

ORIGINAL

20080097

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

---

No. 20080097

---

William Bergum,

Appellant

v.

Workforce Safety and Insurance, STATE OF NORTH DAKOTA

Appellee.

---

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAY 30 2008

On Appeal from Northeast Central Judicial District  
Order for Judgment Affirming the Order of Workforce Safety  
and Insurance  
The Honorable Lawrence E. Jahnke  
Grand Forks Co. No. 07-C-01283

---

*+ addendum*  
BRIEF OF APPELLANT WILLIAM BERGUM

---

Alice R. Senechal (ID #04306)  
ROBERT VOGEL LAW OFFICE, P.C.  
200 First Avenue North, Suite 30  
P.O. Box 5576  
Grand Forks, ND 58206-5576  
(701) 775-3117

ATTORNEYS FOR APPELLANT WILLIAM BERGUM

## TABLE OF CONTENTS

Table of Authorities . . . . .	iii
Jurisdictional Statement . . . . .	1
Issues Presented for Review . . . . .	2
Statement of the Case . . . . .	3
Statement of the Facts . . . . .	5
I.    WORK INJURY . . . . .	5
II.   PRIOR BACK PROBLEMS . . . . .	6
III.  POST INJURY TREATMENT . . . . .	7
IV.   WSI'S EXAMINER . . . . .	12
Argument . . . . .	15
I.    THE DECISION OF WORKFORCE SAFETY AND INSURANCE IS FULLY REVIEWABLE ON APPEAL, SINCE IT PRESENTS A QUESTION OF STATUTORY INTERPRETATION . . . . .	15
II.   WORKFORCE SAFETY AND INSURANCE ERRED IN FINDING THAT WILLIAM BERGUM'S INCREASED PAIN, INCREASED NEED FOR MEDICAL CARE, AND INCREASED NEED FOR MEDICATION DID NOT CONSTITUTE A SUBSTANTIAL WORSENING OR ACCELERATION OF HIS PREEXISTING CONDITION UNDER NORTH DAKOTA CENTURY CODE § 65-01-02(10)(b)(7) . . . . .	16
A.   The applicable statutory definition includes an injury which substantially accelerates the progression of or substantially worsens the severity of a preexisting injury . . . . .	16
B.   Mr. Bergum's injury is compensable under the standard of <u>Geck v. N.D. Workers Comp. Bureau</u> . . .	17

C.	The legislative history of Section 65-01-02(10)(b)(7) demonstrates that the 1997 amendments were not intended to alter the substance of the statute . . . . .	18
D.	WSI's interpretation of Section 65-01-02(10)(b)(7) is not consistent with the legislative history or the interpretations of similar statutes in other states . . . . .	20
III.	WORKFORCE SAFETY AND INSURANCE IMPROPERLY RELIED ON THE OPINION OF ITS EXAMINING PHYSICIAN, WHEN THAT PHYSICIAN ASSUMED THAT AN INCREASE IN SYMPTOMS WAS NOT A SUFFICIENT BASIS TO FIND WILLIAM BERGUM'S INJURY COMPENSABLE UNDER NORTH DAKOTA LAW . . . . .	23
IV.	WORKFORCE SAFETY AND INSURANCE ERRED IN NOT CONSIDERING WILLIAM BERGUM'S TREATING PHYSICIAN'S OPINION TO BE OBJECTIVE MEDICAL EVIDENCE . . . . .	25
Conclusion	. . . . .	27
Affidavit of Service by Mail	. . . . .	29
Addendum	. . . . .	Add. 1

## TABLE OF AUTHORITIES

### CASES

<u>Carlson v. SAIF Corp.</u> , 719 P.2d 54, 55 (Or. App. 1986). . . . .	22
<u>Engebretson v. N.D. Workers Comp. Bureau</u> , 1999 ND 112, 595 N.W.2d 312. . . . .	26
<u>Huwe v. Workforce Safety &amp; Ins.</u> , 2008 ND 47, 746 N.W.2d 158. . . . .	27
<u>Geck v. N.D. Workers Comp. Bureau</u> , 1998 ND 158, 583 N.W.2d 621. . . . .	17-18, 23
<u>Myhre v. N.D. Workers Comp. Bureau</u> , 2002 ND 83, 653 N.W.2d 705. . . . .	26
<u>Negaard-Cooley v. N.D. Workers Comp. Bureau</u> , 2000 ND 122, 611 N.W.2d 898. . . . .	25
<u>Olson v. Workforce Safety &amp; Ins.</u> , 2008 ND 59, 747 N.W.2d 71. . . . .	15
<u>Salas v. General Chemical</u> , 71 P.3d 708 (Wyo. 2003). . . . .	22
<u>State ex rel. Wyoming Workers' Comp. Div. v. Roggenbuck</u> , 938 P.2d 851, 854 (Wyo. 1997). . . . .	21-22
<u>State ex rel. Wyoming Workers' Comp. Div. v. Slaymaker</u> , 156 P.3d 977 (Wyo. 2007). . . . .	22-23
<u>Swenson v. Workforce Safety &amp; Ins. Fund</u> , 2007 ND 149, 738 N.W.2d 892. . . . .	25

