

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Scott Neuhalphen,

Supreme Court Case No. 20080175

Claimant and Appellant,

v.

North Dakota Workforce Safety
and Insurance Fund,

Appellee,

and

Marketplace Foods,

Respondent.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 19 2008

STATE OF NORTH DAKOTA

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**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE FUND**
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**APPEAL FROM MEMORANDUM AND ORDER DATED APRIL 24, 2008,
AFFIRMING FINAL ORDER OF WORKFORCE SAFETY AND INSURANCE
DATED OCTOBER 3, 2007, AND FROM ORDER FOR JUDGMENT
AND JUDGMENT ENTERED MAY 14, 2008
WARD COUNTY DISTRICT COURT
NORTHWEST CENTRAL JUDICIAL DISTRICT
THE HONORABLE WILLIAM W. McLEES**
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STATEMENT OF THE CASE

1. On March 30, 2006, Appellant Scott Neuhalfen (“Neuhalfen”) submitted a claim for benefits with WSI. (App.¹ pp. 23-24, C.R.² 3-4) On that date, he was employed by Marketplace Foods, Minot, as a baker. (App. p. 23) On March 31, 2006, WSI issued a Notice of Decision accepting the claim. (App. p. 25)
2. On October 10, 2006, WSI issued a Notice of Intention to Discontinue Benefits for willfully and intentionally making material false statements regarding prior treatment for his low back. (App. pp. 27-34) Neuhalfen, through counsel, submitted a request for reconsideration. (App. p. 35) On December 28, 2006, WSI issued an Order denying further benefits on the claim for willful false statements regarding prior low back treatment, and seeking recoupment of benefits paid in the amount of \$11,500.47. (App. pp. 36-45) Neuhalfen submitted a request for reconsideration/demand for formal hearing. (App. p. 46)
3. On June 19, 2007, an administrative hearing was held before ALJ Seaworth. (C.R. 38; App. pp. 74-107³). On September 27, 2007, ALJ Seaworth submitted her recommended findings of fact and conclusions of law to WSI’s Claims Director. (C.R. 255; App. pp. 47-58) On October 3, 2007, WSI adopted the recommended decision as its Final Order. (App. p. 59) Neuhalfen requested reconsideration from the Final Order (App. p. 72), which was denied by WSI on November 5, 2007. (App. p. 73)

¹ “App.” refers to the Appendix submitted to this Court by Appellant.

² “C.R.” refers to the Certificate of Record on Appeal to District Court dated January 2, 2008, and filed pursuant to N.D.C.C. § 28-32-44.

³ “App. pp. 74-107 is the transcript of the administrative hearing held June 19, 2007.

4. On December 3, 2007, Neuhalfen took an appeal of WSI's Final Order of October 3, 2007, to the District Court, Ward County, North Dakota. (App. pp. 17-22) On April 24, 2008, the District Court, the Honorable William W. McLees issued a Memorandum and Order affirming WSI's Final Order of October 3, 2007. (App. pp. 108-114) Order for Judgment and Judgment were entered May 14, 2008. (App. pp. 115, 116) Notice of Entry of Judgment was served May 19, 2008. (App. pp. 117-118) On July 16, 2008, Neuhalfen filed his appeal to this Court. (App. pp. 119-120)

STATEMENT OF FACTS

5. On March 30, 2006, Neuhalfen submitted a First Report of Injury to WSI regarding an injury sustained on that date while employed by Marketplace Foods, Minot, as a baker. (App. pp. 23-24; C.R. 3-4) Leanne Klein from the personnel department asked Neuhalfen the questions off the C1 form and filled in his responses. (App. p. 80) Neuhalfen claimed an injury to his "right lumbar spine" in the form of a "sprain." (App. p. 23) Neuhalfen described the injury as occurring when he "reach[ed] across a pallet to lift a case of frozen donuts to stock them, and I felt a pop in my lower back, a few hours later it is still stiff and swollen (sic)." (App. p. 23; C.R. 4) On the claim form, Neuhalfen responded "yes" to the question as to whether he had prior problems or injuries to that body part (App. p. 24; C.R. 4), qualifying his answer with describing the prior problems as "in upper back, not lower." (App. p. 24; C.R. 4) The day after the claim was submitted, WSI issued its Notice of Decision accepting the claim and awarding Neuhalfen benefits. (App. p. 7) In processing a claim and determining whether

to accept or deny, the claim adjuster confirmed that WSI relies on the information concerning prior conditions or injuries as reported by the injured worker. (App. pp. 84, 85-86) In this case, there were no prior conditions or injuries reported on the claim form as to the body part alleged to have been injured – the right lumbar spine - and so WSI proceeded to accept the claim. (See App. p. 84)

6. On a “hunch,” because usually chiropractors treat the whole back, not just one specific part, the claims adjuster decided to check into where Neuhalfen had previously gone to the chiropractor after she started receiving notes of treatment following the work incident. (App. p. 85, 86) The claims adjuster also wanted to make sure that she had all the records. (App. p. 86) Because she was aware of the prior automobile accident, the claims adjuster also checked with Trinity Hospital to request any prior treatment records. (App. p. 86)
7. In mid-July of 2006, the employer wrote to WSI regarding the claim and concerns regarding work loss, Neuhalfen’s problems prior to his work injury, and his outside activities. (C.R. 8-9) The employer, however, did not mention whether Neuhalfen had any prior low back injuries. (C.R. 8-9; App. p. 86) On July 19, 2006, another claims adjuster, Cherry G., had a conversation with Neuhalfen regarding a 3-point contact. (C.R. 10) That adjuster then documented what was discussed in that conversation. (C.R. 10) Regarding prior problems, that adjuster documented: “IW states no priors except many years ago with shoulder and knee but no permanent restriction or work loss.” (C.R. 10)
8. On July 28, 2006, Neuhalfen stopped at WSI to drop off tax information from which the adjuster could compute an average weekly wage. (App. p. 86)

The claims adjuster recorded a conversation with Neuhalfen at that time to gather information regarding work loss issues. (App. p. 86; C. R. 252) During the conversation, Neuhalfen brought up the issues concerning the automobile accident referred to in the employer's recent letter and reiterated he had never had prior treatment to the low back. (App. p. 87; C.R. 252)

9. WSI continued to gather additional information on prior treatment. Medical records obtained revealed significant complaints relating to the low back and treatment of the same prior to Neuhalfen's claimed March 30, 2006, injury. In addition, contrary to Neuhalfen's contentions, the medical records reflected prior treatment to the low back as a result of the automobile accident. Specifically, as it pertains to the low back, the records obtained by WSI revealed the following:

Chiropractic Arts Clinic (C.R. 104-110)

- | | |
|---------|---|
| 12-9-03 | Main problem: . . . left foot goes numb
What do you think caused it? Car accident Dec. 6
Questionnaire symptoms: . . . hip, left foot pain/numbness
(C.R. 105) |
| Undated | Chart of Effects of Spinal Misalignments Areas: 5L lower
legs, ankles, feet (C.R. 106) |
| 9-27-04 | Chief Complaint: Mid-Low back pain started 3 days ago
– he walked a trail at Mt. Rushmore & it got so bad after
that pain is constant – sharp pain – feels like a steak knife
in his back – pain down both legs to mid back of thigh.

