

IN THE SUPREME COURT

20020083

STATE OF NORTH DAKOTA

Supreme Court Case No. 2002-0083

Cass County Case No. 01 C 3209

Pamela Jo Myhre,

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

Plaintiff/Appellant,

MAY - 1 2002

vs.

STATE OF NORTH DAKOTA

ND Workers Compensation

Fund, *Bureau,*

Defendant/Appellee.

---

BRIEF OF APPELLANT, PAMELA JO MYHRE

---

APPEAL FROM JUDGMENT OF CASS COUNTY DISTRICT COURT ENTERED ON FEBRUARY 14, 2002, PURSUANT TO THE MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT ENTERED ON FEBRUARY 5, 2002, AFFIRMING THE FINAL ORDER OF THE NORTH DAKOTA WORKERS COMPENSATION BUREAU OF SEPTEMBER 11, 2001, ADOPTING THE RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE REFEREE DATED AUGUST 31, 2001, DENYING PAMELA JO MYHRE WORKERS COMPENSATION BENEFITS FOR HER LOW BACK CONDITION AND HER CHEMICAL EXPOSURE.

---

Steven L. Latham  
Attorney for Plaintiff/Appellant  
WHEELER WOLF  
220 N. 4th Street, P.O. Box 2056  
Bismarck, ND 58502-2056  
Phone: 701-223-5300

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES .....	iii
STATEMENT OF THE CASE .....	1
ARGUMENTS.....	10
ISSUES:	
I. THE BUREAU ERRED IN DETERMINING THAT MYHRE'S BACK CONDITION WAS NOT CAUSALLY RELATED TO HER EMPLOYMENT AT MAC'S.....	10
II. THE BUREAU ERRED IN DETERMINING THAT MYHRE'S CONDITION AS DIAGNOSED BY DR. WILLIAM REA IS NOT CAUSALLY RELATED TO HER EMPLOYMENT AT MAC'S.....	14
CERTIFICATE OF SERVICE .....	22

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

Kouril v. Bowen, 912 F2d 971 (8th Cir 1990).....	21
Intalco Aluminum Corp. v. Department of Labor & Industries, 66 Wash. App. 644, 833 P2d 390 .....	21, 24
Menendez v. Continental INS Co., 515 SO. 2d 525 (LA. App. 1 Cir. 1987) .....	21
Robinson v. Saif Corporation. 717 P2d (78 OR App. 581     21	

### **STATE CASES**

Boger v. North Dakota Workers Compensation Bureau, 1999 ND 192, 600 NW2d 877 .....	20
Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112, 595 NW2d 312, 319 .....	14
Hust v. North Dakota Workers Compensation Bureau, 1998 ND 25, 74 NW2d 808, 811 .....	13
Spangler v. North Dakota Workers Compensation Bureau, 519 NW2d 576 (ND 1994) .....	20
Wanstrom v. North Dakota Workers Compensation Bureau, 2001 ND 21, 621 NW2d 864, 867 .....	13

### **STATE STATUTES**

Section 65-01-03(11)(a)(1) N.D.C.C.....	16
Section 65-01-02(11) N.D.C.C. ....	14
Section 65-01-02(d)(7) N.D.C.C. ....	13

### **OTHER**

Bismarck Tribune, 12-11-01 .....	22
----------------------------------	----

### **STATEMENT OF THE ISSUES**

- I. THE BUREAU ERRED IN DETERMINING THAT MYHRE'S BACK CONDITION WAS NOT CAUSALLY RELATED TO HER EMPLOYMENT AT MAC'S.
- II. THE BUREAU ERRED IN DETERMINING THAT MYHRE'S CONDITION AS DIAGNOSED BY DR. WILLIAM REA IS NOT CAUSALLY RELATED TO HER EMPLOYMENT AT MAC'S.

## **STATEMENT OF THE CASE**

On May 24, 2000, the North Dakota Workers Compensation Bureau issued an Order Awarding Specific Benefits, which awarded the claimant Pamela Myhre reasonably necessary medical benefits directly related to her tarsal tunnel condition in her feet but denying disability benefits for such condition and denying any Workers Compensation benefits for her low back injury or for her aldehyde or chemical poisoning that occurred during her course of employment at Mac's (CR pp. 136-154).

A Request for Hearing was made and a hearing was held on May 10, 2001, with the record left open for the taking of the depositions of the Bureau's medical records review doctor, Dr. Brian McCrary, and Myhre's treating physician, Dr. William Rea. Final arguments were held on August 9, 2001, with the Recommended Order issued on August 31, 2001, by the Administrative Law Judge recommending affirmation of the denial of benefits for Myhre's low back condition and chemical poisoning. The Bureau issued its Order adopting the recommended findings on September 11, 2001.

