

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

++++
BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY
AND INSURANCE FUND
++++

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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STATEMENT OF THE CASE

[1] Brenda Albright (“Albright”) filed a First Report of Injury on June 14, 2010, alleging an injury to her low back that occurred on June 8, 2010. (App.¹ C.R. 4²) She claimed that the injury occurred when she squatted down to pull a tag from a roll of material. (Id.) On October 15, 2010, WSI issued its Notice of Decision Denying Benefits. WSI referenced medical evidence that Albright had pre-existing multi-level degenerative disk disease throughout her lumbar spine, and the act of bending down at work on June 8, 2010, triggered symptoms but did not substantially accelerate the progression of the degenerative disk disease or worsen its severity. (App. 47; C.R. 10) Albright requested reconsideration on October 23, 2010 (App. 49; C.R. 12), and WSI issued its formal Order Denying Claim on December 3, 2010. (App. 51; C.R. 14-19)

[2] Albright requested a formal evidentiary hearing on April 6, 2011, which took place on August 19, 2011. (App. 72-173; C.R. 374) ALJ John Allen issued his Findings of Fact, Conclusions of Law and Order on November 1, 2011, concluding that Albright had not proved that she suffered a compensable work injury on June 8, 2010. (App. 174-189; C.R. 412-428) On November 10, 2011, Albright filed her Petition for Reconsideration. (App. 190; C.R. 429) WSI responded to Albright’s Petition for Reconsideration on November 23, 2011. (App. 204; C.R. 443) On December 7, 2011, ALJ Allen issued his Reconsideration Order denying Albright’s request for reconsideration of his Findings of Fact, Conclusions of Law and Order. (App. 208-213; C.R. 447-452)

¹ “App.” refers to the Appendix filed in conjunction with this appeal.

² “C.R.” refers to the Certificate of Record filed with the District Court on February 3, 2012, followed by the bate stamp page number of the referenced page number of the exhibit.

[3] Albright filed her Notice of Appeal and Specifications of Error with the District Court, Cass County, North Dakota, on January 1, 2012. (App. 214-223; C.R. 453-462) On June 7, 2012, the District Court Judge Wick Corwin issued a Memorandum Opinion and Order reversing ALJ Allen's Final Order of November 1, 2011. (App. 224-244) Judge Corwin found that Albright had sustained her burden of proof and demonstrated that her work was a substantial contributing factor to her injury. (Id.) Order for Judgment was entered on June 19, 2012 (App. 245) and Judgment was entered on June 22, 2012. (App. 246) Notice of Entry of Judgment was served on June 25, 2012. (App. 247) WSI filed its Notice of Appeal to the North Dakota Supreme Court in Cass County District Court on July 24, 2012. (App. 248)

STATEMENT OF FACTS

A. June 8, 2010, work incident.

[4] Albright submitted a claim for an injury to her lumbar spine that occurred on June 8, 2010. She worked for Smurfit-Stone Container as a fork-lift operator. (C.R. 1; C.R. 4) She reported to WSI that she squatted down to remove a label from a roll of paper, and when she straightened up she felt a twinge on her right side. (C.R. 1; C.R. 4) She was seen in the emergency room, where an MRI was performed. The MRI showed multilevel degenerative disease with desiccation, as well as the lateral disk herniation at L1-L2 affecting the first nerve root in the foramen. (C.R. 180) A CT Scan of the lumbar spine showed mild degenerative disease without any evidence of "traumatic injury or pars defect." (C.R. 182) She was diagnosed with L-1 radiculopathy which was subsequently confirmed by an EMG. (C.R. 186; C.R. 197)

[5] Albright saw Dr. Marc Eichler on June 18, 2010, for low back pain and lower extremity radiating pain. She described the pain as in the L2-3, L3-4 and L4-5 area

and radiating to the buttocks, right hip, right groin and into her public bone. (C.R. 185) Dr. Eichler noted that Albright's MRI revealed a high intensity zone at L3-4 with disk bulges at L2-3, L3-4 and L4-5 but no root or cauda equine compression at those levels. There appeared to be a large interforaminal right-sided L1-2 disk herniation with compression of the nerve root. Dr. Eichler recommended a nerve root block at L1-2, which was performed on June 23, 2010. (C.R. 186; C.R. 193) Dr. Eichler completed a Capability Assessment for WSI indicating Albright was not to work due to L1 radiculopathy. (C.R. 190) A nerve conduction study performed on June 25, 2010, was positive for right L1 radiculopathy. (C.R. 197)

