ORIGINAL

20070367

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

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BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE FUND

++

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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STATEMENT OF THE CASE

1. On March 31, 1994, Janet Von Ruden ("Von Ruden") submitted a claim for benefits with the North Dakota Workers Compensation Bureau (n/k/a Workforce Safety and Insurance and hereinafter referred to as "WSI") in connection with an injury sustained on March 23, 1994. (App[1]. p. 25) WSI accepted liability for Von Ruden's musculoskeletal strain by Order dated August 2, 1994. (App. pp. 26-32)

2. On February 8, 2000, WSI issued a Notice of Intention to Discontinue/Reduce Benefits. (App. p. 45) By that Notice, Von Ruden was asked to send copies of her pay stubs each month to determine eligibility for partial wage replacement benefits. (Id.)

3. On December 15, 2005, WSI issued a Notice of Intention to Discontinue/Reduce Benefits, discontinuing Von Ruden's partial disability benefits effective January 5, 2006, as she had received in excess of five years of partial disability benefits. (App. p. 51) Von Ruden requested reconsideration from WSI's Notice of December 15, 2005. (App. p. 52)

4. On January 19, 2006, WSI issued an Order Denying Further Partial Disability Benefits. (App. pp. 53-60) Von Ruden, through counsel, requested reconsideration and a formal hearing. (App. p. 61) An administrative hearing was conducted September 28, 2006, before Administrative Law Judge Janet Demarais Seaworth ("ALJ Seaworth"). (App. pp. 62-63, 67-80)

[1] "App." refers to the Appendix filed contemporaneously with this Brief.

5. On October 27, 2006, ALJ Seaworth issued her recommended findings of fact and conclusions of law. (App. pp. 81, 82-96) WSI its Final Order on December 7, 2006, wherein it adopted the recommended decision and added two Conclusions of Law relating to termination of partial disability benefits and failure to establish entitlement to temporary total disability benefits. (App. pp. 97-100) Von Ruden requested reconsideration from the Final Order (App. p. `0`), which WSI denied by Order dated February 12, 2007. (App. p. 102)

6. On February 12, 2007, Von Ruden appealed WSI's decision to the District Court, Burleigh County, North Dakota. (App. pp. 104-108) On July 18, 2007, the District Court granted Appellant's Motion to Adduce Additional Evidence, in the form of hearing testimony from Timothy Wahlin in a different adjudicative proceeding. (App. pp. 109-110) On September 4, 2007, the District Court entered its Order Reversing Appellant's Denial of Partial Disability Benefits. (App. pp. 1465-154) Judgment was entered October 19, 2007 (App. pp. 158-159), and Notice of Entry of Judgment served October 24, 2007. (App. p. 160) WSI filed its Notice of Appeal to this Court on December 14, 2007. (App. p. 161)

STATEMENT OF FACTS

7. On March 23, 1994, Von Ruden suffered a compensable, work related injury to her low back while working as an x-ray tech at Mid Dakota Clinic in Bismarck. (App. p. 5) By its "Order Awarding Specific Benefits" dated August 2, 1994, WSI paid medical and disability benefits to Von Ruden. (App. pp. 26-32) That Order provided that Von Ruden was entitled to benefits referable to a musculoskeletal strain sustained on March 23, 1994, and not in connection with

her condition of arachnoiditis. (App. p. 29) Von Ruden did not appeal this decision.

8. In January 2000, Von Ruden began a part-time job as liturgy coordinator at Cathedral of the Holy Spirit Church in Bismarck. (App. p. 67[2], 73-74, Tr. 28-29) Her schedule was flexible and she generally worked a maximum of 15 hours per week. (App. p. 74, Tr. 29) Von Ruden's husband was a union pipefitter and was working in Iowa while Von Ruden was performing her part-time church duties in Bismarck. (App. p. 74, Tr. 29-30)

9. In early 2003, Von Ruden contacted Myrna Wetch, claims analyst at WSI, and asked Wetch what would happen if she (Von Ruden) quit her job. (App. p. 74, Tr. 30) According to Von Ruden, Wetch told her "Nothing would change" and "[E]verything was fine with Workers Comp whether I was working or not." (App. p. 74, Tr. 30-31) Von Ruden subsequently quit her part-time job at church and joined her husband on the road. (App. pp. 74, 36, Tr. 31-32, 36) No doctor took Von Ruden off work at that time. (App. p. 75, Tr. 36) Instead, Von Ruden "voluntarily chose to leave" that employment. (App. p. 77, Tr. 41)