### STATUTES

N.D. Cent. Code § 28-32-46 (2007) . . . . .	15
N.D. Cent. Code § 28-32-49 (2007) . . . . .	1, 15
N.D. Cent. Code § 65-01-02(10)(b)(7) (2007) . . . . .	2, 16, 22

MISCELLANEOUS

1997 N.D. Sess. Laws ch. 527 § 1 . . . . . 18-19

Hearing on H.B. 1269 Before the  
House Indus., Bus., & Labor Comm.,  
55th N.D. Legis. Sess. (Feb. 5, 1997)  
(testimony of Reagan R. Pufall,  
attorney for Worker's Compensation Bureau)  
["Hearing on H.B. 1269"] . . . . . 18-20

Hearing on S.B. 2256 Before the  
Senate Judiciary Comm.,  
51st Legis. Sess. (Jan. 24, 1989)  
(testimony of Dean J. Haas,  
Assistant Attorney General)  
["Hearing on S.B. 2256"] . . . . . 21

Hearing on S.B. 2256 Before the  
Senate Judiciary Comm.,  
55st Legis. Sess. (Jan. 24, 1989)  
(testimony of Pat Mayer,  
Assistant Claims/Rehabilitation Manager  
at the Workers Compensation Bureau)  
["Hearing on S.B. 2256"] . . . . . 21

## JURISDICTIONAL STATEMENT

Jurisdiction in this matter is pursuant to N.D. Cent. Code § 28-32-49. On February 27, 2008, WSI served Notice of Entry of Judgment on an Order affirming a Workforce Safety and Insurance decision which denied Mr. Bergum benefits. (App. 32-38.) Mr. Bergum timely filed a Notice of Appeal on April 22, 2008. (App. 40-41.)

## ISSUES PRESENTED FOR REVIEW

Whether Workforce Safety and Insurance erred in finding that a worker's increased pain, increased need for medical care, and increased need for medication did not constitute a substantial worsening or acceleration of a preexisting condition under North Dakota Century Code § 65-01-02(10)(b)(7).

Whether Workforce Safety and Insurance improperly relied on the opinion of its examining physician when that physician assumed that an increase in symptoms was not a sufficient basis to find an injury compensable under North Dakota law.

Whether Workforce Safety and Insurance erred in not considering the worker's treating physician's opinion to be objective medical evidence when the physician's opinion was based on examination, medical history, and the physician's education and experience.

## STATEMENT OF THE CASE

On January 13, 2006, William Bergum filed an application for benefits with Workforce Safety and Insurance (WSI). (R. at 1.) Mr. Bergum had injured his left hip and back during the course of his employment with Development Homes, Inc., in Grand Forks. (R. at 1.) WSI denied Mr. Bergum benefits on March 14, 2006, stating that Mr. Bergum failed to prove that he sustained a compensable injury. (R. at 14.)

Mr. Bergum requested reconsideration on March 21, 2006. (R. at 16.) WSI dismissed his claim on April 19, 2006, stating that Mr. Bergum's January 6, 2006 work-related injury "did not substantially accelerate the progression of or substantially worsen the severity of claimant's pre-existing underlying low back condition" and was therefore not compensable. (App. 18; R. at 17-25.) Mr. Bergum requested a hearing on the Order. (App. 18; R. at 29.) A hearing was initially scheduled for December 12, 2006, but because of requests for rescheduling, the hearing was not held until March 13, 2007. (App. 19.) On July 17, 2007, the Administrative Law Judge (ALJ) issued her Recommended Findings of Fact, Conclusions of Law and Order, which recommended that the April 19, 2006 Dismissal be affirmed. (App. 18-31; R. at 240-53.) The ALJ stated that Mr. Bergum failed to establish by a preponderance of the evidence that his January 6, 2006



work activity "substantially accelerated the progression of, or substantially worsened the severity of, his preexisting condition of chronic low back pain." (App. 31; R. at 253.) WSI adopted the ALJ's Recommended Findings of Fact, Conclusions of Law and Order on July 24, 2007. (App. 17; R. at 258.)

Mr. Bergum filed a Notice of Appeal with the Northeast Central Judicial District on August 14, 2007. (App. 34.) On February 19, 2008, Northeast Central Judicial District Judge Lawrence Jahnke issued an Order Affirming the Agency decision. (App. 32-38.) The Order concluded:

that the ALJ and the agency adequately addressed inconsistencies in the medical opinions in this matter, that there was valid rationale for disregarding medical evidence in favor of Mr. Bergum, and that a reasoning mind reasonably could have found, by a preponderance of the evidence, that Mr. Bergum's January 2006 injury was not a compensable injury as now defined by statute.

(App. 37-38.) Judgment was entered on the Order on February 26, 2008. (App. 1.)

Mr. Bergum timely filed a Notice of Appeal to this Court on April 22, 2008. (App. 39-41.)

Mr. Bergum's employer has not challenged his claim, or participated in the appeals process.