From the Bureau's Final Order, an appeal was taken to the District Court for Cass County, which issued a Memorandum Opinion Order on February 5, 2002, affirming the Final Order of the Bureau of September 11, 2001 (Appendix p.39). From the Final Judgment of the District Court entered on February 14, 2002, Myhre has appealed to this Court.

Myhre was hired by Mac's, Inc., as a manager of its upholstery department on May 22, 1995. Mac's is a hardware store in Fargo, North Dakota, that had an upholstery department that was failing at the time of Myhre's hiring (HT p. 77). Myhre had been self-employed in the upholstery business since 1976, with her own shop where she could bring

her kids with her to work (HT p. 72). In her employment at Mac's, Myhre specialized in camper cushions and couch cushions, and the business tripled in sales during the first year that Myhre was the manager (HT pp. 77-78).

Myhre's employment at Mac's was a very physical and labor-intensive job that involved constant standing and walking on concrete floors and doing a lot of heavy lifting. Her work included staying after her regular work hours to cut the fabric for the cushions and taking the pieces for the cushions home and sewing them at her home and then bringing them back to Mac's (HT p. 80).

The lifting required at Mac's involved big sheets of foam rubber and fabric bolts that would hold anywhere from 10 to 100 yards of fabric, with the large bolts being impossible to lift alone, requiring at least two people. The bolts of fabric would be lifted onto metal racks and stacked one on top of the other, starting at ground level to approximately eye level. There would be six or seven rows of fabric, which would require constant shifting of the bolts around, bringing in new ones and reorganizing. Other bolts weighing 50 pounds or less would be stacked or stood up in bins, which involved lifting them out of bins approximately three feet deep, carrying them over to the cutting table, cutting them, and then carrying them back to the bins. Other heavy lifting involved chairs, springs, rocker bottoms, big bolts of Dacron, and frequent lifting of large quantities of foam. Myhre also testified that, in addition to the constant lifting, she was on her feet all day long. She testified that she loved her job and loved being active (HT pp. 111-113).

In addition to the constant lifting, walking, and being on her feet all day, Myhre worked extensively with various chemicals such as polyfoam, Scotchguard, and spray adhesive glues used in the upholstery of cushions. Myhre was doing 10-12 sets of cushions

a week, with three cushions to a set (HT p. 84-104). The glue she used to seal the cushions was manufactured by 3M. She used a 74 Super Foam Fast Adhesive glue and an 80 and 90 Neoprene Contact Adhesive glue. The glue came in aerosol spray cans. She primarily used the 74 Super Foam Fast Adhesive glue. She used the glue every day, usually going through three or four cans of glue a day. She would apply the glue by pushing the nozzle and spraying.

Myhre came in constant contact with the glue. She testified that the glue would stick to everything, including her clothing, the floor, and the table she worked on. The glue had a strong odor. In addition to the glue sticking to her skin, it would stick to the frequent cuts and nicks on her hands that were an occupational hazard of being an upholsterer. She also breathed the airborne particles. Myhre was using up to three to four cans of spray glue daily from when she started her employment with Mac's in May of 1996 until December of 1998 (HT pp. 83-88, 144).

Myhre's coworkers testified as to the use of the Foam Fast aerosol spray. Terry Overbo testified that the glue became airborne and particles of it deposited on your skin, hair, your clothes, and that it was hard for her to breathe when she was around it and that it was an irritant to her lungs (HT p. 31).

Gina Whiteford testified that the glue was stringy and when it got on your arms you had to peel it off and that the smell, if you did a big job, would make you light-headed and cough (HT pp. 41-43). Myhre testified she could not get the odor out of her shirts (HT p. 106).

When Myhre started her employment at Mac's, she was in good physical health and she loved her job at Mac's. No physical problems had interfered with her ability to

do her job at Mac's, including the constant standing and walking and lifting all day (HT p. 92).

The only problems Myhre had were minor problems. She previously had undergone rehabilitation treatment for marijuana use and had been put on a low dosage of Prozac. She was involved in an automobile accident in the Fall of 1992 and sought treatment from a massage therapist for approximately a year and a half following that accident (HT pp. 94-95). The injuries Myhre received in the automobile accident were her mid- and upper-back, specifically her mid- and upper-thoracic paraspinal muscles (CR p. 744). Myhre also had migraine headaches, which ran in her family.

