 1/2 hours of phone use per day. Ms. Osowski noted that Ms. Lewis had been working with the State's Division of Vocational Rehabilitation to secure retraining (App. 56-57). On March 17, 1997, Dr. Wink wrote Ms. Lewis' Bureau claims analyst, Laurie Jensen, that Ms. Lewis was "disabled from her current occupation" (App. 58-59).

The Bureau dismissed Ms. Lewis' claim for benefits on June 20, 1997, finding that her condition was not work-related (App. 60-63). Ms. Lewis requested rehearing on August 26, 1997 (App. 64-67). On March 30, 1998, Dr. Wink offered her final opinion on causation: "[i]t is reasonable to assume that Mrs. Lewis' exposure in the work place from 1992 to 1996 had significant bearing on her vocal condition" (App. 68-69).

A formal administrative hearing was held on May 4, 1998, Temporary Administrative Law Judge Edwin F. Dyer III, presiding. According to ALJ Dyer, the issue to be resolved at the hearing was: "[W]hether Claimant sustained a compensable injury. More specifically, the issue was whether there was a causal connection between the Claimant's voice problems and her employment" (App. 71). Ms. Lewis' counsel also identified compensability as the sole issue at the formal hearing (App. 121). Following the formal hearing, ALJ Dyer issued Recommended Findings of Fact, Conclusions of Law and Order finding Ms. Lewis had sustained a compensable injury and was entitled to appropriate workers compensation benefits (App. 70-86). Jeff R. Bitz, the Bureau's Director of Claims and Rehabilitation, issued the Bureau's final Order on June 23, 1998 (App. 87-90). Mr. Bitz adopted additional findings of fact and conclusions of law denying Ms. Lewis any disability benefits after November 18, 1996, when she had been laid off from her employment with ICA (App. 89, Conclusion of Law III).

On July 22, 1998, Ms. Lewis petitioned for reconsideration of the Bureau's final Order (App. 91-102). Ms. Lewis noted that her position at ICA had been modified following her work injury and did not exist in

the national labor market. She noted that she had been unable to find suitable employment as reflected by accompanying Job Service logs. She noted that she had applied for and had received vocational rehabilitation assistance from the Department of Human Services, and she enclosed records from the Division of Vocational Rehabilitation indicating that she was undergoing retraining as a medical transcriptionist, a position requiring very little talking.

On August 3, 1998, Jeff R. Bitz denied Ms. Lewis' petition for reconsideration. Subsequently, Ms. Lewis filed her Notice of Appeal, Specification of Error on September 1, 1998 (App. 106-107). Ms. Lewis noted that her entitlement to disability did not depend on her reasons for terminating employment and that the issue of her entitlement to disability benefits should have been raised in the Bureau's Dismissal dated June 20, 1997. Ms. Lewis also noted that the Bureau's denial of disability benefits without affording her an evidentiary hearing had deprived her of due process and that the Bureau's use of Jeff R. Bitz as both an investigator and adjudicator had deprived her of due process. Since Ms. Lewis was unaware, at that point, of the Bureau's ex parte activities, they were not included in her Specification of Error.

#### LAW AND ARGUMENT

- I. Rule 60(b), N.D.R.Civ.P., affords relief from judgment to injured workers as well as others.

Generally, the North Dakota Rules of Civil Procedure apply to "all suits of a civil nature" (Rule 1, N.D.R.Civ.P.). Appeals to the district court are similarly governed by the Rules unless subject to a statutory exception (Rule 81, N.D.R.Civ.P.). Nothing in N.D.C.C., Chapter 28-32 or

Title 65 exempts Bureau appeals from application of the Rules of Civil Procedure. The Office of Administrative Hearings has determined that the Rules of Procedure will govern certain administrative hearing procedures. See: N.D.A.C., Sections 98-02-02-06 and 98-02-02-07.

In State by Workers Compensation Bureau v. Kostka Food Serv., 516 N.W.2d 278 (N.D. 1994), this Court used Rule 60(b), N.D.R.Civ.P. to grant relief from a judgment obtained by the Bureau without proper notice. Presumably, the same remedies are available to injured workers (such as Vicki Lewis) as are available to Kostka Food Services, an employer.

It is axiomatic that a fair workers compensation adjudicatory procedure is Vicki Lewis' only avenue of relief for her work-related injury. The same procedures and safeguards available to civil litigants should be available to injured workers. Pace v. North Dakota Workmen's Compensation Bureau, 201 N.W.2d 348 (N.D. 1924). Indeed, this Court favors the use of Rule 60(b) to correct judgments because the rule provides for notice and hearing. Disciplinary Action Against Wilson, 462 N.W.2d 105 (N.D. 1990). In the instant case, Ms. Lewis had no practical means of alerting the District Court to the Bureau's undisclosed ex parte communications (presumed after Scott, supra) except to bring a Rule 60(b) motion.

