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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 19, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Mickelson,	)	
	)	
Claimant and Appellant	)	
	)	
-vs-	)	
	)	Supreme Ct. No. 20110232
Workforce Safety and Insurance,	)	McLean Co. No. 28-10-C-0232
	)	
Appellee	)	
	)	
Gratech Company. Ltd.,	)	
	)	
Respondent	)	
.....	)	

BRIEF OF APPELLANT

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA FROM THE JUDGMENT OF THE DISTRICT COURT DATED JUNE 17, 2011, AFFIRMING THE FINAL ORDER OF WORKFORCE SAFETY AND INSURANCE OF MAY 12, 2011.

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Issues Presented

[1] Whether Mickelson's degenerative disc disease is compensable under the Act, given the findings by WSI that Mickelson's degenerative disc disease was asymptomatic prior to his repetitive employment injury, and his back pain worsened by his employment.

[2] Whether Mickelson sustained a compensable soft tissue injury to the low back and pelvis.

[3] Whether the ALJ provided adequate reasons for rejecting evidence favorable to Mickelson, and whether the ALJ appropriately deferred to his treating doctors opinions.

[4] Whether Mickelson's failure to provide notice to the employer of his repetitive injury within seven days of his first doctor's visit provides grounds to deny that Mickelson sustained a compensable injury.

Statement of the Case

[5] James Mickelson ("Mickelson") filed an application for workers compensation benefits with North Dakota Workforce Safety and Insurance ("WSI") on December 17, 2009, in connection with an injury to his low back that developed as a result of the repetitive activity required to perform his employment as an equipment operator for Gratech Company, Ltd. ("Gratech"). (App. Pg. 9).

[6] WSI denied Mickelson's claim by Administrative Order dated March 18, 2010, (App. Pg. 12-14), and Mickelson requested a hearing. (App. Pg. 16-17). The hearing was held in Bismarck, North Dakota, on September 2, 2010. (CR 89, Hearing Transcript pp. 1-115; *See* App. 42-56). ("HT"). Administrative Law Judge Janet

Seaworth issued her decision affirming WSI's denial on November 7, 2010. (App. Pg. 32-41). Mickelson took an appeal to the District Court. By order dated 06/17/2011, the Honorable Bruce Romanick affirmed WSI. (App. Pg.62). Mickelson takes an appeal to this Honorable Court.

Statement of the Facts

[7] Mickelson filed an application for workers compensation benefits in connection with low back pain and radiculopathy (pain radiating into the leg) that developed as a result of repetitive injury due to his employment as an equipment operator for Gratech. (CR 4, App. Pg. 9). Mickelson began the job as operator of a payloader in July, 2009. (HT 15, lines 7-13), and he testified that he generally worked 12 hour days. (HT 16, lines 18-22). Mickelson was forced to sit most of the 12 hour work day, moving in the seat as he pressed his right foot downwards to operate controls with his right foot. (HT 16-17).

[8] Mickelson operated the loader over rough terrain, with significant impact on the loader—and more importantly, on him—as the loader bounded and jolted. (HT 18-20). Significantly, Mickelson testified that before working at Gratech, he did not have any back pain, and he did not have pain radiating into his leg. (HT 20, lines 21-25; HT 30, lines 11-15). In this he has been consistent all along; Mickelson replied to WSI's prior injury questionnaire that he did not have a pre-existing back condition, and was without back pain before he began his employment at Gratech. (App. Pg. 10).

[9] Mickelson's testimony as to the lack of back pain prior to his employment is confirmed in the medical records. Matthew S. Goehner, D.C., of Qual Chiropractic in Jamestown, ND, reported on August 30, 2009, that Mickelson first noticed low back pain "earlier this week." (App. Pg. 18). On that date, Dr. Goehner diagnosed "[l]umbosacral

region dysfunction with associated soft tissue damage causing nerve root irritation, lumbosacral strain from repetitive foot control use." (App. Pg. 18).

[10] By December 10, 2009, Mickelson reported pain in the low back and right buttock "with numbness into the right thigh and calf to foot." (App. Pg. 19). Regarding causation, Dr. Goehner opined that Mickelson's back pain and right leg pain and numbness were "due to repetitive motion over[ ]time using foot pedal and driving over rough terrain." (App. Pg. 21). In a letter dated April 21, 2010, Dr. Goehner noted that Mickelson's back pain began in August, 2009, and he had no prior history of back pain. (App. Pg. 22).

[11] Dr. Goehner diagnosed Mickelson with soft tissue injury to the muscles, ligaments, and joints of the low back and pelvis. *Id.* He also opined that Mickelson's injury "is directly related to his job duties as work which included repetitive foot control use." *Id.* Dr. Goehner noted that only after the work-related soft tissue injury did Mickelson discover that he had degenerative disc disease (as it had been dormant): "Mickelson did not have any of the symptoms of degenerative dis[c] disease prior to performing his job duty," and degenerative disc disease "is a normal part of the aging process." *Id.*

[12] On January 5, 2010, Mickelson consulted family practitioner Linda Regan, PA-C, who diagnosed lumbar strain and right radiculopathy. (App. Pg. 23). X-rays were ordered on the same day, which showed mild degenerative changes of the lumbar spine, especially at L5-S1. (App. Pg. 25). The recommended treatment for lumbar strain to the soft tissue includes a medication to relax the muscles, and ice, which Regan duly prescribed. *Id.* A follow-up radiographic study, an MRI, was taken on January 21, 2010,

and showed a mild disc bulge at L4-L5, with moderate to severe degenerative disc disease at L5-S1 with disc protrusion at that level. (App. Pg. 29). Regan noted that Mickelson had not had low back pain and right leg radiculopathy prior to August 2009, opining that "the combination of the rough terrain, using heavy equipment, sitting in one position for several hours at a time and also using only his right leg has caused the back pain with right leg radiculopathy for which he originally sought care for." (App. Pg. 30).

[13] In her report of January 15, 2010, physical therapist Schulz reported that Mickelson developed back pain and right leg numbness as a result of "repetitive type injury from running equipment especially over rough terrain." (App. Pg. 26). Schulz confirmed that Mickelson had not had back pain prior to working as an equipment operator. (App. Pg. 31). Schulz opined that Mickelson's "injury is directly related to his work situation. He did not have prior back pain. This is a reasonable mechanism of injury for this problem." (App. Pg. 31).

[14] The sole discordant opinion was provided by WSI's medical consultant, Dr. Gregory Peterson, who reviewed the records, opining on March 12, 2010, that Mickelson's "degenerative disc disease is not caused by his reported work injury. Repetitive motion on rough ground while operating a loader may trigger symptoms associated with lumbar disc disease, but not cause, substantially worsen, or substantially accelerate the condition." (CR 37).

[15] Despite the uniformity of opinion from Mickelson's treating medical providers, WSI relied upon the opinion of its medical consultant, and issued its Administrative Order on March 18, 2010, denying the claim under N.D.C.C. § 65-01-02(10)(b)(7), simply concluding that Mickelson's low back and leg pain is attributable to

"lumbar degenerative disc disease" (DDD) that pre-existed his employment, and that the employment did not worsen or accelerate his condition. (App. Pg. 13-14).

