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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Beverly Fetzer,	)	
	)	
Appellant	)	
	)	
-vs-	)	
	)	Supreme Ct. No. 20110251
Workforce Safety and Insurance,	)	McLean Co. No. 28-2011-CV-00067
	)	
Appellee	)	
	)	

REPLY BRIEF OF APPELLANT

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Law and Argument

I. WSI erroneously applies increased (peculiar) risk reasoning to an unexplained fall—a neutral risk case.

[1] WSI misconstrues the causal requirement. WSI argues that the 'arising' element requires "something more than being on the employer's premises during an employee's working hours," contending that 'but for' reasoning "wipe[s] causation completely out of the law." (WSI Brief at ¶¶ 15, 28). WSI is simply wrong about the positional risk test—it does not wipe out the causal element—it actually serves as the majority view causal test. 1 Larson, Workers' Compensation Law, § 7.04[1][a], p. 7-24 (2007) ("[t]he particular injury would not have happened if the employee has not been engaged upon an employment errand at the time," thus "but-for reasoning satisfies the 'arising' requirement."). WSI used this common 'but for' reasoning in its own hearing brief. (See WSI Hearing Brief, p. 7, at CR 95).

[2] WSI denies using an increased (peculiar) risk test—that it is merely "requiring Fetzer to demonstrate a causal connection/relationship between her employment and injury." (WSI Brief at ¶ 30). But if WSI is not requiring a peculiar risk—one distinctly associated with the employment rather than a neutral risk—to satisfy the 'arising' test, then by definition it has accepted the positional risk theory. And unless WSI is advocating the peculiar risk test, why is its brief chock-full of authority expounding this very position?[1]

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[1] *See e.g*, two Illinois cases cited by WSI: *Financial Services v. Industrial Commission*, 853 N.E.2d 799 (Ill. App. Ct. 2006) ("a risk greater than that faced by the general public") (WSI Brief at ¶ 20); *Jones v. Industrial Commission*, 399 N.E.2d 1314, 1315 (Ill. 1980) (an injury arises out of the employment where the risk of injury "is peculiar to the work.") (WSI Brief at ¶ 20). *See also Chaparral Boats, Inc. v. Heath*, 606 S.E.2d 567, 571 (Ga. Ct. App. 2004), where the Court purported to accept 'but-for' (positional risk) reasoning, but used increased (peculiar) risk language. (WSI Brief at ¶ 22). The Court

[3] WSI is indeed asking the Court to apply the more stringent and unprincipled minority-view increased risk test, despite the statute's use of the standard 'arising' element. The Court has long expressed the 'arising' element in terms focusing on deviation analysis: the relevant inquiry is whether the injury was *incident to or contemplated by* employment. *Mitchell v. Sanborn*, 536 N.W.2d 678, 684 (N.D. 1995); *Westman v. North Dakota Workers Comp. Bureau,* 459 N.W.2d 540, 545 (N.D. 1990). This is entirely consistent with the majority 'arising' formulation: whether 'but for' the employment, would the claimant have been injured at that time and place? WSI wholly misrepresents *Mitchell*, stating "North Dakota [ ] requires a showing of a "causal connection" between the injury and employment, or a risk that is greater than that of the general public." (WSI Brief at ¶ 26, citing *Mitchell*, 536 N.W.2d at 684 n.4). In fact, this court has not applied the peculiar risk test.

[4] The Court's "incident to" language points out that deviation analysis is common to the many cases where the employee was clearly in the 'course' of employment, but there is some question as to the causal relationship. Professor Larson notes that the majority rule in personal comfort cases is thus the same as in horseplay: the focus is on whether there was a deviation. 2 Larson, § 21.05. In addressing horseplay, the *Mitchell* Court noted that compensability "is entitled to be judged according to the same standards of *extent and duration of deviation* that are accepted in other fields, such as resting, seeking *personal comfort,* or indulging in incidental personal errands." 536 N.W.2d at 685 (Emphasis added). The focus is on the 'course' element: an employee pausing to eat lunch on the

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said "the causative danger required to afford compensation must be '*peculiar to the work*' in a way that causally connects the employment to the injury." (Emphasis added).

employer's premises has not "taken a break from work," but should be treated as "continuing in the employment," rendering an injury sustained in that short pause compensable. *See Desautel v. North Dakota Workmen's Compensation Bureau*, 4 N.W.2d 581, 583 (N.D. 1942). The Court, quoting a New York case, held: "[s]uch acts as are necessary to the health, comfort, and convenience of the employee, while at work, though strictly personal to himself, and not acts of service and only remotely and indirectly conducive to the object of the employment, are incidental to the service." (Citation omitted).