Approximately five months after starting her employment at Mac's, Myhre started seeing a chiropractor, Dr. Mittet, with complaints of pain in her neck and upper back (CR pp. 757-776). The chiropractic records clearly indicate that Myhre's primary problem when she was initially seeing Dr. Mittet was neck pain and headaches and other physical problems, with intermittent low back pain. Treatment records from Dr. Mittet indicate that he provided electrical stimulation and manipulation to Myhre's cervical and thoracic spine (CR p. 761, p. 763). It was not until Myhre's visit to Mittet in January of 1999 that she developed consistent reports of low back pain on the left side (CR p. 774) and received treatment for her low back.

In December of 1998, Myhre started noticing a correlation between the headaches she was having and the 3M glue she was using at work. The headaches Myhre was experiencing were different from her Migraine headaches. Around January of 1999, she started noticing other symptoms, including dizziness, chronic fatigue, and chronic pain.



It was at that point in time that she started seeing Dr. Darrel Moon of Moon Chiropractic Clinic (HT pp. 101-102). Moon started treating her for her back and neck pain.

Dr. Moon, whose specialty in chiropractic is applied kinesiology, started doing objective muscle testing to determine whether she had a positive reaction to different substances (Moon Transcript pp. 13-14). Myhre showed positive testing to aldehydes on November 29, 1999. Dr. Moon advised Myhre that her problems with her feet and her back were a result of her standing on concrete and heavy lifting while employed at Mac's (HT p. 111).

After being advised by Dr. Moon that her back and neck problems were work related, Myhre filed her claim on November 17, 1999, for her lower back and feet due to trauma and repetition (CR p. 1). Dr. Moon, in his initial report of injury, indicated that the mechanism of injury coincided with his findings and was due to lifting foam and fabric and chronic standing on cement floor (CR p. 3). Dr. Moon, in his deposition, testified that Myhre's work activities substantially aggravated her low back condition, although he indicated he could not say whether it substantially accelerated her condition or to what degree it substantially worsened the severity of her condition (HT pp. 55-56).

Because Myhre had started to put together a connection between her physical symptoms and her use of the spray glue, she discontinued using the spray glue at the end of 1998. Because Dr. Moon tested her positive for sensitivity to aldehydes, she requested that the Bureau add aldehyde poisoning to her claim (CR p. 43).

Myhre testified that when she started to realize that her exposure to the chemicals at Mac's was causing her physical problems, she started investigating the issue and learned about "Material Safety Data Sheets," which she requested from Mac's. These

Material Safety Data Sheets had never been provided to Myhre previously (HT p. 116). Pursuant to the Bureau's request, Myhre provided them the Material Safety Data Sheets (HT pp. 77-116).

The Material Safety Data Sheets specified that for the spray glue, the precautions that were to be taken were eye protection to avoid eye contact with vapors, sprays, or mists; and to wear safety glasses with side shields. Also to be avoided were prolonged or repeated skin contact and the glue was not to be used in a confined area or areas where there was no air movement; and if exhaust and ventilation was not adequate, appropriate respiratory protection was to be used to avoid breathing of vapors, sprays, or mists.

There was no exhaust or ventilation where Myhre worked, only overhead ceiling fans (HT p. 102). The MSDS indicated symptoms that can be produced by inhalation include headache, dizziness, drowsiness, incoordination, slowed reaction times, slurred speech, giddiness, and unconsciousness (CR pp. 85-88).

Myhre, who was unaware of the potential hazards, had not used any protective devices until June 1998, when she indicated to her employer that she was getting headaches from the materials she was working with and started to wear a paper mask and goggles, because the glue was making her eyes burn really bad. The goggles would get a sticky film on them and the paper masks would have to be disposed of after use because they developed a yellowish color (HT pp. 118-119).

While Myhre discontinued the use of the spray glue altogether at the end of 1998, her coworkers continued to use it in her absence in the evenings (HT p. 106). Myhre's condition did not improve, and, in November 1999, she indicated her condition would come and go, depending on her exposure to different elements (HT p. 120). Her

condition gradually worsened, resulting in a cutback in her hours. There were times she was so sick and nauseated from the odor on her shirt she would have to take it off and wear her jacket home (HT p. 106). She last worked on November 27, 1999 (HT p. 109). Her family noticed a significant deterioration in Myhre's physical condition the last year or so she worked at Mac's (HT pp. 47, 60).

Myhre then sought a medical opinion and saw an occupational physician at Merit Care Clinic in Fargo, Dr. Martino. Dr. Martino ran some tests, which were negative, and released Myhre to work with limitations of proper respiratory and skin protection or in a well-ventilated area. He suggested that she see a psychiatrist (HT p. 121, CR p.273).

