ORIGINAL (e-filed)

20070367

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Janet Von Ruden, Appellee, vs. North Dakota Workforce Safety and Insurance Fund, Appellant, and Mid Dakota Clinic, Respondent.	Supreme Court Case No. 20070367

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REPLY BRIEF OF APPELLANT WORKFORCE SAFETY AND INSURANCE

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APPEAL FROM ORDER REVERSING APPELLANT'S DENIAL OF PARTIAL DISABILITY BENEFITS DATED SEPTEMBER 4, 2007 AND ORDER FOR JUDGMENT AND JUDGMENT DATED OCTOBER 19, 2007
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD JORGENSON

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LAW AND ARGUMENT

I. WSI'S TERMINATION OF VON RUDEN'S BENEFITS DID NOT VIOLATE DUE PROCESS.

1. At no time prior to, during or following the administrative hearing did Von Ruden claim that she was not provided adequate notice of WSI's basis for termination of her partial disability benefits under N.D.C.C. § 65-05-10. As outlined below, there is no basis for contending WSI did not provide Von Ruden with adequate pretermination notice of the basis for its termination of benefits. Accordingly, WSI's actions did not violate due process.

2. On December 15, 2005, WSI issued a Notice of Intention to Discontinue/Reduce Benefits, advising Von Ruden that her temporary partial disability benefits were being discontinued effective 1/5/2006. That notice provided as follows:

> Your weekly benefits for TPD (Temporary Partial Disability) are being, or will be discontinued or reduced effective 1/05/2006 for the following reason:
>
> A recent review of your claim has revealed that you have received temporary partial disability benefits beyond the 1825 days as provided by N.D.C.C. § 65-05-10(2). This statute provides that partial disability benefits may not exceed a period of five years (1825 days).
>
> Therefore, your weekly benefits for temporary partial disability are being, or will be, discontinued or reduced effective 1/05/2006. As a result of temporary partial disability benefits paid in error, you will receive an overpayment of temporary partial disability benefits from 1/25/2005 through 12/12/2005. However, WSI will not seek reimbursement of the overpayment of benefits.

(C.R. 17) In response to the Notice, Von Ruden on January 9, 2006, requested reconsideration. (C.R. 18) Her request for reconsideration was timely and made

no contention that she did not understand WSI's basis of terminating her benefits. (Id.)

3. On January 19, 2006, WSI issued its Order Denying Further Partial Disability Benefits. (C.R. 19-26) Von Ruden, through counsel, submitted a timely request for reconsideration/demand for formal hearing. (C.R. 27) That request/demand provided again did not raise an issue pertaining to failure to understand WSI's basis of termination of benefits or violation of due process, the same providing:

> Findings of Fact 1, and 2 and Conclusions of Law 1, 2, and 3 are in error.
>
> WSI cannot apply the 5-year limitation in TPD benefits to claimants injured and receiving benefits before August, 1997. Furthermore, WSI has waived the 5-year limitations in the instant case. Finally, the Claimant is totally, not partially, disabled and entitled to TTD, not TPD benefits.

(C.R. 27) Again, at the administrative hearing, neither in opening statement (C.R. 262 at 8-15) or in closing arguments (C.R. 262 at 44-47) did Von Ruden assert inadequate notice and opportunity to be heard or a violation of due process.

4. On appeal to District Court, Von Ruden did not make any assertions regarding inadequate notice. Her Notice of Appeal and Specification of Error state: "Findings of Fact 5, 6 and 11 are in error, and Conclusions of Law 2 and 3 are in error. Ms. Von Ruden relied on her claims analyst's assurance that she would continue to receive disability benefits as long as she remained disabled." Similarly, in her briefs filed with the District Court, Von Ruden made no such contention.

> "Due process requires a participant in an administrative proceeding be given notice of the general nature of the questions to be heard, and an opportunity to prepare and to be heard on those questions." Saakian v. North Dakota Workers Comp. Bureau, 1998 ND 227, ¶ 11, 587 N.W.2d 166. "Notice is adequate if it apprises the part of the nature of the proceedings so there is no unfair surprise." Id.

Buchmann v. North Dakota Workers Compensation Bureau, 2000 ND 79 ¶ 12, 609 N.W.2d 437. The pre-termination notice "must include 'a statement of the reason for the action, [and] a brief summary of the evidence relied upon by the bureau." Flink v. North Dakota Workers Compensation Bureau, 1998 ND 11 ¶ 15, 574 N.W.2d 784.

5. Here, unquestionably WSI fairly apprised Von Ruden of the basis of its termination of her partial disability benefits – she had exhausted five years of those benefits under N.D.C.C. § 65-05-10(2). She never contended otherwise. The District Court, *sua sponte*, determined that WSI termination of Von Ruden's partial disability benefits violated due process. Under the law as articulated by this Court, cited above, this is in error.

