NO. 03-3599

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GARY L. BRANHAM,

Plaintiff-Appellant,

v.

PAUL H. O'NEILL, Secretary,
United States Department of Treasury/Internal Revenue Service,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIEF OF THE AMERICAN DIABETES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 03-3599

Short Caption: Gary Branham v. Paul H. O'Neill

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3): American Diabetes Association, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Rosenthal & Greene, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
Not applicable.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
Not applicable.

Attorney's Signature: _____ Date: April 2, 2004

Attorney's Printed Name: Michael A. Greene

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(3):
Yes _____ No _____

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TABLE OF AUTHORITIES

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RULE 29(a) STATEMENT

All parties consented to the filing of this *amicus curiae* brief by the American Diabetes Association. Copies of these consents are in the addendum to this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Diabetes Association ("Association") is a nationwide, nonprofit, voluntary health organization founded in 1940. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. The membership of the Association consists of persons with diabetes, health professionals, research scientists, and other concerned individuals. The Association is the largest, most prominent nongovernmental organization that deals with the treatment and impact of diabetes.[1] The Association establishes and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes.[2] The Association publishes the most authoritative professional journals concerning diabetes research and treatment.[3]

One of the Association's principal concerns is the equitable, fair, and legal treatment of persons with diabetes in employment situations. Presently, there are more than 18,000,000 Americans with diabetes, including over 4,000,000 persons who take some insulin to help treat their

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[1] The Association has over 400,000 general members,17,000 health professional members, and 3,000,000 contributors.

[2] American Diabetes Association: Clinical Practice Recommendations 2004, *Diabetes Care,* 27:1-150 (2004).

[3] The Association publishes four professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); and, (4) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

diabetes.[4] The Association knows through long experience that employers frequently restrict employment opportunities for persons with insulin-treated diabetes[5] based on prejudices, stereotypes, unfounded fears, and misinformation concerning diabetes and insulin in the workplace.

The Association believes that each person with diabetes should be individually considered for employment based on the requirements of the specific job, the particular qualifications of the individual, and the capacity of that individual to fully and safely perform that job. The Association advocates the following policy:

> Any person with diabetes, whether insulin-dependent or non-insulin dependent, should be eligible for any employment for which he or she would be otherwise qualified.
>
> In summary, because the effects of diabetes are unique to each individual, it is inappropriate to consider all people with diabetes the same. People with diabetes should be individually considered for employment based on the requirements of the specific job. Factors to be weighed in this decision include the individual's medical condition, treatment regimen (medical nutritional therapy, oral glucose-lowering agent, and/or insulin), and medical history, particularly in regard to the occurrence of incapacitating hypoglycemic episodes.[6]

Consistent with this policy, the Association appears as *amicus curiae* in cases throughout the United States involving prohibitions or restrictions on the employment of persons

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[4] Centers for Disease Control & Prevention, *National Diabetes Fact Sheet* (2003).

[5] The currently medically acceptable term for diabetes which is treated with insulin is "insulin-treated diabetes." There are a number of different types of diabetes. Type I diabetes requires the use of insulin and is the most severe type of diabetes because of the dependency on insulin. See: American Diabetes Association Position Statement: Diagnosis and Classification of Diabetes Mellitus, *Diabetes Care,* 27: S5 (2004).

[6] American Diabetes Association Position Statement: Hypoglycemia & Employment/Licensure, *Diabetes Care*, 27:S134 (2004).

with diabetes.[7]

The Association is an advocate for employees and an information resource for employers to help them understand that persons with insulin-treated diabetes can be qualified, productive, and safe workers in a wide range of employment situations. Indeed, employees with insulin-treated diabetes are often superior workers because of their discipline and their appreciation, awareness, and concern about medical issues and safety in the workplace.

STATEMENT OF THE ISSUES PRESENTED

Are there questions of fact as to whether Gary Branham is disabled because of his insulin-treated diabetes?

A. What does medicine and science say about the impact of Gary Branham's insulin-treated diabetes on his major life activities?

