

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 95-F-08

Date issued: September 15, 1995

Requested by: Bill Oban, House of Representatives

- QUESTIONS PRESENTED -

I.

Whether certain legislation enacted by the 1995 North Dakota Legislature relating to the North Dakota Workers' Compensation Bureau but not containing a specific effective date may be retroactively applied.

II.

If such legislation may not be retroactively applied, whether the law in effect at the time of an employee's injury, application for benefits, or some other triggering event applies to that particular claim.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the four bills discussed in this opinion may not be retroactively applied because the Legislature has not expressly declared its intent that the legislation be so applied, as required by N.D.C.C. § 1-02-10.

II.

It is my opinion that the law governing an employee's claim for workers' compensation benefits will generally be the law in effect when the employee's injury occurred, but will also depend on whether the application of a new or amended statute controls only future determinations or abrogates vested rights. Specifically, it is my further opinion that 1995 Senate Bill 2501 may only be applied to aggravations occurring after July 31, 1995; 1995 House Bill 1253 may only be applied to rehabilitation determinations made by the Bureau after July 31, 1995; 1995 House Bill 1221 may only operate on injuries occurring after July 31, 1995; and 1995 House Bill 1217, overruling the rule of liberal construction, may not alter the use of that rule for determining injuries, their

compensibility or benefits to which entitled for injuries occurring before August 1, 1995, but would prohibit use of the rule for review of claims or actions arising out of injury aggravations, permanent impairment determinations, or rehabilitation determinations occurring after July 31, 1995.

- ANALYSES -

I.

The Legislature enacted several bills during the 1995 session pertaining to the North Dakota Workers' Compensation Bureau (Bureau). This opinion discusses four such bills that do not contain a specific effective date, and that amend or add new sections to Title 65 of the North Dakota Century Code (N.D.C.C): House Bill 1217 (1995 N.D. Sess. Laws ch. 605), House Bill 1221 (1995 N.D. Sess. Laws ch. 626), House Bill 1253 (1995 N.D. Sess. Laws ch. 628), and Senate Bill 2501 (1995 N.D. Sess. Laws 625). Because these four bills do not contain a specific effective date, they are effective on August 1, 1995. N.D. Const. art. IV, § 13.

"No part of this code is retroactive unless it is expressly declared to be so." N.D.C.C. § 1-02-10.

An amendatory act, like other legislative enactments, does not take effect prior to the time of passage, and the new or changed portions have no application to prior transactions unless an intent to the contrary is expressed in the act or clearly implied from its provisions.

In Interest of W.M.V., 268 N.W.2d 781, 783 (N.D. 1978) (quotations omitted). Therefore, the four bills discussed in this opinion may not be retroactively applied without the express authorization of the Legislature. This prohibition applies to these bills without regard to whether they are considered substantive or procedural. Reiling v. Bhattacharyya, 276 N.W.2d 237, 240 (N.D. 1979); see also Letter from Attorney General Heidi Heitkamp to Ken Purdy (July 7, 1995).

Unless prohibited by the United States or North Dakota constitutions,¹ retroactive application of a statute depends solely on legislative intent:

N.D.C.C. § 1-02-10 is but a canon of statutory construction to aid in interpreting statutes to ascertain legislative intent. It is not an end in itself. Like any rule of construction, N.D.C.C. § 1-02-10 is subservient to the goal of statutory interpretation: to ascertain and effectuate legislative intent.

State v. Cummings, 386 N.W.2d 468, 471 (N.D. 1986) (citations omitted); State v. Davenport, Criminal No. 950006 (N.D. Aug. 29, 1995). N.D.C.C. § 1-02-10 does not "require that a statute or act contain the word 'retroactive' in order for it to be applied to facts occurring prior to the effective date of the statute or act." In Interest of W.M.V., 268 N.W.2d at 783. State v. Davenport, slip op. at 5. Instead, both the text of a statute and its legislative history may be reviewed to determine legislative intent. Id.; Gimble v. Montana-Dakota Utilities Co., 44 N.W.2d 198, 204 (N.D. 1950).

When the Legislature during the 1995 session intended to specify how to apply a particular bill regarding the Bureau, it expressed that intent. See, e.g., 1995 N.D. Sess. Laws chs. 606, 612, 614, 618, 620, 623, 624, 627. However, neither the text nor legislative history of the four bills under consideration in this opinion contain a clear expression of legislative intent that the bills were to be retroactively applied. Further, such intent cannot be clearly implied from the provisions themselves. Therefore, it is my opinion that the four bills discussed in this opinion may not be retroactively applied. See Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250, 253 n.2 (N.D. 1989); Wolf v. North Dakota Workmen's Compensation Bureau, 267 N.W.2d 785, 787 (N.D. 1978).