## STATEMENT OF THE FACTS

### I. WORK INJURY

Appellant William Bergum had worked at Development Homes, Inc. as an operational maintenance worker for approximately five-and-one-half years before he injured his lower back and left hip on January 6, 2006. Development Homes is a non-profit entity which operates group homes and provides other services to developmentally disabled individuals. (R. at 274; Hr'g Tr. 23:14-15, Mar. 13, 2007.) Mr. Bergum has continued his employment with Development Homes, and his claim to date concerns only medical expenses.

On the date of injury, a Friday, Mr. Bergum and a co-worker were disassembling an old hospital bed at a Development Homes site. (R. at 61.) The task of dismantling the bed included bending, twisting, lifting, and carrying pieces which weighed approximately 50 pounds. (R. at 274; Hr'g Tr. 26:12-19.) After a twisting motion, Mr. Bergum felt pain in his lower back on the left side. (R. at 61.) He notified his supervisor the same day the injury occurred. (R. at 18.) The next day on which her clinic was open, Monday, January 9, 2006, Mr. Bergum saw his primary physician, Dr. Yvonne Gomez, for treatment of low back, left hip, and left leg pain which he had experienced since January 6, 2006. (R. at 61.)

## II. PRIOR BACK PROBLEMS

Although Mr. Bergum had a history of lower back pain, his condition had been stable for more than a year prior to the work incident, and his condition has been significantly worse since the incident. Prior to January 9, 2006, it had been more than one year since Mr. Bergum had sought medical treatment for any reason. (R. at 60.) On December 29, 2004, his primary reason for seeking medical care was not related to his back pain. (R. at 178; Gomez Dep. 11:5-11, Feb. 15, 2007.) The record of that visit indicates Mr. Bergum had some muscle tenderness but had full range of motion of his lower extremities. (R. at 60.)

Mr. Bergum has been treated for lower back problems periodically since August 1990, after lifting a generator at work. (R. at 121.) In February 1992, he had lower back pain after moving a cabinet at work, and a chiropractor diagnosed lumbar strain and lumbar subluxation. (R. at 133.) In April 1994, he sought chiropractic and medical care because of pain after work, which was not related to a specific incident, and lumbar strain and lumbar subluxation were again diagnosed. (R. at 142.)

In 1995, Mr. Bergum injured his upper back and ankle when he fell from a roof while working. (R. at 274; Hr'g Tr. 35:5-12.) In 1996, Mr. Bergum again sought medical care for non-

incident specific pain following work. (R. at 162.) Dr. Robert Cooper examined Mr. Bergum, and ordered permanent medium work restrictions. (R. at 176.) The record shows two occasions, in 2001 and 2004, when Mr. Bergum sought medical care because of a temporary worsening of his pain from non-work-related activity. (R. at 274; Hr'g Tr. 35:21 - 36:20.) There was a single occasion in 2003 on which he sought medical care for low back pain with no mention of any specific precipitating incident. (R. at 50.)

Since 2001, Mr. Bergum's primary treating physician for his back problems has been Dr. Gomez at Altru Clinic in Grand Forks. (R. at 178; Gomez Dep. 7:18-19.) Dr. Gomez has treated his chronic pain conservatively with anti-inflammatories, muscle relaxers, and pain medications. (R. at 178; Gomez Dep. 12:12-16.)

### III. POST-INJURY TREATMENT

On January 9, 2006, the Monday following his Friday injury, Mr. Bergum saw Dr. Gomez for low back, left hip, and left leg pain. (R. at 61.) Mr. Bergum had pain shooting down his left lower leg and described the pain as almost debilitating. (R. at 61.) Dr. Gomez diagnosed Mr. Bergum as having a recurrent low back strain and "exacerbation of degenerative joint disease - related to lifting." (R. at 61.)

Dr. Gomez increased his work restrictions, and increased doses of his pain medication and muscle relaxants, and prescribed the medications on a regular schedule, rather than on an "as needed" basis. (R. at 61.)

Mr. Bergum followed up with Dr. Gomez on January 24, 2006. (R. at 63.) Dr. Gomez described Mr. Bergum as having "a new injury after lifting a part of a hospital bed." (R. at 63.) Mr. Bergum had less tingling in the legs than he had had at his previous visit, but was not yet at his pre-January 6 baseline. (R. at 63.) On February 7, 2006, Mr. Bergum saw Dr. Gomez for difficulty with urination,<sup>1</sup> though he felt his low back pain was improving. (R. at 64.) Dr. Gomez noted Mr. Bergum's new symptoms and recommended an MRI to rule out advancement of degenerative joint disease. (R. at 64.)

WSI sent Dr. Gomez a letter on February 17, 2006, asking whether the injury on January 6, 2006, substantially accelerated the progression of or substantially worsened the severity of Mr. Bergum's pre-existing low back condition. (R. at 66.) Dr. Gomez stated that it was "not substantial acceleration or worsen [sic], but new symptoms, changes in micturition." (R. at 66.) WSI then denied benefits for the January 6, 2006 injury, based on Dr. Gomez's letter. (R. at

---

1

Dr. Gomez later concluded that Mr. Bergum's urinary problems were attributable to changes in medication ordered after the January 6th incident. (R. at 178; Gomez Dep. 63:15-64:4.)

