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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Brenda Albright,	)	**Supreme Court Case No. 20120298**
	)	
Appellee,	)	
	)	
vs.	)	
	)	
North Dakota Workforce Safety And Insurance,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
Smurfit-Stone Container Corporation,	)	
	)	
Respondent.	)	

****

BRIEF OF APPELLEE

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APPEAL FROM MEMORANDUM OPINION AND ORDER DATED JUNE 7, 2012, AND ORDER FOR JUDGMENT DATED JUNE 19, 2012, AND JUDGMENT DATED JUNE 22, 2012
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE WICKHAM CORWIN

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TABLE OF CONTENTS

Page No.

Paragraph No.

TABLE OF AUTHORITIES

CASES **Paragraph No.**

STATUTES AND REGULATIONS

STATEMENT OF THE ISSUES

A. Did WSI establish that the opinions of Albright's treating doctors are not entitled to the statutory presumption of controlling weight under N.D.C.C. § 65-05-08.3?

B. Could a reasoning mind reasonably conclude Albright failed to prove either that her work was a substantial contributing factor to her degenerative disc disease or that her degenerative disc disease was substantially worsened by her work-related disc herniation of June 8, 2010?

STATEMENT OF THE CASE

[1] Brenda Albright ("Albright") suffered a work-related injury on June 8, 2010 while employed as a clamp truck operator by Smurfit-Stone Container Corporation ("Smurfit") in Fargo, North Dakota. C.R.[1] 1-2, 4. WSI determined that "WSI does indeed have liability for this work[-]related injury." C.R. 294. The WSI claims analyst noted that "[t]his incident is a L1 herniation." *Id.* However, WSI subsequently reversed its decision when the case was staffed with WSI's legal department "as [Smurfit] is quite unhappy on accepting this claim with [Albright's] extensive prior history for degenerative disc [disease]." *Id.*

[2] On October 15, 2010, WSI sent a "Notice of Decision Denying Benefits" stating that Albright's "claim for medical disability benefits is denied because [her] work injury was a trigger to [her] underlying condition." C.R. 10. Albright requested

[1] "C.R." refers to the Certificate of Record filed with the District Court on February 3, 2012 (Index #8), followed by the bates stamp page number of the referenced page number of the exhibit.

reconsideration on October 23, 2010 (C.R. 12-13) and WSI affirmed its denial on December 3, 2010. C.R. 14-22.

[3] On April 6, 2011, Albright timely made a "request for rehearing" from WSI's formal Order Denying Claim. C.R. 26-27. The case was assigned to ALJ John Allen ("ALJ") and the formal hearing was held on August 19, 2011. C.R. 31-33. ALJ Allen issued his "Findings of Fact, Conclusions of Law and Order" on November 1, 2011. C.R. 412-428. Albright then made a timely "Petition for Reconsideration" on November 10, 2011. C.R. 429-442. On December 7, 2011, ALJ Allen issued his "Reconsideration Order" denying Albright's Petition for Reconsideration. C.R. 447-452. A timely Notice of Appeal was then taken to District Court, Cass County, North Dakota, on January 5, 2012. C.R. 214-215.

[4] With her appeal, Albright filed "Specifications of Error," listing fifteen specific errors of fact and law by ALJ Allen and affirmatively stated that the court "must" award reasonable attorney's fees under N.D.C.C. § 28-32-50(1) because, *inter alia*, WSI "affirmatively refused to recognize its burden of persuasion under the 'treating doctor' statute (N.D.C.C. § 65-05-08.3)." App. 221.

[5] The District Court Judge Wickham Corwin issued a Memorandum Opinion on June 7, 2012 reversing the Final Order of ALJ Allen. App. 224-243. Specifically, the District Court found, *inter alia*, "Albright's employment was a substantial contributing factor to the development of any pre-existing disease[.]" App. 243. As a result, the District Court found Albright "is entitled to full benefits, retroactive to June 8, 2010." *Id.* Order for Judgment was entered on June 19, 2012 (App. 245) and Judgment was entered on June 22, 2012. App. 246. On June 25, 2012, WSI was served

with the Notice of Entry of Judgment. App. 247. WSI then filed its Notice of Appeal to this Court in Cass County District Court on July 24, 2012. App. 248.

STATEMENT OF THE FACTS

[6] The undeniable facts of this case, based upon the medical opinions of Brenda Alright's ("Albright") treating neurosurgeon, Dr. Mark Eichler, M.D., her physician's assistant, PA-C Heidi Olson-Fitzgerald, and her chiropractor, Dr. Kevin Paape, D.C., are that Albright's arduous physical work (primarily driving fork lift, being a clamp truck operator, and unloading rail cars and trucks) over the past nineteen years (*see* C.R. 4) substantially contributed to her underlying degenerative disc disease leading to the acute ". . . onset of the L1-L2 disc herniation [that] occurred while bending at work." C.R. 418 (ALJ Finding 24; quoting WSI's Medical Director, Dr. Peterson). Moreover, her preexisting disc disease, whether found work-related or not, was substantially worsened by the L1-L2 disc herniation that occurred on June 8, 2010.

[7] Albright's testimony regarding her strenuous nineteen years of labor at Smurfit-Stone Container Corporation is entirely supported by the written job descriptions created by her employer (C.R. 325-40). Specifically, Albright worked in the business of making "cardboard boxes" (C.R. 374; 17/22-24) at Smurfit for "over nineteen years" (C.R. 374; 18/13) and has not worked since she herniated her L1-L2 disc at work on June 8, 2010 (C.R. 4). To date, Albright has not been released by any of her medical providers to return to work since the L1-L2 disc herniation on June 8, 2010. C.R. 374; 18/4-8.

[8] At her hearing, Albright testified in detail as to the arduous physical labor she did while performing her various job duties at Smurfit over her nineteen years of employment. C.R. 374; 18-26. Her job duties at Smurfit included "Gluer/first helper"

(C.R. 325-27), "Taper/take off" (C.R. 328-30), "Forklift/driver" (C.R. 331-34), and "Clamp truck/driver, material handler" (C.R. 338-40). While Smurfit had a "light duty worker/injured worker" job description (C.R. 335-37), Albright was never placed in that "injury job, light" category. C.R. 374; 27/9-12.

[9] In her first job at Smurfit as a "gluer," Albright would lift "up to a hundred pounds" and frequently lift "30 to 60" pounds. C.R. 374; 20/1-3. In 1994 she began her "forklift job." C.R. 374; 22/7-9. She testified that the job description for the "forklift job" was "pretty much" an accurate description of her physical duties as a forklift operator. C.R. 374; 22/13-23 (*See* job description at C.R. 331-34). These duties included lifting "up to 55 to 60 pounds." C.R. 374; 22/24-25.