[16] WSI also concluded that Mickelson had not timely (within 7 days) notified his employer of this repetitive injury under N.D.C.C. §§ 65-05-01.2, 65-05-01.3, which "may be taken into account in determining whether the injury is compensable." (App. Pg. 14, Conclusion of Law ¶ 2). WSI's Administrative Order did not offer an explanation how the lack of the 7-day notice gave rise to questions about whether the claim is compensable; rather WSI merely determined that Gratech wasn't promptly notified of the injury. (See App. Pg. 13, Finding of Fact ¶ 3; App. Pg. 14, Conclusion of Law ¶ 2).

[17] Mickelson requested a hearing, which was held before Administrative Law Judge Janet Seaworth on September 2, 2010. The ALJ heard evidence on the issues Mickelson posed: (1) whether Mickelson sustained an injury to the lumbar spine—(which includes whether Mickelson's employment caused a soft tissue injury); (2) whether Mickelson's employment substantially aggravated the progression of or worsened the severity of his degenerative disc disease under N.D.C.C. § 65-01-02(10)(b)(7); and, (3) issues concerning the timeliness of Mickelson's notice of injury to the employer under N.D.C.C. §§ 65-05-01.2, 65-05-01.3. (CR 27).

[18] The ALJ found that Mickelson hadn't reported the August, 2009 low back problem to his employer until December, 2009 (when he filed his workers' compensation claim) as he hadn't yet focused his mind on the fact that his repetitive work duties were the cause. (App. Pg. 33, Finding of Fact 2: "He didn't realize [the injury and pain] was from repetitive motion."). The ALJ also found that Mickelson may have delayed

notifying the employer so as not to "jeopardize his relationship with his employer." (App. Pg. 37, Finding of Fact 21).

[19] Despite her findings explaining Mickelson's reasonable explanations for the prompt failure to notify Gratech of a work injury, the ALJ said that Mickelson must have suspected that there was a causal relationship in August, 2009. (App. Pg. 37, Finding of Fact 21). From this, the ALJ concluded that "WSI may consider that failure to [timely] notify in determining whether Mr. Mickelson's injury was compensable." (App. Pg. 39, Conclusion of Law 4). The ALJ did not explain what it means for WSI to "consider" the failure to timely notify the employer in determining whether Mickelson sustained a compensable injury, and the findings of fact do not support the conclusions of law.

[20] Although Administrative Law Judge Seaworth affirmed WSI's legal conclusions about the meaning of the pre-existing disease exclusion to compensation, she made critical factual findings that Mickelson's pre-existing degenerative disc disease had been dormant prior to his engaging in the repetitive stresses of his employment at Gratech, and that his DDD was made symptomatic by his work. "There is no evidence that Mr. Mickelson had these symptoms [low back pain and radiculopathy] before he operated a loader for Gratech Company Ltd." (App. Pg. 36, Finding of Fact 17). "Mr. Mickelson's employment triggered his symptoms of degenerative disc disease." (App. Pg. 38, Finding of Fact 22).

[21] The ALJ found that although Mickelson's work injury caused his symptoms, the work did not accelerate or worsen the "degenerative disc disease itself." (App. Pg. 36, Finding of Fact 18). Thus the ALJ's characterization of the "degenerative disc disease itself" is divorced from symptoms, being how the it appears on an x-ray or MRI.

[22] That the dispute is primarily a question of law rather than fact is illustrated by comparing the opinions of Mickelson's treating doctors and Dr. Peterson. The ALJ said that while Dr. Goehner opined that his "degenerative disc disease is worse because Mr. Mickelson's work caused him to have symptoms, and he didn't have symptoms before," she thought the doctors "part[ed] company" on that point in that Dr. Peterson opined that "Mr. Mickelson's work may have triggered the symptoms of the degenerative disc disease, but work didn't make the degenerative disc disease worse; it made it symptomatic." (App. Pg. 36-37, Finding of Fact 19).

[23] But this alleged difference is a matter of semantics. Both Dr. Goehner and Dr. Peterson confirm that work activities can bring out the first symptoms of DDD, and that it can be made more painful by work activities. They agree that pain triggered by work engender a need for medical attention that would not otherwise exist. Dr. Peterson admitted that Mickelson's employment would likely produce his pain (HT 61, lines 21-24; HT 69, lines 5-20), which is the criteria by which living and breathing human beings so afflicted determine seriousness.

[24] Dr. Peterson's testimony did not differ in any significant respect from his conclusory note to that effect (CR 37), but Dr. Peterson clarified that his definition of 'the condition' is the degenerative disc disease as it objectively appears on the MRI. (HT 54-55). Dr. Peterson explained that the progression he considers relevant is not the symptoms that affect life (pain, impairment, disability), but "the changes on x-ray and MRI progress." (HT 58, lines 3-24).

[25] There is no dispute regarding the cause of the DDD condition itself. The ALJ found that repetitive job stress does not contribute to the ***development of*** degenerative

disc disease. (App. Pg. 36, Finding of Fact 18). This, of course, is not Mickelson's allegation. Rather, Mickelson contends that but for his employment, he would not be suffering the symptoms and effects of degenerative disc disease. This is the very definition of 'worsening.'

[26] There is one dispute of fact: whether Mickelson suffered a compensable soft tissue injury. The ALJ found that Mickelson's "symptoms of low back pain with pain and numbness in his right leg are related to the degenerative disc disease." (App. Pg. 37, Finding of Fact 22). But other than simply discounting Dr. Goehner's opinion (App. Pg. 39-40, Conclusion of Law 5), the ALJ doesn't state the basis for the conclusion that all of Mickelson's back pain is related to his DDD.

[27] Moreover, WSI's medical consultant didn't directly address the issue; Dr. Peterson's opinion that Mickelson' back and leg pain can be at least partially attributed to DDD is not in dispute. What he does not say is more significant. Dr. Peterson does not provide an opinion whether Mickelson also suffered a soft tissue injury that contributed to his back pain. Clearly, WSI cannot rely on Dr. Peterson for a conclusion that Mickelson did not also sustain a soft tissue injury because its medical consultant didn't offer any opinion on the topic.

[28] There is significant evidence that Mickelson sustained a soft tissue strain to the muscle and ligaments in the low back. On August 30, 2009, Dr. Goehner diagnosed "[l]umbosacral region dysfunction with associated soft tissue damage causing nerve root irritation, lumbosacral strain from repetitive foot control use." (App. Pg. 18). Dr. Goehner reports medical findings indicative of soft tissue injury—including loss of range of motion in the spine and muscle tenderness. *Id.* Additionally, Dr. Goehner's treatment

course of cold packs, interferential electric stimulation, and chiropractic adjustment are utilized for soft tissue injury. (App. Pg. 18-20). In his letter dated April 21, 2010, Dr. Goehner repeated that he had diagnosed Mickelson with soft tissue injuries "to the muscles, ligaments, and joints of the lower back and pelvis." (App. Pg. 22).