2 weeks ago similar incident (C.R. 107) |
| 9-27-04 | I also told him that I do not believe he has a disk herniation
at this time and we will treat this conservatively however it
is very possible that he does have. I told him that we
suspect right now is more of some irritation around the disc |

and around the 4th nerve that does go down into the leg.
(C.R. 108)

- 9-28-04 Review of systems – notations regarding past or present symptoms: Leg pain (now); Ankle/Foot pain (Past); Low back pain (now). (C.R. 110)
- 9-29-04 Scott presents today primarily with LBP [low back pain]. He hasn't noticed any difference in his lower back since the 1st treatment and he has still been having a lot of pain. He actually hasn't been able to go to work the last 2 days. He tried to go into work this morning however he said he just could not stand for any prolonged period of time so he had to go home. He has been putting a lot of ice on it, but that just seems to make things more stiff rather than take any pain away. Pain down into the left leg to the knee today where he did not have it initially. I told him we will have disc symptoms and therefore we are going to treat this as though it is a disc herniation. (C.R. 111)

Chiropractic Associates (C.R. 112-120)

- 1-4-00 Chiropractic Registration and History Form
Reason for visit – back pain
Severity of pain – 7
Type of pain: Sharp, Aching, Shooting, Stiffness
How often do you have this pain? All the time.
Is it constant or does it come and go? Constant
Does it interfere with your: work, sleep, daily routine, recreation
Activities or movements that are painful to perform: sitting, standing, walking, bending, lying down
Prior problems – Herniated disk – yes
Pinched nerve – yes
(C.R. 112-113)
- 1-4-00 Low back pain started yesterday relating to shoveling snow. He locates to the lower back at the lumbosacral region slightly more left sided. There's extension and radiation into the left posterior thigh terminating at the knee. Describes as sharp and shooting intermittently with movements and otherwise dull aching pain through the lower back. Patient was involved significant motor vehicle accident approximately four or five years ago and he has had ongoing pain since. He also states that this is initially what began his lower back problems. He is currently

working with these insurance companies, but does not want to file today due to the amount of paperwork that it takes to have things covered.

Lumbar spine range of motion is restricted in all planes most notably on flexion and extension with sharp left lumbosacral pain.

Assessment: Possible radiculitis in the lower back.
(C.R. 114)

2-14-00 Intermittent low back pain. (C.R. 115)

4-30-01 Patient presents for low back pain . . . (last week was unloading Karoke equipment and felt it develop. Difficulty sleeping and laying in bed. L/S & T/S L leg pain. Nagging, numb, aching.

Radiculitis. Disc involvement (*illegible*) Explained to patient. (C.R. 115)

5-30-01 Low back pain mildly improved as well as left lower extremity pain.
(C.R. 116)

8-14-02 Patient presents with low back pain __ L/S . . . No new injury. (C.R. 116)

8-19-02 Low back has been worse more sharp problems standing . . . pain into the legs. (C.R. 116)

8-21-02 Patient reports that L/S is still really stiff/sore but better.
(C.R. 117)

Medical Arts Clinic (C.R. 121-152)

8-30-94 Involved in MVA December 6, 1993. Driving car, no seat belt, broadsided a car traveling 30 mph. He claims . . . sustained an injury . . . to his neck, thoracic and low back. Has had Cortisone injections to various spinal regions per Dr. Mehta. (C.R. 121)

Assessment: Cervical, thoracic and lumbar spinal pain, which I feel is musculoskeletal in origin, not amenable to surgery. (C.R. 123)

- 10-27-94 Continues to complain of pain into the left low back region. Physical examination reveals some pain with palpation to the left lumbar spine region. (C.R. 126)
- 01-11-95 Patient does report some stiffness in the posterior cervical region and some chronic low back pain. (C.R. 129)
- For the low back, reports pain with palpation to the lumbosacral spine region bilaterally just proximal to the spinous process. (C.R. 129)
- 01-04-95 Called in to report increased pain in back while undergoing physical therapy for knee. (C.R. 131)
- 04-26-95 Reports still having the same problems. Pain between his shoulder blades and low back pain, pain in the posterior neck region as well. (C.R. 135)
- 05-06-96 Complaining of pain lower back. Physical examination reveals pain with palpation at various points at the spine from the cervical spine to the lumbosacral level. (C.R. 139)
- Assessment: Motor vehicle accident, posterior cervical pain, thoracic spinal pain and lumbar spinal pain, right shoulder pain with some paresthesias in the right upper extremity, status post left knee arthroscopy. (C.R. 140)
- 06-24-96 He reports that usually after driving for such a long portion of the day, it takes him several days to recover. He reports, especially today, left lower back pain with pain radiating down the posterior buttocks. Assessment: Lumbar strain/chronic pain syndrome. Given a prescription for lumbar support to be utilized only with heavy-type lifting activity. (C.R. 144)
- 08-05-96 Reports that he has been having a significant amount of pain "between my shoulder blades and in my low back." Has become so painful for him that he has had difficulties with even driving his car. Assessment: spinal injury secondary to motor vehicle accident. (C.R. 147)
- 08-28-96 Continues to report spinal pain, shoulder pain and knee pain. (C.R. 149)

Minot Chiropractic Health Center (C.R. 162-169)

- 05-03-94 Low back pain 10 today. (C.R. 163)
- 05-06-94 Low back pain (C.R. 163)
- 05-09-94 Low back pain 10 day with twinges into left knee. Pain is sharp at times. Worse with bending . . . (C.R. 163)
- 06-02-94 Increased low back and neck pain _____ shoulder pain after being a pallbearer in grandmother's funeral yesterday. Cannot stand longer than ½ hour without considerable low back pain. (C.R. 165)
- 06-20-94 Low back soreness – increases with standing for periods of time. (C.R. 165)
- 06-22-94 Is going to California this week with a friend to pick up a vehicle so he scheduled today instead of at the end of the week. Low back pain and neck pain but is less intense than on Friday. Pain is daily & worse at times with activity. (C.R. 166)
- 06-30-94 Stumbled over a telephone cord yesterday and jarred low back as he was carrying a 15 lb _____. Did not fall but did twist his low back. Called in today – did not go on his trip. (C.R. 166)
- 08-02-94 Low back pain – increased right shoulder pain 4 days duration – started after painting his house. (C.R. 167)
- 08-10-94 Intermittent low back pain present. Some days are better than others. Depends on activity level. (C.R. 167)
- 08-23-94 Low back pain, right shoulder pain present – not much change ____ last visit. Achy all over. (C.R. 168)
- 08-24-97 Low back pain left sided started after doing yard work; pain increases with stooping, sitting standing some L-S pain also 2 days ago. No leg pain. (C.R. 169)