[10] Albright explained that she was "constantly" driving backwards (because of the load on the front of the forklift). C.R. 374; 23/16-23. Further, she explained that during her 8-hour shifts as a forklift operator, she would continually have to rotate at the trunk while looking back at approximately 180 degrees. C.R. 374; 23/25 through 24/2. She was exposed to frequent "jarring" while operating a forklift (which had no suspension) during "loading and unloading." C.R. 374; 24/13-25. She also explained that anytime things "were slow" she would have to stack boxes of up to "500 per bundle" if she wasn't "doing something" else like cleaning and vacuuming. C.R. 374; 26/12-19. In sum, there was "never a dull moment." *Id.*

[11] Most notably, Albright testified that she had conversations with each of her three primary medical providers regarding the specific tasks she performed at work:

Dr. Eichler (the neurosurgeon who performed surgery[2] on June 23, 2010) (C.R. 191 and 265), her physician's assistant, PA-C Olson-Fitzgerald, and her chiropractor, Dr. Paape. C.R. 374; 28/16-20. Albright further explained that she was **not** represented by an attorney when she "went in and talked to Dr. Paape about getting his opinion as to the cause and effect relationship between [her] activities at work at Smurfit and the condition of [her] back." C.R. 374; 89/7-17.

[12] When testifying about the pain caused by her work injury, Albright stated: "If I am sitting and not doing anything, it's not so bad, but when I get up and do anything, even just to stand and make supper or something, it shoots way up." C.R. 374; 44/17-21.

[13] When asked what "daily activities will spike your pain[,]" she responded: "Just anything. Everything. Walking. Taking a shower . . . trying to wash my feet will - - because I can't reach - - to bend and try and get to my feet - - I['ve] got to sit down[.]" C.R. 374; 48/17-23. "Just mostly anything" will "spike" her pain. *Id.*

[14] Finally, Albright testified that there was not "any question" in her "mind" that the June 8, 2010 incident where she herniated the disc in her back and compressed her nerve root, substantially caused the major problems she was having. C.R. 374; 87/22-25. Specifically, Albright answered: "Did it cause it? Of course it did." C.R. 374; 88/1. And Dr. Charles Burton, M.D., the medical evaluator hand-picked by WSI, agreed that the L1 nerve root involvement was the source of Albright's pain and disability. C.R. 274; 47/18 through 48/11. Dr. Burton also agreed that ". . . there is no evidence that she had a

[2] The surgery, as stated by neurosurgeon Eichler, was: "[A]n L1-2 facetectomy on the right for removal of the intraforaminal disc herniation and decompression of right L1 nerve root, and she underwent an L1-2 fusion and stabilization secondary to the complete facetectomy on the right." C.R. 265.

severe or even a significant radicular L1 nerve component to her condition prior to the disc herniation on June 8, 2010 . . . .” C.R. 374; 47/25 through 48/4.

[15] All three of Albright’s medical providers are in agreement that her nineteen years of strenuous work at Smurfit was a substantial contributing factor to her degenerative low back condition that resulted in the L1-L2 acute herniation on June 8, 2010. Most prominently, Albright’s treating neurosurgeon, Dr. Eichler, wrote in his October 8, 2010 letter to WSI that “her injury clearly did occur at work when she stood up after squatting” and it was “clearly the single event at work [that] led to her herniated disc.” C.R. 248. WSI’s independent medical examiner, Dr. Burton, also agrees that “the June 8, 2010 incident clearly resulted in an L1-L2 disc herniation on the right.” C.R. 276.

[16] Even WSI’s own medical director, Dr. Gregory Peterson, also acknowledged that “the onset of the L1 disc herniation . . . occurred while bending at work.” C.R. 7. Dr. Peterson went on to state that “[i]f one defines the ‘condition’ as L1 disc herniation rather than [degenerative disc disease], then I would not be able to demonstrate that specific condition as pre-existing.” C.R. 7-8.

[17] Moreover, it is clear that Albright’s work-related degenerative disc disease and subsequent work-related acute L1-L2 herniation are **not** mutually exclusive. As Dr. Eichler explained to WSI in his April 11, 2011 letter:

> I am writing this letter in support of her appeal for workers compensation claim 201-821399[sic]. The patient was found to have overall lumbar spondylosis with degenerative disc and facet disease and clearly this could be related to her work. **She does operate a forklift, and the continued jarring as well as twisting and bending is known to lead to degenerative disc disease**. She also had a clear acute disc herniation on the right side at L1-2 **probably related** to her overall degenerative disc disease which again is **most likely related to her repetitive activities at**

> **work**. In addition I explained to the patient that her previous workup of her lumbar spine and back pain by Dr. [sic] Olson-Fitzgerald and by Dr. Hutchison among others clearly showed significant lumbar spondylosis in the low back but not higher up in the lumbar spine. It is therefore possible this acute disc herniation on the right side at L1-2 was **entirely related** to twisting and bending in a **single episode** while at work. I am unclear as to why workers compensation does not feel that her overall injury is **related to her work activities**. It does seem fairly clear to me by reviewing her history that this was an acute event that occurred while she was working. If you have any other questions as to why I feel **Ms. Albright's herniated disc at L1-2 is directly related to a work injury** or why I believe that **her worsening lumbar spondylosis is also related to repetitive activities at work**, please feel free to contact me.

C.R. 265 (emphasis added).

[18] WSI failed to even consider that Albright's underlying "pre-existing condition" was in fact a compensable work-related injury, despite the medical opinion of Albright's medical providers. C.R. 260. WSI's denial was based **solely** upon the alleged existence of a non work-related "pre-existing condition" which WSI claimed was merely "triggered" by Albright's June 8, 2010 herniation. C.R. 10-11.

[19] PA-C Olson-Fitzgerald noted that "Ms. Albright . . . began having problems . . . that I believe are a consequence of hard work due to demanding physical activities required in the course of her work. She had worked for Smurfit Stone Container Corporation for just over 19 years and in the last 17 years driving fork truck, [working as a] clamp truck operator, and unloading rail cars and trucks." C.R. 260.

[20] Dr. Paape agreed with PA-C Olson-Fitzgerald's analysis and stated in a December 14, 2010 letter that:

> The type of activity Mrs. Albright performs during her normal daily work activities involve repetitive twisting, bending, as well as climbing on and off her clamp truck/forklift. There is also little to no suspension on her various forklifts that she drives, therefore frequent axial loading occurs with driving over bumps as well as over un-even surfaces.

> Knowing the work requirements for this individual to perform her normal daily activities, as well as the prolonged period of time she has worked as a forklift/clamp truck operator, multilevel degenerative disc disease is not only possible, but more often than not expected. It is expected [that] this individual [would] drive her forklift in reverse therefore twisting 180 degrees to watch where she is driving. This rotational stress along with the 18 years of operation of a forklift/clamp truck operator is **most likely** the cause of her degenerative disc disease within her lumbar spine.

C.R. 278 (emphasis added).

