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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20080089

RORY CLARK

APPELLANT

VS

NORTH DAKOTA
WORKFORCE SAFETY & INSURANCE
FUND,

APPELLEE, AND

NABORS DRILLING, USA, INC.

RESPONDENT.

SUPREME COURT NO 20080089

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 23 2008

STATE OF NORTH DAKOTA

APPEAL FROM THE FEBRUARY 26, 2008, ORDER AFFIRMING THE
ADMINISTRATIVE AGENCY'S DECISION DATED JULY 20, 2008, BY THE
HONORABLE ALLAN SCHMALENBERGER, JUDGE OF GOLDEN VALLEY COUNTY
DISTRICT COURT AND THE JUDGMENT ENTERED ON FEBRUARY 28, 2008,
GOLDEN VALLEY COUNTY, SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO.: 07-C-00025

APPELLANT'S BRIEF

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I. STATEMENT OF ISSUE

Did Workforce Safety & Insurance establish by the greater weight of the objective medical evidence that Rory Clark's October 12, 2005, work injury substantially aggravated a pre-existing low-back condition?

II. STATEMENT OF THE CASE

Rory Clark was "tripping pipe" for Nabors Drilling on October 22, 2005, when he twisted, hurting his low back and causing his legs to go numb (Appendix p. 29 (App.)). Mr. Clark was subsequently diagnosed with a L5-S1 disc herniation. WSI issued an informal decision denying benefits on April 21, 2006, and a formal dismissal on May 11, 2006 (App. pp. 30-44). A formal administrative hearing was held on January 4, 2007, Administrative Law Judge Rosella Sand presiding (App. p. 87). ALJ Sand issued a Recommended Decision on February 7, 2007, finding that Mr. Clark's condition was compensable but deferring the issue of whether his work injury had aggravated any pre-existing low-back condition (App. pp. 45-61).

WSI accepted ALJ Sand's decision on March 12, 2007, but ordered a remand for a second hearing on the aggravation issue (App. pp. 62-64). Finally, after a second hearing on June 22, 2007, ALJ Sand issued Recommended Findings of Fact, Conclusions of Law, and Order on June 29, 2007, holding that Mr. Clark's compensable low-back injury was a substantial aggravation of a pre-existing low-back condition (App. pp. 74-83). On July 20, 2007, WSI issued its Final Order (App. p. 84). Mr. Clark petitioned WSI for Reconsideration and Rehearing on August 8, 2007 (App. p. 85). WSI denied Mr. Clark's petition on August 21, 2007 (App. p. 86). Mr. Clark appealed to the District Court on September 11, 2007 (App. pp. 14-15). The Honorable Allan Schmalenberger, District

Judge, issued a Memorandum Opinion on February 13, 2008, affirming WSI's Final Order (App. pp. 19-23), and Mr. Clark has, once again, appealed on April 8, 2008 (App. p. 27).

III. STATEMENT OF FACTS

At the time of the January 4, 2007, evidentiary hearing, Rory Clark was 45 years old and a native of Glenburn, North Dakota, with a GED (App. p. 95 - (Hearing Transcript (HT) p. 26). Mr. Clark had first gone to work in the oil fields when he turned 18 years old (App. p. 95 - HT p. 27). His work consisted of heavy labor including mixing 6 tons or more of drilling mud each day (App. p. 112 - HT pp. 105-106). He began "tripping pipe" in 1980 (App. p. 97; - CR 186, HT p. 35). Tripping pipe required him to lift a 90-foot length of pipe overhead while his safety harness pulled down at his waist, causing him to twist with his right foot lower than his left (App. pp. 106-108 [CR 186 - HT pp. 70-78]). Mr. Clark went to work for Nabors Drilling on November 23, 2004, after passing a rigorous physical examination (App. pp. 98-99; [CR 186 - HT pp. 37-40]).

Unquestionably, Mr. Clark had a pre-existing low-back "condition" before going to work for Nabors Drilling. He had bruised his back when some sheep stampeded over him when he was three years old (App. p. 99; [CR 186 - HT pp. 41-42]). He had also bruised his back in June of 1992 while participating in a demolition derby in Colorado (App. pp. 99-100; [CR 186 - HT pp. 42-45]). Mr. Clark had a full recovery after both incidents and was able to return to work as an oil field driller, lifting weights over 100 pounds (App. pp. 99-100; [CR 186 - HT pp. 42-45]). When Mr. Clark worked in the oil fields, he occasionally saw Dr. Dean Redington, a Minot chiropractor, when he felt stiff and

sore after working (App. p. 100; [CR 186 - HT p. 45]). Mr. Clark always felt better after one or two visits (*Id.*).

After tripping pipe on October 12, 2005, Mr. Clark had severe low-back pain and numbness down both legs (App. p. 109; [CR 186 - HT pp. 80-81]). Although he saw Dr. Redington afterwards, chiropractic treatment offered no relief (App. p. 109; [CR 186 - HT p. 82]). Mr. Clark was able to return to work with modified duties (App. p. 109; [CR 186 - HT p. 83]). Although he was on modified duties, Mr. Clark still had to take "massive amounts" of pain relievers in order to function (App. p. 109a; [CR 186 - HT pp. 85-87]). Nevertheless, his low-back pain grew worse and worse as time went on (App. p. 109a; [CR 186 - HT pp. 85-87]).