10. Von Ruden asked Wetch for a letter which confirmed their telephone conversation, and Wetch sent Von Ruden a letter dated February 19, 2003. (App. p. 48) In pertinent part, the letter stated as follows:

> In response to your recent request for verification of continued disability benefits, you would be entitled to temporary partial disability benefits based upon your earnings capacity of $150.00 per week or your actual earnings, whichever is the higher, for as

[2] "App. p. 67 is the transcript of the administrative hearing held September 28, 2006. The designation "Tr. p. __" thereafter refers to the specific page in the transcript contained in the Appendix.

> long as we have verification of your continued disability which is directly related to your work injury of March 23, 1994.

(Id.)

11. The letter from Wetch to Von Ruden of February 19, 2003, does not refer in any respect to a "cap" of five years on the payment of temporary partial disability benefits, nor does it refer to Section 65-05-10(2), N.D.C.C. At the hearing, Von Ruden conceded that "I never knew anything about a five-year law. Five-years was never, ever mentioned to me anywhere." (App. p. 77, Tr. 41)

12. Von Ruden's testimony that her decision to stop working in January 2003 was not related to any new work restriction imposed by her treating physician, Dr. Ralph Dunnigan (App. pp 75, 77, Tr. 36, 41), is supported by Dr. Dunnigan's treatment note of December 11, 2002 – the last note before Von Ruden quit her job – which stated in part as follows:

> Janet Von Ruden returned for follow up. I had seen her two months ago. She is still doing well on the Oxycontin. It is controlling her pain well. She continues to be more active.

(C.R. 215) When Dr. Dunnigan saw Von Ruden two months later, on February 17, 2003, he noted that "she is having a bad day today, but generally her pain has been fairly well controlled on the Oxycontin." (C.R. 216)

13. Von Ruden had participated in two functional capacity assessments in the late 1990's. In the first, conducted by Jeanne DeKrey at St. Alexius on February 3-4, 1997, Von Ruden was found capable of full-time work – not part-time work – at a sedentary level. (App. pp. 33-38) In the second FCE, administered by Ms. DeKrey on May 3-4, 1999, Von Ruden was again found capable of full-time work, this time at a sedentary/light level. (App. pp. 39-43)

14. In a treatment note dated January 24, 2000, Dr. Dunnigan stated it was reasonable for Von Ruden to "return to part-time gainful employment," but he did not cite any objective medical evidence as to why she could not work full-time in accordance with the FCE performed eight months earlier. (App. p. 44) Dr. Dunnigan wrote a letter to CorVel on May 11, 2000, noting that his patient was back at work 15 hours a week and stating "[Von Ruden] is not yet in a position where she can increase her hours." (C.R. 179) As objective medical evidence for Von Ruen's inability to work longer hours, Dr. Dunnigan merely stated "[s]he gets extremely fatigued."

15. As represented by Myrna Wetch in her letter to Von Ruden of February 19, 2003, Von Ruden did continue to receive partial disability benefits even after she quit her job at the church. (App. p. 74, Tr. 31) However, on December 15, 2005, WSI issued its "Notice of Intention to Discontinue/Reduce Benefits" by which it informed Von Ruden that her temporary partial disability benefits would be discontinued effective January 5, 2006, because she had received partial disability benefits beyond the five-year period (1825 days) allowed in Section 65-05-10(2), N.D.C.C. (App. p. 51) WSI also provided a letter to Von Ruden explaining that she had been paid in excess of five years of partial disability benefits in error. (App. pp. 49-50)

16. Timothy J. Wahlin is an Assistant Attorney General at Workforce Safety and Insurance. On January 26, 2007, he testified on connection with a claim for benefits by Judith Midthun. At that administrative hearing, Wahlin testified regarding WSI's procedure for application of the five year limitation on partial

disability benefits contained in N.D.C.C. § 65-05-10 and WSI's waiver of that limitation. (App. pp. 111-145[3]) Wahlin testified as to both the current process, and what was done by WSI to correct a previous erroneous interpretation that the five year limitation on partial disability benefits contained in N.D.C.C. § 65-05-05(2) did not apply if the claimant was released to and working less than 28 hours per week.