[29] Similarly, Linda Regan, PA-C, diagnosed lumbar strain and right radiculopathy in her note dated January 5, 2010. (App. Pg. 23). The recommended treatment for lumbar strain to the soft tissue includes a medication to relax the muscles, and ice, which Regan duly prescribed. *Id.* In her report of January 15, 2010, physical therapist Schulz reported Mickelson's pain complaints, and that he was tender to palpation. (App. Pg. 31). The physical therapy included "modalities to decrease inflammation and pain," including ultrasound and manual therapy, classically used to treat soft tissue injury. *Id.* [30] Thus, there significant physical findings that are strongly indicative of soft tissue injury, as is the treatment course.

[31] The ALJ made no reference to the concurrent diagnosis of soft tissue injury made by Linda Regan and Julie Schulz; rather the ALJ assumes that because these providers diagnosed soft tissue injuries they must have ignored his DDD as a source of pain. (See generally App. Pg. 35, Findings of Fact 14, 15). The ALJ does not address the obvious; that an individual may have soft tissue injury and DDD.

[32] The ALJ explained that she discounted the evidence favorable to Mickelson on the ground that in the August 30, 2009 exam, "despite not having any records before him regarding the extent of Mr. Mickelson's degenerative disc disease, [Dr. Goehner diagnosed] a lumbosacral strain." (App. Pg. 31, Conclusion of Law 5). The ALJ thought

that Dr. Goehner's diagnosis "is not consistent with his later opinion on April 21, 2010." *Id.*

[33] But contrary to the assertion, Dr. Goehner's April 21, 2010 letter notes both a diagnosis of degenerative disc disease and "stress to the muscles, ligaments, and joints of the lower back and pelvis." (App. Pg.22). This is wholly consistent with his August 30, 2009 examination, in which he diagnosed Mickelson with soft tissue injury to the low back. (App. Pg. 18). Rather than discuss the significance of the medical evidence supplied by Mickelson's treating providers in totality, the ALJ simply assumes that Mickelson's pain is wholly attributable to his DDD. The ALJ is simply wrong that Dr. Goehner offered inconsistent opinions as to whether Mickelson sustained a soft tissue injury to the low back as a result of his repetitive work duty.

Law and Argument

I. A Compensable Injury Includes Substantial Worsening of the Symptoms of Degenerative Disc Disease by Employment.

[34] An employee seeking WSI benefits has the burden of proving by a preponderance of evidence that he has suffered a compensable injury. N.D.C.C. § 65-01-11. The primary issue in this case is the causal relation between Mickelson's employment and the painful and disabling effects of his degenerative disc disease. While pre-existing conditions are generally excluded from the definition of compensable injury, they are compensable under N.D.C.C. § 65-01-02(10)(b)(7) if the employment substantially accelerates the progression or worsens the severity of the pre-existing condition. The interpretation of this statute is the crux of this case.

A. Basic Compensation Principles Hold that Susceptibility to Injury is Irrelevant—The Employer Takes the Employee "As Is."

[35] At the outset, it is important to note that North Dakota follows the well-known and universally accepted maxim that susceptibility to injury is not relevant, as the employer takes the employee as he finds him. *Bruns v. North Dakota Worker's Compensation Bureau,* 1999 ND 116, ¶ 16 n. 2, 595 N.W.2d 298. In *Balliet v. North Dakota Workmen's Compensation Bureau,* 297 N.W.2d 791, 795 (N.D.1980), the Court put it most plainly "[p]utatively, almost every injury could, with sufficient scrutiny, be linked to some preexisting weakness or susceptibility."

[36] More recently, in *Manske v. North Dakota Workforce Safety & Ins.,* 2008 ND 79 ¶ 12, 748 N.W.2d 394, the Court, citing *Satrom* v. *North Dakota Workmen's Compensation Bureau,* 328 N.W.2d 824, 831 (N.D. 1982), pointedly excluded such susceptibility to injury as grounds to deny a claim for a disc condition. The Court held that "[t]he fact that an employee may have physical conditions or personal habits which make him or her more prone to such an injury does not constitute a sufficient reason for denying a claim. ... To the contrary, the work injury need only be a 'substantial contributing factor.'"

[37] The foremost authority on workers' compensation law, Professor Larson, says that:

> Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. ... The principle that degeneration and infirmities due to age which have not previously produced disability are not a proper basis for reduction of compensation is amply supported by authorities from other jurisdictions.

5 Larson, *Workers' Compensation Law*, § 90.04[1] (Revised November 2007).

[38] Larson notes that benefits should not be reduced via application of an 'aggravation' statute. *Id. A fortiori*, benefits cannot be totally denied either. WSI denied Mickelson's claim in toto, and potential application of North Dakota's aggravation statute, N.D.C.C. § 65-05-15, was not put at issue by WSI's Administrative Order.

[39] Professor Larson states the central proposition that susceptible employees are entitled to entitled to the same sure and certain relief:

> Preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' [causal] requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying the employer takes the employee as it finds that employee.

1 Larson, *Workmen's Compensation Law*, § 9.02[1], p. 9-15 (Revised November 2007).

[40] The bedrock workers' compensation principle is to place the risk of loss on industry that caused the plaintiff's damages; if repetitive injury brings out a condition that would otherwise remain dormant, compensation must follow. Any other result alters the basic bargain between employees and employers. The workers' compensation bargain expressed by N.D.C.C. § 65-01-01 in which employees exchange the right to sue employers in tort in for "sure and certain relief" in the form of medical and disability benefits has a storied history. Early economic theory assumed that the cost of workers' compensation, ostensibly borne by employers, was priced into the cost of the product or service. See Dean J. Haas, *Falling Down on the Job: Workers' Compensation Shifts from a No-Fault to a Worker-Fault Paradigm*, 79 North Dakota Law Review 203, 215-216 (2003).

[41] The forceful statement that the cost of production "bears the blood of the working man" starkly presents the economic principle of cost internalization—that

industry bears the cost of the risk it poses to employees sustaining life-altering injuries or disease. *Id.* The requisite causal relation to the employment is met when work 'triggers' an otherwise asymptomatic condition, causing a need for medical care and disability not otherwise present.

[42] The compensation rule set forth by Professor Larson that industry must bear the risk of loss when employment triggers the onset of symptoms is in accord with modern tort principles that distinguish between the eggshell plaintiff doctrine and the aggravation doctrine. *See generally* 5 Larson, *Workers' Compensation Law*, § 90.04[1] (Revised November 2007). The eggshell plaintiff rule applies when the condition had been asymptomatic prior to injury, which is distinct from the aggravation doctrine which applies when there is a prior symptomatic injury. *Rowe v. Munye*, 702 N.W.2d 729, 741 (Minn. 2005) (noting difference between aggravation and eggshell-plaintiff rules); *see also* Restatement (Second) of Torts § 461 cmt. a (1965) (noting that eggshell-plaintiff rule applies "not only where the peculiar physical condition which makes the other's injuries greater than the actor expected is not known to him, but also where the actor could not have discovered it by the exercise of reasonable care, or, indeed even where it is unknown to the person suffering it or to anyone else until after the harm is sustained."