[5] Fetzer's injury sustained as a result of a fall walking down her employee's hallway is no more a causal deviation from her work duty than engaging in horseplay, eating lunch, or attending to her personal comfort. The proper view of the arising test is indeed whether the fall somehow breaks the causal chain. North Dakota law uses the same terms of art as the other states, the majority of which find that the positional risk doctrine supports a compensation award to an employee injured as a result of a neutral risk (one not personal to the claimant). 1 Larson, §§ 7.01;7.04. There is no break in the causal chain simply because the fall that caused the employee's injury is unexplained.

[6] As Fetzer explained in her principal brief, there are a number of sound reasons to reject the peculiar risk test, which leads to an ever expanding search for ways to get to increased risk—as it has in weather and fall-from-a height cases. Larson observes that cases go from compensating for falls from several feet to a few inches; the awards or denials are dubiously based on "*factual matters of physics and physiology rather than of legal principle.*" 1 Larson § 9.01[4][d], p. 9-11 (Emphasis added). Moreover, determining whether the employee was exposed to an increased risk is problematic and inherently

subjective. (*See e.g., Brady v. Louis Ruffalo & Sons Construction Co.*, 578 N.E.2d 921 (Ill. 1991), cited in Fetzer's Principal Brief, at ¶ 37). Only the positional risk test can avoid gerrymandering as to the kinds of neutral risks that are compensated (e.g., terrorist attacks and tornados only) and further avoid drawing subjective distinctions regarding the heights, stresses, or emergencies that pose an 'increased risk' of injury. There is no reason to extend this unprincipled exercise to the neutral risk case; the increased risk doctrine should be confined to where it may be of use, in idiopathic (personal) risk cases. 1 Larson, § 9.01[1], p. 9-2; 1 Larson, § 9.01[4][b], pp. 9-7 & 9-8.

[7] WSI takes another stab at distinguishing hard cases like terrorist attacks, arguing that rejecting the positional risk test will not preclude compensation: "the attack on the World Trade Center on September 11th occurred because the place of employment was the target of the attack." (WSI Brief at ¶ 23). First, the 9-11 attack is the easy test case to award compensation under the increased risk test WSI advocates, as the World Trade Center was the target of a previous attack. What about less conspicuous targets, or random bombings meant to instill fear? North Dakotans may not be prone to this particular horrific risk, but our compensation system must be primed with the proper legal principles and avoid ad hoc decision making. Moreover, the increased risk in the case of high-profile building bombings is an accident of the location of the employment, not a risk of any duty associated with work. At root, 'but for' reasoning is the basic rationale for compensating anyone injured at work in a random act of violence. 'But for' reasoning establishes the causal nexus in a great variety of situations, from terrorism and random acts of violence by criminals or lunatics, animal attacks, and injuries sustained in weather events like tornados and lightning strikes. 1 Larson, § 7.04[1][a], p. 7-24; *see also* 1 Larson, § 7.02[1], p. 7-10.

[8] The positional risk doctrine correctly focuses on the 'course' element rather than the 'arising' element: but for the employment, the claimant would not have been injured at that time and place. *Id.* WSI imagines that Fetzer "could have suffered this injury when she fell while walking at home … any time and any place." (WSI Brief at ¶ 24). Imagining an alternative history can be great fun, but is a barren exercise—while the injury could have happened at home, it actually did happen at work. WSI's 'it could have happened anywhere' defense sounds suspiciously like fate.

II. Claimants suffering injury due to an unexplained fall at work are entitled to compensation under the same test as perpetrators of horseplay.

[9] Despite its struggles to do so, WSI simply cannot rationalize an award to perpetrators of horseplay, and not an innocent employee, walking down a hallway at work. The *Mitchell* Court observed the "momentary time" of the horseplay and that it happened at work justified an award, concluding that the perpetrator's act of horseplay was "commingled with his duties." 536 N.W.2d at 685. In rejecting the close correspondence between the *Mitchell* test to compensate the perpetrator of horseplay, and an individual sustaining an injury in an unexplained fall, WSI cites the ALJ: "it could just as well be argued that the court was focused on an *increased risk* of employment (horseplay) as satisfying the "arising out of" requirement, but the court didn't address that either." (Conclusion of Law 1, App. at 23). Of course, horseplay is never a job duty, and from the *perpetrator's perspective*, cannot be a risk associated with the employment itself. WSI's peculiar risk test could never justify an award to the horseplay perpetrator. Perpetrators of horseplay are entitled to compensation, *not because they pose an increased risk of injury to themselves*, but because the 'arising' element is satisfied so long as the act of horseplay was not a distinct departure from employment duty—so long as it was *commingled with work.* Larson notes that the

essence of the controversy for perpetrators of horseplay stems from the nature of his own conduct, which may or may not be called a departure from his employer's business. Thus, once it has been concluded that the horseplay activity itself is commingled with work duty rather than a departure from the course of employment, the arising out of employment issue "can usually be easily disposed of." 2 Larson § 23.07[1], p. 23-13. This analysis logically extends to neutral risk cases. The *Mitchell* Court accepted Larson's view of the horseplay test; the Court should also accept Larson's view in neutral risk cases. It will be difficult to explain to any claimant injured in a fall occasioned walking down her employer's hallway, that she would have been better off hurting herself as a result of playfully pushing a co-employee.