Dr. Nabwangu (C.R. 170-173)

- 12-15-93 Involved in MVA on December 6, 1993. Complains of some numbness at the level of the foot. Also complained of cervical, mid dorsal and lumbar pain. (C.R. 170)

Neck & Back Pain Center (C.R. 171-230)

- 02-04-94 Chief complaint of low back pain or entire back pain after 12-6-93 MVA. (C.R. 174, 176, 177)
- Assessment: neuromusculoligamentous sprain and injuries. Also musculoligamentous sprain in the low back and shoulder areas. (C.R. 175)
- 02-08-94 Has not worked for a week or so because of increased lumbosacral discomfort. (C.R. 178)
- 02-08-94 Has continuous complaint of neck and back pain. More complaint of low back pain radiating into lower extremity. While doing his occupation which he has to do a lot of bending and lifting, pain gets worse at the end of the day. (C.R. 179)
- 03-17-94 Complaining of more low back pain than upper back pain. Tender area of muscle spasm at L5,S1 about 1cm right lateral to the mid spine. (C.R. 181)
- __-__-94 Patient came to clinic yesterday after leaving work early because of low back pain and __ shoulder pain and complaint of numbness and tingling. (C.R. 184)
- 04-11-94 Limping today. Has some muscle spasm on right upper back and lower back area. (C.R. 185)
- 09-30-04 Diagnosis: Neuromusculoligamentous sprain/low back, degenerative disc disease. Subjective findings: Low back pain with radiation into lower extremities. Pain is so much that he is unable to sleep at night and also unable to continue to work as a chef in Market Place Foods. Pain scale level goes up to 8 or 9. Ambulation with limping. More pain on the right side of the lower back radiating into right lower extremities. (C.R. 186, 187)
- 10-07-94 Still has a lot of pain in the low back area. Tenderness on the right lower back area at the level of L4-5 2 to 3 cm lateral to the spine with a lot of muscle spasm. Trigger point injection. Injected the medication into the most painful area of the right lower back. (C.R. 188)

Trinity Hospital (C.R. 239)

10-7-04 Lumbar spine x-ray – low back pain radiating into the right leg.
(C.R. 239)

10. After receiving the medical information regarding prior lumbar spine problems, the claims adjuster requested all the medical notes be reviewed by a medical consultant. (App. p. 87) Dr. Gregory Peterson reviewed the medical information that had been gathered regarding the prior lumbar spine complaints and treatment, staffed the claim with the claims adjuster, and entered a notepad reflecting his opinion that he believed Neuhalfen's condition was related to a preexisting condition and that the work incident had been a trigger to produce symptoms in the preexisting condition. (C.R. 13; App. p. 87, 84) Based on that notepad, had WSI had the information concerning the prior problems, the adjuster testified that the claim would not have been accepted. (App. p. 87)
11. WSI went on to gather additional information from Neuhalfen concerning his failure to report the extensive prior lumbar spine problems to WSI. On September 7, 2006, Neuhalfen was interviewed by Todd Flanagan and Kelvin Zimmer of WSI's special investigations unit. (C.R. 44-103) During that interview, Neuhalfen denied having a herniated disk in his lower back previously. (C.R. 62) He also stated he had never had "stabbing pains" (C.R. 64) in his lower back, or pain down his legs. (C.R. 73). He also stated he "never had regular pain in my lower back." (C.R. 79) When asked why he did not put it on the first report of injury that he had prior low back problems, Neuhalfen stated he "never thought it was a severe deal" (C.R. 64), it escaped his mind (C.R. 66), he "didn't

figure it was important,” (C.R. 71), and he had “never” had “problems walking.” (C.R. 78) Later, when asked why he didn’t simply answer yes, that he had prior problems in his low back, he stated: “I don’t even know. I really. . . . I don’t know why I didn’t put it in.” (C.R. 79)

12. On October 10, 2006, WSI issued a Notice of Decision to Neuhalfen notifying him that his benefits were being terminated after October 31, 2006, for making willful false statements concerning prior low back problems and injuries. (App. pp. 27-34) Neuhalfen was also notified that WSI was going to seek repayment of benefits paid on the claim. (App. p. 34) Neuhalfen requested reconsideration, denying material false statements were made. (App. p. 35) Thereafter, WSI issued a formal appealable Order discontinuing Neuhalfen’s benefits for making willful material false statements and failure to disclose prior low back treatment, seeking benefits paid in error from June 23, 2006 through October 31, 2006, in the amount of \$11,500.47. (App. pp. 36-45) Neuhalfen requested reconsideration/formal hearing. (App. p. 46)
13. At the hearing held June 19, 2007, WSI presented testimony from Neuhalfen, Evette Bosch (the claims adjuster), and Dr. Gregory S. Peterson. (App. p. 76) ALJ Seaworth was present and observed the testimony of the witnesses. After doing so, on September 27, 2007, ALJ Seaworth issued her recommended findings of fact and conclusions of law. (C.R. 255; App. pp. 47-58) In her recommended decision, ALJ Seaworth found:
 18. The greater weight of the evidence shows that Mr. Neuhalfen has a long history of low back pain commencing with his motor vehicle accident sustained on December 6, 1993. He consistently attributed this low back pain to the motor vehicle accident, until his work injury

on March 30, 2006. The record shows that Mr. Neuhalfen's medical expenses related to the low back pain were paid for by State Farm Insurance and Mr. Neuhalfen admits that he received an insurance settlement for his injuries. But, he also admits that the settlement didn't cover all of his medical bills and his ongoing medical expenses for treatment of the injuries he sustained in the accident. That could explain why Mr. Neuhalfen intentionally mislead WSI about his prior low back pain.