[21] The undisputed facts also demonstrate that Albright has been totally disabled – and entitled to disability benefits – since the acute herniation of her L1-L2 disc at work on June 8, 2010. Albright's treating medical providers have consistently placed her on "no work" restrictions. Specifically, Dr. Eichler imposed a "no work" restriction (on "C3" forms provided by WSI) on the following dates: June 18, 2010 (C.R. 190), July 30, 2010 (C.R. 230), August 18, 2010 (C.R. 237), September 17, 2010 (C.R. 245), October 25, 2010 (C.R. 254), and December 29, 2010 (C.R. 264). Similarly, PA-C Olson-Fitzgerald imposed a "no work" restriction on her "Capability Assessment" ("C3" form) dated July 8, 2010. C.R. 207. PA-C Olson-Fitzgerald also stated in a letter dated August 7, 2011 that, "[a]t this point her work restriction is unchanged." C.R. 343. PA-C Olson-Fitzgerald noted in April 2011 that Albright "continued to have problems with pain, stiffness, and mobility" and stating that Albright ". . . underwent radio frequency ablation on 7/31/2011, both right and left lumbar areas were addressed by Dr. Schrawny involving the 4th to 5th lumbar vertebrae and 5th lumbar to 1st sacral vertebrae." *Id.*

[22] Albright was awarded Social Security Disability benefits on June 4, 2011, with a stated onset date of June 8, 2010 (the date of the disc herniation). C.R. 315. Congress has defined "disability" as the "inability to engage in **any** substantial gainful activity by reason of any medically determinable physical or mental impairment which . .

. can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 432(d)(1) (emphasis added).

LAW AND ARGUMENT

I. Burden of Proof and Standard of Review on Appeal.

[23] Albright bears the burden of establishing her right to benefits from the Workers Compensation Fund. *Unser v. N.D. Workers Comp. Bureau*, 1999 ND 129, ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. This burden requires proof by a preponderance of the evidence that Albright is entitled to the benefits. *Reynolds v. N.D. Workmen's Comp. Bureau*, 328 N.W.2d 247 (N.D. 1982). Albright must prove that the medical condition for which benefits are sought is causally related to a work injury. *Manske v. Workforce Safety & Ins.*, 2008 ND 79, ¶ 9, 748 N.W.2d 394.

[24] Questions of law are fully reviewable on appeal from an administrative decision. *Tedford v. Workforce Safety & Ins.*, 2007 ND 142, ¶ 7, 738 N.W.2d 29. On appeal, the Court determines "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the **entire record**." *Landrum v. Workforce Safety & Ins.*, 2011 ND 108, ¶ 20, 798 N.W.2d 669 (emphasis added). Although this Court "review[s] the decision of the administrative agency, rather than that of the district court . . . **the district court's analysis is entitled to respect**." *Snyder v. N.D. Workers Comp. Bureau*, 2001 ND 38, ¶ 7, 622 N.W.2d 712 (emphasis added). Albright submits that Judge Corwin's reasoned analysis and opinion (App. 224) is in accord with the facts and law of this case and, indeed, is "entitled to respect." *Id.*

[25] The ALJ's Order cannot be affirmed if Albright proves **any** of the following:

> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the [Appellee].
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedures of the agency have not afforded the [Appellee] a fair hearing.
> 5. The Findings of Fact made by the agency are not supported by preponderance of the evidence.
> 6. The Conclusions of Law and Order of the agency are not supported by its Findings of Fact.
> 7. The Findings of Fact made by the agency do not sufficiently address the evidence presented to the agency by the [Appellee].
> 8. The Conclusions of Law and Order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[26] Here, the ALJ made numerous errors of law, most prominently ignoring WSI's statutorily-imposed burden of demonstrating that the opinions of Albright's treating doctors are not entitled to controlling weight. This and other errors of law serve to compound numerous factual findings that are unsupportable under the reasoning mind test. Any one of those legal and factual errors requires overturning ALJ Allen's decision (App. 174 and 208). The totality of the same command reversal and remand for award of the "benefits [s]he seeks." *Flink v. N.D. Workers Comp. Bureau*, 1998 ND 11, ¶ 19, 574 N.W.2d 784.

II. The ALJ erred in not affording the opinions of Albright's treating doctors controlling weight.

[27] Throughout the Findings of Fact, Conclusions of Law, and Order ("Order") (App. 174), the ALJ misapprehended and misapplied N.D.C.C. § 65-05-08.3. Specifically, The ALJ ignored the statutorily-imposed burden of persuasion which WSI

must meet before the opinions of Albright's treating doctors may be accorded less than controlling weight. *See* N.D.C.C. § 65-05-08.3 (Addendum A). Further, no reasoning mind could reasonably conclude that the opinions of Albright's treating doctors are inconsistent with other substantial evidence in the record. Thus, the District Court properly concluded that the opinions of Albright's doctors are entitled to controlling weight as a matter of law.

A. The ALJ ignored the statutory burden of persuasion which requires WSI to establish that the opinions of Albright's treating doctors should be accorded less than controlling weight.

[28] A treating doctor's opinion is presumed, by operation of statute, to have controlling weight. *See* N.D.C.C. § 65-05-08.3. Specifically, if WSI does not "give an injured employee's treating doctor's opinion controlling weight," it "**shall 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 [. . .][.]"[3] *Id.* (emphasis added). WSI must meet this burden "based on one or more of" several "factors[.]" *Id. See* discussion, *infra*.

[29] Here, WSI's burden of persuasion under the treating doctor statute is neither referenced nor analyzed in the ALJ's Findings of Fact, Conclusions of Law, and Order (App. 174-188) or the Reconsideration Order (App. 208-212). Indeed, the ALJ specifically demonstrated a misapprehension of the treating doctor statute when concluding that "none of [Albright's treating doctors'] education, training, and

[3] The ALJ's stated reason for according the opinions of Albright's treating doctors less than controlling weight was "because they were inconsistent with other substantial evidence in Albright's record[.]" App. 183. Thus, the ALJ apparently recognized, correctly, that the opinions of Albright's treating doctors are otherwise "well-supported by medically acceptable clinical and laboratory diagnostic techniques[.]" N.D.C.C. § 65-05-08.3.

experience was identified to indicate that **additional weight** should be **given** to their **testimony**[.]" App. 183 (emphasis added). This misapprehension is again demonstrated by the ALJ's conclusion that the opinions of Albright's treating doctors "were weakly worded and therefore, carried little weight." App. 187. These statements plainly demonstrate that the ALJ weighed the evidence as if N.D.C.C. § 65-05-08.3 were not a part of the Act.

[30] Very simply, it is not the ALJ's prerogative to withhold "additional weight" from the opinions of Albright's treating doctors. App. 183. Rather, these opinions, by operation of statute, are entitled to controlling weight unless and until WSI affirmatively establishes that they are "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3. The ALJ plainly required no such showing on the part of WSI.

[31] As a result, the ALJ specifically and erroneously concluded that "Albright failed to meet **her** burden of proof[]" because, in large, he simply found Burton's opinion "[. . .] more credible." App. 187 (emphasis added). Such a statement impermissibly confuses WSI's burden of establishing that a treating doctor's opinion is not entitled to controlling weight with Albright's ultimate burden of proving by a preponderance of the evidence that she suffered a compensable injury. *See* N.D.C.C. § 65-01-11. This impermissible burden shifting is an error of law. *See Paul v. N.D. Workers Comp. Bureau*, 2002 ND 96 ¶ 11, 644 N.W.2d 884 (finding an error of law where an ALJ "erroneously shifted the burden of proof" to an injured employee "to show there were no job opportunities.").

B. No reasoning mind could reasonably conclude that the opinions of Albright's treating doctors are inconsistent with other substantial evidence in Albright's record.

