ORIGINAL

20080078

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JAMES BRUDER APPELLEE, VS. NORTH DAKOTA WORKFORCE SAFETY & INSURANCE FUND, APPELLANT, AND HAMM'S WELL SERVICE INC. RESPONDENT.	SUPREME COURT CASE NO.: 20080078

APPEAL FROM MEMORANDUM OPINION AND ORDER DATED JANUARY 18, 2008, AND ORDER FOR JUDGMENT DATED JANUARY 30, 2008, AND JUDGMENT DATED FEBRUARY 1, 2008
RENVILLE COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
CIVIL NO.: 38-07-C-35
THE HONORABLE MICHAEL G. STURDEVANT

APPELLEE'S BRIEF

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I. ISSUES PRESENTED

A. Has James Bruder shown, by the greater weight of the objective medical evidence, that his low back and leg condition are substantially the result of his work activities of many years as an oilfield worker?

B. Did the District Court properly award attorney's fees under N.D.C.C., Section 28-32-50(1)?

II. STATEMENT OF FACTS

James Bruder was 59 years old when he filed a claim for workers compensation benefits on October 3, 2005 (Appendix p. 16 (App.). Mr. Bruder with the exception of a tour of duty in Viet Nam, had been employed as an oilfield worker ever since graduating from high school (App. p. 54; Hearing Transcript (HT) p. 16). Mr. Bruder filed his claim for his low back and legs, claiming that his pain and weakness were caused by his working conditions as an oilfield worker (App. 16). As an oilfield worker, Mr. Bruder suffered aches and pains on a daily basis but was nevertheless able to perform the full range of heavy oilfield work without restrictions or accommodations (App. p. 55; HT 19, 21).

In 1998, Mr. Bruder began suffering increasing low back pain but continued working until his entire crew was laid off for lack of work (App. p. 55; HT 19). During the layoff, Mr. Bruder noticed increasing numbness and weakness in his legs and consulted a chiropractor who soon thereafter referred him for a surgical consultation (App. p. 55; HT 20). Dr. James Nabwangu performed a radical L4-5 discectomy with radicular decompression at both the L4 and L5 vertebral levels (App. p. 118). Mr. Bruder never filed a workers compensation claim for his 1998 low back surgery, explaining,

> Well, in '98 when the rig was stacked (idle) for so many days and I just didn't think I was eligible to file for it, so I didn't. They (his employers) hate you if you say anything about filing Worker' Comp, but usually it's got to be something serious happening that's right on the spot where they have witnesses. I thought that being as just the rig was stacked and I hadn't worked for, oh, I'm estimating a couple of weeks or more, I just went to see the doctor and everything on my own health insurance. I didn't even think I was eligible for Workman's Comp otherwise I would have turned it in. (App. p. 57; HT 26)

Following his surgery, Mr. Bruder spent about 6 months recovering, after which he returned to full-duty work at Hamm's Well Service without restrictions or accommodations (App. pp. 55-56; HT 20-21). Mr. Bruder continued to work his full-duty job for the next 7 years without incident, without symptoms or complaints, without medical treatment and without any restriction or accommodation (App. p. 56; HT 21-22). In 2005, Mr. Bruder again began experiencing pain and weakness in his lower legs and sought medical help (App. p. 56; HT 22). He got some relief by taking epidural steroid injections along with the oral medications Neurotin, Tramadol, and Elavil (App. p. 56; HT 24). Mr. Bruder was unable to work after July 13, 2005 (App. pp. 56, 57; HT 23, 26).

Mr. Bruder filed a claim for workers compensation benefits on September 28, 2005, attributing his low back and leg condition to "much repetition and stressful conditions" as an oilfield worker (App. p. 16). His treating doctors, Dwight Woiteshek, an orthopedic surgeon, and Manuel Colon, a pain specialist, both supported his claim for benefits (App. pp. 137, 138). In response, WSI solicited an opinion from its medical consultant and former medical director, Dr. Gregory Peterson, that, based solely on a records review, Mr. Bruder's condition was substantially attributable to heredity, aging and personal habits

(smoking) rather than decades spent performing heavy labor in the oilfields (App. p. 66; HT 62). Dr. Peterson disagreed with the board certified radiologist who interpreted a June 28, 2005, MRI as showing the development of a new disc protrusion at L4-5 (App. pp. 61-64; HT 44-45). Finally, Dr. Peterson did not believe that Drs. Woiteshek's and Colon's opinions constituted "objective medical evidence" because they were not supported by published studies and were based, in part, on those doctors' personal observations (App. pp. 64, 68; HT 54-56, 71).