B. Did the insulin-treated diabetes of Gary Branham create a fact issue as to whether it substantially limits his major life activity of eating?

C. Did the insulin-treated diabetes of Gary Branham create a fact issue as to whether it substantially limits his major life activity of caring for himself?

BACKGROUND INFORMATION ABOUT DIABETES[8]

Diabetes is a noncurable, progressive, metabolic disease which now affects more than

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[7] The Association participated as *amicus curiae* in the U.S. Supreme Court, many Circuit Courts of Appeal (First, Third, Fifth, Seventh, Eighth, and Ninth Circuits), and a number of District Courts.

[8] See generally: Bode*, Medical Management of Type I Diabetes,* (4th Ed.), American Diabetes Association (2004); *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1213-1214 (N.D. Ohio 1993); Bayler, *Dulling a Needle*: *Analyzing Federal Employment Restriction on People with Insulin-Dependent Diabetes*, 67 Ind. L.J. 1067, 1068-1074 (1992).

18,000,000 Americans. The Seventh Circuit defines diabetes as follows:

> Diabetes involves the uncontrolled fluctuation of the blood sugar level in the body. It is a product of a failure of the beta cells of the pancreas to produce sufficient insulin for normal carbohydrate, protein and fat metabolism, or the failure of the body in general to utilize effectively the insulin produced. Insulin is a hormone: it takes sugar from the bloodstream into the cells of the body for metabolism. Without insulin, sugar remains in the bloodstream, causing severe and possibly fatal consequences.[9]

It is the use and impact of insulin to treat diabetes that is the key factor in evaluating whether Gary Branham has a disability. If Branham did not take insulin, he was not in danger from a low blood sugar. However, insulin is not a cure for diabetes. Rather, insulin is one of a number of tools to help treat the symptoms of diabetes, lessen the acute and chronic impact of diabetes and other medical complications, and minimize or control blood sugar fluctuations. Taking insulin creates additional and different problems and risks from diabetes without insulin. Too much insulin causes too much sugar to leave the blood and cross into the body cells resulting in abnormally low blood sugar levels (hypoglycemia). Too little insulin causes too little sugar to leave the blood resulting in abnormally high blood sugar levels (hyperglycemia). As a direct consequence of taking insulin a person must continually steer a perilous course between the Scylla of high blood sugar (hyperglycemia) and the Charybdis of low blood sugar (hyperlycemia).

Generally, eating raises blood sugar while taking insulin or exercising lowers blood sugar. Symptoms of mild to moderate low blood sugar include tremors, sweating, lightheadedness, irritability, confusion, and drowsiness. Severe low blood sugar may lead to unconsciousness, convulsions, and can be life threatening if not promptly and properly treated. While low blood sugar

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[9] *Nawrot v. CPC Int'l,* 277 F.3d 896, 901 (7th Cir. 2002).

is the principal diabetes safety risk in the workplace, severe symptoms of low blood sugar are not inevitable with the aid of advances in medicine and science. Many persons with insulin-treated diabetes are able to successfully avoid severe low blood sugar episodes.[10] Such individuals, through blood sugar self-monitoring,[11] can recognize the early warning signs of low blood sugar and take immediate corrective action to raise blood sugar, (*eg.* eat quickly-absorbed forms of sugar such as carbohydrates, fruit juice, or soft drinks) or to lower blood sugar, (*eg.* take more insulin). Such self-monitoring is *the* early warning trip wire to avoid or minimize low or high blood sugar, *i.e.* the earlier one knows about their blood sugar level, the earlier one can take the necessary corrective actions to keep the blood sugar in a safe range for that individual. A person with insulin-treated diabetes uses blood sugar self-monitoring to chart the course between low and high blood sugar.