14-15.)

Although her initial records and correspondence did not use language of the N.D. Cent. Code § 65-01-02 in describing Mr. Bergum's condition, Dr. Gomez's deposition testimony explained that she had misinterpreted the questions WSI had initially asked of her. (R. at 178; Gomez Dep. 30:23 - 31:22.) Dr. Gomez testified that she did not fully understand WSI's questions. (R. at 178, Gomez Dep. 31:3 - 32:11.) When her deposition was taken, Dr. Gomez testified unequivocally:

Q. Did the work incident of January 2006 substantially accelerate the progression of Mr. Bergum's low back problems?

A. Yes.

Q. Did the January 2006 work incident substantially worsen the severity of [Mr. Bergum's] low back problems?

A. Yes.

Q. Is it likely that had that incident not happened his symptoms would not have progressed as quickly as they did?

A. You know, again we don't know, but probably not. I mean based on his prior course of events I think he would have had flares off and on, but not to the level that we were dealing with, or the limitations that we were dealing with.

Q. This was more than an off and on flare-up that you had seen prior.

A. Correct.

Q. The opinions that you have just described, do you have those opinions to a reasonable degree of medical certainty?

A. Yes.

Q. And the changes that you have referred to in talking about your opinions, those are reflected by objective medical findings that you've documented from time to time in your records?

A. Yes. I mean I feel very confident in my opinion because Bill has consistently followed up with me, and it's been an ongoing relationship. So you get a sense of a patient's baseline and how things change versus if he had seen different doctors for the same injury.

(R. at 178; Gomez Dep. 32:3 - 33:14.)

Dr. Gomez again saw Mr. Bergum on March 21, 2006. (R. at 69.) She noted that Mr. Bergum still had left foot numbness and urinary problems that seemed to be improving. (R. at 69.) Mr. Bergum's lower back was improving. (R. at 69.) Dr. Gomez continued pre-January 6 work restrictions and adjusted his pain medications because of stomach problems resulting from the pain medications. (R. at 69.)

On April 4, 2006, Mr. Bergum again followed up with Dr. Gomez, complaining of an upset stomach and little improvement in his lower back pain. (R. at 70.) He also was having sleeping problems due to his pain. (R. at 70.) Dr. Gomez again adjusted his pain medication and added a sleep aid. (R. at 70.) In his next follow-up visit on April 25, 2006, Dr. Gomez discussed back pain management, including possible referrals to a pain management specialist or to a neurosurgeon for more aggressive treatment of his back pain. (R. at 70-71.) On June 27, 2006, Mr. Bergum again saw Dr. Gomez for

urination problems and continued lower back pain. (R. at 72.) Dr. Gomez referred Mr. Bergum to a pain management specialist for an assessment and long term plan for management of his pain. (R. at 72.)

On July 26, 2006, Mr. Bergum was examined by Brenda Hanson, a certified physician's assistant who works in Altru's pain management department. (R. at 76.) Mr. Bergum had neck and back pain radiating into his left buttock and thigh with occasional pain in his calf. (R. at 76.) He also experienced weakness, numbness of his left foot, and muscle spasms in his lower back. (R. at 76.) P.A. Hanson diagnosed degenerative disc disease, left L5 lumbar radiculopathy, and left L4-5 lumbar facet joint arthropathy. (R. at 79.) Mr. Bergum had a series of caudal epidural steroid injections to treat his pain. (R. at 100, 104, 110.)

Prior to January 6, 2006, Mr. Bergum had used a muscle relaxant medication and pain medication (Darvocet) approximately every two weeks; since the incident he has taken those medications every day on his physician's orders. (R. at 274; Hr'g Tr. 29:11 - 30:19.) Prior to January 6, 2006, he used Celebrex and Protonix once a day; since the incident he has used increased daily dosages of both medications. He also takes several medications that he did not require prior to the January 6th incident: Cymbalta, Lamictal, and a sleep



medication. (R. at 274; Hr'g 30:20-25.) Dr. Gomez described Mr. Bergum's pre-injury medications in testifying, "[h]ad he not been lifting the bed parts then he probably would be ticking along his merry way taking his meds when he needs it." (R. at 178; Gomez Dep. 58:7-10.)

An MRI performed on July 27, 2006 showed no significant change since a 2004 MRI. (R. at 96.) The 2006 MRI showed at least moderate degenerative changes at L5-S1, with no significant focal disc bulging or disc herniation at any level, and no spinal stenosis. (R. at 96.) As of December 18, 2006, the last time prior to her deposition that Dr. Gomez had seen Mr. Bergum, he had not returned to his pre-injury "baseline." (R. at 178; Gomez Dep. 36:17-20.)

In February 2007, Mr. Bergum was examined by an Altru Clinic neurologist, Dr. Kristen Jessen. (R. at 180-83.) Dr. Jessen found abnormalities requiring further evaluation and treatment. In her assessment and plan after EMG studies, Dr. Jessen found electrophysiologic evidence of neuropathy in the L5-S1 distribution bilaterally, particularly in the sensory component. (R. at 184-85.) Dr. Jessen described Mr. Bergum's neuropathy as "fairly severe." (R. at 183.)

