20130391

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DENNIS WHEDBEE APPELLANT VS. NORTH DAKOTA WORKFORCE SAFETY & INSURANCE FUND, APPELLEE, BLACK HAWK ENERGY SERVICES, INC. RESPONDENT.	SUPREME COURT NO.: 20130391

APPELLANT'S BRIEF

APPEAL FROM DISTRICT COURT JUDGMENT ENTERED SEPTEMBER 26, 2013, WITH NOTICE OF ENTRY OF JUDGMENT SERVED SEPTEMBER 30, 2013 AND ORDER AFFIRMING BDR DECISION DATED SEPTEMBER 17, 2013

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DAVID W NELSON

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I. ISSUE

[1] The Appellant, Dennis Whedbee, has appealed the March 27, 2013, binding dispute resolution of North Dakota Workforce Safety & Insurance (WSI). The issue is whether WSI's decision to deny Mr. Whedbee the type of prosthesis prescribed by his treating physician was an abuse of discretion.

II. STATEMENT OF THE CASE

[2] WSI's medical director, Dr. Luis Vilella, noted on January 11, 2013, that:

> Upper limb amputations are devastating occurrences for individuals and result in profound functional and vocational consequences. The level of amputation is the single most important determinant of post amputation function. Upper limb amputees require a thorough musculoskeletal examination that includes motor strength testing, sensory testing, and examination of the contralateral limb. Furthermore, a careful functional assessment must be performed to secure the most appropriate prosthetic prescription.
>
> Body powered prosthesis [sic] are durable and capable of a variety of prehensors available for various activities. However, they require a lot of body movement to operate and increase energy expenditure. In contrast, myoelectric prosthesis requires least body movement to operate and have stronger grasp. However, they are heavy, expensive and require most maintenance.
> Function and comfort, rather than cosmoses, are the most important consideration when developing a prescription for upper extremity prosthesis. Occupation and social habits must be evaluated to determine the combination of components that best meet the needs of the individual. (App. 16.2).

[3] Rather than evaluate Mr. Whedbee's post-injury occupation (which did not require any prosthesis, let alone a particular type) or his social habits, WSI sent him to an "independent medical evaluation" (IME) in Edina, Minnesota, 924 miles from his home in Homer City, Pennsylvania (App. 17-18). Dr. Ronald Bateman spent fifteen minutes evaluating Mr. Whedbee (App. 39), noted that the myoelectric prosthesis

recommended by Dr. Balk was only ounces heavier than the body-powered prosthesis approved by WSI without noting the extra exertion required to operate a body-powered prosthesis and failed to give any consideration to Mr. Whedbee's work-related depression or activities of daily living (App. 20-28). WSI was perfectly aware that Mr. Whedbee's activities of daily living included coaching Little League, hunting, fishing, biking, being outdoors, cooking and practicing taxidermy (App. 34; App. 37).

[4] On February 22, 2013, WSI issued its informal decision denying approval of the requested myoelectric prosthesis (App. 36). WSI asserted that a myoelectric prosthesis was not the most cost-effective prosthesis without giving any consideration to Mr. Whedbee's social habits (activities of daily living), something its medical director, Dr. Vilella, said must be evaluated (App. 16.2).

[5] Dennis Whedbee responded to WSI's denial as follows:

Why I'm appealing Prostatic [sic] Hook

1) I can't pick up grand baby
2) Can't use a hook on key board computer
3) Can't wear a baseball glove, play ball with grand kids or when I coach little league
4) Sprayed stincles [sic] on fire extinguishers today at work, wud [sic] of been nice to have another hand to hold them with.
5) Need hand to hold fishing pole, (2 hands)
6) Need two hands to use my bow to hunt with.
5) Need two hands to shoot my rifles with
6) Carrying supplies around at work, two hands are better than one.
7) I like to cook, try cutting up meat or veggies with one hand.
8) Is a hook going to help me tie my own shoes again?
9) When I hug my love ones, is the hook going to stab them?
10) I cud [sic] go on and on why I need a hand not a hook, to me its [sic] a no brainer, why wud [sic] you