After seeking treatment with another chiropractor, Dr. Lee, which was not helping, Myhre became aware of the Environmental Health Center in Dallas, Texas, and was flown there by Air Life Line (HT p. 123). While at the Environmental Health Center, Myhre underwent comprehensive testing and treatment by a variety of medical specialists.

Examination and testing indicated that Myhre was noted to have petechiae and telangiectasia on her abdomen and chest; erythematous and swollen nasal passages; especially on her left side, white coated tongue; positive Romberg's sign, where she was unable to maintain her balance with eyes closed while performing the tandem gait and standing on her toes test; an abnormal autonomic nervous system, documented by an abnormal heart rate and variability test; and an abnormal pupillography test.

An immune system study showed an abnormal TN B Lymphocyte subset profile with full total lymphocytes, low total CD3 and low CD8. Immune system function was abnormal, as revealed by an abnormal cell-mediate immunity (CMI) test of only 3+. Skin

tests showed sensitivity to several foods, molds, and common chemicals. Her skin tested positive for natural gas, unleaded gas, and diesel. Hair and mineral analysis revealed elevated tin, uranium, and arsenic.

The only negative test was chemical panels of blood and tissue, which were negative for petrochemicals and solvents. Myhre's treating physician Dr. Rea noted this test has its limitations, in that the chemicals may not be present in the blood or the site where the tissue samples were taken.

Dr. William Rea, who is the Director of the Environmental Health Center, is a Board Certified Physician in surgery, thoracic surgery, and environmental medicine, with special emphasis in toxicology. He has held numerous teaching positions in his areas of specialty, which include First World Professor of Industrial Hygiene and Occupational Medicine for two years at the Robers Institute in England, which is the British Institute of Toxicology (Rea Deposition p. 40). In addition, Dr. Rea has been published extensively in recognized medical journals and, unlike Dr. McCrary, has subjected his opinions to extensive peer review, which has included criticism of Dr. Rae's opinions.

Dr. Rae indicated that a definitive and valid test was the SPECT brain scan, where the results showed that Myhre had neurotoxic patterns, which was confirmed by posturographic testing performed by Dr. Daniel Martinez, Board Certified in otolaryngology. The SPECT image test was conducted by Dr. Theodore Simon, and showed a severe "salt-and-pepper pattern," the mismatch in the early compared with the latter phase and the shunting to the soft tissues are part of a pattern which has been seen in patients with neurotoxic exposure. The degree of involvement was moderate (CR p. 508).

Myhre also underwent an extensive neuropsychological evaluation by Dr. Nancy Didriksen, a Board Certified psychologist, who found after extensive testing that Myhre had neurocognitive dysfunction, with the greatest contributor to her neurocognitive dysfunction the toxic exposure experienced in the workplace, primarily solvents. She arrived at a diagnosis of Toxic Encephalopathy (mild, chronic, reversibility uncertain without continued avoidance and treatment) and psychological factors associated with (but secondary to) physical condition classified elsewhere. Dr. Didriksen also found no evidence of malingering (CR pp. 509-518).

Based upon his testing and examination and the tests performed by Drs. Martinez, Simon, and Didriksen, Dr. Rea arrived at a diagnosis of Toxic Encephalopathy, toxic effects of solvents and petrol chemicals, immune deregulation, chemical sensitivity, autonomic nervous system dysfunction, chronic fatigue, thyroiditis, allergic rhinosinusitis to pollens and molds, and food sensitivity. It was Dr. Rea's opinion that Myhre had significant chemical exposure at her work, which resulted in her current medical condition and recommended a course of treatment (CR pp. 336-339).

In response to Dr. Rea's opinion and the test results from the other doctors, the Bureau obtained the services of Dr. Brian F. McCrary to perform a medical records review in regard to Myhre. Dr. McCrary is neither Board Certified in environmental medicine, nor has he completed any medical training in toxicology. Dr. McCrary's specialty was occupational medicine.

Dr. McCrary's conclusion was that multiple chemical sensitivity is not a legitimate diagnosis and most of his report was spent attacking a diagnosis of multiple

chemical sensitivity, even though such diagnosis was not indicated by any of Myhre's treating physicians.

Myhre's treatment at the Environment Health Center, included treatment to mobilize chemicals through exercise; deep heat, massage, and antioxidant therapy to detoxify Myhre; intervenous feeding; and therapy with vitamins, minerals, and amino acids; and a program of avoidance of inciting agents or other chemicals (HT p. 128, CR p. 338).