III. STATEMENT OF THE CASE

James Bruder filed a claim for workers compensation benefits on September 28, 2005 (App. p. 16). WSI issued an informal denial on November 23, 2005 (App. p. 18), and Mr. Bruder asked for reconsideration (App. p. 19). WSI again informally denied Mr. Bruder's claim on April 13, 2006 (App. pp. 20-21), and he again sought reconsideration (App. p. 22) WSI issued a formal Dismissal on February 10, 2006 (App. pp. 23-31) and an Amended Dismissal on May 18, 2006 (App. pp. 33-45), and Mr. Bruder requested a formal hearing each time (App. pp. 32, 45).

A formal administrative hearing was held on April 25, 2007, before Temporary Administrative Law Judge Janet Seaworth (App. p. 51). TALJ Seaworth issued Recommended Findings of Fact, Conclusions of Law and Order on June 5, 2007 (App. pp. 73-82). WSI's Claims Director, Kim Ehli, adopted TALJ Seaworth's recommended decision with one significant modification (App. pp. 84-85). The TALJ had determined that Drs. Woiteshek's and Colon's opinions must be supported by "reasonable conclusive medical evidence" in order to sustain Mr. Bruder's burden of proof (App. p. 79). WSI thought that the TALJ's turn of phrase "could

lead to confusion" and concluded, instead, that the treating doctors' opinions must be supported by medical evidence that Mr. Bruder's condition was fairly traceable to his employment activities (App. p. 84). Nevertheless, WSI concluded that James Bruder had failed to present objective medical evidence that he had suffered a compensable, work-related injury (App. p. 85). Mr. Bruder appealed to the District Court. The Honorable Michael G. Sturdevant, District Court Judge, issued a Memorandum Opinion and Order on January 18, 2008, reversing WSI's Final Order and awarding Mr. Bruder's attorney's fee. Judge Sturdevant found that WSI's findings of fact were not supported by a preponderance of the evidence and did not sufficiently address the evidence presented by Mr. Bruder. WSI has appealed Judge Sturdevant's decision to this Court.

IV. LAW AND ARGUMENT

A. James Bruder has shown a compensable injury by the greater weight of the evidence.

This case is one of conflicting medical opinions. On the one hand, Mr. Bruder's treating providers, Dr. M. W. Whitman (the board certified radiologist who performed and interpreted the June 28, 2005, MRI) and Drs. Dwight Woiteshek and Manuel Colon, opined that Mr. Bruder had a new L4-5 disc protrusion that was substantially attributable to his years of work in the oilfields. On the other hand, Dr. Peterson, WSI's consultant and former medical director, performed a records review and concluded that, based on that review as well as unnamed studies, Mr. Bruder did not have a new disc protrusion, and his condition was more likely the result of heredity, aging and personal habits. Dr. Peterson did not believe that the treating doctors' opinions were supported by

"objective medical evidence."

In its Brief, WSI criticized Judge Sturdevant for pointing out that Dr. Whitman, the radiologist who read the 2005 MRI as showing a new disc protrusion, was board certified when there was no evidence of that certification. In North Dakota, judges can take judicial notice of adjudicative facts, at any stage of a proceeding, if such facts are capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned. See: N.D. R. Evid. 201. In the instant case, a simple telephone call to the State Board of Medical Examiners is sufficient to confirm Dr. Whitman's board certification in diagnostic radiology.

This Court has, on occasion, wrestled with the concept of what, exactly, comprises the sort of "objective medical evidence" necessary for an injured worker to establish a compensable, work relationship. Most recently, this Court confirmed the idea that, at least legally, "objective medical evidence" consists of a treating doctor's opinion based on patient history, symptoms and complaints along with the doctor's examination and treatment as well as the doctor's education, training and experience. It does not have to be supported by double-blind epidemiological published studies and does not have to be scientifically reproducible to the satisfaction of WSI's medical director. In that sense, there is a real difference between the legal definition of "objective medical evidence" and that used by Dr. Peterson. See: Swenson v. Workforce Safety & Insurance Fund, 2007 ND 149, 738 N.W.2d 892. While Mr. Bruder's evidence may not have been "conclusive," as mistakenly required by TALJ Seaworth and may not have met Dr. Peterson's personal requirements, it is abundantly clear that it met the standards

set by this Court. Similarly, although Dr. Lewis B. Scott's December 21, 2006, MRI report (App. p. 133) indicates "no definite signs of recurrent disc protrusion," evidence of a work-related condition need only be "more likely than not" rather than "definite" or "conclusive." Moses v. Workers Compensation Bureau, 429 N.W.2d 436 (N.D. 1988).