Once the blood sugar level is known, adjustments can be calculated for insulin dosage, carbohydrate intake, and amount of exercise. Successful management of insulin-treated diabetes requires a treatment regimen that is custom designed to each individual, *i.e.* based on each individual's medical history, mental and physical capabilities, and activity level. There is no single, successful treatment regimen which fits everyone with diabetes, *i.e.* one size does *not* fit all. The management of diabetes is a balancing act which focuses on the particular needs of each person from the setting of individual blood sugar level goals to the formulation of an individual's diabetes management plan, including insulin therapy, blood sugar self-monitoring,

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[10] For a discussion of the advances in medicine and science to avoid or minimize low blood sugar see, generally, *Kapche v. City of San Antonio*, 176 F.3d 840, 846-47 (5th Cir. 1999).

[11] Blood sugar self-monitoring is done by a finger stick to draw a drop of blood to place in a glucometer to test. The time for this test varies depending on the type of glucometer. Bode, *supra,* pp. 77-83.

regular medical visits, an exercise program[12], and customized medical nutritional therapy.[13] All of these are tailored an individual's needs, conditions, and capacities.

A person with insulin-treated diabetes implements a diabetes management plan created by that person and his health care team (physician, diabetes nurse educator, diabetes nutrition educator, and other health care professionals). Self-monitoring is the most critical feature of the plan because it provides the necessary information to allow that person to adjust insulin dosage, carbohydrate intake, and amount of exercise to keep blood sugar levels within that individual's normal target.[14] Diabetes management focuses on the individual, *not* the disease.

Given the acute dangers of low blood sugar, it might seem to make sense to allow blood sugar levels to stay higher than normal. In the long run, however, the chronic effect of elevated blood sugar causes severe complications, including heart disease, kidney disease, nerve disease, lower limb amputations, and blindness. There is a high "misery index" for a person with insulin-treated diabetes with chronic high blood sugar: up to a 15-year shorter life expectancy; 2 to 4 times more likely to get heart disease; 2.5 times more likely to suffer a stroke; 4 times more likely to go blind; and, 20 times more likely to suffer from end-stage renal disease (kidney failure). A person

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[12] A medically reviewed exercise program helps to lower blood sugar and promote the general health of a person with insulin-treated diabetes. American Diabetes Association Position Statement: Physical Activity/Exercise & Diabetes, *Diabetes Care,* 27:S58 (2004).

[13] Bode*, supra,* pp. 47-119.

[14] American Diabetes Association Position Statement: Standards of Medical Care in Diabetes, *Diabetes Care,* 27:S15 (2004).

with diabetes has substantial difficulty controlling infections. Diabetes is the leading cause of adult blindness and nontraumatic amputations.[15] Again, to delay or avoid both short-term and long-term complications, persons with diabetes must keep blood sugar levels as close as possible to their target range.

Insulin therapy helps individuals with diabetes walk a life sustaining tightrope between the pillars of low and high blood sugar. In order to stay balanced on that tightrope, people with insulin-treated diabetes like Gary Branham must continually, perpetually, and rigorously follow and implement a comprehensive diabetes treatment plan. This plan, which is aimed at keeping Gary Branham from falling off his life-sustaining tightrope, substantially limits a number of his major life activities compared to "the average person in the general population."[16]

THE DIABETES OF GARY BRANHAM

The impact of the insulin-treated diabetes on Gary Branham is well explained in Appellant's Brief.[17] The most significant highlights of Branham's diabetes treatment plan that clearly show how his insulin-treated diabetes substantially limits his major life activities are:

1. Gary Branham takes insulin to live.

2. During the relevant time period, Branham took at least four shots of insulin each day, on average 120 insulin shots each month.

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[15] Centers for Disease Control & Prevention, *National Diabetes Fact Sheet, supra*; *Diabetes in America* (2d Ed), National Institutes of Health (NIH Publication No. 95-1468) (1995), p. 224.

[16] 29 C.F.R. § 1630.2 (j); *Sutton v. United Airlines, Inc.*, 257 U.S. 471, 480 (1999); *Nawrot,* 277 F.3d. at 904.

[17] Brief of Appellant, Statement of Facts, pp. 1-3.

3. Because he must take insulin, Branham is always at risk of low blood sugar (hypoglycemia) which can have traumatic, significant, and acute health consequences.