[43] Courts have long recognized the "eggshell plaintiff' principle to aid plaintiffs in establishing causation in cases where an injury makes symptomatic a prior latent condition. *Calcagno v. Kuebel, Fuchs Partnership,* 802 So.2d 746 (La.App. 2001) (holding that the eggshell plaintiff doctrine required an award of damages when the accident caused age-related changes in an elderly plaintiff's brain to become symptomatic); *Middleton v. Myers*, 778 N.W.2d 67 (Iowa App. 2009) (holding the trial

court erred giving an aggravation instruction rather than an eggshell plaintiff instruction where x-rays and an MRI showed a mild degenerative disc disease pre-existed the accident, but had been previously asymptomatic).

[44] To determine whether prior symptoms or conditions give rise to either an aggravation or eggshell plaintiff instruction, the court looks to the first instance when the pain or disability for which compensation is sought arose. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 577-578 (Iowa 1997). Even "an abnormally susceptible employee" who had been asymptomatic prior to injury is entitled to the same protection as is a healthy worker. *Fontenot v. Wal-Mart Stores, Inc.*, 870 So.2d 540 (La.App. 3 Cir. 2004), *writ denied,* 876 So.2d 843.

[45] Modern workers' compensation and tort rules agree on this crucial point that an individual's susceptibility to injury is not grounds to deny compensation. The ALJ's contrary conclusion—that mere triggering an injury is insufficient to ground a compensation award—attaches a talismanic significance to the statute's use of the word 'trigger.' N.D.C.C. § 65-01-02(10)(b)(7) provides that the term compensable injury does not include:

> 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.

Id.

[46] The ALJ reasons that triggering of symptoms—even if the condition had been asymptomatic prior to injury—does not suffice to prove a compensable injury because "[i]f that were the case, the trigger language ... would be meaningless." (App.

Pg. 38, Conclusion of law 2). The ALJ concludes that the "*disease itself*" must be made substantially worse. *Id.*

[47] Thus, under WSI's interpretation of the trigger language in N.D.C.C. § 65-01-02(10)(b)(7) only those workers young enough so the degenerative process cannot yet be detected by x-ray or MRI could ever receive compensation for low back pain. This is starkly illustrated here, since WSI did not even pay benefits in connection with Mickelson's contemporaneous soft tissue injury, as it is prone to blame the entirety of the claimant's back pain on the DDD.

[48] The broad sweep of WSI's stringent interpretation of the statute is not an overstatement—because even though radiographic evidence of the existence of DDD does not necessarily correlate with symptoms, DDD always shows progressive 'worsening' radiographically. For make no mistake, degenerative disc disease is natural aging—we all develop it. In fact, the ALJ concluded that "Dr. Peterson agreed with Dr. Goehner that degenerative disc disease develops over time and is an aging process." (App. Pg. 36, Finding of Fact 18).

[49] A plain reading of the statute does not support WSI's harsh—and what would be absolutely unique to North Dakota—legal conclusion barring most claims for low back pain. N.D.C.C. § 65-01-02(10)(b)(7) specifically directs compensation to be paid if the condition is worsened or accelerated. The statute does not define the word 'condition,' nor does any sound compensation principle direct that the word 'condition' is measured by the abstraction of a radiographic image divorced from effect.

[50] Moreover, contrary to the ALJ, the statute is not rendered meaningless by Mickelson's interpretation of the word 'trigger.' Clearly the word 'trigger' remains a bar

to compensation in the many cases in which the claimant's prior condition was already symptomatic at the time of the work injury, but the employment simply brought symptoms back out with a vengeance.

[51] The root of the issue is whether the claimant's pre-existing condition is such that it would naturally progress on its own timetable. Here, Mickelson's employment triggered symptoms—and caused damages—that would not otherwise have occurred. The difference between the two pictures—a natural progression of DDD, and triggering of an asymptomatic condition—is stark. The significance of the injury is measured in the clinical picture, which alone gives rise to damages.

[52] Absolutely nothing compels the courts to follow the ALJ's logic to the extreme lengths of requiring the employee to bear the risk of loss when his employment activities combined with the effects of his natural aging to an injury that requires a need for medical attention. In *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621, the Court held that a compensable aggravation of arthritis does include a worsening of symptoms. Rejecting the ALJ's legal conclusion that Geck's employment contribution was not insufficient to ground an award because it was "merely a trigger," to pain, *Geck,* ¶ 11, the Court reversed and remanded the ALJ's conclusion that her employment could not be a substantial aggravating factor in an injury. *Id.* The Court said that in contrast to the conclusion, there was evidence that her work activities "resulted in her latent underlying condition of arthritis becoming symptomatic and painful. Pain can be an aggravation of an underlying condition of arthritis." *Id.* ¶ 10. The majority found the distinction between worsening the "condition itself" and the symptoms to be without significance. *Id.* ¶ 10.

[53] Following the *Geck* court, where the pre-existing condition had never been symptomatic, as here and in *Geck*, it is sheer speculation to conclude that even absent injury the condition would have inevitably become symptomatic and would have necessitated medical attention. That is to imagine an alternative history that did not occur.

B. North Dakota Case-Law Applies Basic Compensation Principles to Require an Award Due to Worsening of Symptoms of Previously Asymptomatic Degenerative Disc Disease.

[54] North Dakota case law and the basic principles of compensation law—placing the risk of loss on employers when employment causes the employee's damages—agree with the medical authorities that asymptomatic and symptomatic DDD are two distinct entities, reflecting utterly different clinical pictures. The legal principle that the employer takes the employee as is he fits the clinical picture of work triggering symptoms in an otherwise asymptomatic condition. In that case, compensation is owed, as the need for medical care and disability are traced directly to an employment risk.

[55] Despite the clear fact difference between the 'natural progression' of an already symptomatic DDD with the triggering of an asymptomatic condition into full bloom, WSI contends that neither are compensable. WSI's confusion of the two pictures has a long history. The mistaken interpretation of the statute may have begun as WSI applied the Court's holding in *Pleinis v. North Dakota Workers Comp. Bureau,* 472 N.W.2d 459, 462 (N.D. 1991).

[56] There are two reasons WSI appears to have taken *Pleinis* out of context. First, at the time *Pleinis* was decided, the former incarnation of N.D.C.C. § 65-01-02(10)(b)(7) (then codified at N.D.C.C. § 65-01-02(8)(b)(6)), contained broad language excluding from coverage 'employment triggers' that either worsened a latent underlying

condition or a symptomatic condition. A subsequent amendment to the statute eliminated the term 'latent condition.' Second, the facts in *Pleinis* established that his ongoing knee problems were the simple natural progression of a pre-existing condition, and were not attributable to his initial compensable soft tissue injury.