Myhre testified that she showed significant improvement as a result of the treatment she was receiving at the Environmental Health Center and, in December, the symptoms of nausea, dizziness, fatigue, brain fog, and the muscle pains had stabilized. She testified she did not even think "I was sick any more." Although Myhre continued to have to avoid exposure to inciting agents such as petrochemicals and pesticides because such exposure would make her very sick, Myhre had to leave the Center because of the lack of funding as the result of the Bureau's refusal to pay for her medical treatment. Because of the pesticides and her home being heated with fuel oil, Myhre was unable to return to North Dakota and went to reside as a caretaker on a "safe" ranch in Texas that was owned by another person she met at the Environmental Health Center. When Myhre incurs any exposures, she gets sick and is usually down for about two days (HT pp. 129-132).

As a result of the chemical poisoning, Myhre had been separated from her home, community, church, family, friends, and her job for eight months at the time of the hearing (HT p. 175).

## ARGUMENTS

### **I. THE BUREAU ERRED IN DETERMINING THAT MYHRE'S BACK CONDITION WAS NOT CAUSALLY RELATED TO HER EMPLOYMENT AT MAC'S.**

The Bureau, in its decision in its Findings of Facts and Conclusions of Law, attempts to ignore the sequence of events leading to the onset of Myhre's low back condition and attempts to also confuse the issue by attempting to relate her low back condition to her neck and shoulder problem she had as a result of the 1992 automobile accident. Myhre never sought chiropractic treatment of any sort until after she had commenced her employment at Mac's and had never developed significant low back problems or received treatment for low back problems until January of 1999.

The Bureau in its Conclusions of Law numbers 4 and 5 concluded that the greater weight of the evidence demonstrated that Myhre's back condition was not related to her employment at Mac's by competent objective and reasonable medical evidence and refers to the records as being replete with references to claimant's preexisting back condition, and specifically referencing her 1992 automobile accident. Conclusion of Law number 4 goes on to indicate that Myhre had been treating for several months with Dr. Mettit and Dr. Moon for low back pain shooting into the left hip before submitting her claim for benefits and that these symptoms were essentially the same as those for which she is now claiming a work-related injury. Conclusion of Law number 5 indicated that Dr. Moon did not appear to have taken into account these factors, and his opinion is not corroborated by any objective findings.

In this case, there is no allegation that Myhre did not timely file a claim for benefits. The onset of Myhre's low back problems during the course of her employment at Mac's was gradual, and the pain did commence prior to her submitting her claim for benefits on November 17, 1999.

The Conclusions of Law are not supported by the Bureau's Findings of Fact. The only Findings of Fact dealing with Myhre's back injury are Findings 5-11. Finding of Fact number 6 notes in January 1999, Myhre was seeing Dr. Mettit for low back pain on the left with shooting pains into her left hip and leg and that she started treating with Dr. Moon on January 25, 1999, with complaints of low back pain on the left side, and continued to receive treatment from Dr. Moon for low back complaints.

What the Findings do not note, but which is uncontradicted in the record, is that Myhre filed her claim when she was advised that her problems with her feet and her low back were the result of repetitive trauma from standing on concrete floors all day and the repetitive lifting she was doing while employed at Mac's. Myhre's foot and low back condition were not the result of acute trauma, but cumulative trauma.

Making reference to a preexisting back condition and relating it to a 1992 automobile accident ignores the medical records. The medical records are quite clear that Myhre received treatment only for her neck and upper thoracic area of her back prior to January 1999 (CR pp. 744-745, 732, 626, 611, 604).

To have a compensable Workers Compensation injury, it is sufficient if the work condition or activity or work-related stress is a "substantial contributing factor" to the claimant's injury. Hust v. North Dakota Workers Compensation Bureau, 1998 ND 25, 74 NW2d 808, 811.



A worker's employment need not be the sole cause of a disease or injury. It is sufficient if a work condition is a substantial contributing factor. Wanstrom v. North Dakota Workers Compensation Bureau, 2001 ND 21, 621 NW2d 864, 867.

The Bureau's Conclusion of Law number 4 refers to Myhre's preexisting back condition. However, Section 65-01-02(d)(7) N.D.C.C. provides that injuries attributable to a preexisting, disease, or other condition are compensable when the employment substantially accelerates its progression or substantially worsens its severity.

The medical records in this case indicate that Myhre never had significant low back problems until January 1999, after she had been employed at Mac's for four years. She never sought chiropractic treatment of any kind until approximately five months after she began her employment at Mac's, and this chiropractic treatment was related to her complaints of headaches and neck pain.