17. Wahlin testified that the current process for exercising the waiver of the five year limitation on benefits was to assign a claims supervisor to track claims approaching the five year duration on partial disability benefits. (App. p. 115) Prior to the five year limitation, the claim is brought to the attention of a staff attorney and a staffing takes place to determine whether or not waiver of the five year limitation is appropriate. (App. p. 116) That staffing takes place between the staff attorney, claims supervisor, claims adjuster and, if necessary, Kim Ehli, head of claims. (Id.) There is a review of whether there is clear and convincing evidence that the injured worker has a work release below 28 hours, whether the injured worker is working, and then whether there is some sort of extraordinary circumstances involved such that waiver of the five year statute needs to take place. (App. p. 117) Wahlin explained that there are injured workers out there that are being paid partial disability benefits but in reality they could be receiving temporary total benefits but a doctor is keeping them in the work force for therapy. (Id.) If the five year cap is applied to these workers, it would punish that

[3] "App. pp. 111-145" is the excerpt of the testimony of Timothy Wahlin in the Claim of Judith Midthun, submitted to the District Court pursuant to the Order Granting Motion to Adduce Additional Evidence.

individual for working when in reality they could be a temporary total disability recipient. (App. p. 118) This has been the practice since approximately 2004. (App. p. 120)

18. Wahlin further explained that in approximately 2003, it was noticed that in some claims there were notations that had been made in notepad entries that if there was less than a 28 hour work release, the five year cap on partial disability benefits did not apply to the claim. (App. pp. 118-119) It was determined that the statute does in fact apply to those claims, and a determination must be made on whether to waive that five year limitation. (App. pp. 119-120, 123) WSI then generated a list of claims where the five year limitation would be applies (post 1991 law), and worked through those files to determine whether a waiver of the five year limitation had been made. (App. p. 121) In some of the claims a waiver of the five year limitation was found either in a documented notepad of a phone call with the analyst, prior litigation which established a waiver, or a letter from the organization to the injured worker indicating a waiver. (App. pp. 122-123)

19. Where no waiver had been identified, WSI worked through the current process identified above to make a determination whether a waiver was appropriate in that claim. (App. p. 123) If WSI determined no waiver was appropriate, a Notice of Intention to Discontinue Benefits was sent out; along with a letter explaining what happened. (App. p. 121) Wahlin testified that these letters would have gone out in December of 2005 for claims that had been identified for review on payment of partial disability benefits. (App. p. 122) If a letter went out on a claim making a determination that there had been erroneous

payments in excess of five years of partial disability benefits, the claim had been looked at for waiver and rejected. (App. pp. 123-124)

STATEMENT OF THE ISSUE

20. This case involves construction and application of N.D.C.C. § 65-05-10, and whether WSI can correct an erroneous interpretation of application of that statute when there has been no formal or informal communication to the injured worker notifying the injured worker of WSI's previous erroneous interpretation. In other words, where the facts demonstrate that claims adjusters at WSI had previously believed that if an injured worker was released to work less than 28 hours per week, they were not subject to the five year limitation on partial disability benefits under N.D.C.C. § 65-05-10(2); and in fact N.D.C.C. § 65-05-10(2) provides that WSI "may" waive the five year limitation under certain circumstances; and the claims adjuster documented that erroneous interpretation in notepad entries; and there is no express waiver of the five year limitation in the claim such as a communication to the injured worker by letter, conversation with the injured worker where she was advised of waiver, or prior litigation on the claim that resulted in waiver; and the injured worker in fact has been paid in excess of five years of partial disability benefits under N.D.C.C. § 65-05-10; and WSI then reviewed the claim and in its discretion determined waiver was not appropriate – under such circumstances, may WSI discontinue the injured worker's partial disability benefits.

21. This case also involves the issue of whether WSI waived the five year limitation on partial disability benefits in Von Ruden's claim by notations in the

notepad entry that the limitation "did not apply," even though no specific communication to Von Ruden concerning the five year limitation.