[57] In *Pleinus,* the sole expert opinion did not support the claimant's theory that an employment injury aggravated his underlying condition; the Bureau specifically concluded Pleinis' injury had not causally contributed to his condition in any way. ("Claimant has failed to prove a cause and effect relationship between his September 25, 1984, injury and his current osteoarthritic condition which is disabling.") *Pleinis,* at 461.

[58] Also in contrast to Mickelson's claim, WSI awarded Pleinis initial medical benefits for a localized contusion and strain of the right knee which occurred in a slip and fall he sustained at work in September of 1984. *Pleinis*, 472 N.W.2d at 460. X-rays of Pleinis's knee taken at that time indicated that he had osteoarthritis, but the diagnosis was limited to a contusion/strain, and the treatment course related to the sprain/contusion. Thus, there was no indication that the work injury 'lit up' Pleinis' arthritis at that time; WSI only paid benefits for the soft tissue injury.

[59] While Pleinis testified that he had problems with his knee after the 1984 injury and those problems progressively worsened, he did not again seek benefits until August 1989. *Pleinis*, at 460. Significantly, the claimant returned to work and received no further medical treatment for his knee until he consulted a physician nearly five years after the initial contusion, in March, 1989. *Id.* There was no new injury that caused the pain to recur. At Pleinis' hearing the claimant's counsel neglected to ask the doctor whether the symptoms had been worsened or accelerated by the initial injury sustained

five years prior; the undisputed testimony was that Pleinis' arthritic knee pain was simply progressing on its natural timetable. *Id.* at 460-461. The Court noted that "the statute focuses on whether the underlying condition would likely have progressed similarly in the absence of employment, or whether the employment substantially aggravated or accelerated the condition." This factual finding of a natural progression ruled out that the employment caused a worsening of the claimant's pain that thus resulted in a need for medical care.

[60] Not only was *Pleinis* decided under since amended statutory language, the decision is confined to the precise facts of the case in which the undisputed medical opinion was that Pleinis' knee problems were entirely due to an arthritic process that was naturally progressing on its own timetable. The Bureau's finding that the claimant failed to prove any causal relationship between his soft tissue injury from 5 years before, and his current disabling osteoarthritis, was not in dispute. *Pleinis,* at 461. Unlike here, Pleinis failed to show any causal nexus between his employment and any damages, including need for medical care. The facts in *Pleinis* limit the import of the holding.

[61] The facts in *Hein v. North Dakota Workers Compensation Bureau*, 1999 ND 200, 601 N.W.2d 576, like *Pleinis*, showed that the claimant's work activities did not trigger the pre-existing condition in the first instance. As in *Pleinis*, the claimant's initial work injury was a simple sprain—in Hein's case to the coccyx. *Hein* ¶ 2. Again as in *Pleinis*, but unlike here, WSI accepted Hein's soft tissue injury claim, awarding benefits for a closed period of time. *Id.*

[62] Four months after WSI paid the medical bills in connection with Hein's diagnosis of headache and coccyx sprain, she was finally treated for neck pain, and

degenerative changes were noted. Hein had a two level discectomy with fusion, and her neurosurgeon was "concerned about the time lapse" between the injury and her cervical complaints. *Hein* ¶ 5. The medical experts concluded that the degenerative disc disease would naturally progress on its own timetable without contribution from the fall at work—that her current "symptomatic muscular findings are more likely due to stress and tension and other factors than they are to the injury and they [symptoms] certainly were not triggered by the injury." *Hein* ¶ 7.

[63] On the other hand, *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621, addresses the precise issue in question in Mickelson's appeal. *Geck* clarifies that a compensable aggravation of arthritis does include a worsening of symptoms. In *Geck*, the claimant experienced a sharp pain in the left knee as she knelt down to perform a work-related task. *Id.*, at ¶ 2. She consulted a physician about the continuing pain in her left knee, and was diagnosed as having patellar femoral arthritis. *Id.*

[64] The Bureau dismissed Geck's claim, concluding that claimant failed to prove she sustained a "compensable injury" under N.D.C.C. § 65-01-02(9)(b)(6)—which at that time, as in *Pleinis,* provided that triggering symptoms in either a latent or previously symptomatic condition was insufficient grounds to award compensation, absent evidence that the employment substantially aggravated the pre-existing condition.

[65] The Court noted that it was not disputed that the claimant's arthritis in her left knee was a latent and underlying condition as then contemplated by N.D.C.C. § 65-01-02(9)(b)(6). *Geck,* ¶ 9. Applying the statute, the ALJ concluded that "Geck's employment appears to be merely a trigger," and "[b]ased on the evidence presented[,]

Geck fails to prove that her employment is anything but a trigger that started the pain." *Geck*, ¶ 11. The ALJ also concluded that there was no evidence that her employment was a substantial aggravating factor in an injury." *Id.* The Court reversed and remanded, because there was evidence that her work activities "resulted in her latent underlying condition of arthritis becoming symptomatic and painful. Pain can be an aggravation of an underlying condition of arthritis." *Id.* ¶ 10.

[66] Prior to the fall, her condition had been asymptomatic. *Geck*, ¶ 9. The Court specifically held that the Bureau was required to consider whether a fall at work had "triggered" a worsening of Geck's preexisting arthritis of the knee, *id.*, ¶ 14, which worsening could include pain; the majority found the distinction between worsening the "condition itself" and the symptoms to be without significance. *Id.* ¶ 10. Thus, the Court has already answered the question at issue here: a worsening of symptoms can constitute a worsening of the condition as a legal matter.

[67] The fact question is whether Mickelson's repetitive work duties worsened Mickelson's symptoms. The ALJ has answered this question, finding that Mickelson's work did trigger his symptoms. (App. Pg. 37, Finding of Fact 22). *Pleinis*, *Hein*, and *Geck* show that the Court's central concern was to differentiate between the mere natural progression of 'the condition' (pre-existing arthritis or DDD) worsening on its own timetable, from the significant triggering of symptoms that aggravates and accelerates the symptomatic expression of the pre-existing condition. The key is what is meant by 'the condition' that is said to have been worsened by work (or not to have worsened by work but simply due to a natural progression).