III. The 1977 legislative amendment adding the 'arising' element does not require rejection of the majority-rule Positional Risk theory.

[10] The legislature incorporated the standard 'arising' element into the definition of compensable injury in 1977. WSI contends that the *Mitchell* Court decided that the legislature intended to reject 'but-for' reasoning as the causal test. (WSI Brief at ¶ 29, 32). The contention is untenable, given that the Court held compensable an injury to a perpetrator of horseplay because the momentary act was not a distinct departure from his employment, but commingled with work duty. WSI argues that the 'arising' element was added because otherwise, injuries at work are automatically compensable, eviscerating the causal element. This is not true; injuries in the course of employment, but attributable to an employee's personal risk, or part of a distinct departure from work duty, are not compensable simply because they occurred at work.

[11] Rather than construing the 'arising' term consistent with other courts, WSI relies on vague and conflicting legislative history. (WSI Brief at ¶ 15). One part of the

legislative history observes that absent an 'arising' element, an injury is compensable if it occurs during the course of employment, and the employee is engaged in an activity whose purpose is related to the employment. 536 N.W.2d 678, 684 n.4. This language is a slim reed on which to rely to reject the positional risk doctrine. The *Mitchell* Court simultaneously held that the 'arising' element is satisfied if the employee was engaged in something incident to the employment—something commingled with his duty. *Id.* at 685. In both horseplay and neutral risk cases, the focus is on the course of employment element, because, as Larson notes, once the 'course' element is established, but for reasoning establishes the causal element, and the injury is compensable absent the confounding factor of a personal risk. 1 Larson, § 7.04[1][a], p. 7-24.

[12] Moreover, WSI doesn't place the legislative history in its full context. While WSI acknowledges that the amendment incorporating an 'arising' element was in response to a lower court holding compensable an injury sustained by an employee in an attack on the employer's premises, it minimizes the specific legislative history that the attack had been personally motivated, but merely happened to have occurred at work. (*See* WSI Brief at ¶¶ 15, 29). WSI interprets the legislative amendment much too broadly. The amendment incorporated the standard 'arising' element to ensure that injuries at work are not compensated when an employee is injured due to a personal risk—whether in an idiopathic fall, or a personally motivated assault. A statute containing the 'course' element alone had not proven sufficient to do that. The statute as amended is standard, and perfectly consistent with the 'but for' reasoning of the positional risk principle. It is unfortunate that WSI doesn't have an institutional memory of its own prior interpretations of the statute; nevertheless, WSI can't in good faith represent that its current interpretation is long-

standing.

[13] In keeping with the underlying compensation principles, the amendment is best read in the specific context under which it was represented to the legislature as justified—as response to the district court holding. WSI argues that Fetzer's fall should not be compensated, because, like an assault, could as easily happen elsewhere. But the circumstances of injury are not similar: Fetzer fall is unexplained, due to a neutral risk, not the personal risk that engendered the assault. And while it *is* speculation that Fetzer was fated to fall, whether at work or home, it is not so speculative to conclude that a personal grudge that had already resulting in one previous round of fighting, would recur.

Conclusion

[14] For the reasons above stated, and for those set forth in Fetzer's primary brief, the Court should reverse and remand for payment of benefits to which Fetzer is entitled.

Respectfully submitted this 3rd day of November, 2011.

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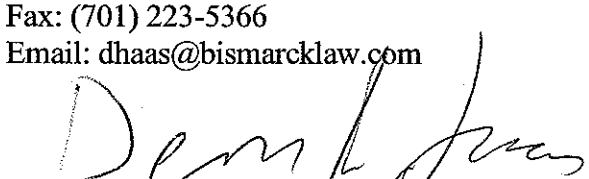

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CERTIFICATE OF COMPLIANCE

[15] 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 2,500 words.

Dated this 3rd day of November, 2011.

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I, Dean J. Haas, hereby certify that on November 3, 2011, I served the REPLY BRIEF OF APPELLANT upon the following by emailing a true and correct copy to the following email address:

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