LAW AND ARGUMENT

I. STANDARD OF REVIEW AND APPLICABLE STANDARDS FOR STATUTORY CONSTRUCTION.

22. Decisions of administrative agencies are reviewed in accordance with N.D.C.C. § 28-32-49, which provides that the review is the same as provided in N.D.C.C. § 28-32-46 for review by the District Court, which is as follows:

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
>
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

It is well established that the reviewing court may not make independent findings of fact or substitute its judgment for that of the agency. Rather, this Court determines "only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Thompson v. Workforce Safety and Insurance, 2006 ND 69, 712 N.W.2d 309; Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979).

23. Like a trial court judge, an administrative law judge "hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses," and is, therefore, "in a much better position to ascertain the true facts than an appellate court relying on a cold record" without "'the advantage . . . of the innumerable intangible indicia that are so valuable to a trial judge.'" State v. Guthmiller, 2004 ND 100 ¶7, 680 N.W.2d 235 (quoting Doyle v. Doyle, 52 N.D. 380, 389, 202 N.W. 860, 863 (1925)); Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8. As this Court has stated, "[w]e defer to the hearing officer's opportunity to judge the credibility of witnesses." Aamodt v. North Dakota Dep't of Transp., 2004 ND 134 ¶12, 682 N.W.2d 308. See also Reynolds v. North Dakota Workmen's Comp. Bureau, 328 N.W.2d 247, 251 (N.D. 1982).

24. "Questions of law, including the interpretation of a statute, are fully reviewable" on appeal. Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. "The primary objective of statutory construction is to ascertain the intent of the legislature." Witcher v. North Dakota Workers

Compensation Bureau, 1999 ND 225 ¶ 11, 602 N.W.2d 704, 708; Ash v. Traynor, 2000 ND 75 ¶ 6, 609 N.W.2d 96, 98. In doing so, Courts look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 12, 687 N.W.2d 714 717; Goodleft v. Gullickson, 556 N.W.2d 303. 306 (N.D. 1996). Statutes are construed "as a whole to harmonize and give meaning to each word and phrase." Baity ¶ 12, 687 N.W.2d at 717: Witcher, ¶ 11, 602 N.W.2d at 78; Ash, ¶ 6, 609 N.W.2d at 99. In addition, "[t]he practical application of a statute by the agency enforcing it is entitled to some weight in construing the statute, especially where the agency interpretation does not contradict clear and unambiguous statutory language." Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992); see also Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989); Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469 (N.D. 1992).

25. A statute is ambiguous when it is "susceptible to differing but rational meanings." Ash ¶ 6, 609 N.W.2d at 96, citing Werlinger v. Champion Healthcare Corp., 1999 ND 173 ¶ 44, 598 N.W.2d 820. "Although courts may resort to extrinsic aids to interpret a statute if it is ambiguous," it must "look first to the statutory language, and if the language is clear and unambiguous, the legislative intent is presumed clear." McDowell v. Gille, 2001 ND 91 ¶ 11, 626 N.W.2d 666, 671. "When the meaning of the statute is clear on its face, there is no room

for construction." Baity ¶ 12, 687 N.W.2d at 718. As this Court has reaffirmed on numerous occasions:

> When a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442 N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). See also Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 19, 584 N.W.2d 530, 535 (J. VandeWalle, dissenting).

II. ELEMENTS OF WAIVER.

26. Waiver is a voluntary and intentional relinquishment or abandonment of a known advantage, benefit, claim, privilege or right. Diversified Financial System v. Binstock, 1998 ND 6, 575 N.W.2d 677. Waiver may be established by express agreement, or by inference from acts or conduct. Id. This Court has held that "[t]he existence or absence of a waiver is generally a question of fact." Hanson v. Cincinnati Life Ins. Co., 1997 ND 230 ¶ 13, 571 N.W.2d 363.

27. Von Ruden's Notice of Appeal and Specification of Error dated February 12, 2007, identifies three findings of fact (#5, 6 and 11) and two conclusions of law (#2 and 3) as being in error. (App. p. 104) Those findings and conclusions form the basis of the ALJ/WSI's decision that no waiver of the five year

limitation on partial disability benefits occurred. The District Court did not specifically hold WSI "waived" the five year limitation, but instead relied upon the fact that the claims adjuster had made notations in Von Ruden's claim file that the cap did not apply, which required WSI to describe a medical basis for termination of partial disability benefits. (App. pp. 151-152)

28. Whether or not a waiver was established by the facts of this case was for ALJ/WSI to determine, based on the written evidence at hearing and the testimony of Von Ruden. The testimony of Timothy Wahlin submitted to the District Court further explains how and when WSI waived the five year limitation on partial disability benefits, and supports WSI's determination that no waiver occurred in Von Ruden's claim, nor would she qualify for the discretionary waiver of the five year limitation on partial disability benefits. Based upon the applicable standard of review, WSI's findings of fact must be sustained if "a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Thompson, 2006 ND 69 ¶9, 712 N.W.2d 309.