19. The greater weight of the evidence shows that Mr. Neuhalfen made intentional false statements regarding the absence of any prior treatment for low back pain. Mr. Neuhalfen has a long history of low back pain and treatment prior to his work injury on March 30, 2006. He failed to disclose this on the First Report of Injury. His very specific statement that he had prior problems "in upper back, not lower" cannot be characterized as inadvertent or unintentional. At the hearing, Mr. Neuhalfen admitted that he had low back pain before the work injury, that he had been treated by at least four doctors for low back pain before his work injury, and that he knew this when he was injured on March 30, 2006.
20. The greater weight of the evidence shows that Mr. Neuhalfen's false statements were material to WSI's determination of liability and caused WSI to pay benefits in error. In order to ascertain whether Mr. Neuhalfen's work injury was compensable, WSI must know whether he has any preexisting injuries to the low back. Mr. Neuhalfen's false statements designed to prevent WSI from considering his prior low back problems when assessing the compensability of his current symptoms, precluded WSI from determining the compensability of Mr. Neuhalfen's claim with full knowledge of the facts. When WSI obtained some medical records and became aware that Mr. Neuhalfen had been treated for low back pain prior to his work injury, it asked Dr. Peterson to review the claim. More records were obtained and on September 25, 2006, Dr. Peterson reviewed the file and determined that the claim was not compensable, since Mr. Neuhalfen's medical history showed that the work injury was only a trigger of his preexisting low back symptoms. At the hearing, Dr. Peterson confirmed that but for Mr. Neuhalfen's false statements, WSI would not have accepted the claim. WSI claims adjuster Evette Bosch also testified that WSI would not have accepted the claim if it had been aware of Mr. Neuhalfen's preexisting low back condition resulting from the motor vehicle accident.
21. Mr. Neuhalfen argues that his failure to disclose his preexisting low back condition is not material because WSI had knowledge of his

motor vehicle accident. WSI did not have knowledge of Mr. Neuhalfen's motor vehicle accident until after it accepted the claim. On July 13, 2006, WSI received a letter from the employer mentioning the previous motor vehicle accident. On July 28, 2006, WSI interviewed Mr. Neuhalfen. He disclosed the motor vehicle accident, but he again failed to mention his low back pain resulting from the accident. So on August 3, 2006, WSI accepted liability for Mr. Neuhalfen's apparent displaced lumbar disc. It knew of the motor vehicle accident, but knowledge of the motor vehicle accident, but itself, did not put WSI on notice of Mr. Neuhalfen's pertinent preexisting low back condition (including a prior history of a herniated disc), since Mr. Neuhalfen specifically denied any such prior history by intentionally omitting it, even while he specifically identified other injuries caused by the motor vehicle accident. Mr. Neuhalfen's selective omission is material and prevented WSI from accurately assessing its liability for benefits. If Mr. Neuhalfen had disclosed his preexisting low back condition, WSI would have taken some time to assess its liability for benefits. WSI had no reason to doubt Mr. Neuhalfen's misstatements and awarded benefits without knowledge of their falsity.

22. Mr. Neuhalfen argues that he now has a herniated disc, so his failure to disclose his prior low back condition is immaterial. First, it's not clear that Mr. Neuhalfen has a herniated disc, and even if he does, Mr. Neuhalfen specifically admitted having a herniated disc on January 4, 2000, before his work injury. Exhibit W24, p. 113. So, if Mr. Neuhalfen had a herniated disc in 2000, he failed to disclose it when he filed for WSI benefits on March 30, 2006, and that again constitutes a false statement. In any event, as Dr. Peterson testified, bulging discs most often cause radiculopathy, and Mr. Neuhalfen's x-ray in 1993 is not inconsistent with the later MRI done on July 13, 2006. But it doesn't matter whether the disc is bulging or herniated, it still can cause nerve pain. Thus, whatever Mr. Neuhalfen's back condition was in 1993, it is the same today. The symptoms are the same, Mr. Neuhalfen has consistently attributed those symptoms to his motor vehicle accident, and Mr. Neuhalfen's intentional failure to disclose that preexisting condition interfered with WSI's determination of liability.

(App. pp. 52-54) ALJ Seaworth concluded Neuhalfen made material, intentional false statements and that he is required to reimburse WSI for benefits paid based on his false statements. (App. p. 55) WSI adopted ALJ Seaworth's decision as its Final Order. (App. p. 59)

14. On December 30, 2007, Neuhalfen filed an appeal to the District Court, Ward County, North Dakota, from WSI's Final Order. (App. pp. 17-18) In his Specification of Error, Neuhalfen states: "Mr. Neuhalfen's low-back pain stemming from his 1993 car accident resolved in 1996, as shown by the medical records. Consequently, when he suffered a work related injury to his low back in 2006, he had no 'long history of preexisting low back pain and treatment stemming from a December 6, 1993, car accident.' There is simply no evidence of chronic, low back pain. Mr. Neuhalfen's statements may have been incorrect but were not intentionally fraudulent or material." (App. p. 17)
15. On April 24, 2008, the District Court, the Honorable William W. McLees, entered a Memorandum and Order, affirming WSI's Final Order of October 3, 2007. (App. pp. 108-113) In its decision, the Court outlined the arguments made and the standard of review under which he reviewed WSI's decision. After doing so, the Court stated: "In closing, the Court would like to comment on one of the statements made by Neuhalfen in his brief. At page seven (7) of his brief, Neuhalfen indicates, "As previously stated, Mr. Neuhalfen did not have any work restrictions or limitations due to his **occasional low-back pain** prior to his 2006 work injury." (bold italics are the Court's). The Court's review of the evidence in this case reveals this statement to be a gross mischaracterization of the nature and extent of the low-back problems experienced by Neuhalfen prior to his 2006 work injury. By all accounts, low-back pain was a **major problem** for Neuhalfen **over an extended period of time** prior to his 2006 work injury. (App. p. 112) The Court then entered its Order for Judgment and Judgment on May 14, 2008,

affirming WSI's Final Order of October 3, 2007. (App. pp. 115-116) Neuhalfen has now taken an appeal to this Court.

STATEMENT OF THE ISSUE

16. Whether WSI could reasonably determine that Neuhalfen willfully made false statements concerning his pre-existing low back condition and therefore pursuant to N.D.C.C. § 65-05-33, Neuhalfen must forfeit additional benefits and repay WSI the sum of \$11,500.47 for benefits paid in error.

