

Office of the Attorney General
State of North Dakota

Opinion No. 86-33

Date Issued: October 24, 1986

Requested by: North Dakota Workmen's Compensation Bureau

--QUESTIONS PRESENTED--

I.

Whether the Workmen's Compensation Bureau is required by statute or otherwise to answer interrogatories submitted by a claimant's counsel.

II.

Whether the Workmen's Compensation Bureau is required to pay counsel for a claimant's attorney's fees in connection with the drafting and submission of interrogatories to be answered by the Bureau.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the Workmen's Compensation Bureau is not required by statute or otherwise to answer interrogatories submitted by a claimant's counsel.

II.

It is my further opinion that the Workmen's Compensation Bureau is not required to pay counsel for a claimant's attorney's fees in connection with the drafting and submission of interrogatories to be answered by the Bureau.

--ANALYSES--

I.

Generally, discovery is not available in administrative proceedings. It has been held that there is no constitutional requirement that a party at an administrative hearing be granted discovery. Instead, the requirement that discovery be granted is found in statutes, administrative rules, and the concept of fundamental fairness. See Walston v. Axelrod, 435 N.Y.S.2d 493

(S.Ct. (1980); Gilbert v. Johnson, 419 F.Supp. 859 (N.D. Ga. 1976); Frilette v. Kimberlin, 508 F.2d 205 (3d Cir. 1974), cert. denied 421 U.S. 980 (1975). Discovery, in administrative proceedings for agency adjudication, is controlled by the agency itself and not by the courts. Walston, at 497. Provisions for the right to due process in administrative proceedings do not generally engage the full panoply of rights that would adhere to a trial-type adversary hearing. Gilbert, at 872.

Specifically, a claimant in a Workmen's Compensation claim for benefits is limited to those methods of discovery authorized by statute or inherent in powers authorized by Workmen's Compensation statutes governing discovery. See State ex rel. River Cement Company v. Pepple, 585 S.W.2d 122 (Mo. App. 1979). However, there appears to be no authority for transplanting the rules of civil procedure into administrative proceedings. Granting an administrative agency, with prosecutorial and adjudicative functions, powers coexistent with the courts would raise serious constitutional questions. See Colgate-Palmolive Company v. Dorgan, 225 N.W.2d 278 (N.D. 1975). Administrative regulations may not exceed the statutory authority nor supersede statutes. Regulations which exceed that which the Legislature has authorized are void. See Moore v. North Dakota Workmen's Comp. Bureau, 374 N.W.2d 71 (N.D. 1985). The Workmen's Compensation Bureau and any hearing examiner appointed pursuant to the Bureau's authority have only such power as the statute gives them to make or allow inquiries and investigations as deemed necessary. See Boggetta v. Burroughs, 118 N.W.2d 980 (Mich. 1962).

The provisions of the Administrative Agencies Practice Act are fully applicable to the North Dakota Workmen's Compensation Bureau. The North Dakota Legislature, in enacting the Administrative Agencies Practice Act, set out the due process requirements of administrative agencies. See Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692 (N.D. 1978). See also N.D.C.C. § 65-02-11.

N.D.C.C. § 65-02-11 states as follows:

65-02-11. PROCESS AND PROCEDURE--INVESTIGATIONS--EXAMINATION OF WITNESSES--COSTS. Process and procedure under this title shall be governed by the provisions of chapter 28-32. The bureau may make investigation in such manner and at such places as in its judgment shall be best calculated to ascertain the substantial rights of all the parties. Any member of the bureau, and any person specifically designated by the bureau shall have the power to examine witnesses and records, with or without subpoena, to examine, investigate, copy, photograph, and take samples at any pertinent location or facility, to administer oaths to witnesses, to require the attendance of witnesses without fee whenever the testimony is taken at the home, office, or place of work of such witnesses, and generally to do anything requisite or necessary to facilitate or promote the

efficient administration of this title. The costs of any medical examination, scientific investigation, medical or expert witness appearance or report, requested or approved by the bureau, relating to a claim for benefits, shall be paid from the bureau general fund.