[32] No reasoning mind could reasonably conclude that the opinions of Albright's treating doctors are "not well-supported by the medically acceptable clinical and laboratory diagnostic techniques or [are] inconsistent with the other substantial evidence" in Albright's record. N.D.C.C. § 65-05-08.3. Because WSI did not meet this standard, the opinions of Albright's treating doctors are entitled to controlling weight.

[33] While the decision to accord a treating doctor's opinion less than controlling weight may also be "based on one or more" of various enumerated factors and "[o]ther relevant factors[,]" the threshold showing which must be met by WSI is establishing the opinions' inconsistency with other substantial evidence in the injured employee's record. *Id.* Here, no reasoning mind could reach such a conclusion.

[34] An analysis of the "eight (8) reasons" (Br. of Appellant at 15) cited by the ALJ for not according controlling weight to the opinions of Albright's doctors demonstrates that none of these reasons pertain to the issue of consistency with other substantial evidence:

- "(1)Neither Eichler nor Paape had been treating Albright since the beginning of when she started having low, lumbar back problems[.]" App. 182.

[35] The date on which Albright's treating doctors began treating her plainly has no bearing on whether their opinions are, as a factual matter, consistent or inconsistent with other substantial evidence. While an infrequent or brief treating relationship could, theoretically, result in an opinion that is inconsistent with other substantial evidence, the ALJ makes no findings of such inconsistency in this case. Thus, a bare statement regarding the length of Albright's treating relationship with her doctors

provides no support for the ALJ's finding that the opinion of Albright's treating doctors are "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3.

- "(2)There was no indication that either Eichler or Paape have reviewed the previous medical records of Albright[.]"App. 182.

[36] No reasoning mind could find that the above statement establishes or lends any support to a proposition that the opinions of Eichler or Paape are inconsistent with other the substantial evidence. Again, this flat assertion, unaccompanied by findings, plainly does not address the alleged inconsistency of the opinions of Albright's treating doctors with other substantial evidence of record. Certainly, a supposed failure to review previous medical records could, hypothetically, result in an opinion that is inconsistent with other substantial evidence. However, the ALJ fails to point to any such factual inconsistency here.

- "(3) None of the medical providers testified and subjected themselves to cross-examination[.]" App. 182.

[37] A reasoning mind could not conclude that a medical professional's lack of appearance at an administrative proceeding or deposition renders a medical opinion inconsistent with other substantial evidence of record. Inappositely, WSI cites to two cases which, in WSI's mind, stand for the proposition that failing to call one's "doctors to testify and provide further elaboration and support is a valid consideration in weighing the credibility of expert medical opinions." Br. of Appellant at 20 (citing *Aga v. Workforce Safety and Ins.*, 2006 ND 254, ¶¶ 14, 17, 725 N.W.2d 204. and *Bruder v. N.D. Workforce Safety and Ins.*, 2009 ND 23, ¶ 14, 761 N.W.2d 588). These cases are not instructive for varying reasons.

[38] First, the Court in *Bruder* upheld the ALJ's decision to discount the opinions of the claimant's doctors largely because they were "only one-page, conclusory statements that, in their opinion," the claimant's "employment was a substantial contributing factor to his back problems." *Bruder* at ¶ 14. Such rationale is not applicable to the detailed narratives supplied by the treating doctors in this case.

[39] Second, to the extent that *Aga* permits an ALJ to discount "written opinions" from a claimant's doctors where the claimant fails to provide "further elaboration and" does not call the doctors to "present testimony[,]" this holding preexists N.D.C.C. § 65-05-08.3, which makes no mention of what form treating doctor opinions must be in before being entitled to controlling weight. *Aga* at ¶ 17. As correctly found by the District Court, "'[t]he opinions of treating doctors are entitled to controlling weight regardless of whether they are expressed in writing or in the form of testimony." App. 240.

- "(4) None of the medical providers gave any details as to what facts they used to support their conclusions[.]" App. 182-183.

[40] Setting aside the factual matter that Albright's treating doctors obviously based their opinions on their treating relationship with her and all such a relationship entails, even an alleged failure to give details as to what facts are used to support conclusions does not necessarily make those conclusions "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3. At any rate, the ALJ makes no findings of the opinions' inconsistency in this case.

- "(5) Eichler's and Olson-Fitzgerald's opinion[s] are not strongly worded[.]" App. 183.

[41] A plainly worded letter is just as capable of being consistent with other substantial evidence as a "strongly worded" letter. No reasoning mind could find otherwise. Moreover, the ALJ's finding that the opinions are not "strongly worded" is simply unreasonable. *See* Statement of Facts, *supra*.

- "(6) None of the medical providers drew any connection between Albright's past **cervical** back issues and her current [lumbar] back issues[.]" App. 183 (emphasis added).

[42] Respectfully, whatever proposition this statement stands for, it is not that the opinions of Albright's treating doctors regarding her **lumbar** spine are "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3.

- "(7) None of their education, training and experience was identified to indicate that **additional weight** should be given their testimony[.]"App. 183 (emphasis added).

[43] First, no reasoning mind could find that "none" of Eichler's education, training and experience "was identified[.]" *Id.* Bountiful undisputed evidence throughout the record indicates that Eichler was educated as a medical doctor with training as a neurosurgeon whose experience includes, *inter alia*, performing surgery on Albright herself. *See, e.g.*, App. 179 (containing the ALJ's finding of fact that "Eichler performed surgery on Albright's low back.").

[44] Second, as a matter of law, the ALJ is not permitted to withhold "additional weight" from these opinions merely because he may not be satisfied with the extent of the information divulged about the education, training, and experience of Albright's treating doctors. App. 183. Rather, these opinions are entitled to controlling

weight unless WSI shows, in this case, that they are inconsistent with other substantial evidence. *See* discussion, *supra*.

- "(8) Their opinions are not supported by the record as a whole." App. 183.

[45] Here, the ALJ essentially concludes that "Eichler, Olson-Fitzgerald, and Paape's opinions are not consistent with the other substantial evidence in Albright's medical records because[,]" *ipso facto*, their "opinions are not supported by the record as a whole." App. 182-183. Once more, the ALJ makes no findings with regard to the manner in which the alleged lack of support in the record "establish[es]" the opinions' inconsistency with the "other substantial evidence in the injured employee's record." N.D.C.C. § 65-05-08.3.

[46] The failure by the ALJ to substantiate the above statements violates the directive that WSI "must consider the entire record, clarify inconsistencies, and adequately explain its reason for disregarding medical evidence favorable to the worker." *Spangler v. N.D. Workers Compensation Bureau*, 519 N.W.2d 576, 577 (1994). When a proper analysis of the enumerated factors set forth in N.D.C.C. § 65-05-08.3 and other relevant factors is undertaken, no reasoning mind could reasonably conclude that the opinions of Albright's treating doctors, especially the opinion of neurosurgeon Eichler,[4] are inconsistent with other substantial evidence in the record:

- "The length of the treatment relationship and the frequency of examinations[.]" N.D.C.C. § 65-05-08.3(1)(a).