> give somebody a hook when they have he B-Bionic hand? This hand does 90% of what a real hand can do, I deserve as normal life as I had before the accident, for work and my social life.
> 11) Try putting deodorant on using one hand, easy for one arm pit, not so easy for the other.
> 12) Try signing a receipt without holding it down with a hand on the counter.
> I could go on and on about why I need a hand. But he [sic] main reason I need a hand is because I lost a hand. I didn't lose a hook.
> This [body powered] hand will increase the time it takes me for anything. Right now from the time I get out of bed it takes me twice the time for my every day life, weather [sic] its [sic] at work where if I had two hands I could do it in one trip rather than two trips. I would make driving easier. I drive a company truck now, why not make life as normal as possible for me? This hook will not improve my quality of life, It will not make life easier for me at work or at home. Its [sic] a morbid, depressing looking device that I will never ever wear, so safe [sic] ur [sic] money, don't pay for it cause its [sic] not going on this man. So thank you very much for the offer but no thanks.
> P.S. Dr. Balk showed me on his computer what he wrote to you all, He did not recommend the hook for me. You went off Dr. Bateman who talk with me for 15 minutes, How does he know whats best for me? Im [50] years old I still plan on living a active life. I need two hands, Thanks for your time. (App. 37-29).

[6] Mr. Whedbee's plea for reconsideration fell on deaf ears, and WSI refused to change its decision (App. 41). Mr. Whedbee appealed to the District Court. The Honorable David W. Nelson, District Court Judge, affirmed WSI's Binding Dispute Resolution in an Order dated September 17, 2013 (App. 50). Mr. Whedbee now appeals to this Court.

III. STATEMENT OF THE FACTS

[7] Dennis Whedbee was working for Black Hawk Energy Services, Inc. on September 23, 2012, when a pressurized device, called a Washington rotating head, malfunctioned. When Mr. Whedbee saw another worker beating the head with a hammer to loosen it, he ran up to the worker, warning him to stop immediately. The rotating head blew up, knocking Mr. Whedbee unconscious, causing a traumatic brain injury,

bilateral rotator cuff tears, vision loss in both eyes, hearing loss in both ears and blowing his left arm off three inches below the elbow (Appendix (App.) 1, pp. 7-8; App. 2, p. 9; App. 11-13). Mr. Whedbee subsequently developed depression as a result of his work injury (App. 19).

[8] In the course of Mr. Whedbee's recovery, his prosthetist recommended and requested WSI's payment for a myoelectric prosthesis (App. 15-16) which would provide 90% of the function of the missing hand (App. 37-38). Mr. Whedbee's pre-injury job was that of a derrick hand, a job considered to be heavy labor by he U.S. Department of Labor (App. 32). His pre-injury employer, Black Hawk Energy Services, offered him a position as a Health and Safety Specialist following his injury (App. 14; App. App. 31). Mr. Whedbee's treating doctor, Marshall Balk, M.D., opined that no prosthesis was required to allow Mr. Whedbee to perform the Health and Safety Specialist position; essentially he could do the job one-handed (App. 48).

[9] WSI offered Mr. Whedbee a body-powered prosthesis (called a split hook) which he has refused, calling the claw-like device "morbid[ly] depressing" (App. 39).

IV. Law and Argument

[10] N.D.C.C., Section 65-02-20 provides:

> The organization shall establish a managed care program, including utilization review and bill review, to effect the best medical solution for an injured employee in a cost-effective manner upon a finding by the organization that the employee suffered a compensable injury. The program shall operate according to guidelines adopted by the organization and shall provide for medical management of claims within the bounds of workforce safety and insurance law. Information compiled and analysis performed pursuant to a managed care program which relate to patterns of treatment, cost, or outcomes by health care providers are confidential and are not open to public inspection to the extent the information and analysis

> identify a specific health care provider, except to the specific health care provider, organization employees, or persons rendering assistance to the organization in the administration of this title. If an employee, employer, or medical provider disputes a managed care decision, the employee, employer, or medical provider shall request binding dispute resolution on the decision. The organization shall make rules providing for the procedures for dispute resolution. Dispute resolution under this section is not subject to chapter 28-32 or section 65-01-16. A dispute resolution decision under this section requested by a medical provider concerning payment for medical treatment already provided or a request for diagnostic tests or treatment is not reviewable by any court. A dispute resolution decision under this section requested by an employee is reviewable by a court only if medical treatment has been denied to the employee. A dispute resolution decision under this section requested by an employer is reviewable by a court only if medical treatment is awarded to the employee. The dispute resolution decision may be reversed only if the court finds that there has been an abuse of discretion in the dispute resolution process. Any person providing binding dispute resolution services under this section is exempt from civil liability relating to the binding dispute resolution process and decision.

[11] The instant case differs from the typical appeal from a WSI order in two important respects:

1). There was no due process provided in WSI's utilization review process.

[12] Neither Dr. Vilella nor Dr. Bateman was ever placed under oath and examined about his opinion. No independent administrative law judge ever considered this matter. Instead, the decision was made by the unnamed and unaccountable members of WSI's Utilization Review Committee.