LAW AND ARGUMENT

A. BURDEN OF PROOF AND SCOPE OF REVIEW OF AGENCY DECISION.

17. A claimant bears the burden of establishing the right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129 ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. However, to trigger the consequences of N.D.C.C. § 65-05-33 for a false statement, WSI must prove: “(1) there is a false claim or false statement; (2) the false claim or false statement is willfully made; and (3) the false claim or false statement is made in connection with any claim or application under this title.” Jacobson v. North Dakota Workers Compensation Bureau, 2000 ND 225 ¶ 9, 621 N.W.2d 141, citing Hausauer v. North Dakota Workers Compensation Bureau, 1997 ND 243 ¶ 12, 572 N.W.2d 426. “Wilfully” has been defined as “conduct engaged in intentionally, not inadvertently.” Forbes v. Workforce Safety & Insurance, 2006 ND 208 ¶ 13, 722 N.W.2d 536, citing Dean v. North Dakota Workers Compensation Bureau, 1997 ND 165 ¶ 15, 567 N.W.2d 626. In addition, WSI must prove that the false statement was “material.” Forbes, 2006 ND 208 ¶ 14,

722 N.W.2d at 536.

Based upon the language of N.D.C.C. § 65-05-33 and the civil penalty sought, two tests are used to determine "materiality." If WSI seeks reimbursement for benefits paid, the level of materiality required is proof by WSI that the false claim or false statement caused the benefits to be paid in error. If WSI seeks only forfeiture of future benefits, however, no such causal connection is required. Thus, a false claim or false statement is sufficiently material for forfeiture of future benefits if the statement simply could have misled WSI or medical experts in deciding the claim.

Id. (citations omitted).

18. This Court reviews the decision of the agency. Thompson v. Workforce Safety and Insurance, 2006 ND 69 ¶ 9, 712 N.W.2d 309. The District Court's decision and analysis, however, is entitled to respect. Zander v. Workforce Safety and Insurance, 2003 ND 193 ¶ 6, 672 N.W.2d 668, citing Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96 ¶ 6, 664 N.W.2d 884; Nagel v. Workforce Safety and Insurance, 2007 ND 202 ¶ 10, 743 N.W.2d 112.
19. This Court's review in appeals of WSI decisions is limited. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d 784, 789. WSI's decision must be affirmed unless its "findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, or its decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. The Court should exercise restraint in determining whether WSI's decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Elshaug, 2003 ND 177 ¶ 12, 671 N.W.2d at 790; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND

40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court need only determine “whether or not a reasoning mind could have decided the agency’s findings were proven by the weight of the evidence from the entire record.” Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. Thus, even if the Court would have taken a different view of the evidence, the Court must only determine whether a reasoning mind could conclude that Neuhalfen made willful, material false statements under N.D.C.C. § 65-05-33. See Renault v. North Dakota Workers Compensation Bureau, 1999 ND 187 ¶ 22, 601 N.W.2d 580.

20. “Ultimately, WSI’s findings under N.D.C.C. § 65-05-33 must be affirmed if they are supported by a preponderance of the evidence.” Fettig v. Workforce Safety and Insurance, 2007 ND 23 ¶ 13, 728 N.W.2d 301, quoting Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536. A preponderance of the evidence is defined as “evidence more worthy of belief,” or “the greater weight of the evidence,” or “testimony that brings the greater conviction of the truth.” Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

II. WSI COULD REASONABLY DETERMINE THAT NEUHALFEN MADE WILLFUL, MATERIAL FALSE STATEMENTS RELATING TO HIS PRE-EXISTING LOW BACK CONDITION AND TREATMENT AND THEREFORE HE MUST FORFEIT FUTURE BENEFITS AND REPAY BENEFITS PAID BY WSI.

21. In an attempt to misdirect the Court’s focus from whether Neuhalfen made false statements concerning prior low back problems, Neuhalfen attempts to make this a case about compensability. In addition, Neuhalfen contends that since he believed his previous low back pain was different (i.e. “muscular), he was

unaware of being diagnosed previously with a herniated disc or thought to have degenerative disc disease, and that because WSI was aware of his previous motor vehicle accident he is somehow relieved of any obligation to disclose prior low back problems or treatment and/or his failure to do so was therefore not material. On proper consideration of the facts and evidence as it pertains to the issue of whether Neuhalfen committed fraud, Neuhalfen's arguments should be rejected by this Court – just as the ALJ rejected them. The District Court was not persuaded by Neuhalfen's arguments that the evidence did not support WSI's decision stating the arguments a "gross mischaracterization of the nature and extent of the low back problems experienced by Neuhalfen prior to his 2006 work injury."

22. To begin, Neuhalfen attempts to absolve himself of any responsibility for the responses to the questions on the C1 form when he filed his claim with WSI. However, the evidence clearly supports that he willfully misrepresented the information submitted to WSI concerning his prior problems. When Neuhalfen electronically submitted (App. p. 88) a claim for benefits for the March 30, 2006, incident he was assisted in submitting his claim electronically by the Leanne Klein of Marketplace Foods. (App. p. 80) Klein asked Neuhalfen the questions off the form and she typed the information into the form. (*Id.*) In response to the question on the claim for: "Have you had prior problems or injuries to that part of the body?" Neuhalfen responded, "Yes in upper back, not lower." (App. p. 24)⁴

⁴ Although when the online form was printed off the portion "in upper back not lower" went into the box regarding witnesses to the injury. (App. p. 24; App. p. 88) However, the claims adjuster interpreted the information as applying to the response to the inquiry concerning prior injuries. (App. pp. 84-85)

The claim form documented that Neuhalfen had been treated on March 30, 2006, and diagnosed with a lumbar strain/sprain. (App. p. 24) In reliance on Neuhalfen's representations that he had only upper and no lower back prior problems, there was no reason to further investigate and WSI accepted the claim on March 31, 2006. (C.R. 7; 284 at 33, 39-40)

23. Neuhalfen initially treated with Dr. Brintnell, a chiropractor. (C.R. 118) Although Neuhalfen had previously seen Dr. Brintnell for low back problems in 2000-2002 (C.R. 112-117), the treatment notes from March 30, 2006, and thereafter, do not make mention of any prior lumbar spine problems or treatment. (C.R. 118-120)

24. In June of 2006, Neuhalfen began treating with Dr. Mehta. (C.R. 190) Dr. Mehta's note from his initial office visit reflects that Neuhalfen had a motor vehicle accident in the past "and for that he had a back pain too." (C.R. 190) However, despite prior treatment by Dr. Mehta for low back pain in 1994 (C.R. 174-185) and 2004 (186-189) there is no specific mention in the initial chart note of the extent of the prior treatment or specifically that it was for the lower back. Dr. Mehta desired radiographic studies (C.R. 190), as well as therapeutic exercise. (C.R. 192-196) X-ray taken June 12, 2006, reflected L5-S1 disc degeneration, disc narrowing and end plate sclerosis. (C.R. 240) On June 23, 2006, Dr. Mehta requested that Neuhalfen be removed from work pending further evaluations. (C.R. 196) Dr. Mehta then reviewed a light duty work offer from Marketplace Foods (C.R. 199), and agreed to release Neuhalfen to light duty work. (C.R. 200) An MRI conducted on July 13, 2006, showed L5-S1 discal degeneration with

eccentric left disk herniation partially obliterating the left lateral recess fat and extending into the left L5-S1 foramen, which would manifest as left L5 and left S1 radiculopathy. (C.R. 242)