#### IV. WSI'S EXAMINER

WSI ordered that Mr. Bergum be examined by Dr. Joel

Gedan, and Mr. Bergum attended that examination on December 6, 2006, eleven months after the incident at issue. (R. at 120.) Dr. Gedan noted "generalized give-way weakness in the left lower extremity," and reports of decreased sensation to pinprick. (R. at 120h.) Dr. Gedan diagnosed chronic back pain. (R. at 120j.)

WSI asked Dr. Gedan to respond to several questions, including, "[W]hat relationship, if any, do the prior work injuries have to Mr. Bergum's current condition?" Dr. Gedan responded by reference to his opinion that there was "no permanency," and thereby concluded that the prior work injuries were not the cause of Mr. Bergum's condition. (R. at 120j.) That is inconsistent with Dr. Gedan's opinions that Mr. Bergum has had chronic back pain since 1990, the date of his first work injury. (R. at 177; Gedan Dep. 14:7-12, Feb. 7, 2007.) Dr. Gedan stated that the prior work injuries did not predispose Mr. Bergum to future episodes of low back pain, while at the same time describing Mr. Bergum as having episodic low back pain since the time of the first work injury. (R. at 120i.)

Dr. Jayant S. Damle, a pain management specialist who administered epidural steroid injections to Mr. Bergum, noted that Mr. Bergum experienced partial relief of his pain following the injections. (R. at 104, 110.) Dr. Gedan stated

in his deposition that epidural steroid injections "may be helpful in temporarily reducing the symptoms of acute radiculopathy but not for nonspecific back pain and not for chronic back pain." (R. at 177; Gedan Dep. 33:20-24.) Dr. Gedan's opinion is inconsistent with the pain relief Mr. Bergum experienced after epidural steroid injections.

Subsequent to the hearing, WSI asked that Dr. Gedan review more recent medical records, and Dr. Gedan's response to that review was included in a letter dated March 19, 2007. (R. at 188-92.) The additional records which Dr. Gedan had reviewed included those of the neurologist, Dr. Jessen. In her assessment and plan after EMG studies, Dr. Jessen found electrophysiologic evidence of neuropathy in the L5-S1 distribution bilaterally, particularly in the sensory component. (R. at 184-85.) Dr. Jessen described Mr. Bergum's neuropathy as "fairly severe." (R. at 183.) Dr. Gedan, in his March 19th letter, acknowledged presence of neurological abnormality, but characterized the findings as "subtle," and unrelated to the January 6, 2006 incident. (R. at 191.)

## ARGUMENT

### I. THE DECISION OF WORKFORCE SAFETY AND INSURANCE IS FULLY REVIEWABLE ON APPEAL, SINCE IT PRESENTS A QUESTION OF STATUTORY INTERPRETATION.

Resolution of this appeal depends on statutory interpretation and application of North Dakota Century Code Section 65-01-02(10)(b)(7). Questions of statutory application and interpretation are questions of law and are fully reviewable on appeal. Olson v. Workforce Safety & Ins., 2008 ND 59, ¶ 9, 747 N.W.2d 71 (quoting Rodenbiker v. Workforce Safety & Insurance, 2007 ND 169, ¶ 15, 740 N.W.2d 831; Rojas v. Workforce Safety & Ins., 2006 ND 221, ¶ 13, 723 N.W.2d 403). This Court reviews the decision of Workforce Safety and Insurance in the same manner as does the district court. N.D. Cent. Code § 28-32-49 (2007). This Court must determine whether WSI's decision is in accordance with the law, whether WSI's findings of fact are supported by a preponderance of the evidence, whether WSI's conclusions of law are supported by its findings of fact, whether WSI's decision is supported by its conclusions of law, and whether WSI's findings of fact sufficiently address the evidence which Mr. Bergum presented to WSI. N.D. Cent. Code § 28-32-46 (2007).

II. WORKFORCE SAFETY AND INSURANCE ERRED IN FINDING THAT WILLIAM BERGUM'S INCREASED PAIN, INCREASED NEED FOR MEDICAL CARE, AND INCREASED NEED FOR MEDICATION DID NOT CONSTITUTE A SUBSTANTIAL WORSENING OR ACCELERATION OF HIS PREEXISTING CONDITION UNDER NORTH DAKOTA CENTURY CODE § 65-01-02(10)(b)(7).

A. *The applicable statutory definition includes an injury which substantially accelerates the progression of or substantially worsens the severity of a preexisting injury.*

The statutory provision at issue is one which excludes certain injuries from the definition of compensable work injuries. The provision at issue, N.D. Cent. Code § 65-01-02(10)(b)(7), states:

Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

There is no dispute that Mr. Bergum had the preexisting condition of chronic back pain. (R. at 263.) The only dispute is whether the January 6, 2006 incident substantially worsened the severity of that condition or substantially accelerated the progression of that condition. Worsening of Mr. Bergum's condition is not apparent on x-ray or other radiological testing. (R. at 120j.) His symptoms, however, have worsened since the injury and impact him significantly more than they did prior to the injury, and that worsening is well-documented in records of his treating physician. (R. at

74.)