[13] Mr. Whedbee has a protectable property interest in his medical care. The informal due process in pre-termination circumstances does not suffice if there is no post-deprivation right to a judicial-type hearing. WSI has not afforded to Mr. Whedbee any procedural fairness

guarantees: he has not been allowed to testify, to call witnesses, to rebut the IME, denying him for all time the right to a judicial-type hearing.

[14] This Court has held that although an agency deciding adjudicative facts is acting in a quasi-judicial capacity, the minimal due process that must be afforded participants are not necessarily synonymous with minimal requirements in a court of law. First American Bank & Trust v. Ellwein, 221 N.W.2d 514 (N.D. 1974). Rather, the balancing in Matthews v. Eldridge, 424 U.S. 318 (1976) must be undertaken.

[15] Before addressing that key issue, it should be noted that the vast bulk of cases that address due process in the administrative context either concern the informal process due at the pre-termination stage, or, as in Ellwein, present courts with a narrow issue about fair process after a formal post-deprivation hearing had been held. In Ellwein, the fair hearing issue primarily concerned the impartiality of the tribunal, and not whether a hearing was required--the aggrieved party had been afforded a formal hearing, which had been held over the course of twelve days; the Court noted "[t]he transcript from such hearing is literally voluminous." Id. at 511. In contrast, Mr. Whedbee was denied the basic requirement that he be afforded any kind of hearing to present his case and to refute WSI's case.

[16] This Court has applied the Eldridge three part balancing test to determine the nature of the process due:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including

> the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Steele, 273 N.W.2d at 699, citing Eldridge, 424 U.S., at 341-343.

[17] This Court concluded that a temporary deprivation of benefits and a delay in the right to a formal hearing in Eldridge, though significant, does not rise to the same level as the private interest affected by a permanent deprivation of the right to a hearing for workers' compensation benefits. Thus, to avoid the holding the APA unconstitutional, Steele concluded that a workers' compensation claimant had a right to a formal evidentiary hearing under the state's APA.

[18] Under the Eldridge test, the Court balances the private interest affected by an erroneous deprivation and the value of providing additional safeguards against the cost of providing those additional safeguards. Admittedly, in regulatory matters (where legislative facts are at issue), a trial-type hearing is not available because even though the private interests affected may be high, the value of additional safeguards is considered to be minimal, given that the agency weighs the legislative facts of the regulated industry as a whole. II. Richard J. Pierce, Jr., Administrative Law, Section 9.5, pp. 813-815 (5th Ed. 2010). However, where adjudicative facts are at issue, there is significant value to providing additional trial-type due process safeguards.

[19] The entitlement to workers' compensation benefits and a fair adjudication are extremely important; employees have given up a tort remedy in exchange for "sure and certain" relief. Workers compensation benefits are as important as the welfare benefits the court protected with a trial-type hearing in Goldberg v. Kelly, 397 U.S. 254 (1970). If

employees aggrieved by WSI decisions affecting a few months of disability payments are entitled to a hearing; a fortiori, Mr. Whedbee, fighting for the opportunity for a more normal life, is entitled to put on a case, to testify, and to call or cross-examine witnesses.

[20] Under the Eldridge balancing test, if this Court holds that Mr. Whedbee's interests are sufficient to require the additional safeguards of a formal hearing, the decision will not necessarily mean that every of managed care decision merits a formal hearing. WSI may have the ability to promulgate a rule that takes the Eldridge factors into account in determining the kinds of managed care disputes that must be resolved in a trial type hearing versus those in which a records review is sufficient, or devise alternate due process mechanisms. WSI has failed or refused to engage in any Eldridge balancing in fashioning the BDR procedures. Instead, WSI's BDR simply denies all of the normal due process protections.

[21] In the absence of appropriate Eldridge balancing, this Court should apply the default rule, which is that in the post-deprivation period, an aggrieved party should have the right to a trial-type hearing to resolve a dispute of adjudicative facts. This Court has quoted Davis' Administrative Law Treatise, stating that:

> The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action [i.e., a protectable property interest] should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstances when some other interest, such as national security, justifies an overriding of the interest in fair hearing.

Colgate-Palmolive Co. v. Dorgan, 225 N.W.2d 278, 281 (N.D. 1974) (citations omitted).

[22] The foremost authorities in workers compensation law, Professors Arthur and Lex Larson, agree with Professors Pierce and Davis about the need for formal hearings when adjudicating a workers' entitlement to benefits under state law:

> Fair play rules include the right of cross-examination, rules against exparte statements, necessity of having all evidence on the record, and restrictions on determinations made by independent investigation conducted by the tribunal. These rules are based on fundamental notions of fairness. Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted.

See Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730, 743 (N.D. 1988) (Meschke, 3., dissenting), quoting 3 Arthur Larson, The Law of Workmen's Compensation Section 79.83(a) (1995) [Renumbered as 7 Larson Workers' Compensation Law, Section 127.11(3)(a), p. 127-48, and p. 127-49 (Revised November 2007)].

[23] While the nature of workers' compensation proceedings "justify some relaxation of strict rules of evidence"--e.g., medical records and physician letters are normally admitted into evidence in compensation hearings--"nevertheless it is fundamental that the right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony must be accorded unless waived." Torres v. Allen Family Foods, 672 A.2d 26, 31 (Del. 1995). That Court noted that these rules, "such as the right to cross-examine, are designed to guarantee the substantial rights of the parties and are based on fundamental notions of fairness." Id. at 40.502.

[24] The Steele Court quoted with approval the standards set by the United States Supreme Court for evidentiary hearings, to include:

(1) timely and adequate notice detailing the reasons for the proposed termination;
(2) an effective opportunity for the recipient to defend by confronting any adverse witness and by presenting his own arguments and evidence orally;
(3) retain counsel if desired;

(4) an impartial decision-making;
(5) a decision resting solely on the legal rules and evidence adduced at the hearing; and
(6) a statement of reasons for the decision and the evidence relied on.

Steele, 273 N.W.2d at 692, n. 4, citing Goldberg, 397 U.S. at 254.

[25] WSI's BDR mechanism does not incorporate the essential requirements of due process.

[26] The right of the claimant to present a case in his or her own way is fundamental to fair process. The right to appear is rooted in the same fundamental human nature that compels us to seek face-to-face encounters with adversaries or wielders of power or money. See: Coy v. Iowa, 487 U.S. 1012, 1017-1018 (1988) (noting the core of the right to a fair trial involves the right for the aggrieved to be present in person).

[27] WSI took the opportunity to rebut Mr. Whedbee's prima facie case by hiring an IME examiner who had available for dissection the opinions of his treating providers. As the bearer of the burden of proof, fundamental fairness requires that Mr. Whedbee be afforded the fundamental right to rebut the evidence WSI relied on to deny him a myoelectric prosthesis. WSI's procedures denied him that--neither he nor his treating providers were afforded opportunity to comment upon and rebut the IME--thus WSI gave Dr. Ronald Bateman, the IME examiner, the absolute last word.

[28] Wigmore has characterized cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." State v. Yang, 712 N.W.2d 400, 405 (WI.App. 2006), citing 5 WIGMORE, EVIDENCE Section 1367 (Chadboun rev. 1974). Consistent with Judge Friendly's observation that while cross-examination can be overrated, See Friendly, 123 U. Pa. L. Rev, at 1284-1285),

cross-examination does have merit where counsel is prepared with a good strategy. The Advisory Committee on Proposed Rules of Evidence state that:

> All may not agree with Wigmore that cross-examination is 'beyond doubt the greatest legal engine ever invented for the discovery of truth,' but all will agree with his statement that it has become a 'vital feature' of the Anglo-American system. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental.

Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730, 743 n.3 (N.D. 1988) (Meschke, J., dissenting) (citations omitted).

[29] Just as Professor Larson advocates that the fair play rules of due process apply in workers' compensation matters and "include the right of cross-examination," 7 Larson, Workers' Compensation Law, Section 127.1 1(3)(b), p. 127-49 and p. 127-50 (Revised November 2007), the Montana Supreme Court quoted Professor Larson's similar heartfelt concern about the "increasingly common practice of referral of claimant to an official medical examiner or an independent physician chosen by the commission," which made it "particularly important that commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such a doctor's report, cross-examine him, and if necessary provide rebuttal testimony. Rumsey v. Cardinal Petroleum, 530 P.2d 433, 436-437 (Mont. 1975), quoting 3 Larson, Workmen's Compensation Law, Section 79.63. [Renumbered as 7 Larson, Section 127.05(4), p. 127-27 (Revised November 2007). See also: Baros v. Wyoming, 834 P.2d 1143, 1146 (Wyo. 1992) (recognizing "the majority rule that medical reports in a written form are admissible so long as the elementary fair-play requirements of notice, timely furnishing of copies, and the right of cross-examination if requested, are observed.")