4. Branham monitors his blood sugar with multiple daily finger stick blood sugar tests, *i.e.* four to five times a day, or 120 to 150 times per month.

5. Branham counts the carbohydrates and measures the quality and quantity of everything he eats in order to adjust his insulin dosage.

6. Branham recalculates each insulin dose to coincide with what and when he eats.

7. Branham limits when and how much exercise he does to coordinate with his insulin dosages and food intake.

8. Branham follows a medically created and tailored treatment plan that requires monthly/quarterly visits to his physician to monitor effectiveness, assess progress, and modify for problems.

9. Branham follows a continual and permanent treatment plan that does not allow a vacation

or any time off as a reward for compliance. In order to live well with his insulin-treated diabetes, Branham follows a state-of-the-art and the most comprehensive and limiting treatment plan of any person with diabetes.

SUMMARY OF ARGUMENT

The medicine and science of diabetes, combined with facts in the record, prove that the insulin-treated diabetes of Gary Branham substantially limits his major life activities of eating and caring for himself in a multitude of ways. The record establishes many meaningful, substantial questions of fact concerning the nature and extent of those limitations. The Association contends

that whether Branham is disabled is a question of fact for a jury not a matter of law for summary judgment. The determination of whether Branham has a disability must be individualized. Such a determination is uniquely a question of fact whenever there are conflicting opinions about the impact of Branham's diabetes on his major life activities. In this case, the record is replete with conflicting views on the impact of insulin-treated diabetes on Branham's major life activities. There is disagreement regarding the impact of insulin-treated diabetes on Branham's major life activities which creates legitimate questions of fact for jury determination.

ARGUMENT

THE INSULIN-TREATED DIABETES OF GARY BRANHAM SUBSTANTIALLY LIMITS HIS MAJOR LIFE ACTIVITIES.

This court has well developed law on what it takes to determine if a person with insulin-treated diabetes has a substantial limitation of any major life activity.[18] Under this court's holdings in *Lawson* and *Nawrot*, the insulin-treated diabetes of Gary Branham substantially limits his major life activities of eating and caring for himself.

A. *The substantial limitation requirement to determine if an impairment such as insulin-treated diabetes is a disability.*

Both *Lawson* and *Nawrot* show how to analyze whether Gary Branham has an impairment which substantially limits his major life activities. It is clear that both eating and caring for oneself are major life activities.[19] It is equally clear that a major life activity need only be substantially limiting, not completely limiting. "The [law] addresses substantial limitations on major life

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[18] *Lawson v. CSX Transp., Inc.,* 245 F.3d 916 (7th Cir. 2001); and *Nawrot,* 277 F.3d 896.

[19] *Lawson,* 245 F.3d 916 (eating); *Nawrot,* 277 F.3d. 896 (caring for oneself); 29 C.F.R. § 1630.2(i) (caring for oneself).

activities, not utter inabilities."[20] Comparing Gary Branham's limitations with insulin-treated diabetes to the "average person in the general population"[21] highlights the many ways in which Branham's major life activities are substantially limited. The insulin-treated diabetes of Branham controls and determines both his eating and his caring for himself in a variety of significant ways. The following is a chart comparing the limitations of Gary Branham to those of "the average person in the general population."

No.	**Limitation**	**Branham[22]**	**Average Person**
1.	Constant blood sugar vigilance	Yes	No
2.	Monthly/quarterly doctor visits	Yes	No
3.	Multiple insulin shots each day	Yes	No
4.	Frequent insulin changes each day	Yes	No
5.	Side effects from insulin	Yes	No
6.	Multiple blood tests each day	Yes	No
7.	Calculate food quality and quantity	Yes	No
8.	Adjust food for insulin and exercise	Yes	No
9.	Adjust exercise for insulin and diet	Yes	No
10.	Adjust insulin for exercise and diet	Yes	No

Insulin-treated diabetes limits Gary Branham in many ways unlike "the average person."

B. *Gary Branham's major life activity of eating is substantially limited by his insulin-treated diabetes.*

The most prominent cases regarding the analysis of the substantial limitations on eating

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[20] *Bragdon v. Abbott,* 524 U.S. 624, 641 (1998).