While the records of Dr. Mettit occasionally note radiating pain radiating into the low back, his records are clear that he never treated the low back. Page 761 of the Certified Record indicates the treatment that Dr. Mettit initially provided for Myhre. He provided electrical stimulation to the cervical and thoracic spine, hydroculator ultrasound, and manipulation of the cervical and thoracic portion of the back (CR p. 763). He gave treatment only to the cervical and thoracic spine. Page 765 indicates treatment only to the cervical and thoracic spine and p. 765 indicates hydroculator ultrasound to the upper back and manipulation of the whole back. Pages 767, 769, 771, and 773 indicate treatment only for the cervical and thoracic area of the spine.

Not until January of 1999 at CR page 775 is there an indication in Dr. Mettit's records that he provides treatment to Myhre's low back. Myhre did not begin receiving

treatment for low back pain by Dr. Mettit until January 1999, and the medical records do not document any complaints of severe low back pain until January of 1999.

The Bureau in its Findings indicates that the greater weight of the evidence indicates that Myhre's low back condition is not related to her employment at Mac's by "competent objective and reasonable evidence." It is uncertain what is meant by that phrase.

Section 65-01-02(11) N.D.C.C. provides that the injury must be established by medical evidence supported by objective medical findings. The Bureau's Findings of Fact do not indicate what objective medical findings are absent to establish Myhre's low back condition. Indeed, at the hearing the issue was not whether Myhre had a low back condition, but whether that low back condition was causally related to her employment at Mac's. There was no disagreement that Myhre has a serious low back condition, which is established by the findings of Dr. Mettit and Dr. Moon.

The concurring opinions in Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112, 595 NW2d 312, 319, stated a physician's medical opinion based on an examination, a patient's medical history, and the physician's medical education and experience, can be "objective medical evidence." In this case, there is no evidence or opinion contrary to Dr. Moon's that Myhre's work caused or aggravated her low back condition and her feet. The Bureau accepted liability for Myhre's feet based upon the same opinion and facts for which they refused to accept liability for her back.

While Dr. Moon said he could not testify for certain, the test for medical certainty is more likely than not. In reviewing Dr. Moon's testimony together with his initial report of injury, it confirmed that the mechanism of injury coincided with his findings that her back

and feet problems were due to lifting foam and fabric and constant standing on the floor (CR p. 380).

The Bureau's Conclusion of Law that Myhre's back condition is not causally related to her employment is not supported by its Findings of Fact, nor are its Findings of Fact that she had a preexisting back condition supported by a preponderance of the evidence.

**II. THE BUREAU ERRED IN DETERMINING THAT MYHRE'S CONDITION AS DIAGNOSED BY DR. WILLIAM REA IS NOT CAUSALLY RELATED TO HER EMPLOYMENT AT MAC'S.**

The Bureau in its Conclusion of Law number 11 says that, taking the record as a whole, the more competent objective medical evidence rebuts the findings that Claimant has any type of chemical exposure problem related to her work at Mac's, Inc. The Claimant may very well suffer from the problems that she alleges, but there is simply insufficient evidence to meet her burden of proving that her facts were caused by exposure to chemicals present in her work environment at Mac's, Inc. Her initial treating medical professionals, in fact, indicated it could not be determined as to whether or not her problems were caused by substances at work.

The Bureau bases this Conclusion of Law on the medical records review performed by Dr. Brian McCrary. However, the more competent objective medical evidence has established that Myhre does indeed suffer from chemical poisoning in the workplace.

Long term or chronic exposures to toxic substances in the workplace have long been known to cause serious health problems. Substances such as lead and asbestos and benzene were once thought safe for use in the home and work settings, but scientific studies have now established that substances such as these are serious health threats.

Chemical exposures in the workplace, including cumulative low-level exposures, have long been recognized as compensable work injuries in the United States. The Workers Compensation decisions in the states of West Virginia, Delaware, Massachusetts, Hawaii, New York, Ohio, Alaska, New Mexico, Florida, and Texas are merely illustrative of these Workers Compensation decisions across the country that recognized long-term exposures as an occupational illness (Appendix p. 102 et seq.).

In North Dakota, a compensable injury is defined in N.D.C.C. Section 65-01-03(11)(a)(1) as a disease caused by a hazard to which an employee is subjected in the course of employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee.