25. On July 13, 2006, the employer faxed a letter to WSI regarding Neuhalfen's claim. (C.R. 8) The employer questioned Neuhalfen's efforts on returning to work, and also noted that he was injured in a car accident prior to being employed by Marketplace Foods. (C.R. 8-9) On July 19, 2006, WSI claims supervisor Cherry G contacted Neuhalfen and completed a "3 point" contact. (C.R. 10; App. p. 85) That notepad reflects Neuhalfen reported to the claims adjuster that he had "no priors except many years ago with shoulder and knee but no permanent restriction or work loss." (C.R. 10)
26. On July 28, 2006, Neuhalfen dropped off tax information concerning his wage loss claim with claims adjuster Evette B. (C.R. 11; 252; App. pp. 86-87, 91) Neuhalfen raised issues pertaining to some information provided by his employer concerning the automobile accident and his other employment activities. (C.R. 11; 252) Neuhalfen stated to Evette B. that: "As far as my prior injuries go, to a car accident . . . I can release all the information you guys would ever need on that. It wasn't anywhere's [sic] regarding or near this injury at all." (C.R. 252) Neuhalfen advised Evette B. that he had injuries to his head, shoulders and knee. (C.R. 252; App. pp. 86-87, 91) He made no mention of prior treatment regarding his low back and clearly attempted to convince the adjuster that there was absolutely no injury to his low back as a result of the automobile accident and

that he had no prior problems with his low back. (C.R. 11, 252; App. pp. 86-87, 91) Thus, on three separate occasions (on the C1, during the 3-point contact, and during a meeting on 7-28-06 with the claims adjuster) when Neuhalfen was asked about prior problems, he denied any problems or treatment related to the low back.

27. "On a hunch," the claims adjuster, Evette B., began checking into whether Neuhalfen had previously gone to the chiropractor. (App. p. 85) Evette started with requesting copies of "all" records from his chiropractor. (App. p. 86) When she received those records, she found that Neuhalfen had treated previously for his low back. (App. p. 86) After receiving those notes, Evette started checking elsewhere in Minot for prior records. (App. p. 86) When Evette spoke with Neuhalfen on July 28, 2006, she had she had already received some, but not all, of the records of prior treatment she had requested. (App. p. 86, 91)

28. On August 3, 2006, Marketplace Foods forwarded a letter from Dr. Mehta to WSI dated July 17, 2006, regarding taking Neuhalfen off work completely. (C.R. 204) On that date, WSI also accepted liability for displacement of lumbar vertebral disc without myelopathy (diagnosis code 722.10) on the basis of medical treatment provided July 13, 2006, by Dr. Mehta. (App. p. 12) See C.R. 242, MRI of 7/13/2006.

29. WSI continued to receive additional medical records regarding prior treatment that had been requested by Evette B. On August 4, 2006, WSI received prior records from Chiropractic Associates (C.R. 112-117) and Neck & Back Pain Center (C.R. 174-189). On August 15 and 29, 2006, WSI received records from

Chiropractic Arts Clinic. (C.R. 104-105, 108-111) On September 1, 2006, WSI received records from Minot Chiropractic Health Center. (C.R. 162-169) After gathering the records of prior low back treatment, Evette B. requested a medical review by WSI's medical director, Dr. Gregory Peterson, to determine if the current condition and current medical notes were related to a preexisting condition or if it was related to a work injury in March of 2006. (C.R. 13; App. p. 87)

30. On September 7, 2006, Neuhalfen was interviewed by Todd Flanagan and Kelvin Zimmer of WSI regarding his claim. (C.R. 44) When asked about his report of only upper and not lower prior back problems, Neuhalfen stated that "the thing that I was telling them was that it wasn't as severe at this point. I've made it from 93 till this latest injury being able to work." (C.R. 62) He then went on to state: "but to my best of my knowledge, I've never had a herniated disk in my lower back." (C.R. 62) Neuhalfen then admitted he had prior low back pain, "but it was all muscular according to the other doctors." (C.R. 62) Neuhalfen later stated: "Yeah, I've had, you know, I've had back problems." (C.R. 65) When asked why he didn't say that in his claim forms or conversations with the claims adjusters, he said: "I just couldn't." (C.R. 66) In fact, during this interview Neuhalfen gave many conflicting reasons on why he didn't simply tell WSI about his prior low back problems, stating:

"I've it it probably escaped my mind with all the problems that I've had." (C.R. 66)

"It's hard to get everything down. You know there's been so much." (C.R. 66)

"I didn't figure it was important you know I figured I was going to the chiropractor, they were going to fix this." (C.R. 71)

"I don't even know. I really." (C.R. 79)

"Yeah, I don't know why I didn't put it in." (C.R. 79)

"Right. I should have put it in but I didn't put it in. It just. . . Cuz at that time, I guess I wasn't thinking." (C.R. 80)

Kelvin Zimmer also asked Neuhalfen about the problems he was now having with his low back and whether he had had problems like that in the past, and Neuhalfen stated:

"I've never had pain down here that has caused me to have to urinate frequently." (C.R. 73)

And all the way down through my legs . . . I have pain down both legs all the way down." (C.R. 73)

"I've never had daily pain in my lower back." (C.R. 78)

"But I've never had regular pain in my lower back." (C.R. 79)

31. Neuhalfen's statements to WSI's investigators about the nature and extent of his prior low back problems were also contradicted by the medical records obtained by WSI. Not only had Neufalen in the past complained continuously of low back pain, he also had reported pain down his legs, and had inquired of physicians about possible disc problems and his physicians had told him he possibly did have a disc herniation. The prior records reflect the following:

2-8-1994 – "This patient has continuous complaint of neck and back pain. Today he has more complaint of low back pain radiating to lower extremity. . . . also patient has some little limping while walking" (C.R. 179)

3-17-1994 – "Today patient has more complaint of low back pain than upper back pain." (C.R. 181)

4-11-1994 – “This patient is limping today. Patient has more problems with the R neck and lower extremity area.” (C.R. 185)

6-25-1996 – “He reports, especially today, left lower back pain with pain radiating down the posterior buttocks.” . . . “Assessment: Lumbar strain/chronic pain syndrome.” (C.R. 144)

1-3-2000 – Reason for visit: back pain; Type of pain: sharp, aching, shooting, stiffness; Rate severity of pain: 7; How often do you have this pain? All the time; Is it constant or does it come and go? Constant; Does it interfere with your: work, sleep, daily routine, recreation; Activities or movements that are painful to perform: sitting, standing, walking, bending, lying down. (C.R. 112)

1-3-2000 – Health History Form: “Place a mark on “Yes” or “No” to indicate if you have had any of the following: “Yes” Herniated Disk. “Yes” pinched nerve. (C.R. 113)

1-4-2000 – “Patient presents for lower back pain which started yesterday relating to shoveling snow. He locates to the lower back at the lumbosacral region slightly more left sided. There’s extension and radiation into the left posterior thigh terminating at the knee. . . . Patient was involved significant motor vehicle accident approximately four or five years ago and has had ongoing pain since.” . . . Assessment: Possible radiculitis in the lower back.