[47] No reasoning mind could conclude that the "length of the treatment relationship and the frequency of examinations[]" renders Eichler's opinion at all

[4] Eichler's opinion, if properly afforded controlling weight, is dispositive in demonstrating that Albright suffered a compensable injury, even without consideration of the other favorable opinions of Paape and Olson-Fitzgerald.

inconsistent with other substantial evidence of record. App. 183. In fact, the ALJ makes no specific findings in support of this conclusion. *Id.* Rather, the evidence demonstrates a longstanding treating relationship between Eichler and Albright with frequent examinations and surgery related to the work-related injury at issue in this case. *See* C.R. 92-94, 98-100, 103-05, 113-16, 117-19, 129-31, 141-54 (operative report), 161-62, 164-65, 185-90, 194-203, 210-13, 214-20 (operative report), 227-30, 234-37, 242-45, 250-54, 261-65.

[48] Specifically, Eichler began treating Albright in 2007. *See* App at. 177 (containing the ALJ's finding that "[o]n October 29, 2007, Albright treated with Dr. Marc E. Eichler [. . .] for neck pain as well as low back pain."). Eichler, by any objective measure, also frequently examined Albright both before and after the neurosurgical intervention he performed following her work-related injury in 2010. *See* App at 177 – 81 (noting the ALJ's findings of numerous visits with Eichler in 2010). Thus, no reasoning mind could reasonably find that the length of the treatment relationship and frequency of examinations in this case renders Eichler's opinion "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3.

- "The nature and extent of the treatment relationship[.]" N.D.C.C. § 65-05-08.3(1)(b).

[49] The nature and extent of Albright's relationship with Eichler demonstrates that his opinion is entitled to the statutory presumption of controlling weight. Eichler is, indisputably, a board certified neurosurgeon who "performed surgery on Albright's low back." App. 179. As poignantly stated by the District Court "Eichler once held in his hands the L1-2 disc material" that reviewing doctors have "only read about." App. 238. No reasoning mind could conclude that the nature and extent of Albright's treatment

relationship with Eichler does anything but strengthen his opinion about the work-related nature of Albright's condition.

- "The amount of relevant evidence in support of the opinion[.]" N.D.C.C. § 65-05-08.3(1)(c).

[50] The amount of relevant evidence in support of Eichler's opinion includes all medical records related to his treatment of Albright from 2007 to 2010, including those related to the surgery he performed on the work-related back injury at issue in this case. *See generally* App. 177-80. Again, the ALJ makes no findings to substantiate his conclusion that the amount of relevant evidence in support of Eichler's opinion somehow makes his opinion inconsistent with the other substantial evidence of record.

- "How consistent the opinion is with the record as a whole[.]" N.D.C.C. § 65-05-08.3(1)(d).

[51] Once again, the ALJ makes no specific findings which tend to support the conclusion that the opinions of Eichler and Albright's other treating doctors are not consistent with "the record **as a whole**[.]" N.D.C.C. § 65-05-08.3(1)(d) (emphasis added). To the contrary, the only conclusion capable of being reasonably reached by a reasoning mind is that of the District Court, which concluded the opinions of Albright's treating doctors are entitled to the statutory presumption of controlling weight since they are "both well supported and completely consistent with the balance of the record." App. 238.

[52] Indeed, the overwhelming evidence demonstrates that Albright had a preexisting lumbar spine disease, substantially contributed to by her work activities, which resulted in an acute herniated disc as a result of the work incident of June 8, 2010. As properly noted by the District Court, "Burton, the expert retained by WSI to testify on

its behalf, was the only expert to challenge the conclusion that Albright's work substantially contributed to her degenerative disc disease." App. 234. No reasoning mind could find that an inconsistency between Albright's treating doctors' opinions and that of a solitary reviewing doctor hired by WSI makes these opinions any less consistent "with the record **as a whole**[.]" N.D.C.C. § 65-05-08.3(1)(d) (emphasis added). Indeed, the ALJ's finding subverts the very purpose of the statutory presumption providing controlling weight to the opinions of treating doctors.

- "Appearance of bias[.]" N.D.C.C. § 65-05-08.3(1)(e).

[53] Bias on the part of Eichler and Albright's treating doctors was neither argued by WSI nor discussed by the ALJ. Thus, no reasoning mind could find that this factor assists WSI in establishing that the opinions of Albright's treating doctors are inconsistent with the other substantial evidence in the record.

- "Whether the doctor specializes in the medical issues related to the opinion[.]" N.D.C.C. § 65-05-08.3(1)(f).

[54] With regard to Eichler, the neurosurgeon, no reasoning mind could reasonably find that he is anything but a specialist in the medical issues related to Albright's back injury for which he has provided treatment, including surgery. Thus, this factor lends no support to WSI in establishing that Eichler's opinion is not entitled to the statutory presumption of controlling weight.

- "Other relevant factors[.]" N.D.C.C. § 65-05-08.3(1)(g).

[55] Apart from the "eight (8) reasons" cited by the ALJ when erroneously dismissing the opinions of Albright's treating doctors discussed *supra*, the ALJ alludes to several other grounds for failing to afford these opinions controlling weight. Br. of Appellant at 15. Because these grounds are either not "relevant factors" or factually

unsupportable, or both, they fail to establish that the opinions of Albright's treating doctors are inconsistent with other substantial evidence of record. N.D.C.C. § 65-05-08.3(1)(g).

[56] First, the ALJ alleges that Eichler's "opinions only indicated possibilities" and that his "original opinion of October 8, 2010 was severely weakened when he issued a letter on April 11, 2011." App. 185. No reasoning mind could reach such a conclusion. Plainly and fairly read, Eichler was entirely clear and consistent in opining that Albright had suffered a compensable injury: 1) Albright had a degenerative spine condition that pre-existed the June 8, 2010 disc herniation (*see* App. 185); 2) her underlying spondylotic changes in her lumbar spine put her at increased risk for a herniated disc (*id.*); and, as acknowledged by the ALJ, 3) Albright's "acute disc herniation **probably is related to** her overall disc disease which is **most likely related** to her repetitive activities at work." *Id.* (emphasis of the ALJ). Thus, as cogently stated by the District Court, "[t]he only 'possibility' referenced in the second letter [from Eichler] is the potential for a purely acute herniation that entirely resulted from 'a single episode at work.'" App. 236. Of course, Albright's injury is compensable if she **either** suffered an "acute disc herniation" at work on June 8, 2010 (*id.*) **or** if her work was a "substantial contributing factor" to her degenerative disc "disease." *McDaniel v. N.D. Workers Comp. Bureau*, 1997 ND 154 ¶ 12, 567 N.W.2d 833. *See also Holtz v. N.D. Workers Comp. Bureau*, 479 N.W.2d 469, 471 (N.D. 1992). No reasoning mind could find that Eichler's opinions "only indicated possibilities" with regard to whether Albright suffered a compensable injury under North Dakota law. App. 185.