III. WSI PROPERLY APPLIED THE FIVE YEAR LIMITATION ON PARTIAL DISABILITY BENEFITS CONTAINED IN N.D.C.C. § 65-05-10(2) TO VON RUDEN'S CLAIM.

29. Section 65-05-10(2). N.D.C.C., states in its entirety as follows:

> Benefits must be paid during the continuance of partial disability, not to exceed a period of five-years. The organization may waive the five-year limit on duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working less than

> twenty-eight hours per week because of the compensable work injury. This subsection is effective for partial loss of earnings capacity occurring after June 30, 1991.

In Von Ruden's case, it is undisputed that she has received in excess of five years of partial disability benefits. Thus, the only way that Von Ruden would be entitled to additional partial disability benefits, is if WSI exercised its discretion to "waive the five-year limit on the duration of partial disability benefits . . ." Id. WSI did not do so, nor was it required to do so.

30. WSI has discretion to exercise a waiver of the five-year limit under N.D.C.C. § 65-05-10(2), which provides that WSI "may" waive the five-year limit on duration of partial disability benefits. (Emphasis supplied.) The use of the word "may" in the statute means that the act is permissive, rather than mandatory. Bernhardt v. Bernhardt, 1997 ND 80 ¶ 9, 561 N.W.2d 656; Matter of Adoption of K.S.H., 442 N.W.2d 417, 420 (N.D. 1989); Timm v. Schoenwald, 400 N.W.2d 260, 263 (N.D. 1987). Based upon the plain language of the statute, here is no basis for contending that the waiver of the five-year limit on the duration of partial disability benefits in N.D.C.C. § 65-05-10 is automatic or mandatory if the conditions outlined therein are present, i.e., a catastrophic injury or the injured worker is working with clear and convincing long-term restrictions based on objective medical evidence and the worker is limited to less than 28 hours per week because of the work injury.

31. Furthermore, under the facts of this case, Von Ruden does not satisfy either element required for application of the discretionary waiver under N.D.C.C. § 65-05-10(2). First, She has not been declared catastrophically injured as

defined in N.D.C.C. § 65-05.1-06.1. Second, Von Ruden conceded in her testimony at hearing that after leaving her job at Cathedral of the Holy Spirit Church in early 2003, she had not attempted any type of employment other than a job selling photography cards that was unsuccessful. (App p. 75, 77, Tr. 36, 42) Thus, at the time her partial disability benefits should have been exhausted she was not working, a requirement for the other option for discretionary waiver of the five year limitation on partial disability benefits.

32. By letter dated December 15. 2005, WSI informed Von Ruden that she had been receiving TPD benefits for approximately 2151 days, or 326 days longer than the statutorily allowed period of five years, which was 1825 days. (App. pp. 49-50) If one subtracts 326 days from 2151 days, Von Ruden's five-year limit for receipt of partial disability benefits should have expired in mid-January of 2005. It is also undisputed that Von Ruden was not working in mid-January 2005. Again, 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. Because Von Ruden was not employed when the five year limit on TPD benefits came due, there was no statutory basis for exercise of the waiver. Ms. Wetch could not grant a waiver in 2003 which would not become effective absent the existence of certain conditions in January 2005.