6. The District Court erroneously relied on Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770, 772 (N.D. 1988). In Beckler, WSI [the the Bureau] attempted to terminate disability benefits based on a release to return to work. However, in doing so, no notice was provided to Beckler that his disability benefits were going to be terminated, nor was he apprised of the evidence supporting the termination of those benefits. The Court found, in that instance, a violation of due process. Id. at 775.

7. In this case, WSI was not terminating Von Ruden's partial disability benefits based on a medical report, return to work, or in fact anything to do with her medical condition. Rather, it was terminating her partial disability benefits based on the cap on those benefits found in N.D.C.C. § 65-05-10(2). Von Ruden was so informed in the Notice issued December 15, 2005. (C.R. 17) Von Ruden had an opportunity to, and did contest the termination of her partial disability benefits based on reasons WSI advised her that her benefits were being terminated. Accordingly, the District Court erred in applying Beckler, and finding a due process violation. See Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129 ¶ 7, 8, 598 N.W.2d 89 (discussion requirements of due process and rejecting argument WSI's actions violated same).

II. WSI PROPERLY EXERCISED ITS DISCRETION AND DID NOT WAIVE THE FIVE YEAR LIMITATION ON PARTIAL DISABILITY BENEFITS IN VON RUDEN'S CASE.

8. Von Ruden contends that she met the requirements of waiver of the five year limitation on partial disability benefits and therefore WSI must waive the cap or issue and appealable order. WSI did issue an appealable Order, after concluding Von Ruden did not meet the requirements for waiver under N.D.C.C. § 65-05-10 after reviewing the claim for express waiver and, finding none, review of the claim to determine if waiver was appropriate. As explained in Wahlin's testimony, in those claims where there had been payment of five years of partial disability or in excess thereof, prior to issuance of a Notice informing the injured worker that their partial disability benefits were being terminated under the cap, the claim was reviewed to see if there had been an express waiver based on a

documented phone call, letter or prior litigation. (App. pp. 122-123) When one was not identified, WSI did look at the claim to make a determination as to whether a waiver was appropriate. (App. p. 123) If no waiver was appropriate, a letter and Notice went out in December of 2005 that partial disability benefits were terminated based on the applicable cap under N.D.C.C. § 65-05-10. (App. pp. 121-122) Von Ruden was informed of WSI's decision on December 15, 2005. (App. pp. 49-50)

9. Von Ruden's five year limit on partial disability benefits expired in mid-January of 2005. Von Ruden was not working in mid-January 2005. WSI's ability to grant a waiver of a five-year limit on TPD benefits only applies if the injured worker "is working" at the time those TPD benefits would otherwise expire under N.D.C.C. § 65-05-10. Because Von Ruden was not employed when the five year limit on TPD benefits came due, there was no statutory basis for exercising the waiver. Ms. Wetch, the claims adjuster, could not grant a waiver in 2003 when she spoke to Von Ruden about her terminating her employment as there was no way for Wetch to know what was to come in terms of Von Ruden's claim. In addition, there was no evidence that the five year limitation on partial disability benefits was ever discussed between Wetch and Von Ruden.

10. The Legislature did not provide for automatic waiver of the five year limitation on partial disability benefits in N.D.C.C. § 65-05-10 if certain criteria are met. Instead, the plain language of the statute provides that it left that decision up to WSI. As this Court recently stated:

> It is for the legislature, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the

> legislature's intent. . . . The function of the courts is to interpret the law, not to legislate, "regardless of how much we might desire to do so or how worthy an argument." . . . . As we have noted, "[i]f the rule is wrong, the legislature has ample power to change it. but the duty of the judiciary is to enforce the law as it exists."

Olson v. Workforce Safety and Insurance, 2008 ND 59 ¶ 23 (citations omitted).

CONCLUSION

11. For the foregoing reasons and as outlined in Appellant's Brief to this Court dated February 25, 2008, WSI's Final Order of December 7. 2006, by which it found that Von Ruden's temporary partial disability benefits were properly terminated after five years, should be *affirmed* in all respects, and the District Court's decision *reversed.*

DATED this 28th day of March, 2008.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, North Dakota Workforce Safety and Insurance Fund, and the author of the Reply Brief of Appellant Workforce Safety and Insurance hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 1,940 words. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 28th day of March.

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JENNIFER M. MJONESS. Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Christine, North Dakota, not a party to nor interested in the action; that she served the attached:

Reply Brief of Appellant Workforce Safety and Insurance

on the following person(s):

Stephen D. Little (via Email: dietzlittle@btinet.net)
Dietz & Little
2718 Gateway Avenue
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Mid Dakota Clinic (via U.S. Mail)
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on March 28, 2008, a true and correct copy thereof.

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

JENNIFER M. MJONESS

SUBSCRIBED AND SWORN TO Before me on March 28, 2008.

(SEAL)

RACHEL D HENRY
[illegible] Public
[illegible] Dakota
My Commission Expires Oct. 4, 2009

NOTARY PUBLIC