[57] Relatedly, the ALJ improperly discounted the opinions of Albright's treating doctors in favor of Burton's because "his opinion was based upon a reasonable degree of medical certainty while Eichler's, Olson-Fitzgerald's and Paape's makes no such claim[.]" App. at 183. This is an error of law. This Court has "recognized that a medical opinion expressed in terms of reasonable probability suffices." *Kunnanz v. Edge*, 515 N.W.2d 167, 172-173 (N.D. 1994) (discussing the admissibility of expert medical testimony). "A medical expert's testimony need not be couched in the magic words 'reasonable degree of medical certainty or a reasonable probability.'" *Shahan v. Hilker*, 241 Neb. 482, 488 N.W.2d 577, 580 (1992) (cited with approval in *Kunnanz*, 515 N.W.2d at 173) (internal quotations omitted). While WSI appears to somehow take issue with the District Court's alleged "characterize[ation]" of Burton as a "professional witness[,]" the lower court concludes correctly as a matter of law that his phraseology "does nothing to add to the weight of his opinions." Br. of Appellant at 18 (quoting App. 239). The ALJ's dismissal of the opinions of Albright's doctors for failure to include the "magic words" is unsupportable as a matter of law. *Shahan*, 488 N.W.2d at 580.

[58] Furthermore, no reasoning mind could conclude that "Olson-Fitzgerald's opinion about causation was **different** from Eichler's original opinion of October 8, 2010[.]" App. 185. (emphasis added). As properly recognized by the ALJ, Eichler candidly "agreed that Albright's underlying spondylotic changes in her lumbar spine did put her at increased risk for [a] herniated disc, however, her injury clearly did occur at work when she stood up after squatting." *Id.* While Eichler, at that time, did not specifically address what he would later clearly characterize as the work-related nature of Albright's preexisting lumbar spine condition, this does not make his opinion "different"

from Olson-Fitzgerald's regarding causation. *Id.* Indeed, Olson-Fitzgerald's opinion is remarkably similar in concluding that Albright's "degenerative process . . . places her at risk for exacerbating injuries." App. 186 (internal quotations omitted).

[59] Next, the ALJ outlines five "concerns" with the opinion of Albright's treating chiropractor, Dr. Paape. Id. Of course, this opinion is supplementary to the dispositive opinion of Eichler and the ALJ's concerns are therefore moot if Eichler's opinion is properly afforded the statutory presumption of controlling weight. Taking Paape's opinion alone, however, the reasons stated by the ALJ fail to establish or lend any reasonable support to a finding that Paape's opinion is "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3(1). Indeed, instead of documenting how WSI "establish[ed]" the inconsistency of Paape's opinion with other substantial evidence, the ALJ actually demonstrates the consistency of this opinion. N.D.C.C. § 65-05-08.3. Specifically, the ALJ concluded that Paape "showed assurance" in opining, as Albright's other treating doctors did, that her "operation of the forklift / clamp truck operator was most likely the cause of her degenerative disc disease within her lumber [sic] spine." App. 186. Further, the ALJ's statement that "there was no testimony of [Paape's] education, training, or experience that would show why his opinion should be given **more weight**" again makes clear that the ALJ merely weighed the evidence as if N.D.C.C. § 65-05-08.3 did not exist. App. 186. The ALJ's "concerns" (*id.*) with Paape's opinion are therefore not "relevant factors" on which a decision to discount an opinion of a treating doctor can be based. N.D.C.C. § 65-05-08.3(1)(g).

[60] In arguing the ALJ properly applied N.D.C.C. § 65-05-08.3, WSI has latched on to the District Court's statement that "the reasons ALJ Allen stated for not

giving these opinions controlling weight did not 'provide the compelling justification required.'" Br. of Appellant at 15 (quoting the District Court's opinion at App. 237-238). At worst, such a statement is harmless *dicta*. Most likely, the "compelling justification" (*id.*) reference is shorthand for the statutory requirement imposed upon WSI to "establish" that a treating doctor's opinion is not entitled to controlling weight. N.D.C.C. § 65-05-08.3. The law indeed requires a compelling justification for discounting such opinions: That WSI "shall establish" these opinions are inconsistent with other substantial evidence of record. *Id.* Again, such a showing was neither required by the ALJ nor made by WSI.

[61] Relatedly, WSI has no valid foundation for its claim that the District Court "reweighed" the credibility of Dr. Burton's medical opinion. Appellant's Br. at 17. By any fair measure, the District Court merely recognized, as a matter of law, what the ALJ entirely failed to account for: That the opinions of treating doctors 'should be given controlling weight,' and can only be rejected if [WSI establishes] they are not 'well supported' by or are otherwise inconsistent with 'substantial evidence' in the employee's file." App. 237-38 (quoting N.D.C.C. § 65-05-08.3(1)). Under this statutory directive, some consideration of "the opinions offered by the treatment providers in this case" (*id.*) is obviously needed to determine whether WSI has met its burden of establishing that the opinion of Albright's treating doctors are "inconsistent with the other substantial evidence in the injured employee's record[.]" N.D.C.C. § 65-05-08.3. Here, the District Court concluded "the opinions offered by the treatment providers in this case are both well supported and completely consistent with the balance of the record." App. 238. WSI apparently concedes that the District Court did so under the appropriate standard of

review. *See* Br. of Appellant at 18 (summarizing the District Court's finding "that no reasoning mind could reject the opinions of Albright's medical providers [. . .]") This is not a factual "reweighing [of] the credibility of the medical opinions," but rather a proper legal analysis of these opinions under the framework of N.D.C.C. § 65-05-08.3.

[62] WSI also accuses the District Court of relying "on information outside of the hearing record, specifically the testimony in support of N.D.C.C. § 65-05-08.3(1)." Appellant's Br. at 18. There can be no reasonable dispute that a court is entitled to look to legislative history when interpreting a statute. *See* N.D.C.C. § 1-02-39. *Cf. Kallhoff v. N.D. Workers Comp. Bureau*, 484 N.W.2d 510, 514 (N.D.1992) (discussing the Court's reluctance to interpret a statute to interfere with an injured worker's expectation since such a result is "something the legislative history suggests the legislature wanted to avoid.").

[63] No reasoning mind could find the factors enumerated under N.D.C.C. § 65-05-08.3(1) (or the other reasons given by the ALJ) when fairly examined, provide any assistance to WSI in establishing that the opinions of Albright's treating doctors are inconsistent with other substantial evidence of record. Thus, Eichler's opinion, and the consistent opinions of Albright's other medical providers, are entitled to "controlling weight[.]" N.D.C.C. § 65-05-08.3(1). When the requirements of N.D.C.C. § 65-05-08.3 are properly respected and the opinions of Albright's treating physicians are afforded controlling weight as provided by statute, no reasoning mind could conclude, as the ALJ did, that "Albright failed to meet her burden of proof." App. 187.

III. N.D.C.C. § 65-05-08.3 is neither a codification of existing case law nor does any administrative rule apply to this case.

[64] WSI has previously argued that N.D.C.C. § 65-05-08.3 "simply codifies existing case law[,]" meaning the agency is not required "to give a treating doctor's opinion controlling weight, but if it doesn't it needs to explain why." App. 204. This interpretation cannot be squared with a plain reading of the statute.