33. In addition, the waiver can only be granted in circumstances in which there is "clear and convincing objective medical and vocational evidence that the injured worker is limited to less than 28 hours of work per week." As noted by ALJ Seaworth, there was a significant discrepancy between what Dr. Dunnigan

expressed as to Von Ruden's work abilities and the results of two functional capacity evaluations performed in 1997 and 1999. (Recommended Findings of Fact, ¶2 and Recommended Conclusions of Law, ¶3, App. pp. 91-92, 95-96)

34. Reviewing what occurred in Von Ruden's claim, it is apparent that her claim fell into the category of claims where there had been an erroneous application of N.D.C.C. § 65-05-10, it being assumed that because she did not have a greater than 28 hour work release, the five year limitation did not apply, as explained by the testimony of Timothy Wahlin in the Midthun action. In Von Ruden's claim, there were a notepad entries made by the claims adjuster that reflect that the limit on partial disability benefits "does not apply" to her claim because of her work release was less than 28 hours per week:

> Laurie J.
> 06/05/2001
> 5 YR TPD REVIEW- DOESN'T APPLY
> 5 YR TPD statute doesn't apply as IW is only released to 15 hours per week, 28 hours per week or more is required. Should IW be released to more hours per week in the future please send file back for review.
>
> Evette B
> 06/07/2001
> 5 YEAR TPD statute does not apply
> 5 year TPD statute does not apply since IW is only released to 15 hrs p/wk. needs to be at 28 hrs before review again. See c130 doc ID #14785118.

(App. p. 46) Just as testified to by Wahlin as to WSI's review of these types of claims, none of the notepad entries reflect that the five-year limit was "waived" – only that it was believed that the limitation did not apply because the Claimant had less than a 28 hour work release. Also, there was in Von Ruden's case, no evidence that there had been any type of communication to her that the five year

limitation had been waived, nor had there been any prior litigation when resulted in waiver of the limitation.

35. Furthermore, as Wahlin testified, if WSI determined that had been no waiver of the limitation in a claim, a review was completed of the claim to determine if waiver was appropriate. If it was not appropriate in the claim, a notice of decision was sent out discontinuing partial disability benefits and letter was then sent out explaining what had occurred on the claim. (App. p. 121) This occurred in approximately December of 2005. (App. p. 121) Again, this is entirely consistent with what occurred in Von Ruden's claim. On December 15, 2005, a NOID was issued regarding the overpayment of partial disability benefits. (App. p. 51) A letter was also sent out on that same date explaining what had occurred. (App. pp. 49-50) Thus, in Von Ruden's claim the notepad entries do not reflect an actual waiver (as outlined above), but rather the misinterpretation of the law. There was no letter or documentation that Von Ruden had been notified of any waiver of the application of the statute, and Von Ruden did not testify to any such conversation at the hearing. In fact, Von Ruden testified that "I never knew anything about a five-year law. Five years was never, ever mentioned to me anywhere." (App. p. 77, Tr. 41) Based on the evidence, therefore, it is apparent that WSI did not exercise its discretion and "waive" the five-year limitation on partial disability benefits in Von Ruden's claim. See also Kerzman v. North Dakota Workers Compensation Bureau, 1999 ND 44 ¶ 16, 590 N.W.2d 888, 893 (noting that although WSI had the discretion under N.D.C.C. § 65-05-04 to

reopen an award [which provides it "may" review an award] WSI's notice demonstrated that benefits had been awarded under an erroneous adjudication).[4]

36. By enacting the five year limitation on partial disability benefits found in N.D.C.C. § 65-05-10(2), the legislature obviously intended that there be a cap on those benefits. "It is well-settled that legislative enactments need not attempt to cure all evils within the Legislature's reach, and the wisdom, necessity and expediency of legislation are issues for legislative, not judicial determination." Eagle v. North Dakota Workers Compensation Bureau, 1998 ND 154 ¶ 16, 583 N.W.2d 97. Thus, the fact that Von Ruden may disagree with a five-year limitation on those benefits, is not an issue for judicial determination. See Baldock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441, 444 (N.D. 1996) (noting wisdom and necessity of legislation are legislative questions, not for judicial determination). The legislature did, however, give WSI discretion to waive the five year limitation in certain circumstances.

> The word "may" ordinarily creates a directory, non-mandatory duty under settled principle of statutory construction. Timm v. Schoenwald, 400 N.W.2d 260, 263 (N.D. 1987); Solen Public School District No. 3 v. Heisler, 381 N.W.2d 201, 203 (N.D. 1986). The word "may" will be construed as "must" only where the context or subject matter compels that construction. Roshau v. Meduna, 307 N.W.2d 835, 837 (N.D. 1981).

North Dakota Commission on Medical Competency v. Racek, 527 N.W.2d 262, 268 (N.D. 1995).

37. In matters left to agency expertise, "an agency decision is entitled to appreciable defense." North Dakota State Board of Medical Examiners-

[4] See NOID dated December 15, 2005 (App. p. 51).