B. Mr. Bergum's injury is compensable under the standard of Geck v. N.D. Workers Comp. Bureau.

Geck v. North Dakota Workers Compensation Bureau involved a worker who had experienced knee pain while kneeling to give foot care to a client to whom she was providing in-home services. Geck v. N.D. Workers Comp. Bureau, 1998 ND 158, ¶ 2, 583 N.W.2d 621, 622. WSI dismissed her claim for compensation, attributing her problems to preexisting arthritis. Id. at ¶ 4. WSI's decision was affirmed by the district court, but this Court reversed and remanded to determine whether the work activity had substantially aggravated the preexisting arthritis. Id. at ¶ 14-15. Geck's only post-injury symptom was increased pain. Id. at ¶ 9. One of her physicians described the incident as having resulted in a "brief exacerbation," and another physician described it as a "temporary setback." Id. at ¶ 12.

Interpreting the predecessor version of section 65-01-02(10)(b)(7), this Court remanded for a determination of whether the increased pain was "substantial," and therefore compensable. Id. at ¶ 14-15. Geck therefore holds that increased pain can be sufficient to establish compensability where work activity impacts a preexisting condition, if the impact results in a "substantial" change. This Court held that, "[P]ain can be an aggravation of an underlying

condition." Id. at ¶ 10.

Despite changes in statutory language since the Geck decision, the substance of the statute has not changed. Geck is therefore applicable in deciding Mr. Bergum's appeal. While the statute no longer uses the phrase "substantial aggravating factor," the legislative history demonstrates that the substitute terms, "substantial acceleration of progression," or "substantial worsening of severity" are to be interpreted in the same way that "substantial aggravating factor" was interpreted.

C. The legislative history of Section 65-01-02(10)(b)(7) demonstrates that the 1997 amendments were not intended to alter the substance of the statute.

A review of the history of the current definition of preexisting condition demonstrates that the substance of the definition has not changed since the Geck decision, and that the reasoning of Geck is therefore applicable to this case.

The definitions applicable to WSI claims underwent a "comprehensive 'clean-up'" during the 1997 North Dakota Legislative Assembly. Hearing on H.B. 1269 Before the House Indus., Bus., and Labor Comm., 55th N.D. Legis. Sess. (Feb. 5, 1997) (testimony of Reagan R. Pufall, attorney for Worker's Compensation Bureau) ["Hearing on H.B. 1269"]; Add. 3. The 1997 amendment involved elimination of dozens of words and addition of a handful of words:

~~(6)~~ (7) Injuries attributable to a preexisting injury, disease, or other condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. It is insufficient, however, to afford compensation under this title solely because, including when the employment acted acts as a trigger to produce symptoms in a latent and underlying the preexisting injury, disease, or other condition if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity substantially accelerates its progression or substantially worsens its severity.

1997 N.D. Sess. Laws ch. 527 § 1; Add. 2. In summary, the 1997 amendments replaced "substantial aggravating or accelerating factor" with "substantially accelerates its progression or substantially worsens its severity." Id.

Testimony of the agency's counsel demonstrates that no substantive change was intended by substituting "worsening of severity" or "acceleration of progression," for "aggravation."

If the workplace incident is a "mere trigger" of a preexisting condition then there is no coverage. If the work injury significantly aggravates a known preexisting condition then there is partial coverage. If the work injury is not really affected by the presence of the preexisting condition then it is a "new and separate" injury and is covered at 100% of benefits.

Hearing on H.B. 1269, supra (testimony of Reagan R. Pufall, attorney for Worker's Compensation Bureau) (emphasis added);



Add. 6-7. The 1997 amendments did not alter the substance of the section, but rather removed unnecessary and confusing language. Id. WSI erred in concluding that the statutory amendment diminished the Geck holding.

D. *WSI's interpretation of Section 65-01-02(10)(b)(7) is not consistent with the legislative history or the interpretations of similar statutes in other states.*

WSI erroneously interprets the applicable definition to require something more than worsening of pain from a preexisting condition:

Claimant relies on *Geck v. N.D. Workers Comp. Bureau*, 1998 ND 158, 583 N.W.2d 621, for the proposition that worsening of pain can be considered a substantial aggravation of an underlying condition. In *Geck*, while dealing with a prior version of the definition of compensable injury, the North Dakota Supreme Court noted that "[p]ain can be an aggravation of an underlying condition of arthritis." *Geck*, 1989 ND 158 at ¶ 10. But the court remanded because the agency did not make appropriate findings on whether the employment activity "substantially aggravated" the claimant's condition. *Id.* At ¶¶ 13-14. The court in *Geck* did not conclude that a showing of pain in and of itself was sufficient to support the claim. Under the law applicable here, the claimant must show more than aggravation of an underlying condition, he must show that the employment activity substantially accelerated the progression of or substantially worsened the severity of the preexisting injury, disease, or other condition. N.D.C.C. § 65-01-02(10)(b)(7).