[65] WSI 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" if it does not "give an injured employee's treating doctor's opinion controlling weight[.]" N.D.C.C. § 65-05-08.3 (emphasis added). This statutorily-imposed burden of persuasion adds to the holding of the case cited by WSI, which requires WSI to "consider the entire record, clarify inconsistencies, and adequately **explain** its reasons for disregarding medical evidence favorable to the claimant." *Barnes v. Workforce Safety and Ins.*, 2003 ND 141 ¶ 20, 668 N.W.2d 290 (emphasis added). With the enactment of N.D.C.C. § 65-05-08.3, it is no longer enough for WSI to merely "explain" why a treating doctor's opinion is disregarded. *Barnes* at ¶ 20. Rather, WSI must now affirmatively "establish" that a treating doctor's opinion is not entitled to the statutory presumption of controlling weight. N.D.C.C. § 65-05-08.3(1). For all the reasons discussed *supra*, WSI was neither required by the ALJ to make, nor made, such a showing.

[66] While WSI has recently promulgated a rule directing "a hearing officer" to "affirm the organization's determination whether to give a treating doctor's opinion controlling weight under . . . section 65-05-08.3 if a reasoning mind could have decided that the organization's determination was supported by the greater weight of the evidence from the entire record[,]" this administrative rule was not in effect at the time of

Albright's hearing. *See* N.D. Admin. Code § 92-01-02-02.4 (noting an effective date of April 1, 2012). Thus, the rule is inapposite to this case and there is no need to inquire whether the rule is "entitled to deference in the courts[.]" *Sloan v. N.D. Workforce Safety and Ins.*, 2011 ND 194, ¶ 12, 804 N.W.2d 184.

[67] Even if the rule were applicable, it is "void" since it "conflicts with the statute it implements." *North Dakota Dept. of Human Services v. Ryan*, 2003 ND 196, ¶ 10, 672 N.W. 2d 649. The rule plainly "limits[] the statute being administered" by restricting its application at the hearing level, impermissibly allowing WSI to dismiss the opinion of a treating physician at the initial steps of the claims process, and forcing a claimant to rebut this determination at a hearing under the reasoning mind test. *Moore v. N.D. Workmen's Comp. Bureau*, 374 N.W.2d 71, 74 (N.D. 1985). Under this rule, no longer would WSI be required to "establish" that a treating doctor's opinion is not entitled to controlling weight. N.D.C.C. § 65-05-08.3. Rather, the injured worker would be required to establish, under an extraordinarily strict standard of review, that WSI's determination to disregard the opinion of his or her treating doctor is entitled to controlling weight. The rule "alters" and is entirely "out of harmony with" N.D.C.C. § 65-05-08.3 and is therefore void. *Id.*

IV. No reasoning mind could reasonably conclude that Albright failed to prove she suffered a compensable injury.

[68] Alternatively, even if the opinions of Albright's treating doctors were somehow not entitled to controlling weight by operation of statute, the ALJ's unsupportable findings of fact demonstrate that no reasoning mind could reasonably conclude Albright failed to prove she suffered a compensable injury. Further, ALJ

Allen's numerous errors of law are inseparable from and compound these unfounded findings of fact.

[69] "[T]he weight of the evidence from the entire record[,]" when properly considered, demonstrates that no reasoning mind could reasonably conclude Albright failed to prove she has **either** a cumulative lower back injury substantially contributed to by her years of arduous labor **or** an acute work related disc herniation which substantially worsened this condition. *Landrum* at ¶ 20. Indeed, she has proved beyond dispute that she suffered both.

A. Albright proved the nature of her work was a substantial contributing factor to her preexisting degenerative disc disease.

[70] As summarized by the District Court, "it was reasonable for the ALJ to conclude Albright had preexisting degenerative disc disease in her lumbar spine, but Albright clearly proved the unique loads and stresses incident to her work were at least a substantial contributing factor to the development of this pathology." App. 242.

[71] Albright's injury is compensable if she proves that her work was a "substantial contributing factor" to her degenerative disc "disease." *McDaniel* at ¶ 12. Here, no "reasoning mind reasonably could have determined that the factual conclusions reached" by the ALJ in finding that Albright's work was not a substantial contributing factor to her degenerative disc disease "were proved by the weight of the evidence from the **entire record**." *Landrum* at ¶ 20 (emphasis added).

[72] First and quite strikingly, the ALJ rejects the opinion of Paape, who concluded that Albright's work was a substantial contributing factor to her degenerative disc disease, reasoning, *inter alia*, that "without testifying, we do not know what work duties he opined caused or contributed to Albright's [degenerative disc disease] and it

was unknown exactly what information he understood was [sic] Albright's job duties." App. 186. Such a statement impermissibly disregards "Albright's undisputed testimony" that "she discussed her job, and all it entailed, with Eichler, Paape, and Olson-Fitzgerald." App. 234. The failure of the ALJ to consider Albright's testimony is an abdication of the ALJ's duty to consider the entire record, sufficiently address the evidence, and adequately explain the reasons for disregarding the evidence presented by Albright. *See* N.D.C.C. § 28-32-46(7); *Elshaug v. Workforce Safety & Ins.*, 2003 ND 177, ¶ 11, 671 N.W.2d 784.

[73] Second, given the weaknesses in Burton's opinion (identified by the ALJ himself) no reasoning mind could reasonably conclude that Burton's stand-alone opinion, made after a paper review of the medical evidence and with only a layman's cursory knowledge of Albright's work duties, serves to rebut the formal opinions of three treating medical providers which hold that Albright's work conditions substantially contributed to her degenerative disc disease. Specifically, the ALJ candidly acknowledges multiple "weaknesses in Burton's opinion:" 1) that Burton "performed only a records review and was not able to discuss Albright's condition with her[;]" and 2) "he opined that driving a forklift would not cause the condition." App. 187. The ALJ also rightly notes that Burton never "inquired as to what those job duties were and how often they occurred, before **simply dismissing them outright** and simply stating that [degenerative disc disease] was primarily related to genomic or hereditary factors." *Id.* (emphasis added).

[74] The unreliability of Burton's testimony in this regard was observed not only by the ALJ, but also by the District Court. App. 235. As noted by the lower court, Burton himself opined "it is well recognized that occupational duties have a significant

relationship to diseases of the spine, and it is **extremely important** for individual's [sic] orthopedists and neurosurgeons that treat spine disease to have a **very good understanding** of these factors far beyond what a layman would have." *Id.* (internal quotations omitted, emphasis supplied by the District Court). "Nonetheless," found the District Court, "when it came time to testify in this case, Burton was willing to exclude a relationship between Albright's occupational duties and her spine disease, without any understanding of the work in question." *Id.*

[75] It is therefore objectively stunning that the ALJ rejected the opinions of all of Albright's medical providers. All were familiar with Albright's "job, and all it entailed[]" and they unanimously concluded that Albright's work duties were at least a substantial contributing factor to her degenerative disc disease. App. 234. Instead, the ALJ adopted the opinion of Burton, who "never inquired as to what" Albright's "job duties were and how often they occurred, before simply dismissing them outright and simply stating that [degenerative disc disease] was primarily related to genomic or hereditary factors." App. 187 (quoting the ALJ).

[76] Given the ALJ's own findings regarding the weaknesses of Burton's opinion, especially when weighed against the unanimous opinions of Albright's treating medical providers, no "reasoning mind reasonably could have determined that" Albright's work was not a substantial contributing factor to her degenerative disc disease based on "the weight of the evidence from the **entire record**." *Landrum* at ¶ 20 (emphasis added).