II. The District Court erred in denying Appellant's Motion for Relief from Judgment.

Vicki Lewis filed her District Court appeal on September 1, 1998 (App. 106-107). This Court subsequently found on December 22, 1998, that the Bureau, through the use of ex parte communications, was

engaged in "systemic" violations of the law. Scott, supra. On December 28, 1998, the District Court issued a Memorandum Opinion affirming the Bureau's decision in this matter (App. 3). On January 13, 1999, the District Court issued an Order and Judgment affirming the Bureau's decision (App. 4-5). On February 10, 1999, Ms. Lewis moved to set aside the District Court Judgment under Rule 60(b), N.D.R.Civ.P., alleging that the Bureau had engaged in ex parte communications which had not been disclosed as required by this Court's decision in Scott, supra.

It is now abundantly clear that this Court's determination in Scott, supra, that the Bureau's use of ex parte communications was "systemic" -- was entirely correct. Despite the clear terms of N.D.C.C., Section 28-32-12.1 and despite this Court's imposition of sanctions in Scott, supra, the Bureau's litigation counsel only disclosed her surreptitious ex parte communications with the Bureau when ordered to do so by the District Court. The Bureau's litigation counsel engaged in ex parte communications at least two times following issuance of Recommended Findings of Fact, Conclusions of Law and Order wholly favorable to Ms. Lewis. First, the Bureau's litigation counsel recommended modifying the ALJ's recommended decision to deprive Ms. Lewis of disability benefits, an issue not raised prior to or during the formal administrative hearing. Following issuance of the Bureau's tainted, final Order, Ms. Lewis petitioned for reconsideration and submitted evidence supporting her entitlement to disability benefits (App. 91-102). The Bureau's litigation counsel again engaged in improper ex parte communications -- this time, actually drafting the Bureau's Order on Petition for Reconsideration (App. 103-105; 108-119).

Vicki Lewis was injured in 1996. Generally, the law in effect on the date of injury controls. Anderson v. North Dakota Workers Compensation Bureau, 553 N.W.2d 496 (N.D. 1996). Consequently, the ex parte contacts between the Bureau and its litigation counsel occurred prior to the enactment of N.D.C.C., Section 65-01-16 and are controlled by this Court's decision in Scott, supra. Both the Bureau and its counsel had an affirmative duty to disclose their ex parte communications, and failed to do so. It is apparent that the standard of due process announced by this Court in Scott, supra, has gone unheeded by the Workers Compensation Bureau and its litigation counsel. The actions of the Bureau and its litigation counsel demonstrate an impermissibly adversarial attitude toward Vicki Lewis and represent a continuing pattern of illegal behavior, entitling Ms. Lewis to reinstatement of the ALJ's decision and a determination of her disability status based on current vocational and medical information.

The District Court denied Ms. Lewis' Motion for Relief from Judgment because it found that she should have raised the issue of ex parte communications in her Notice of Appeal and Specification of Error on September 2, 1998 (App. 47), not, because the Bureau's actions were permissible. Clearly, the District Court recognized the Bureau's obligation to disclose its ex parte communications, even if the Bureau and its counsel did not. The District Court denied Ms. Lewis' Motion because Ms. Lewis' counsel should have somehow assumed ex parte contacts before the publication of the Scott, supra, decision on December 22, 1998, finding such communications "systemic."

Clearly, the District Court accepted the Bureau's argument (App. 20-29) that, because Ms. Lewis' counsel is a member of the same law firm as Glen Scott's counsel, Ms. Lewis' counsel should have assumed ex parte contacts were occurring and so should have raised the issue of such contacts in the Specification of Error. The Bureau's argument ignores the experience of another member of the same firm. In Pittman v. North Dakota Workers Compensation Bureau, Morton County Civil No. 95-C-1010, issued approximately six months before this Court's decision in Scott, supra, the District Court announced that a motion to disclose suspected ex parte contacts bordered on frivolous. A copy of the Court's Order is attached as an addendum. The Bureau's position, accepted by the District Court, also ignores the plain meaning of this Court's decision in Scott, supra, and the relationship between the Bureau's counsel in the instant case and the Bureau's counsel in Scott, supra.