In this case, the undisputed facts are that Myhre was exposed over a period of four years on a daily basis to the adhesive glue. She would breathe the air-borne particles, which would also enter her blood stream through open wounds and sores on her hands and would stick to her skin; and the glue had a strong odor. The MSDS specifically stated that prolonged or repeated skin contact was to be avoided and that appropriate respiratory protection was to be used to avoid breathing of vapors, sprays or mists; and that symptoms induced by inhalation include headaches, dizziness, drowsiness, incoordination, slowed reaction time, slurred speech, giddiness, and unconsciousness (CR pp. 85-88).

After Myhre was examined and treated at the Environmental Health Center in Dallas, Texas, and received the diagnosis from Dr. Rea of Toxic Encephalopathy, Toxic effects of solvents and petrochemical immune deregulation, chemical sensitivity, autonomic nervous system dysfunction, chronic fatigue, thyroiditis, allergic rhinosinusitis

to pollens and molds, and food sensitivity, the Bureau had the medical records review performed by Dr. McCrary. Dr. McCrary's experience is in the area of IMEs, impairment ratings for private industry, including Regional Medical Director for the largest Workers Comp insurance company in the United States, Liberty Mutual Insurance Group, and employment with the U.S. military.

Dr. McCrary, without examining Myhre or reviewing any psychological or psychiatric testing performed on Myhre, arrived at a conclusion that Myhre suffered from severe psychiatric diagnoses, which existed prior to any work-related injury, and that her complaints of sensitivity to chemical substances had no medical basis or logical connection to any workplace exposure (CR pp. 534-559). Dr. McCrary, in his IME report, does not so much address Myhre's situation but merely takes part in the medical issues regarding diagnoses of multiple chemical sensitivity. While the diagnosis of multiple chemical sensitivity has been applied since the 1950s, medical science has yet to specifically define how long-term chemical exposure poisoning can result in occupational injuries such as Myhre's. However, the issue in this case is not whether Myhre's occupational disease, caused by her long-term exposure to aerosol spray glue and other contaminants on the job, is termed chemical poisoning, multiple chemical sensitivity, or environmental illness. The issue is, does she have a medical condition related to the long-term exposure?

Much of Dr. McCrary's report is spent discussing the diagnosis of multiple chemical sensitivity, even though Dr. Rea did not diagnosis Myhre with multiple chemical sensitivity and agreed it was not an appropriate diagnosis (Rea Depo p. 32). Dr. McCrary goes on to make numerous inflammatory statements without citing or

providing any references to support his allegations. He closes his report by indicating well designed investigations suggest that most MCS sufferers have a psychosomatic disorder in which they develop multiple symptoms in response to stress. Dr. McCrary, however, does not reference these “well designed investigations” or identify the experts he relies upon.

Dr. McCrary asserts that Myhre has a psychosomatic disorder in response to stress and does not identify any stress to which Myhre was subjected. Myhre testified she was very happy and had no emotional stress in her life (HT p. 139).

Dr. McCrary’s expertise is in occupational medicine, with some training in toxicology, yet he arrives at a psychiatric diagnosis for Myhre without examination or review of any psychiatric testing that was done on Myhre.

Dr. McCrary, in his report, does not address the tests performed and conclusions reached by Drs. Martinez, Simon, and Didriksen, who, in addition to Dr. Rea, performed objective medical tests that produced objective evidence of an injury due to chemical exposure. All three doctors are Board Certified in their specialties.

Dr. Martinez, whose specialty is Otolaryngology, arrived at a diagnosis of right peripheral vestibular disease. Dr. Simon, radiologist, performed a SPECT Image test. SPECT is an acronym for Single Photon Emission Tomography, which creates a scan or image of the brain. Dr. Simon indicated the SPECT scan showed a neurological pattern consistent with neurotoxic exposure (CR p. 508).

Dr. McCrary says Myhre has a severe psychiatric illness. Neither he nor the Bureau addressed the extensive psychological testing performed by Dr. Didriksen. The neuropsychological testing was done to determine whether Myhre’s problems were

physical or psychological. Dr. Didriksen's findings were that Myhre had a neurocognitive dysfunction, the greatest contributor being her toxic exposure experience in the workplace, primarily solvents; and she rendered a diagnosis of toxic encephalopathy, with psychological factors secondary to her physical condition. Dr. Didriksen also specifically found no evidence of malingering.

The Bureau works both as a fact finder and advocate when considering a worker's claim for benefits, so it must not place itself in a full adversary position to claimant. Instead, the Bureau must consider the entire record, clarifying inconsistencies, and adequately explain its reasons for disregarding medical evidence favorable to workers. This requirement applies to conflicting statements in the same medical report, inconsistent statements from the same physician, and conflicting reports from two different physicians. Spangler v. North Dakota Workers Compensation Bureau, 519 NW2d 576 (ND 1994).