On March 9, 2006, Dr. Redington noted that he suspected Mr. Clark had a herniated disc and ordered an MRI (App. 65). The March 9, 2006, MRI showed, among other things, protruding discs at the L4-5 and L5-S1 vertebral levels and suspected impingement on the left S1 nerve root (App. pp. 68-69). On March 13, 2006, Dr. Redington noted that Mr. Clark had numbness in the S1 dermatome and referred him for a neurosurgical consultation (App. p. 69a).

On March 20, 2006, Mr. Clark coughed twice and felt a sudden increase in his low-back pain (App. p. 109b; [CR 186 - HT p. 89]). He was diagnosed with an acute herniated disc at the L5-S1 level and S1 radiculopathy (App. p. 72). Mr. Clark had a partial hemilaminectomy surgery on his L5-S1 herniated disc on March 22, 2006 (App. p. 141; [June 22, 2007 HT p. 25]). At the time of the June 22, 2007, hearing, Mr. Clark was still being prescribed methadone and other pain medications for his unrelenting low-back pain (App. p. 138; [CR 187 -

HT. p. 22]). Additionally, one of his treating doctors, Shelley Killen, had not yet released Mr. Clark to return to work, and the other, Manuel Colon, had released him to only sedentary work with additional restrictions (App. p. 141; [CR 187 - HT p. 25]). Although he had had occasional low-back pain and stiffness in the past which he had treated with chiropractic care, Mr. Clark had never been diagnosed with a herniated disc before his October 12, 2005, work injury (App. p. 142; [CR 187 - HT p. 26]).

IV. LAW AND ARGUMENT

N.D.C.C., Section 65-05-15 requires WSI to aggravate an award of benefits if a prior condition, known in advance with previous work restrictions or interference with physical function, is substantially worsened by a compensable injury. This Court has said,

[A]n aggravation award is appropriate if the prior injury, disease or other condition is known in advance of a connected work injury and has caused previous work restriction or interference with physical function, and the work injury combines with the preexisting condition to substantially accelerate the progression of, or substantially worsen the severity of, the preexisting condition.

Mikkelson v. ND Workers Compensation Bureau, 2000 ND 67, para. 13, 609 N.W.2d 74.

In the instant case, Rory Clark unquestionably had incidents of low-back pain and stiffness prior to his October 12, 2005, work injury. Even WSI's medical expert, Dr. Robert Cooper, however, agreed that there are any number of causes of low-back pain (App. p. 105; [CR 186 - January 4, 2007, Transcript p. 64]). There was no medical evidence indicating Mr. Clark had a herniated disc before October 12, 2005 (App. p. 104; [CR 186 - HT p. 61]). Furthermore, an MRI showed conclusively that Mr. Clark had a herniated disc at L5-S1 prior to the March 20,

2006, coughing incident (App. p. 105; [CR 186 - HT p. 64]). Thus, there was no objective medical evidence showing that Mr. Clark had a herniated disc prior to his work injury or that any of his occasional complaints and chiropractic treatments were attributable to anything other than muscle soreness. Although Mr. Clark may have had a pre-existing low back "condition," and although his "condition" may have occasionally interfered with his physical function, there is absolutely no evidence that his pre-existing "condition" was connected to his work-related herniated disc, that it combined with his work-related herniated disc or that his work-related herniated disc somehow accelerated the progression or worsened the severity of his pre-existing "condition," whatever it was.

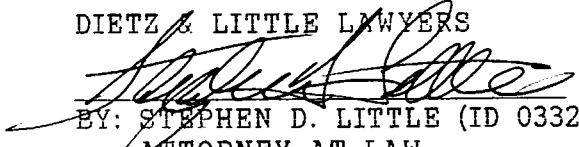
Not only does the objective medical evidence conclusively demonstrate that Mr. Clark's L5-S1 disc herniation, which he had surgically repaired, pre-existed any coughing incident, but such an incident is legally irrelevant as well. See: Roggenbuck v. Workers Compensation Bureau, 481 N.W.2d 599 (N.D. 1992). In other words, there is no evidence that Rory Clark had a pre-existing low-back condition which was substantially worsened by his work-related injury, and there is no evidence that his work-related L5-S1 herniated disc is related in any way to a any pre-existing condition. That is, essentially, the opinion of Mr. Clark's treating medical provider, Dr. Shelley Killen (App. pp. 66-67; [CR pp. 63-64]). There is simply nothing to connect Mr. Clark's earlier episodes of low-back pain to a work-related herniated disc.

V. CONCLUSION

WSI has not satisfied the requirements of N.D.C.C., Section 65-05-15. The fact that Mr. Clark may have had a bruised low back when he was 3 years old is irrelevant. The fact that he had a bruised low back from a demolition derby is irrelevant. He fully recovered from both incidents. The fact that he sought chiropractic treatment for his occasional aches and pains is irrelevant. There are many causes of low back pain, particularly for someone involved in heavy labor. There is no evidence of a pre-existing disc herniation and no evidence that Mr. Clark's work injury while tripping pipe worsened any pre-existing condition. He remains entitled to full benefits.

Dated this 23rd day of May, 2008.

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CERTIFICATE OF SERVICE

I, Stephen D. Little, certify that on the 23rd day of May, 2008, a true and correct copy of the Appellant's Brief with an attached Certificate of Service and Appendix were mailed to the following:

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