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.). WSI has chosen to exercise that discretion where there are individuals being paid partial disability benefits "in a manner that the reality of the situation is they would be temporary and total but for a doctor out there keeping them in the work force as a form of therapy." (App. p. 117) Applying a five-year limitation of partial disability benefits in that situation would in effect "punish that individual who in reality is a temporary total disability recipient." (App. p. 118)

38. WSI's application of its discretion in such situations certainly meets the standard of reasonableness. Even the Legislature has not provided for automatic exclusion of the five year limitation on partial disability benefits in cases of catastrophic injuries or where the injured worker is working and has clear and convincing evidence of objective restrictions limiting the worker to less than 28 hours per week. Why then would WSI be required, in exercising its discretion, to waive the five year limitation in such cases? The standard WSI applies to make a decision on waiver of the five year limit is neither arbitrary nor capricious based on the number of hours worked or nature of the injury. Rather, WSI looks at whether the injured worker would in essence be penalized for working when

otherwise that person would likely be receiving total disability benefits (for which there is no statutory limit). Wahlin raised an appropriate and compelling question in his testimony, as to whether it is a fair reading of the statute to create classifications of individuals working 28 hours or less, and give those individuals unlimited partial disability benefits, and individuals working more than 28 hours and limit those individuals to five years of partial disability benefits? (App. pp. 142-143) If that is what the legislature intended, it could certainly have so provided. It plainly did not do so, and instead, left the determination to WSI of when and under what circumstances to waive the five year limitation. See Kasprowicz, 1998 ND 4 ¶ 14, 574 N.W.2d 564; DeLorme v. North Dakota Department of Human Services, 492 N.W.2d 585, 587 (N.D. 1992) (noting "courts are to give great weight to an agency's construction of a statutory scheme it is entrusted to administer.")

IV. NO WAIVER OCCURRED BECAUSE THERE WAS NO VOLUNTARY AND INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT.

39. Von Ruden's claim of a waiver fails because there was no discussion or written communication between WSI claims adjusters and Von Ruden regarding Section 65-05-10(2), N.D.C.C., or a "waiver" of a "five-year limit on the duration of partial disability benefits." As noted by ALJ Seaworth, Myrna Wetch's letter to Von Ruden of February 19, 2003, does not indicate that Ms. Wetch considered all the factors necessary for waiver under N.D.C.C. § 65-05-10(2), and following such consideration, granted a waiver. (App. pp. 94-95) Indeed it would have been impossible for Wetch, in February 2003, to predict what Von Ruden's

physical condition and work abilities would be almost two years later, in mid-January 2005, when claimant's five years of TPD benefits would expire by statute. Id. Wetch did not voluntarily and intentionally relinquish or abandon a statutory obligation of WSI to correctly apply the statute in considering whether or not a waiver could be granted. As this Court has stated, "If waiver is 'implied from conduct, the conduct must clearly and unequivocally show a purpose to relinquish the right.'" D.E.M. v. Allickson, 555 N.W.2d 596, 600 (N.D. 1996), quoting Shapiro v. Shapiro, 701 S.W.2d 205, 206 (Mo. App. 1985). In addition, Von Ruden confirmed she was unaware of anything relating to a five year limitation on partial disability benefits, and thus there is no way to construe her testimony to effectuate a waiver by WSI of such limitation. "There can be no waiver, unless so intended by one party and so understood by the other . . . ." Stoffels v. Brown, 37 N.D. 272, 163 N.W. 834 (1917).

40. Furthermore, as Wahlin testified, all claims were reviewed to determine if there had been a documented waiver in a telephone call with the injured worker, a letter from WSI to the injured worker advising of a waiver, or if prior litigation had established a waiver. (App. pp. 122-123, Tr. 12-13) If no waiver was found, WSI went through the characteristics of the claim to determine if a waiver was appropriate under the statutory factors. (App. p. 123, Tr. 13) If WSI determined not to exercise its discretion and waive the five year limitation, a letter went out advising the injured worker of the overpayment of partial disability benefits. (App. p. 123, Tr. 13)

CONCLUSION

41. For all the reasons discussed herein, 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 25th day of February, 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 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 5,728 words minus the Statement of the Issue. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 25th day of February.

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