Besides discounting Dr. Whitman's interpretation of the 2005 MRI as showing a new disc protrusion, Dr. Peterson opined that Mr. Bruder's condition was, based on unnamed medical studies, more likely attributable to heredity, aging and personal habits than to many years of heavy oilfield labor. Dr. Peterson based his opinion primarily on a lack of MRI findings of a specific work-related incident (App. pp. 64-65; HT pp. 56-57). Mr. Bruder, of course, did not claim he had a specific incident at work; rather, he claimed that the years of work-related wear and tear he had as an oilfield worker had worn out his low back. That opinion was shared by Drs. Woiteshek and Colon after reviewing Mr. Bruder's activity history as well as other medical records (Supplemental App. pp. 1-5; 6-34 (Supp.)). Dr. Peterson admitted that, if aging, genetics and personal habits were not considered, the only possible causes of degenerative disc disease remaining are wear and tear and lack of job satisfaction (App. p. 67; HT pp. 65-66). There is, of curse, no evidence that Mr. Bruder was dissatisfied with the type of work he had performed for decades.

In North Dakota, as elsewhere, workers compensation is a no-fault system. It's an accepted truism that the employer (and WSI) take the worker as they find him. None of us is genetically perfect. We all age. We all have personal habits. Statistical evidence of the respective roles of genetics, aging and personal habits is simply background noise. To

deny compensation simply because a worker is in his 50's and not his 20's or because he isn't genetically perfect or because he has personal habits is unconscionable and makes a mockery of the promise of "sure and certain relief." See: N.D.C.C. Section 65-01-01. Workers compensation was not created for the super man but for the common man. This Court has refused to allow WSI to consider an injured worker's personal habits as causation where, as in this case, objective medical evidence of work-related causation is presented. See: McDaniel v. North Dakota Workers Comp. Bureau, 1997 ND 154, 567 N.W.2d 833. More recently, this Court held that,

> The fact that an employee may have physical conditions or personal habits which make him or her more prone to . . . injury does not constitute a sufficient reason for denying a claim. . . . To the contrary, the work injury need only be a "substantial contributing factor."

Mankse v. Workforce Safety and Insurance, 2008 ND 79, para. 12; *citing* Satrom v. Workmen's Compensation Bureau, 328 N.W.2d 824, 831 (N.D. 1982). Furthermore, in Manske, supra, this Court held that work activities need only be one of a number of substantial contributing factors to render an injury compensable. Id., para. 11.

B. The District Court properly awarded attorney's fees under N.D.C.C., Section 28-32-50(1).

WSI has distilled the issue of attorney's fees to whether its Final Order was substantially justified. Let's review: Dr. Mark Whitman, a board certified radiologist, interpreted the June 28, 2005, MRI as showing a new lumbar disc protrusion (App. p. 122). A later MRI was interpreted by a different radiologist as not "definite" (App. p. 133). Even Dr. Charles Stillerman, upon whom WSI relies, in part, conceded that Dr. James Nabwanga's 1998 surgery appeared to be successful (App.

p. 124). Mr. Bruder's two treating providers, Drs. Woiteshek and Colon, concluded (after reviewing his activity history and, in the case of Dr. Colon, the records surrounding Mr. Bruder's 1998 surgery) that his low-back condition was substantially attributable to his work activities (Supp. App. pp. 1-5; 6-34). Dr. Gregory Peterson, WSI's medical consultant, attributes Mr. Bruder's condition to aging, heredity, personal habits, job dissatisfaction and work activity (App. pp. 66, 67; HT pp. 62, 65-66). The first three of Dr. Peterson's suggested causes are legally irrelevant, and there is no evidence of job dissatisfaction, leaving only work activity as a possible cause. Finally, of course, Mr. Bruder had no documented symptoms, no complaints, no restrictions, and no accommodations in the seven years of heavy oilfield labor before his 2005 claim.

Judge Sturdevant was clearly unimpressed with Dr. Peterson's cavalier dismissal of Mr. Bruder's work activities as a substantial contributing factor in his low-back condition. He clearly did not believe WSI's Final Order was substantially justified as, indeed, it was not. Rojas v. Workforce Safety & Insurance, 2005 ND 147, para. 16 and para. 17, 703 N.W.2d 299.

V. CONCLUSION

James Bruder has presented objective medical evidence that his low-back and leg conditions are related to a protruding disc caused by years of oilfield work. That evidence may not be "conclusive" as required by TALJ Seaworth, and it may fly in the face of the unnamed studies relied on by Dr. Peterson, but it meets the standards set by this Court. Mr. Bruder isn't genetically perfect. So what? He ages every day. Again, so what? He has personal habits. Big deal. He

spent decades performing heavy labor in North Dakota's oilfields and worked until he wore out. His claim is supported by objective medical evidence, and he's entitled to compensation for his condition.

Respectfully submitted this 23rd day of May, 2008.

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