II.

¹Nothing in this opinion is intended to address the constitutionality of retroactive legislation with or without a specific effective date. Any law enacted by the Legislature is presumed constitutional. See N.D.C.C. § 1-02-38(1).

"Unless otherwise provided, the statutes in effect on the date of an injury govern workers' compensation benefits." Thompson v. North Dakota Workers' Compensation Bureau, 490 N.W.2d 248, 251 (N.D. 1992) citing Gregory v. North Dakota Workmen's Compensation Bureau, 369 N.W.2d 119, 121, 122 (N.D. 1985). See also Smith, 447 N.W.2d at 253 n.2; Wolf, 267 N.W.2d at 787 n.1; Heddon v. North Dakota Workmen's Compensation Bureau, 189 N.W.2d 634, 638 (N.D. 1970). This broad, general statement was not supported by any analysis or explanation other than the cites to Gregory and a similar Minnesota case, and therefore must be interpreted in context.

In Gregory, the Bureau argued that, consistent with the general rule in other jurisdictions, "all rights to recover benefits vest on the date of injury and, accordingly, the rate in effect at the time of injury controls." 369 N.W.2d at 121. The rationale behind this argument is that the application of a new or amended statute to claims for workers' compensation benefits arising out of an injury occurring before its effective date would alter vested rights acquired before that date and therefore be a retroactive application of the statute. As previously discussed in this opinion, such application of a new or amended statute is prohibited under N.D.C.C. § 1-02-10, "[u]nless otherwise provided" by the Legislature. Thompson, 490 N.W.2d at 251. The North Dakota Supreme Court in Gregory rejected application of this argument to permanent partial impairment benefits because of the language of a particular statute, but later accepted it as the general rule in Thompson, 490 N.W.2d at 251.

While a claim for benefits may generally be governed by the law in effect at the time of the injury, that general rule is not always applied because the right to some benefits vests at a later date. See, e.g., Thompson, 490 N.W.2d at 252-53 n.4 (rehabilitation benefits awarded under law in effect when claimant determined to have reached maximum medical recovery); Gregory, 369 N.W.2d at 122 (permanent impairment compensated under law in effect when impairment determined rather than injury causing that impairment); Wolf, 267 N.W.2d at 787 (aggravation of previous injury compensated under law in effect when aggravation occurred rather than original injury).

When interpreted in context, the general rule asserted by the Bureau in Gregory and accepted in Thompson is simply a restatement of the general presumption against retroactive application of legislation, coupled with the observation that it will generally be a retroactive application of a new or

amended statute to apply it to claims for workers' compensation benefits arising out of injuries occurring before its effective date. The inverse of this general rule is that a new or amended statute may be applied to decisions on claims involving prior injuries claims unless prohibited as retroactive under N.D.C.C. § 1-02-10. Therefore, although the general rule in Thompson may be used in many cases, the law governing a particular claim, including the four bills discussed in this opinion, actually depends on what applications of a new or amended statute are prohibited as "retroactive" by N.D.C.C. § 1-02-10.

"A statute is not retroactive because it draws upon antecedent facts for its operation or because part of the requisites of its action is drawn from time antecedent to its passing." Public School District No. 35 v. Cass County Bd. of County Commissioners, 123 N.W.2d 37, 40 (N.D. 1963). Thus, a change in procedure or the type of remedy available can be applied prospectively to cases pending on the effective date of a new or amended statute without violating N.D.C.C. § 1-02-10 if doing so does not impair vested rights acquired under existing law. Heddon, 189 N.W.2d at 638; Letter to Ken Purdy, supra. However, a statute is applied retroactively when it takes away or impairs a vested right or obligation acquired under existing law, or when it creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations that have already occurred before the effective date of the statute. Fairmount Township Board of Supervisors, 431 N.W.2d 292, 295 (N.D. 1988); State v. J.P. Lamb Company, 401 N.W.2d 713, 717 (N.D. 1987). "The conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." State v. Davenport, slip op. at 7 quoting Landgraf v. USI Film Products, U.S. 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229, 254-255 (1994).

In summary, there is a two-part analysis to determining whether a statute is applied retroactively: when it "operate[s] [either] on transactions which have occurred or [on future transactions to alter] rights and obligations which existed before [the effective date] of the act." Sutherland, Statutory Construction § 41.01, at 337 (5th ed. 1993) (emphasis added). Under this two-part analysis, it is my opinion that the law governing a particular claim will generally be the law in effect when an injury occurred to

avoid retroactive application, but depends on these factors: what transactions or acts are regulated by a particular statute, when those transactions or acts occur, and what vested rights or obligations existed on the effective date of the new or amended statute.