[21] 29 C.F.R. § 1630.2 (j).

[22] See: Brief of Appellant, Statement of Facts, pp.1-3.

caused by insulin-treated diabetes are *Lawson v. CSX Transp., Inc.,* and *Fraser v. Goodale.*[23] In both *Lawson* and *Fraser*, the courts conclude that a plaintiff "when taking insulin, h[is] ability to regulate h[is] blood sugar and metabolize food is difficult, erratic, and substantially limited."[24] The control and regulation of Branham's diet is not an ordinary diet which is voluntary and from which a healthy person can deviate without acute medical consequences. As the court states in *Fraser:*

> Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much in a meal or forgets his medications for a few hours, Fraser does not enjoy this luxury.[25]

In other words, the eating limitations for Gary Branham are mandatory and unforgiving.

Rigorous, individualized, and comprehensive medical nutritional therapy significantly improves blood sugar control and eliminates or minimizes both acute and chronic problems from using insulin.[26] Medical nutritional therapy is a critical part of any diabetes treatment plan. The purpose of this therapy is both to manage the diabetes to prevent or limit complications such as heart disease, stroke, renal failure, and impaired vision, but also, and equally important, to manage the impact of insulin and the acute problem of balancing insulin with food, exercise, and general health, *i.e.* illness, stress, or infection. Without medical nutritional therapy, a person taking insulin cannot effectively balance food, insulin, and exercise to prevent wildly fluctuating blood sugars and health-

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[23] *Fraser,* 342 F.3d 1032, 1039-40 (9th Cir. 2003). In *Fraser*, the 9th Circuit followed this court's analysis in *Lawson.*

[24] *Fraser,* 342 F.3d. at 1041; *Lawson,* 245 F.3d at 924.

[25] *Fraser,* 342 F.3d at 1041.

[26] American Diabetes Association Position Statement: Nutrition Principles and Recommendations in Diabetes, *Diabetes Care* 27:S36 (2004); Bode*, supra,* pp. 85-107.

threatening high or low blood sugar levels. Medical nutritional therapy for a person with insulin-treated diabetes is a requirement, not an option.[27]

Gary Branham follows the essentials of a medically required medical nutritional therapy for a person with insulin-treated diabetes:

1. Branham counts carbohydrates for everything he eats. This is an elaborate and complex calculation that allows him to determine how much insulin is necessary to balance the particular type, amount, and quality of food to be eaten. This calculation occurs each time and before any food is eaten.

2. After the carbohydrate count, Branham calculates the amount of insulin necessary to balance those carbohydrates. This calculation is based on the timing, type, quality, and quantity of food intake. Again, this occurs each time and before any food is eaten.

3. Prior to eating anything, Branham takes a blood sugar test to determine his baseline blood sugar. This is necessary in order for him to do a second elaborate and complex calculation of how much insulin is necessary to bring his actual blood sugar into his target range prior to eating. Once again, this calculation is done every time and before anything is eaten.

4. Branham either writes down or stores electronically the above calculations and data so that he can recreate the facts and data upon which certain food or insulin dosage decisions are made. This recorded history keeps track of the accuracy and effectiveness of the above calculations and allows for periodic medical review and revisions.

5. Each time he eats anything, Branham rebalances any future exercise and insulin to

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[27] See generally: American Diabetes Association Position Statement: Nutrition Principles and Recommendations in Diabetes, *Diabetes Care*, 27:S36 (2004).

accommodate his food intake. This is not like a typical prescription of one pill four times a day with meals. Each time he eats, Branham recalculates a new insulin dosage.

6. Branham follows customized, individualized, medical nutritional therapy. This therapy also includes the adjustments necessary for any infection, illness, or unusual stress. For Branham this nutritional therapy is not only required but permanent, *i.e.* there is no vacation or relaxation without life threatening risks. Unlike "the average person in the general population" who goes on a diet for a variety of reasons, the medical nutritional therapy required for Branham is a substantial limitation on his eating.