[30] The Massachusetts Supreme Court was equally concerned about IMEs, construing a statute which gave "prima facie" status to the report of the Independent Medical Examiner. O'Brien's Case, 673 N.E.2d 567, 569 (Mass. 1996). The Court considered "the facial constitutionality of the provision...regarding medical testimony is sufficiently serious and its resolution sufficiently important" to consider the issue though the claim had been remanded for redetermination. Id., at 568. The Court noted that the statute authorized the ALJ to order "the submission of additional medical testimony," Id., at 570, and provided "an opportunity for the claimant to put before the relevant decision makers medical testimony she considers favorable to her claim." Id., at 571. Finally, the Court noted that the parties may also "go so far in challenging the examiner's report as to depose the examiner for the purposes of cross-examination," Id., which "will, of course, be part of the record on review before the reviewing board." Id. For these reasons, the Court concluded that the statute survived a facial challenge to its constitutionality.

[31] In contrast, the BDR decision simply parrots the IME examiner's conclusions. WSI has applied the BDR review under N.D.C.C. Section 65-02-20 in a manner that violates Mr. Whedbee's right to due process. Fundamental to Mr. Whedbee's right to due process is his entitlement to testify, to present a rebuttal case, and to cross-examine. The right to cross-examine or rebut an IME examiner must be zealously guarded. 7 Larson, Workers Compensation Law, Section 127.05(4) ((Rev. Nov. 2007).

[32] Finally, WSI's decision-making in the instant case was both unreasonable and capricious because it ignored the treating doctor's

opinion without any analysis and because it ignored Mr. Whedbee's concerns with both his work-related expression and his functioning in his non-work life.

2). The standard of review on appeal is even more onerous than usual.

[33] If WSI has the discretion to simply ignore Mr. Whedbee's activities of daily living, the effect of being forced to use a "morbidly depressing" hook has on his mental health, the physical demands of using both types of prostheses and to simply use cost as the sole criterion, this appeal is meaningless. If, on the other hand, Dennis Whedbee is more than "wage slave," whether working as a derrick hand or a Health and Safety Specialist, WSI clearly abused its discretion in not considering his roles as a husband, father and grandfather and his activities as a Little League coach, hunter, fisherman, bicyclist, outdoorsman, taxidermist and cook. How can the body-powered prosthesis approved by WSI be the "best medical solution" if it does not allow Mr. Whedbee to perform the family, recreational and social activities he performed before his left arm was blown off? It is not WSI's consideration of cost which is objectionable. It is that agency's refusal to consider Mr. Whedbee's need for a prosthesis outside of work, whether to coach Little League or to cut up vegetables or to play with his grandchildren. To paraphrase Mr. Whedbee, he did not lose a hook; he lost a hand. Although cost can certainly be a consideration in determining the appropriateness of prescribed medical care, there is no authority for WSI's decision-making in which cost is the <u>only</u> consideration (App. 36). How did WSI consider the effect of the "morbidly depressing" split hook on Mr. Whedbee's diagnosed

depression? How did the agency consider his motor strength testing, sensory testing, examination of his right arm and a careful functional assessment in determining the "best medical solution" required by N.D.C.C., 65-02-20? In short, how did WSI address the issues identified as necessary by its own medical director?

[34] N.D.C.C., Section 65-05-28 requires WSI to try to find a doctor, within 275 miles of Mr. Whedbee's residence before sending him to Edina, Minnesota for an IME. Since there is no evidence that WSI ever attempted to comply with its own statute authorizing IMEs, is that IME entitled to consideration simply because WSI's Utilization Review Committee chose to rely on it?

[35] Finally, of course, WSI did not give Dr. Balk's opinion controlling weight, as required by N.D.C.C., Section 65-05-08.3 and did not explain why it failed to do so based on the analytical criteria in that statute. Rather than rely on Mr. Whedbee's treating doctor and prosthetist, WSI relied on an illegally obtained IME opinion based on a fifteen-minute examination without the "thorough musculoskeletal examination" Dr. Vilella said was required. While the precise terms of N.D.C.C., Section 65-05-08.3 may not apply to utilization review adjudications, WSI has provided no cogent rationale for disregarding the opinion of a treating doctor who had hands-on experience with Mr. Whedbee, was an expert in his field, showed no evidence of bias and considered all factors in arriving at his opinion.

V. CONCLUSION

[36] WSI's refusal to consider Dennis Whedbee as a whole person, both mental and physical, with a life outside of work, is unworthy of a North Dakota state agency. As Mr. Whedbee bluntly stated, "I lost a

hand, not a hook." WSI's actions are an egregious abuse of discretion. Mr. Whedbee respectfully requests that this Court reverse WSI's order and grant him the medical treatment prescribed by his treating doctor.

Respectfully submitted this 2nd day of January, 2014, 2013.

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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 2nd day of January, 2014, a true and correct copy of the Appellant's Brief with an attached Certificate of Service and an Appendix were mailed to the following:

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