4-30-01 – “Patient presents for LBP & T/S pain. Friday last week was unloading karaoke equipment & felt pain develop. Difficulty sleeping & laying in bed. L/S & T/S. L leg pain nagging numb aching.” Assessment: Radiculitis – disc involvement (illegible) explained to patient. (C.R. 115)

9-27-2004 - “pain is constant – sharp pain – feels like a steak knife in his back – pain down both legs to mid thigh.” (C.R. 107, emphasis supplied)

9-27-2004 – “patient doesn’t know if it is a disc problem or what but wanted to get in and see if there was anything we could do.” . . . “I told him I do not believe he has a disc herniation at this time and we will treat this conservatively however it is very possible that he does have. I told him that what we suspect right now is more of some irritation around the disc and around the 4th nerve that does go down into the leg.” (C.R. 108)

9-29-04 – “has still been having a lot of pain. He actually hasn’t been able to go to work the last 2 days. He tried to go into work this morning however he said he just could not stand for any prolonged period of time so he had to go home.” . . . “I told him we will have disc symptoms and therefore we are going to treat this as though it is a disc herniation.” (C.R. 111, emphasis supplied)

9-30-2004 – “This patient has complaint of low back pain with radiation of pain to the lower extremities. He says his pain is so much that he is unable to sleep at night and also unable to continue to work as a chef in Market Place Foods. He can work for only 2-3 hours and then his pain gets aggravated. He says his pain scale level from 0-10, 0 no pain, 10 maximum, pain, he says it goes up to 8 or even 9. Ambulation is with limping. He has more pain on the right side of the lower back radiating to right lower extremities.” “Diagnosis: Neuromusculoligamentous Sprain/Low Back, Degenerative Disc Disease.” (C.R. 186)

9-30-2004 – “[P]atient accompanied with his wife today is reporting that he has a lot of low back pain since last two, three days. So much that he is unable to sleep at night and also unable to continue to work as a chef in Market Place Foods. . . . Has more pain on the right side of the lower back radiating to right lower extremity.” “Overall assessment: #1 – Neuromusculoligamentous sprain. #2 – possibility of degenerative disc disease.” (C.R. 187)

Thus, the records were completely inconsistent with Neuhalfen’s stated reasons for failure to disclose prior treatment related to his low back on the claim form, and his statements to the claims adjusters that the problems he had in the past were to his “upper back” and shoulders not his lower back. This Court has recognized that a “state of mind can rarely be proven directly and must usually be inferred from conduct and circumstantial evidence.” Dean, 1997 ND 165 ¶ 20, 567 N.W.2d 626. ALJ Seaworth recognized the fact that Neuhalfen was not truthful to in his statements to WSI’s claims adjusters and investigators, and relied on these facts in rendering her decision. See Finding of Fact 14, App. pp. 51-52.

32. Although Neuhalfen has a diagnosed memory problem, he nonetheless was able to recall the amount of an insurance settlement he received for his automobile accident (C.R. 82); remembered that he had back problems after being at Mount Rushmore in September of 2004 for which he saw a chiropractor and Dr. Mehta (App. p. 82); remembered needing chiropractic care for his low back after shoveling snow in January of 2000 (App. p. 82); and that he knew at the time he was injured on March 30, 2006 that he had seen Dr. Mehta, Dr. Ray, Dr. Brintnell, and Dr. Roedocker for low back pain. (App. p. 83) Despite the fact he could remember all of these things, he reported to WSi that his prior problems were to the “upper” back and repeatedly denied any prior low back problems to WSi. After hearing Neuhalfen’s testimony and considering the evidence in the record, ALJ Seaworth found that Neuhalfen made “intentional false statements regarding the absence of any prior treatment for low back pain” and that this was neither “inadvertent or unintentional.” See Finding of Fact 19, App. p. 53. “Like a trial court judge, an administrative law judge ‘hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses,’ and is therefore, ‘in a much better position to ascertain the true facts than an appellate court relying on a cold record’ without ‘the advantage . . . of the innumerable intangible indicia that are so valuable to a trial judge.” Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8. Thus, this court must “defer to the hearing officer’s opportunity to judge the credibility of witnesses.” Id.

33. In his Brief, Neuhalfen argues that “in all the medical records, both pre- and post-work injury collected by WSI, there is not one diagnosis of degenerative disc disease or herniated disc prior to Mr. Neuhalfen’s work injury. Furthermore, there is no evidence of any medical record, reviewed by Mr. Neuhalfen, which would have apprised him of the presence of degenerative disc disease or a herniated disc prior to his work injury.” See Appellant’s Brief at page 5. These contentions are completely in error, which the District Court clearly recognized when Judge McLees characterized Neuhalfen’s arguments as a “gross mischaracterization” of the evidence of prior low back problems. As outlined above, in September of 2004, the medical records of Dr. Roedocker and reflect that he discussed with Neuhalfen that he possibly does have a disc herniation. (C.R. 108, 111) Significantly, Dr. Roedocker’s notes also reflect that it was in fact Neuhalfen that inquired as to whether he had a disc problem when he came in for treatment. (C.R. 108) Neuhalfen also reported in January of 2000 in an intake form that he previously had been diagnosed with a herniated disc. (C.R. 112) In addition, Dr. Mehta’s notes reflect that he was diagnosed with possible degenerative disc disease. (C.R. 186, 187)

34. Furthermore, it does not matter if Neuhalfen knew or understood his prior condition was muscular, rather than degenerative or disc related. What is significant and important is that Neuhalfen admitted to WSI’s investigators and at the hearing that he knew he had treated previously for low back problems, following the motor vehicle accident in 1993 and thereafter for other reasons, but nonetheless on the claim form specifically reported that his prior treatment was

for the “upper” not “lower back” and when discussing issues pertaining to his prior treatment with the claims adjusters, reiterated that it was for the “upper” and not “lower” back. (App. p. 24; C.R. 10, 252) As ALJ Seaworth found, the fact that WSI found out about the motor vehicle accident in 1993 after it accepted the claim, and Neuhalfen stated he would provide records relating to that accident, he nonetheless “failed to mention his low back pain resulting from the accident.” See Finding of Fact 21 (App. pp. 53-54) WSI’s knowledge of the prior accident does not put it on notice that the same resulted in prior low back treatment, especially in light of the fact that Neuhalfen’s claim form specifically reports previous “upper” rather than “lower” back problems. As ALJ Seaworth properly found: “If Neuhalfen had disclosed his preexisting low back condition, WSI would have taken some time to assess its liability for benefits. WSI had no reason to doubt Mr. Neuhalfen’s misstatements and awarded benefits without knowledge of their falsity.” (Finding of Fact 20, C.R. 277)