C. *Gary Branham's ability to care for himself is substantially limited by his insulin-treated diabetes.*

This major life activity is analyzed in *Nawrot*. Caring for oneself is specifically listed as a major life activity to be analyzed for purposes of determining a disability by the federal regulations enacted under the Americans With Disabilities Act.[28]

To determine if there is a substantial limitation of Gary Branham's ability to care for himself, this court should look at the overall impact of his insulin-treated diabetes. This analysis is individualized and therefore fact-driven. For Branham, caring for himself is substantially limited in a number of ways:

1. Branham's insulin-treated diabetes requires medical nutritional therapy that is much more than a simple weight loss diet. It is a medically prescribed, adjusted, monitored, and implemented treatment by a physician, diabetes educator, and nutritionist. This is mandatory, not voluntary.

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[28] 29 C.F.R. § 1630.2 (i).

2. Branham's insulin-treated diabetes demands constant monitoring, measurement, and testing of his blood sugar level. This happens at least every time he eats, before going to bed at night, before exercise, and occasionally in the middle of the night. This testing creates the essential database for Branham to determine how well he is managing his diabetes. This is required, not optional.

3. Branham's insulin-treated diabetes requires multiple daily injections of insulin. For each dose of insulin, calculations are made concerning the amount of insulin and the type of insulin. There are many different types of insulin ranging from fast acting to long acting that must be blended together in different quantities for each injection. An additional, different calculation is done for any infection, illness, and/or unusual stress.

4. Branham's insulin-treated diabetes requires an exercise program which helps to balance the food and insulin to try to maintain his target range of blood sugars and general health. This is not an exercise program to train for a particular purpose but rather to maintain and preserve a functional life.

5. Branham's insulin-treated diabetes forces the coordination of his insulin therapy, nutritional therapy, and activity level. This requires a balancing act that demands constant monitoring and calibration. Everything that Branham puts in his body (food or insulin) and any physical activity is analyzed, calculated, balanced, and monitored.

Gary Branham's ability to care for himself places significantly greater demands on his time, economic resources, and intellectual ability than for any "average person in the general population." Branham's insulin-treated diabetes makes caring for himself an unrelenting burden that changes multiple times each day and whenever medical/scientific development produces better therapies,

medications, medical devices, and more advanced thinking regarding the management of a functional life affected by insulin-treated diabetes.

CONCLUSION

Insulin-treated diabetes imposes two unrelenting burdens: (1) how to handle the disease of diabetes; and, (2) how to avoid the side effects of insulin. Each of these burdens is significant and totally different from any burdens affecting an "average person in the general population." Insulin-treated diabetes not only makes Gary Branham different from that average person, but substantially limits major life activities taken for granted by "the average person."

In this case, the record in the trial court shows many significant questions of fact regarding why and how Gary Branham's major life activities of eating and caring for himself are substantially limited by his insulin-treated diabetes. Different interpretations by different medical persons highlight the critical need for a fact determination by a jury, *eg.* witness bias and credibility are especially issues for a jury. The impact of insulin-treated diabetes on major life activities is uniquely a fact-driven issue because it turns on an individualized assessment of the impact of Branham's treatment plan. It is for a jury to determine why and how Gary Branham's major life activities of eating and caring for himself are or are not substantially limited.

This court should reverse the trial court's decision and remand this case for trial.

Respectfully submitted,

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RULE 32 CERTIFICATE OF COMPLIANCE

I, Michael A. Greene, the attorney of record in this matter, do hereby certify that this brief complies with the type-volume limitation for briefs established by the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Seventh Circuit. The word count is 4,357.

_____
Michael A. Greene

CERTIFICATE OF SERVICE

I, Michael A. Greene, hereby certify that one original and fourteen paper copies along with one electronic copy of the Brief of the American Diabetes Association as *Amicus Curiae* in Support of Appellant were sent this 2nd day of April, 2004, via overnight commercial carrier to:

United States Court of Appeals
Seventh Circuit
219 S. Dearborn, Room 2722
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