[68] WSI has contended that Mickelson argues about what the law 'should be,' and not what it is. (*See e.g.,* WSI District Court brief at 11, 14). This is not true. It has long been argued that the statute is primarily concerned with distinguishing a simple natural progression of the condition with a worsening of the condition by work. The statute accordingly directs a focus on whether the employment substantially changed the clinical picture of the condition. As was noted shortly after *Pleinis*, *Hein* and *Geck* were decided:

> Contentions that employment merely "triggered" a condition--that is, did not cause a substantial worsening--is a Bureau staple. The usual argument is that a condition (such as degenerative disc disease) preexists the work injury, and the work injury merely triggered the condition to become symptomatic, which, it is argued, is noncompensable. Contention that a "mere triggering" work injury that transforms degenerative disc disease from an asymptomatic condition to a symptomatic state is a noncompensable event is a narrow view of causation. First, causation matters are difficult to untangle. If, for example, an independent medical evaluation (IME) states that a worker's fall from a ladder merely triggered symptoms in degenerative disc disease but did not alter the course of the disease, one must ask what is being measured. The IME opinion will almost certainly rest on the fact that the condition itself, as measured radiographically by narrowing of the disc space, did not show any change after the fall. Yet, the worker's life might be utterly shattered. If the fall triggers symptoms that require medical attention and result in disability, the worker certainly suffers a significant worsening in the severity of his or her condition. The answer should be that we look to the effect of the fall on the worker's health, life, his need for medical attention, and disability, not on whether the fall altered the appearance of an MRI.

Dean J. Haas, *Falling Down on the Job: Workers' Compensation Shifts from a No-Fault to a Worker-Fault Paradigm*, 79 North Dakota Law Review 203, 238 (2003).

[69] As the *Pleinis* Court noted, the question is whether 'the condition' would progress on its own accord and timetable. Clearly, this natural progression can only be forecast as inevitable if the condition had already been symptomatic. Whether an asymptomatic condition would have naturally progressed if another history was true—

i.e., that the condition was not triggered in the first instance—is to imagine an alternative history that did not happen. Imaging an alternative history can be great fun, but is a logical dead-end. One court, considering "whether or not the employee might have been injured in the same way, and even at the same place and time" had he not sustained the injury at work noted that such an alternative history had not happened—an alternative history "has nothing whatever to do with the case." *Kern v. Southport Mill,* 141 So. 19, 21 (La. 1932). In determining causation under any version of the coverage statute, WSI must deal with the facts as they are, not how they might have been.

[70] The North Dakota Supreme Court has also addressed the successor statute, which now concisely provides that a compensable injury does not include:

> 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.

N.D.C.C. § 65-01-02(10)(b)(7).

[71] The Court has repeatedly said that it is not necessary under the statute to show the employment was the sole cause of the injury; to establish a causal connection under the statute the claimant must demonstrate his employment was 'a substantial contributing factor' to the disease or injury. *Bruder v. Workforce Safety & Ins.*, 2009 ND 23, ¶ 8, 761 N.W.2d 588. Employment plays a substantial causal role where it worsens or aggravates the pre-existing condition, causing damages that would not have occurred but for the employment.

[72] While *Bruder* has a superficial relevance in that WSI attributed the claimant's pain to his degenerative disc disease, the case is easily distinguishable on the

facts. In that case, there was undisputed evidence that Bruder's disc disease had been symptomatic for many years before he filed his workers' compensation claim. *Bruder* ¶ 2. By the time Bruder filed his WSI claim in 2005, he already had a long history of back pain, including an L4-5 discectomy with L4 and L5 radicular decompression. *Id.* In *Bruder*, the medical history legitimately indicated a mere natural progression of disc disease that had been troubling the claimant for many years.

[73] *Bergum v. N.D. Workforce Safety and Insurance*, 2009 ND 52, ¶ 12, 764 N.W.2d 178 presents the legal issues in this case, but also with substantially different facts. Unlike Mickelson, "Bergum has had a long history of treatment for back pain dating back to 1990, and there is no dispute that Bergum has a preexisting condition of chronic low back pain." *Bergum* ¶ 2. The Court described Bergum's preexisting condition as chronic low back pain, which required management with pain medication. *Id.* ¶ 19. The Court noted that Bergum's 'baseline' condition included "daily low back discomfort, and ... the regular use of an anti-inflammatory drug and a muscle relaxant." *Id.* ¶ 19.

[74] Despite Bergum's contention that WSI erred as a matter of law in adopting the opinions of the independent medical examiner that an increase in symptoms was not a sufficient basis to find his injury compensable, the Court found that the factual record did not establish any such worsening: he had significant back pain pre and post injury. While the treating physician testified Bergum's symptoms were more severe after the injury, the physician's first written reply to WSI was that the work injury "did not substantially accelerate the progression or substantially worsen the severity of the preexisting condition but that there were new symptoms." *Id.* ¶ 20.

[75] Moreover, the IME examiner opined that Bergum's chronic recurrent back pain naturally progressed on its own timetable, not changing the overall course or nature of the preexisting condition, and the recurrent back pain from work did not accelerate or worsen the preexisting chronic low back pain condition. *Id.* ¶ 22. Unlike Mickelson, Bergum did not have a latent preexisting degenerative disc disease—rather he had a preexisting condition simply labeled chronic low back pain.

[76] *Curran v. North Dakota Workforce Safety and Insurance*, 2010 ND 227, 791 N.W.2d 622 also documents that the claimant had back symptoms prior to the work injury. Curran had a non-work automobile accident in February 2004, with neck and low back pain. *Curran,* ¶ 3. She bent down to pick up a band-aid at work in February 2007, with significant recurrent low back pain. *Id.* ¶ 1. An MRI in March 2007 showed mild disc degeneration and a ring shaped tear in the disc. *Id.* ¶¶ 6-7. In November 2007, Curran underwent a disc replacement surgery for her degenerated disc, which was noted to be both "chronic and severe." *Id.* ¶ 10.

[77] WSI rejected the opinions of Curran's treating physicians that the disc tear was related to the work injury, noting the "striking similarities between Curran's symptoms after the February 2007 work incident and the February 2004 automobile accident." *Id.* ¶ 25. And the report of Curran's operation to replace the degenerated disc characterized her preexisting degenerative disc disease as "severe" and "chronic." *Id.* ¶ 26. Curran's condition and need for surgery were attributed to her advanced and progressive disc disease, unrelated to her acute event at work. *Id.* The IME said that her injuries were the *natural progression* of an underlying and previously symptomatic

degenerative disc disease that was just getting progressively worse. *Id.* ¶ 27. Curran failed to prove the causal connection that Mickelson has established.

[78] Larson observes "denials of compensation in this category [due to a preexisting condition] are almost entirely the result of holdings that the evidence did not support a finding that the employment contributed to the final result." 1 Larson, *Workers' Compensation Law*, § 9.02[4], p. 9-19 (Revised November 2007). In other words, whether the claim is compensable depends upon whether, as a factual matter, the employment "contributed to the final result," *i.e*, whether employment contributed to the employees' *damages*. WSI's conclusion that a worsening of the condition itself must be a worsening shown via x-ray or MRI is illogical and not grounded in any compensation principle. This Conclusion of Law, of course, is fully reviewable by the Court, and no deference is given to the agency.

[79] A case from Wyoming is on all fours with Mickelson. Wyoming law contains the normal exclusion for injuries that are causally attributable to a pre-existing condition, as the term "injury," does not include any injury or condition preexisting at the time employment begins with the employer against whom a claim is made. Wyo. Stat. Ann. § 27-14-102(a)(xi). Wyoming also applies the universal compensation principle that "the employer takes the employee as he finds him." *Lindbloom v. Teton International*, 684 P.2d 1388, 1389 (Wyo.1984).