35. Furthermore, as the record reflects, Neuhalfen had much more treatment relating to his low back than simply the treatment he received for several years following the 1993 motor vehicle accident. He had chiropractic treatment in 2000 following shoveling of snow and in 2004 after he reported problems after he had been at Mount Rushmore. The treatment in 2004 reflects substantially similar complaints of low back pain radiating into the lower extremities (C.R. 108, 186, 187) which were attributed possibly to degenerative disc disease as he did when he first went in for treatment on March 30, 2006. (C.R. 118) The treatment in 2000 and 2004 did not specifically relate to the motor vehicle accident in 1993

and was specifically for low back problems, but again Neuhalfen made no mention of the same in his conversations with the adjusters and kept to his story that he only had prior problems with his upper back.

36. This is not a case where there are but a few instances of prior low back treatment that could be explained away by failure to remember the same or that they were insignificant and minor. The prior low back treatment reflects significant complaints of low back pain, on levels of intensity report as 9 out of 10. The evidence further reflects that as a result of the most recent treatment in September-October of 2004 (C.R. 186-188), the low back pain radiating into his lower extremities interfered with his sleep and ability to work. These facts further support the ALJ/WSI's determination that Neuhalfen's statements that his prior back problems were "upper" rather than "lower" were in fact not inadvertent or unintentional. Therefore, because the ALJ/WSI could reasonably conclude, on this record, that Neuhalfen willfully and intentionally made false statements, WSI's decision should be affirmed. See Jacobson, 2000 ND 225 ¶ 16, 621 N.W.2d 141 (affirming WSI's decision).

37. Finally, the ALJ/WSI found that Neuhalfen's statements were "material" and therefore WSI paid benefits in error and forfeiture of future benefits. See Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536 (outlining tests for "materiality"). The claims adjuster specifically testified that had Neuhalfen claim would not have been accepted if Neuhalfen had reported the prior low back treatment, WSI obtained the records and had them evaluated by Dr. Peterson. (App. p. 87) Because of Neuhalfen's failure to disclose prior low back treatment, WSI did not

obtain and could not have all the records evaluated by Dr. Peterson until September of 2006. (C.R. 13) Although WSI began receiving some prior records which revealed prior low back treatment in July of 2006, the record reflects that WSI continued to receive those records and it was until it had sufficient records to make a determination on compensability that they were forwarded to Dr. Peterson for review. Dr. Peterson testified, as outlined in his notepad, that the work incident would be regarded as a trigger of a pre-existing condition. (App. p. 94) Dr. Peterson testified that the treatment records from 2000 and 2004 were significant in terms of rendering his opinion that Neuhalfen had a significant preexisting low back condition. (App. pp. 94-96) These are records that WSI obtained after WSI had accepted liability for the disc displacement on August 3, 2006 (C.R. 12). See Dr. Mehta notes C.R. 186-187 reflecting faxed August 4, 2006; Chiropractic Associates records C.R. 112-117, faxed August 4, 2006). The fact that Neuhalfen had a possible disc herniation in 2004 with pain into his buttocks and down his legs, is a significant fact in light of his complaints following the March 30, 2006, incident. Clearly, WSI established that it paid benefits in error and therefore the ALJ/WSI properly required Neuhalfen to repay benefits paid in error. See id.

38. Furthermore, as for forfeiture of future benefits, all that is required to be shown is that the statements “could have misled WSI or medical experts in deciding the claim.” Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536. Not only does the evidence show that Neuhalfen’s statements of only prior “upper” and no

“lower” back pain could have misled WSI, the evidence in fact shows it did. Accordingly, this test is also met.

39. Neuhalphen’s arguments essentially ask this Court to reconsider/reweigh that evidence and come to an opposite conclusion, which this Court cannot do. See Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI’s decision is supported by the evidence). In this case, as outlined above, ALJ Seaworth’s reasoned analysis meets that standard. Quite simply, “[i]t is within [WSI’s] province to weigh the credibility of the evidence presented.” Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). This Court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). Based upon the evidence presented at the hearing on this issue as outlined above, the ALJ could reasonably determine as she did. Accordingly, WSI’s decision should be affirmed. See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93 ¶ 12, 576 N.W.2d 861; Engbretson v. North Dakota Workers Compensation Bureau, 1999 ND 112 ¶ 22, 595 N.W.2d 312.

CONCLUSION

40. For the foregoing reasons, WSI respectfully requests that this Court *affirm* the District Court’s decision which affirmed WSI’s Final Order of October 3, 2007, in all respects.

DATED this 19th day of September, 2008.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Workforce Safety and Insurance, and the author of the Brief of Appellant Workforce Safety and Insurance hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 9,272 words from the portion of the brief entitled "Law and Argument" through the signature block minus the Statement of the Issue. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this ____ day of September, 2008.

/s/ Jacqueline S. Anderson
Jacqueline S. Anderson (ND ID # 05322)
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20080175

STATE OF NORTH DAKOTA)
) AFFIDAVIT OF SERVICE
COUNTY OF CASS)

GENA T. BLAINE, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Fargo, North Dakota, not a party to nor interested in the action; that she served the attached:

**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE FUND**

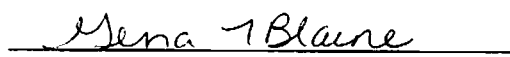
on the following person(s):

Stephen D. Little
(via email: dietzlittle@btinet.net)
2718 Gateway Avenue Suite 302
Bismarck ND 58503-0586

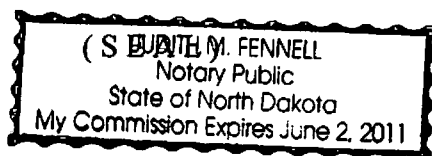
Becky Fossand
Johannesons of Minot (via U.S. Mail)
PO Box 608
Bemidji, MN 56619-0608

on September 19th, 2008, a true and correct copy thereof.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.


GENA T. BLAINE

SUBSCRIBED AND SWORN TO Before me on September 19th, 2008.




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STATE OF NORTH DAKOTA