. . . Pain can be an indication of aggravation of an underlying, preexisting condition. See *Geck*, 1998 ND 158 at ¶ 10. However, the current statute requires a showing of more than aggravation. See N.D.C.C. §65-01-02(10)(b)(7); see also *Geck*, 1998 ND at ¶ 10 (focusing on statutory requirement). Furthermore, subjective reports of pain, however honest, in isolation, do not constitute objective medical findings. See *Geck*, 1989 ND 158 at ¶

22 (Sandstrom, J. Dissenting) ("Pain alone is not enough.").

(App. 29-30; R. at 251-53.) WSI's interpretation is not consistent with Geck, or with section 65-01-02(10)(b)(7).

The "preexisting condition" statute was also amended in 1989, to align North Dakota's definition with the "industry standards" in place in other states. Hearing on S.B. 2256 Before the Senate Judiciary Comm., 51st N.D. Legis. Sess. (Jan. 24, 1989) (testimony of Pat Mayer, Assistant Claims/Rehabilitation Manager at the Workers Compensation Bureau) ["Hearing on S.B. 2256"], Add. 12.)

Subsection (6)<sup>2</sup> [is] essentially a modern restatement of the general rule, that an injury attributable to a pre-existing condition is noncompensable if it is the independent and intervening cause of the injury. The subsection does not prevent compensation where an employment injury has also contributed to the pre-existing condition by worsening its severity, or accelerating its progression.

Hearing on S.B. 2256, supra (testimony of Dean J. Haas, Assistant Attorney General); Add. 9-10.

Since the North Dakota statute is an "industry standard", decisions interpreting similar statutes of other states are instructive in interpreting North Dakota's statute. Other states have defined the worsening of a preexisting condition as a worsening in pain experienced by the claimant plus other

---

<sup>2</sup>

What was then subsection 6 has been renumbered to become the current subsection 7.

factors (e.g., need for additional medical attention). State ex rel. Wyoming Workers' Comp. Div. v. Roggenbuck, 938 P.2d 851, 854 (Wyo. 1997) (worsening of pain constituted a worsening of the preexisting condition); see also, Salas v. General Chemical, 71 P.3d 708 (Wyo. 2003) (allowing benefits for preexisting condition where pain had increased). Another case defined the worsening of a preexisting condition as "worsening [which] caused increased pain...[and] required [the injured worker] to seek medical services." Carlson v. SAIF Corp., 719 P.2d 54, 55 (Or. App. 1986).

Even though the Wyoming statute is not identical to the North Dakota statute, some parallels can be made. The Wyoming statute requires that the work incident substantially or materially aggravate the preexisting condition. State ex rel. Wyoming Workers' Comp. Div. v. Slaymaker, 156 P.3d 977, 981 (Wyo. 2007). The North Dakota statute requires that the incident substantially accelerate the progression of or substantially worsen the severity of the preexisting condition. N.D. Cent. Code § 65-01-02(10)(b)(7) (2007). Wyoming courts do not require medical testimony which use the words "substantial or material" to describe the difference in the condition. Slaymaker, at 981. The court determined that the testimony of a doctor that the work accident "contributed to" the injury and is "most likely" or "probably" the product

of the work accident was sufficient to satisfy the "substantial" or "material" aggravation requirement. Id. at 986.

In Slaymaker, the increased pain and the testimony of the patient's primary doctor was sufficient to satisfy the "substantial aggravation" standard. Dr. Gomez's assessment of Mr. Bergum similarly satisfies a "substantial worsening" standard. The fact that she did not use those words in her June 27, 2006 letter does not make her opinion insufficient. (R. at 74.) The evidence of increased pain plus the increase in seeking medical help and increased prescription use is sufficient under these cases to prove "substantial worsening" of Mr. Bergum's preexisting condition.

Contrary to WSI's interpretation, under Geck, increased pain, if substantial, can constitute a substantial worsening in severity or acceleration in progression of a preexisting condition. Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621.

### III. WORKFORCE SAFETY AND INSURANCE IMPROPERLY RELIED ON THE OPINION OF ITS EXAMINING PHYSICIAN, WHEN THAT PHYSICIAN ASSUMED THAT AN INCREASE IN SYMPTOMS WAS NOT A SUFFICIENT BASIS TO FIND WILLIAM BERGUM'S INJURY COMPENSABLE UNDER NORTH DAKOTA LAW.

WSI's examiner, Dr. Gedan, based his opinions on the premise that increased symptoms alone could never be sufficient to find compensability under section 65-01-02-

(10) (b) (7) :

Q. Your opinions, Dr. Gedan, are based on the premise that an increase in symptoms is not a substantial acceleration or aggravation under North Dakota law; correct?

A. Based on the fact that solely on the report symptoms, that's correct. I am also going by objective findings, clinically and radiographically, that's correct. Not that it is not considered. It is one of the areas I consider.

Q. You consider increased symptoms [an] acceleration and aggravation?

A. No, not by itself. It has to be correlated and corroborated by the objective findings in the case. Otherwise if it is solely on self-report, then the objective findings become meaningless.