[77] Respectfully, if the reasoning mind test is to have any meaning apart from acting as a total bar to appellants who seek to challenge the findings of an ALJ, this Court

must respectfully conclude, as the District Court did, that Albright "clearly proved the unique loads and stresses incident to her work were at least a substantial contributing factor to the development of this pathology." App. 242.

B. No reasoning mind could reasonably conclude that Albright's preexisting degenerative disc disease failed to be substantially accelerated or substantially worsened by the L1-L2 disc herniation that occurred on June 8, 2010.

[78] The District Court also properly concluded that "the record clearly establishes that the L1-2 disc herniation / compression was an acute event that occurred at work on June 8, 2010, which substantially accelerated the progression, or worsened the severity, of any preexisting disease[.]" App. 242. No reasoning mind could conclude otherwise.

[79] "Injuries attributable to a preexisting injury, disease, or other condition," are not compensable "unless the employment substantially accelerates its progression or substantially worsens its severity." N.D.C.C. § 65-01-02(10)(b)(7). This Court recently clarified the meaning of this statutory language, noting that "injuries attributable to a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition." *Mickelson v. N.D. Workforce Safety & Ins.*, 2012 ND 164, ¶ 20.

[80] Here, as properly found by the District Court, "[t]he medical experts seemingly unite in the conclusion that some level of degeneration was likely present before June 8, 2010." App. 233. Prior to her June 8, 2010 work injury, however, "there is

no indication any disease that may have existed in Albright's L1-2 disc was symptomatic." App. 236. Indeed, the ALJ correctly cites the unequivocal and unambiguous statement from Burton regarding Albright's L1-L2 disc herniation, "that the June 8, 2010 incident clearly resulted in the L1-L2 disc herniation on the right." App. 180-181.

[81] Notably, as discussed by the lower court, "two WSI staff physicians ([Drs.] Peterson and Vilella) concurred with the only reasonable conclusion the[] undisputed facts support[,]" namely that "[t]he events of June 8, 2010, resulted in an acute and severe disc herniation / nerve compression [. . .][.]" App. 237. *See also* App. 179 (discussing Peterson's conclusion that "the onset of the L1 disc herniation [. . .] occurred while bending at work.").[5] Of course, Eichler was also of the same mind, finding that "her injury clearly did occur at work when she stood up after squatting." App. 181. In addition to this unanimity amongst the physicians of record, the L1-L2 disc herniation, according to Albright's undisputed testimony, also caused her "to experience the most 'ungodly' pain she had ever felt." App. 236. Indeed, even Burton agreed the L1 nerve root involvement was the source of Albright's ongoing pain and disability. CR 344; 47:18 through 48:11.

[82] Thus, under the clarification provided in *Mickelson*, no reasoning mind could reasonably find that Albright's work-related L1-L2 disc herniation on June 8, 2010

[5] The ALJ erroneously concluded "[t]here were essentially four medical opinions of relevance (not counting Peterson's) in this case[.]" App. at 184. There is no basis to declare Peterson's opinion not to be relevant. Very simply, the ALJ is not permitted "to pick and choose in an unreasoned manner" from the medical evidence. *See, e.g., Boger v. North Dakota Workers' Comp. Bureau*, 1999 ND 192, ¶ 11, 600 N.W.2d 877. The ALJ's out-of-hand dismissal of the opinion of Peterson is an error of law that serves only to compound his unsupportable findings of fact in this case.

"in some real, true, important, or essential way" failed to make Albright's preexisting degenerative disc disease "more unfavorable, difficult, unpleasant, or painful[.]" *Mickelson* at ¶ 20. Likewise, no reasoning mind could conclude that a "clear[] . . . L1-L2 disc herniation" (App. 180-181) is merely a "symptom[]" of Albright's preexisting degenerative disc disease that was "trigger[ed]" by her employment. N.D.C.C. § 65-01-02(10)(b)(7). Plainly, Albright's disc herniation was a "substantial[] worsen[ing]" of a preexisting injury if there ever was one. *Id.*

[83] WSI has erroneously argued that "ALJ Allen was presented with a variety of conflicting medical opinions on whether Albright's L1-2 disc herniation was causally related to her work activities." Br. of Appellant at 12. As demonstrated above, there is absolutely **no** support in the factual record for this statement. Rather, the opinions of treating neurosurgeon Eichler, WSI physicians Vilella and Peterson, and that of Burton himself are in complete accord with one another regarding the L1-L2 disc herniation experienced by Albright at work on June 8, 2010. *See* discussion, *supra*. Any reasoning mind would most reasonably conclude, as the District Court did, that "the record clearly establishes that the L1-[L]2 disc herniation / compression was an acute event that occurred at work on June 8, 2010, which substantially accelerated the progression, or worsened, the severity, of any preexisting disease that may [have] been present." App. 242.

CONCLUSION

[84] The ALJ's errors of law and resulting unsustainable findings of fact were properly recognized by the District Court. By operation of statute, the opinions of Albright's treating doctors are entitled to controlling weight unless WSI establishes their

inconsistency with other substantial evidence of record. The ALJ plainly required no such showing, shifting the burden to Albright and therefore erring as a matter of law. Even if the opinions of Albright's treating doctors were not entitled to controlling weight, no reasoning mind could reasonably conclude on the record as a whole that Albright failed to establish **either** 1) that her years of arduous labor were a substantial contributing factor to her degenerative disc disease **or** 2) that the L1-L2 disc herniation she experienced at work on June 8, 2010 substantially worsened that underlying condition. Accordingly, the District Court's Judgment of June 22, 2012 should be affirmed.

Respectfully submitted this 1st day of October, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorneys representing Appellee, Brenda Albright, and the authors of the Brief of Appellee hereby certify that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 9,446 words from the portion of the brief entitled “Statement of the Case" through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 1st day of October, 2012.

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ADDENDUM

65-05-08.3. Treating doctor's opinion.

1. If the organization does not give an injured employee's treating doctor's opinion controlling weight, the organization shall 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 one or more of the following factors:

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.

2. This section does not apply to managed care programs under section 65-02-20. For purposes of this section, the organization shall determine whether a doctor is an injured employee's treating doctor.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20120298

Brenda Albright,

Appellee,

v.

North Dakota Workforce Safety and Insurance,

Appellant,

and

Smurfit-Stone Container Corporation,

Respondent.

AFFIDAVIT OF SERVICE

Sarah A. Amundson, being first duly sworn, deposes and says that she is of legal age and that on October 1st, 2012 she served the attached:

1. Brief of Appellee Albright;

2. Appellee Albright's Motion for N.D.C.C. § 28-32-50 Attorney's Fees and Costs On Appeal to the Supreme Court; and

3. Appellee Albright's Brief in Support of Motion for N.D.C.C. § 28-32-50 Attorney's Fees and Costs on Appeal to the Supreme Court.

on the following person:

Doug Gigler, Attorney at Law, P.O. Box 2626,Fargo, ND 58108

via email, with read receipt requested, at dgigler@nilleslaw.com

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

Sarah A. Amundson

Subscribed and sworn to before me this 1st day of October 2012.

Notary Public
County of Cass, State of ND
My Commission Expires:

CINDY R. NORTON
Notary Public
State of North Dakota
My Commission Expires Aug. 23, 2015