[80] *Judd v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 233 P.3d 956, ¶ 26 (Wyo. 2010), illustrates the means by which a claimant proves a causal nexus between the injury and worsening. In *Judd*, the Commission denied compensation for the claimant's total knee replacement surgery, concluding surgery was inevitable and

the "contribution of the significant preexisting condition to the total knee replacement was far more considerable than the relatively minor fall that occurred on that date." *Id.* ¶ 26. The Court held:

> By employing that rationale for denying Judd's claim, the Medical Commission misapplied the law regarding the compensability of injuries resulting from aggravation of a preexisting condition. First, *the Commission committed a legal error when it relied upon the conclusions of [the doctors] that no material aggravation of Judd's condition can be found because there was only an increase in symptoms and not a change in the underlying pathology of the preexisting condition.* Wyoming law does not require a change in the underlying pathology to find a material aggravation. What it requires is that the work injury combine with the preexisting condition to create the present disability and need for treatment.

Judd, 233 P.3d 956, ¶ 26 (emphasis added).

[81] Like the North Dakota cases, Wyoming focuses on whether the pre-existing condition was already symptomatic. *See Langberg v. State ex rel. Wyo. Workers' Safety & Comp. Div.,* 203 P.3d 1098, 1104 (Wyo. 2009) (holding injury compensable where work injury did not cause Kienbock disease but rendered dormant condition symptomatic, creating need for surgery); *Ramos v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 158 P.3d 670, 679 (Wyo.2007) (holding facial work injury did not create periodontal disease but combined with it to necessitate compensable dental treatment); *Salas v. General Chemical,* 71 P.3d 708, 715-16 (Wyo.2003) (holding knee surgery compensable where work injury aggravated pain of preexisting degenerative knee condition).

[82] The Court should apply sound compensation principles, following the uniformly adopted rule that the triggering of DDD from no symptoms to a disabling condition that requires medical care is compensable under the North Dakota Workers' Compensation Act as a significant worsening of the clinical picture of the condition.

II. The ALJ Failed to Address the Opinions of Mickelson's Treating Doctor that Mickelson Sustained a Compensable Soft Tissue Injury

[83] Even if the Court somehow agrees that back pain in the presence of DDD is not compensable in our state, Mickelson has, like Pleinis and Hein, proven an initial compensable soft tissue injury. The ALJ failed to adequately address the evidence favorable to Mickelson on this point, and does not give deference to his treating doctor as required by N.D.C.C. § 65-05-08.3.

[84] The ALJ found that Mickelson's "symptoms of low back pain with pain and numbness in his right leg are related to the degenerative disc disease," (App. Pg. 37, Finding of Fact 22), but does not provide any factual basis for her conclusion that all of Mickelson's back pain is related to his DDD. Dr. Peterson's opinion that Mickelson' back and leg pain can be at least partially attributed to DDD is not in dispute. But he didn't provide any opinion whether or not Mickelson also suffered a soft tissue injury that contributes to his back, pelvis, and leg pain. Thus the ALJ rendered an opinion without relying on any medical opinion, and WSI cannot now rely upon Dr. Peterson on this question.

[85] The ALJ discounted Dr. Goehner's diagnosis of soft tissue injury because in his initial exam of August 30, 2009, he did not have "any records before him regarding the extent of Mr. Mickelson's degenerative disc disease," yet diagnosed a lumbosacral strain. (App. Pg. 40, Conclusion of Law 5). The ALJ asserted that Dr. Goehner's soft tissue injury diagnosis "is not consistent with his later opinion on April 21, 2010." *Id.* This is not what the records reflect.

[86] Rather, Dr. Goehner diagnosed Mickelson in August 2009 with a soft tissue injury: "[l]umbosacral region dysfunction with associated soft tissue damage causing nerve root irritation, lumbosacral strain from repetitive foot control use." (App. Pg. 18). Dr. Goehner's April 21, 2010 letter explicitly states that he had diagnosed a work related

injury "which caused stress to the muscles, ligaments, and joints of the low back and pelvis." (App. Pg. 22).

[87] Throughout, Dr. Goehner medical findings show a soft tissue injury—including loss of range of motion in the spine and muscle tenderness—and his treatment course of cold packs, interferential electric stimulation, and chiropractic adjustment are utilized for soft tissue injury. (App. Pg. 18-20).

[88] Linda Regan, PA-C, also diagnosed Mickelson with lumbar strain and right radiculopathy on January 5, 2010. (App. Pg. 23). Regan prescribed the recommended treatment for lumbar strain to the soft tissue, including a muscle relaxant and ice. *Id.* Physical therapist Schulz reported on January 15, 2010, that Mickelson was tender to palpation; the therapy included "modalities to decrease inflammation and pain," including ultrasound and manual therapy. (App. Pg. 26). These therapies, of course, are classically used to treat soft tissue injury.

[89] Rather than discuss the totality of the medical evidence supplied by Mickelson's treating providers, the ALJ simply assumes that Mickelson's pain is wholly attributable to his DDD. There is no medical opinion upon which to base that conclusion, and the ALJ's incorrect explanation why she did not give deference to the opinion of Mickelson's treating doctor as required by N.D.C.C. § 65-05-08.3(1) must be rejected.

[90] The statute provides that if WSI does not give an employee's treating doctor's opinion "controlling weight," it must "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record" based on the following:

a. The length of the treatment relationship and the frequency of examinations;

b. The nature and extent of the treatment relationship;

c. The amount of relevant evidence in support of the opinion;

d. How consistent the opinion is with the record as a whole;

e. Appearance of bias;

f. Whether the doctor specializes in the medical issues related to the opinion; and

g. Other relevant factors.

N.D.C.C. § 65-05-08.3(1).

[91] The treating physician rule thus recognizes not only consistency and specialty, but the amount of relevant medical evidence and the length of the treatment relationship, while recognizing the nationwide abuse of IME's, directing decision makers to take into account the appearance of bias.

[92] *Kralick v. District of Columbia Dept. of Employment Services*, 842 A.2d 705, 710 (D.C. 2004) explained that there is "the twofold rationale for our treating physician preference: As compared to a doctor retained solely for litigation purposes ... a treating physician was (1) less apt to be consciously or subconsciously biased by the litigation, and (2) more likely to be familiar with the patient's condition because he or she has typically spent a greater amount of time with the patient." See *Snyder v. San Francisco Feed & Grain,* 748 P.2d 924, 931 (Mont. 1987); ("[T]he testimony of a treating physician is entitled to greater evidentiary weight. ... Logic indicates that the treating physician will normally have had more contact with, and greater knowledge of, the injured worker. As a result, the treating physician should generally be in the best position to give an informed opinion.")