Certainly, if the Bureau and its attorney did not understand their obligations under N.D.C.C., Section 28-32-12.1 before this Court issued its decision in Scott, supra, that misunderstanding was cleared up on December 22, 1998, when this Court found the Bureau's ex parte communications to be "systemic" violations of the law. Simply put, Scott held that the Bureau must comply with the plain terms of N.D.C.C., Section 28-32-12.1. That section not only prohibits the sort of ex parte communications which occurred in the instant case as well as in Scott, but also directs both the Bureau and its counsel to disclose both oral and written communications, direct and indirect, if already made. Ms. Lewis' counsel may not have known of the Bureau's ex parte

communications in the instant case, but the Bureau's counsel was a party to them, was presumably aware of Bureau's difficulties in Scott (where the Appellant had actual evidence of ex parte communications), and had a duty, as confirmed by this Court in Scott, to disclose them. Instead, the Bureau's counsel resisted disclosing her ex parte communications until she resisted and was ordered to do so by the District Court (App. 33).

The District Court held Lewis' counsel to an impossible standard of identifying Bureau fraud without any evidence or any finding of "systemic" violation (arguably creating a presumption of ex parte communications) at a time when other members of the same firm were being warned by other district judges that such allegations bordered on frivolous (with the implicit threat of sanctions). Instead, the District Court should have held the Bureau and its counsel to the standards set in N.D.C.C., Section 28-32-12.1 and confirmed by this Court in Scott. Both the Bureau and its counsel had an affirmative duty to disclose their ex parte communications. Ms. Lewis' counsel had no corresponding duty to engage in possibly sanctionable speculations regarding which constitutional violations were taking place behind the Bureau's walls.

#### CONCLUSION

In the instant case, Vicki Lewis has taken the extraordinary step of accusing the Bureau of committing fraud on the District Court through undisclosed ex parte communications. The Bureau has responded that Ms. Lewis should have raised the issue of ex parte communications without evidence and three months before such communications were ruled "systemic." The District Court had no



discretion to ignore the Bureau's ex parte communications and the effects of those illegal acts on Vicki Lewis' entitlement to benefits. The Bureau's intransigence in disclosing ex parte communications cannot be condoned or ignored. Vicki Lewis is entitled to reinstatement of the ALJ's decision, without further modification by the Bureau's litigation counsel.

Respectfully submitted this 2nd day of December, 1999.

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STATE OF NORTH DAKOTA  
COUNTY OF MORTON

IN DISTRICT COURT  
Case No. 95-C-1010

Louis Pittman  
Appellant  
VS  
State of North Dakota by the Workers  
Compensation Bureau  
Appellee

## ORDER

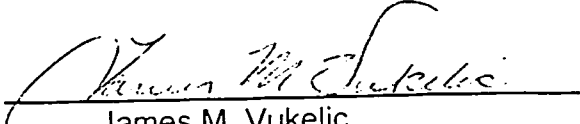
Appellant, Louis Pittman ("Pittman") moves this court for an order requiring Appellee, North Dakota Workers Compensation Bureau ("Bureau") to divulge "any ex parte written communication, including any Bureau attorneys fee billing statement which proves contact was made, and a summary of all oral communication, under N.D.C.C. Section 28-32-12.1." The Bureau resists.

The Bureau's communications with its counsel are not *ex parte* communications under 28-32-12.1(3). See *N.D.C.C. Section 65-01-16(8) and the legislative history attendant to passage of that section of law*. The rationale for the statute was ably set forth by the Honorable Allan Schmalenberger in his Memorandum of April 22, 1998 in which that court concluded the Bureau's contact with its own attorney violated no law or ethical duty. See *Memorandum in Glen Scott v. The North Dakota Workers Compensation Bureau, and Koch Pipeline Co.* date April 22, 1998.

The Bureau is a state agency and is entitled to, indeed would often be remiss if it did not, consult with legal counsel about the scope of its duties and myriad decisions it must make on a regular basis. Administrative hearings are not court trials and administrative agencies are not courts. While some plausible argument could be made relative to contacts between counsel and the hearing officer, the argument here goes much farther. This motion borders on the frivolous. It is DENIED.

Dated this 6<sup>th</sup> day of July 1998.

By the Court:

A handwritten signature in cursive script, appearing to read "James M. Vukelic", is written over a horizontal line.

James M. Vukelic  
Judge of the District Court

CERTIFICATE OF SERVICE

I, Stephen D. Little, certify that on the 2nd day of December, 1999, a true and correct copy of the Appellant's Brief and Appendix with an attached Certificate of Service were mailed to the following:

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