(R. at 177; Gedan Dep. 40:10-24 Feb. 7, 2007.) Under Dr. Gedan's analysis, worsening of the preexisting condition of "chronic back pain" could likely never be compensable, because he does not recognize increased symptoms as a worsening of severity, even though it is a condition defined only by symptoms.

Because Dr. Gedan presumed that a substantial worsening of Mr. Bergum's pain symptoms was not sufficient, Dr. Gedan's opinion is entitled to little weight. He did not question that Mr. Bergum has had increased pain, and that he has required considerably more medication and additional treatment for pain control since the January 6, 2006 incident. (R. at 177; Gedan Dep. 22:12-22.) He did not employ the definition of objective medical evidence which this Court has adopted,

which includes treating physician's opinions.

WSI's decision did not address the inconsistencies within Dr. Gedan's opinion letters and testimony. WSI therefore did not meet its obligation to address and reconcile inconsistencies in medical evidence. Negaard-Cooley v. N.D. Workers Comp. Bureau, 2000 ND 122, ¶ 18, 611 N.W.2d 898, 904 (explaining that the Bureau's responsibility is to clarify inconsistencies in medical evidence and explain its reasons for disregarding medical evidence favorable to the claimant).

IV. WORKFORCE SAFETY AND INSURANCE ERRED IN NOT CONSIDERING WILLIAM BERGUM'S TREATING PHYSICIAN'S OPINION TO BE OBJECTIVE MEDICAL EVIDENCE.

Objective medical evidence includes a physician's medical opinion based on examination, medical history, and the physician's education and experience. Swenson v. Workforce Safety & Ins. Fund, 2007 ND 149, ¶ 25, 738 N.W.2d 892, 901. The opinion of Mr. Bergum's long-time treating physician, Dr. Gomez, established that Mr. Bergum experienced both new symptoms and substantially more symptoms after the January 6, 2006 work injury. Because she has treated Mr. Bergum's chronic back pain for many years, her opinion provides a more comprehensive view of his medical history and condition. Id. at ¶ 27. She knew his pre-injury "baseline" condition, and testified that he had not returned to that baseline almost one

year later. (R. at 178; Gomez Dep. 36:17-20.)

Although Dr. Gomez's initial response to WSI's written inquiries was not supportive of his claim, her deposition testimony explained that she had not correctly understood the questions WSI had asked. (R. at 178; Gomez Dep. 31:3-11.) In her deposition testimony, as in a second letter to WSI, she candidly admitted to having been confused by the manner in which WSI had presented its questions to her. Id.; (R. at 74.) Her candid acknowledgment of that confusion negates questions of credibility which would otherwise arise from the inconsistencies.

This Court has consistently stated that a physician's medical opinion is "objective medical evidence" for purposes of determining compensability of work injuries. Myhre v. N.D. Workers Comp. Bureau, 2002 ND 83, ¶ 15, 653 N.W.2d 705, 710; Engbretson v. N.D. Workers Comp. Bureau, 1999 ND 112, ¶ 24, 595 N.W.2d 312. Although this Court has not recognized a presumption giving greater weight to opinions of a treating physician, the Court has long stated that opinions of a treating physician "may afford the treating doctor a more comprehensive view of the claimant's medical history and condition." Myhre, 2002 ND 83, ¶ 25, 653 N.W.2d 705.

A treating physician's perspective over time is especially important in a case such as this. Dr. Gomez became

familiar with Mr. Bergum's baseline level of pain. (R. at 178; Gomez Dep. 33:10-14.) During the months following the January 6, 2006 work injury, she was able to observe and articulate the ways in which his condition had changed. (R. at 61-74.) Dr. Gomez initially noted changes in examination findings, including muscle spasms, and increased problems with pain and numbness in his legs. (R. at 61, 63.) She continued to prescribe significantly more medication to treat Mr. Bergum's pain after the work injury. (R. at 178; Gomez Dep. 16:22-17:6.) Dr. Gomez's opinion strongly supports Mr. Bergum's claim, (R. at 271-72, 178; Gomez Dep. 57:1 - 58:24, 74:3-24), and WSI improperly discounted her opinion, by not considering it objective medical evidence.

WSI's decision did not address the opinions of Dr. Jessen, Mr. Bergum's treating neurologist. WSI therefore failed to meet its obligation to address all of the evidence which Mr. Bergum presented. Huwe v. Workforce Safety & Ins., 2008 ND 47, ¶¶ 23-27, 746 N.W.2d 158, 166-67.

#### CONCLUSION

For the foregoing reasons, Appellant William Bergum asks this court to reverse the Northeast Central Judicial District Order Affirming the Agency decision and remand this matter to the administrative agency for a determination of benefits.



Dated this 30th day of May, 2008.

A handwritten signature in cursive script, reading "Alice R. Senechal". The signature is written in dark ink and is positioned above a horizontal line.

Alice R. Senechal (ID #04306)  
ROBERT VOGEL LAW OFFICE, P.C.  
200 First Avenue North, Suite 30  
P.O. Box 5576  
Grand Forks, ND 58206-5576  
(701) 775-3117

ATTORNEYS FOR WILLIAM BERGUM