[93] Moreover, the treating physician rule simply strengthens the Court's long-standing instruction that as an administrative agency acting in a quasi-judicial capacity, WSI's primary mission is the "proper, fair, and just determination" of claims. *Steele v. North Dakota Workmen's Compensation Bureau*, 273 N.W.2d 692, 702 (N.D. 1978). While the claimant bears the burden of proof, WSI "should not place itself in a true or full adversary position to the claimant." *Id.* WSI is not free to arbitrarily pick and choose evidence to support its decision. *Negaard-Cooley v. North Dakota Workers Compensation Bureau,* 2000 ND 122, ¶19, 611 N.W.2d 898.

[94] Thus, even prior to the enactment of N.D.C.C. § 65-05-08.3, the Court had long held that WSI must provide reasoned explanations to justify its decisions, and explain why it did not credit evidence favorable to the claimant. "WSI must consider the entire record, clarify inconsistencies, and adequately explain its reasons for disregarding medical evidence favorable to the claimant." *Huwe v. Workforce Safety and Insurance*, 2008 ND 47, ¶ 10, 746 N.W.2d 158 (citations omitted).

[95] Because Dr. Peterson did not render an opinion whether Mickelson also sustained a soft tissue injury to the low back, and as there is no medical evidence contradicting Dr. Goehner's diagnosis of soft tissue injury, Mickelson's claim is compensable—even absent the statutory treating physician rule—for the acute period of recovery from the soft tissue injury, as in *Pleinis* and *Hein*. The ALJ's unreasoned failure to account for the treating doctor's clear diagnosis of soft tissue injury is alone grounds for reversal, both under the new statutory treating physician rule, and prior case-law requiring reasoned explanations for rejecting medical evidence favorable to the claimant.

III. Mickelson's Failure to Provide Notice to Gratech Within Seven Days of Injury is Explained, and is not an Independent Ground to Deny his Claim.

[96] The ALJ affirmed WSI's Administrative decision concluding that WSI "may consider" Mickelson's failure to notify the employer of the injury within seven days "in determining whether the claim is compensable under N.D.C.C. §§ 65-05-01.2 and 65-05-01.3. (CR 23, Conclusion of Law II). N.D.C.C. § 65-05-01.2 sets out the employer notice provision:

> When an employee is involved in an accident while on the job, the employee shall take steps immediately to notify the employer that the accident occurred and what is the general nature of the injury to the employee, if apparent. Notice may be either oral or written. The notice must be given to the employee's immediate supervisor or another supervisor authorized to receive notice. Absent good cause, notice may not be given later than seven days after the accident occurred or the general nature of the employee's injury became apparent.

N.D.C.C. § 65-05-01.2.

[97] N.D.C.C. § 65-05-01.3 provides an ambiguous consequence for failure to provide the employer with timely notice:

> If an employee fails to notify the employer of an accident and the general nature of the employee's injury, the organization may consider that failure to notify in determining whether the employee's injury is compensable.

N.D.C.C. § 65-05-01.2.

[98] Significantly, unlike N.D.C.C. § 65-05-01—which requires a claimant to file a workers' compensation claim within one year of injury, and divests WSI and the courts of subject matter jurisdiction if the claim is not timely filed with WSI—the employer notice provisions are not jurisdictional.

[99] The ALJ concludes that WSI may take Mickelson's failure to promptly notify Gatech of his repetitive injury into consideration in determining compensability. (App. Pg. 39, Conclusion of Law 4). The ALJ stated that Mickelson did not have good cause for the failure to provide notice because he was aware of his back and leg pain, and

personally attributed them to the work injury. (CR 86, Conclusion of Law 3). But, based on Mickelson's testimony, the ALJ also found as fact that he hadn't reported the August 2009 symptoms to his employer until December 2009 (when he filed his workers' compensation claim) "because he thought he was just sore because he was out of shape. He didn't realize [the injury and pain] was from repetitive motion."). (App. Pg. 33 Finding of Fact 2). The ALJ also found that Mickelson may have delayed notifying the employer so as not to jeopardize his relationship with his employer. (App. Pg. 37, Finding of Fact 21). The difficulty of ascertaining that a repetitive injury is work-related, and the desire not to harm the employment relationship—which the ALJ found as true—are logical reasons for failing to immediately notify the employer.

[100] Despite these factual findings, the ALJ concluded that WSI could properly take the delayed notification of the injury into consideration in determining whether Mickelson sustained a compensable injury. (App. Pg. 39, Conclusion of Law 4). Not only is this a bare conclusion not based on any relevant Finding of Fact, it is wholly unclear what it means, exactly, for WSI to take this delay into "consideration" in determining compensability.

[101] Mickelson's failure to provide immediate notice to the employer doesn't do anything whatsoever to detract from Mickelson's case that his claim is compensable. No fact is offered to suggest the contrary. It makes sense to take into consideration the employee's delayed notification of injury only where it bolsters an existing theory of the case as to why the claim is not compensable—as in a case where the history suggests that the injury actually happened while skiing, and the employee did not report the injury to his employer. Of course, compensation carriers have a colorful phrase to encapsulate this

sort of theory: the proverbial "Monday morning injury." In the case in which there were mutually competing theories as to how an accident happened, and doubt about the claimant's history of injury, application of N.D.C.C. §§ 65-05-01.2, 65-05-01.3 would at least make some sense. Their application here is a non sequitur.

Conclusion.

[102] For the reasons above stated, the Court should reverse the final Administrative decision of WSI dated November 7, 2010, and order benefits be paid to Mickelson.

Respectfully submitted this 19th day of September, 2011.

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CERTIFICATE OF COMPLIANCE

[103] The undersigned, as attorney for the appellant in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and that the total number of words, excluding words in the table of contents and table of authorities, does not exceed 10,500 words.

Dated this 19th day of September, 2011.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Mickelson, Claimant and Appellant -vs- Workforce Safety and Insurance, Appellee Gratech Company. Ltd., Respondent	)	**CERTIFICATE OF SERVICE** Supreme Ct. No. 20110232 McLean Co. No. 28-10-C-0232
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

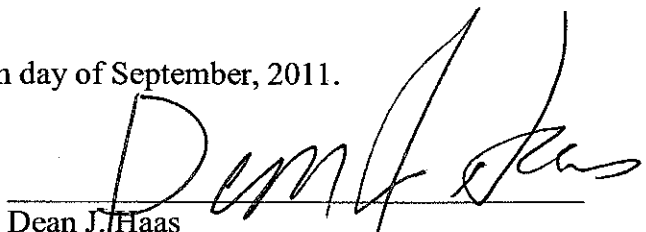
I, Dean J. Haas, hereby certify that on September 19, 2011, I served the APPELLANTS' BRIEF and APPELLANTS' APPENDIX upon the following by emailing a true and correct copy to the following email address:

Jacqueline S. Anderson janderson@nilleslaw.com	Al Schmidt – WSI Legal Department aaschmidt@nd.gov

and by mailing a true and correct copy to the following U.S. Mail address:

Gratech Company, Ltd.
8201 282nd Street NE
Berthold, ND 58718-9602

Dated this 19th day of September, 2011.



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