N.D.C.C. § 28-32-09 states, in part, as follows:

28-32-09. SUBPOENA AND ATTENDANCE OF WITNESSES. . . . Interrogatories may be sent to any witness or party in any proceeding in the same manner and on the same notice as in an action pending in the district court. A party, other than the administrative agency, must show good cause before undertaking discovery proceedings, including interrogatories. (Emphasis supplied.)

The term 'party' as used in the North Dakota Administrative Code means a real party in interest, as well as an adverse party. See Reliance Ins. Co. v. Public Serv. Com'n., 250 N.W.2d 918, 926 (N.D. 1977). However, the North Dakota Supreme Court has determined, in an action by a physician against the Workmen's Compensation Bureau to recover reasonable value of services rendered to a claimant entitled to a share in the Workmen's Compensation fund, that such an action cannot be maintained since 'the Workmen's Compensation Bureau, . . . is not a legal entity subject to suit, and a suit against it is in effect a suit against the state.' Henderson v. Scott, 10 N.W.2d 490, 492 (N.D. 1943), citing Watland et al. v. North Dakota Workmen's Compensation Bureau, 225 N.W. 812 (N.D. 1929). The Workmen's Compensation Bureau becomes a party to litigation only where the claimant appeals from the Bureau's denial of his right to share in the compensation fund and, on further appeal, from the decision of the trial court taken by either claimant or the Bureau. Henderson, at 493.

It is interesting to note that in Steele, the North Dakota Supreme Court said that '[t]he claimant in North Dakota does not have subpoena power but may compel the attendance of a witness by requesting the Workmen's Compensation Bureau to issue the subpoena, etc. The same is true regarding the taking of depositions. Depositions may be taken or a hearing may be conducted in a doctor's office or at any other appropriate place for the convenience of the parties or witnesses. In this regard the Bureau has considerable latitude.' 273 N.W.2d at 701. (Emphasis supplied.)

The only conclusion that can be made where a claimant files a claim with the Workmen's Compensation Bureau against an employer is that the Bureau is not a party in interest or an adverse party. Therefore, interrogatories are not specifically allowed against the Bureau by N.D.C.C. § 28-32-09, even if good cause is shown. In any event, there is nothing mandatory about allowing interrogatories pursuant to N.D.C.C. § 28-32-09.

Interrogatories against the Bureau are not specifically required by statute and neither is there a general right to interrogatories against the Bureau. Therefore, unless the Bureau in its discretion allows them, determining that fundamental fairness require the interrogatories, they are not a part of the administrative proceedings.

II.

If interrogatories are not a matter of right or required by statute, there is no right for the attorney representing a claimant to be paid fees and costs in connection with submitting interrogatories to be answered by the Bureau. If the Bureau did grant the claimant's attorney the right to submit the interrogatories to the Bureau, the attorneys fees and costs would have to be paid by the Bureau.

N.D.C.C. § 65-02-08 gives the Bureau the right to specify the amount of allowable attorney's fees for proceedings before the Bureau. This section does not specifically provide for reimbursement to attorneys for submitting interrogatories or for any discovery activities. N.D.C.C. Ch. 28-32 contemplates attorney's fees only upon appeal if the court finds in favor of the party and determines that the administrative agency acted without substantial justification. See N.D.C.C. § 28-32-21.1. However, N.D.C.C. § 65-10-03 requires the Bureau to pay the appellant's attorney's fees unless the appeal is determined to be frivolous. See also *Steele v. North Dakota Workmen's Compensation Bureau*.

In *Moore*, the North Dakota Supreme Court noted that N.D.C.C. § 65-02-08 does not differentiate between the types of proceedings in which attorney's fees are authorized and held that that statute cannot be interpreted to limit the claimant's right to attorney's fees to situations in which the Bureau has either 'denied or reduced' a claim. 374 N.W.2d at 74. However, neither N.D.C.C. § 65-02-08 nor *Moore* require the Bureau to pay attorney's fees in all cases, especially for discovery.

--EFFECT--

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

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