While it is within the province of the Bureau to weigh the credibility of the medical evidence, this authority to reject medical evidence selectively does not permit the Bureau to "pick and choose" in an unreasoned manner. Boger v. North Dakota Workers Compensation Bureau, 1999 ND 192, 600 NW2d 877.

In this case, the Bureau picked and chose Dr. McCrary's opinion, which did not directly address Myhre's injury, but rather was directed at the issue of a diagnosis of multiple chemical sensitivity. However, even Dr. McCrary's opinion is full of discrepancies and inconsistencies, which were not addressed by the Bureau. In Dr. McCrary's deposition, he acknowledges the existence of Sick Building Syndrome, caused by exposure to molds, fungus, or off-gassing from furniture and carpeting, which cause specific symptoms

(McCrary Depo p. 54). Dr. McCrary also acknowledged that the issue of chemical sensitivity or poisoning of Gulf War veterans is not a psychological or psychiatric condition and that there are possible links between infectious agents and fungal agents and possibly chemical weapons.

Dr. McCrary does not adequately explain why he distinguishes those cases from the chronic, long-term exposure to hazardous chemicals by Myhre when she inhaled them and absorbed them into her skin and into her blood system through open wounds over a number of years.

Dr. Rea was Myhre's treating physician. His opinion is entitled to more appreciable weight than that of a physician who performs only a medical records review and, particularly in this case, when such a review results in a psychiatric diagnosis by an occupational medicine doctor. McNendez v. Continental Ins. Co., 515 So. 2d 525 (LA. App. 1 Cir. 1987); Robinson v. Saif Corporation, 717 P2d 1202, 78 OR App. 581, 1986; Intalco Aluminum Corp. v. Department of Labor & Industries, 66 Wash. App. 644, 833 P2d 390, 1992 : Kouril v. Bowen, 912 F2d 971 (8th Cir 1990).

As the Washington Court stated in Intalco, Supra p. 634, "In Workers Compensation cases, the Court must give special consideration to the opinion of the attending physician. This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case. The evidence is sufficient to prove causation if, from the facts and circumstances of the medical testimony given, a reasonable person can infer that a causal connection exists (p. 654).

The fact that medical science is only beginning to explain how one develops the symptoms that Myhre has incurred from long-term chemical exposure does not mean that it



is not a condition that is causally related to her employment at Mac's. As noted earlier, even Dr. McCrary finds a link between multiple chemical sensitivity and chemical poisoning and exposure by Gulf War veterans. In addition, just recently the Department of Veterans Affairs acknowledged a specific link between service in the Gulf by Gulf War veterans and Lou Gehrig's disease. Even though researchers are not able to explain the medical science behind the link, the decision was based upon the epidemiological study that indicates Gulf War veterans are twice as likely to develop Lou Gehrig's disease as any other military personnel (Bismarck Tribune, 12-11-01; Appendix p. 100).

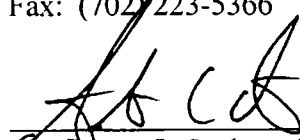
Medical science will, in the future, be able to explain how cumulative exposures over a period of time affects the dysfunction of the body's systems in workers such as Myhre. In this case, Myhre was an excellent worker, successfully turning around the upholstery department at Mac's, when her coworkers and family noticed a significant change in her physical condition.

This change was caused by long-term chronic exposure to hazardous chemicals through inhalation, ingestion, and insertion through the blood stream over a number of years. To deny her claim for Workers Compensation because medical science cannot completely explain how this happened to her, but only what has happened to her, would be denying Myhre sure and certain relief for her injury.

Word Count: 5,987

Dated this 1st day of May, 2002.

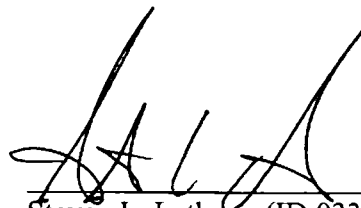
WHEELER WOLF  
Attorneys for Plaintiff/Appellant  
220 North Fourth Street  
P.O. Box 2056  
Bismarck, ND 58502-2056  
Phone: (701) 223-5300  
Fax: (702) 223-5366

  
\_\_\_\_\_  
By: Steven L. Latham (ID 03322)

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Brief of Appellant and Appendix** has been furnished to the following on May 1, 2002:

Jacqueline Anderson  
Special Assistant Attorney General  
P.O. Box 2625  
Fargo, ND 58108-2626

  
\_\_\_\_\_  
Steven L. Latham (ID 03322)