Applying this two-part analysis consistently with the Supreme Court's previous decisions, the four bills discussed in this opinion will generally apply only to claims arising out of injuries, aggravations, or permanent impairment or rehabilitation determinations occurring after July 31, 1995.

On its face, Senate Bill 2501 applies to any aggravation related benefit determination by the Bureau after July 31, 1995. The bill restricts the availability of workers' compensation benefits for an aggravation of a previous injury resulting from an employee's actions that exceed the treatment recommendations of the employee's doctor. Thus, the bill does not operate directly on past transactions. However, it also does not simply rely on antecedent facts for its operation on future transactions. An amended statute is applied retroactively, even if the Bureau's decision regarding benefits is made after the effective date of the amendment, if the amendment "affects the amount of benefits to which a claimant is entitled" for injury aggravations occurring before it is effective. Wolf, 267 N.W.2d at 787 n.1. Thus, because applying Senate Bill 2501 to injury aggravations occurring before it is effective date would be an unauthorized retroactive application of the bill, it may only be applied to aggravations occurring after July 31, 1995.

House Bill 1253 also technically applies to any benefit determinations by the Bureau after July 31, 1995, but may alter vested rights acquired by that date. Section two of the bill reduces the rehabilitation benefits and options available to an employee for injuries occurring before August 1, 1995, by changing the definition of "substantial gainful employment." Instead of being based on the lesser of the employee's average weekly earnings at the time of injury or seventy-five percent of the average weekly wage in the state, "substantial gainful employment" is now based on restoring an injured employee to the lesser of "ninety percent" of the employee's average or "sixty-six and two-thirds" of the state average. Sections three and four of the bill also affect the rehabilitation benefits available for injuries occurring before August 1, 1995.

The amendment to the definition of "substantial gainful employment" cannot be applied to rehabilitation determinations made before the effective date of the amendment. Smith, 447 N.W.2d at 253 n.2, 260. However, employees have no vested right to rehabilitation benefits until the Bureau determines that they have reached maximum medical recovery. Thompson, 490 N.W.2d at 252-53 n.4. Therefore, House Bill 1253 may only be applied to rehabilitation determinations made by the Bureau after July 31, 1995.

Unlike the previous two bills, House Bill 1221 does not alter any vested rights acquired before its effective date. The bill does two things. First, it allows employers who maintain an approved risk management program to select a required medical provider in the specified manner. Second, once such a provider is selected, the bill prohibits payments for medical treatment provided to an injured employee by a different provider, unless the employee selected that provider before the injury occurred. Because a preferred provider could not be selected "under this section" before its effective date, the bill operates only on injuries occurring after July 31, 1995. Therefore, because an employee cannot have a vested right to seek medical treatment for an injury from a particular provider until that injury occurs, the bill does not alter any rights acquired before its effective date.

Finally, House Bill 1217 effectively overrules the long-standing rule of liberal construction used by the North Dakota Supreme Court in Erickson v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 292, 294-95 (N.D. 1963). Consistent with the directive in N.D.C.C. § 1-02-01 to construe the provisions of the code "liberally, with a view to effecting its objects and promoting justice," and relying on the general purpose of the workers' compensation law as stated in N.D.C.C. § 65-01-01, the courts have used this rule of construction to interpret workers' compensation laws when the meaning of a statute or its intent was not expressed or clear. In light of the more than thirty-year period during which the Legislature has acquiesced in this rule of liberal construction, no one could reasonably argue that House Bill 1217 is simply a clarification of legislative intent regarding existing statutes. Rather, the bill changes how the judiciary interprets the provisions of N.D.C.C. tit. 65. Thus, like the other bills discussed in this opinion, House Bill 1217 may not be applied to judicial review of claims arising out of injuries occurring before its effective date if doing so would be a retroactive application of the bill.

Because House Bill 1217 overrules a rule for interpreting other statutes, whether its application to claims arising out of injuries occurring before its effective date would alter vested rights acquired under existing law will depend on the statute interpreted. For example, under the general rule in Thompson, the rule of liberal construction may still be used to determine whether an injury occurring before August 1, 1995, is compensable or to determine the benefits available for that injury. However, it would not be a retroactive application of House Bill 1217 to prohibit the use of the rule of liberal construction on review of claims or actions arising out of injury aggravations (Wolf, 267 N.W.2d at 787), permanent impairment determinations (Gregory, 369 N.W.2d at 122), or rehabilitation determinations (Thompson, 490 N.W.2d at 252-53 n.4) occurring after its effective date.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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