[6] A second MRI was performed on July 22, 2010, which revealed a right foraminal mass of L1-2 approximately the same size as the previous study. (C.R. 208-209) On July 25, 2010, Albright underwent an L-1 laminectomy and right L-1, L-2 facetectomy for removal of a herniated disk and decompression and fusion. (C.R. 214)

B. Prior medical history of degenerative disk disease.

[7] As early as 2001, Albright was experiencing symptoms in her low back. (C.R. 50) On March 5, 2001, she saw Dr. Richard Vetter complaining of "right flank pain radiating to the right groin." (C.R. 51-52) During her GYN exam on January 17, 2002, Albright reported that she continued to have intermittent problems with back pain and recently had been seen at the emergency room. The assessment was back pain, "likely musculoskeletal." (C.R. 59-60)

[8] On November 9, 2004, Albright presented to PA Heidi Olson-Fitzgerald, complaining of an "acute onset of low back pain" when "[s]he bent over to lift a stack of towels and felt a pulling sensation and discomfort in her back into her left hip area" (C.R. 61) PA Olson-Fitzgerald commented that, "Brenda has intermittently had problems with

back pain before but not typical[ly] symptoms that go into the buttocks area or down the leg.” PA Olson-Fitzgerald’s assessment was degenerative disk disease L5-S1 and low back pain with left L5-S1 radicular symptoms. Albright’s x-rays also showed degenerative cervical disease from C3 through C7. (C.R. 62)

[9] Albright returned to Dr. Vetter on November 16, 2004, because her low back symptoms had not improved. Dr. Vetter reported that Albright had “injured her back at home, bending over to pick something up. On her way to straightening up, she felt something go in her back and since then has had severe pain. She initially had some pain going down her left leg and now she has pain and numbness in both extremities going down to the feet.” (C.R. 64) Dr. Vetter’s assessment was low back strain with probable nerve root impingement. (Id.) On the same day, Albright attended physical therapy, where the diagnosis was “[l]eft L5-S1 radicular symptoms[.] Degenerative disk L5-S1, cervical degenerative disk C5-C7.” (C.R. 66)

[10] An MRI of Albright’s lumbar spine on November 26, 2004, revealed multilevel lumbar degenerative disk disease with some central disk bulging, most predominantly at L3-4 with no large disk herniation. (C.R. 69) She saw PA Olson-Fitzgerald on December 1, 2004, and reviewed with her the MRI of her lumbar spine. PA Olson-Fitzgerald’s assessment was lumbar degenerative disk disease. (C.R. 70)

[11] PA Olson-Fitzgerald referred Albright to neurosurgeon Dr. John Hutchinson for a consultation regarding her low back pain. (C.R. 72) Albright reported radiating pain from the middle of the lower back that started on November 8, 2004. (Id.) Dr. Hutchinson did not feel that Albright was a candidate for either cervical or lumbar spine surgery, but he did recommend a trial of epidural steroid injections. (C.R. 74) Albright had her first epidural steroid injection on January 20, 2005. (C.R. 40) A second

injection scheduled for February 3, 2005, was cancelled because Albright's lumbar spine had improved significantly after the first injection. (C.R. 43) Albright had additional epidural steroid injections for lumbar spine pain on August 4 and August 18, 2005. (C.R. 45-47)

[12] In November of 2005, Albright saw PA Olson-Fitzgerald for a physical and gynecologic examination. PA Olson-Fitzgerald noted that Albright had problems with her cervical and lumbar spine due to degenerative arthritis. (C.R. 77) Albright reported intermittent problems with numbness, and PA Olson-Fitzgerald noted that imaging studies might be necessary. (C.R. 79)

[13] Albright saw Dr. Richard Howden on February 8, 2007, for persistent bilateral low back pain. She presented for an assessment, and reported there was nothing unusual in her work environment or home environment that acted as a trigger factor. (C.R. 82) Dr. Howden noted that Albright had past back problems with nerve root involvement, but had not been seen for that problem for some time. His assessment was musculoligamentous back pain. (Id.)

[14] Albright presented to PA Olson-Fitzgerald on August 29, 2007, for a review of her medical problems, primarily neck pain and weakness down both extremities. Albright reported that her lower back bothered her "off and on, but not consistently." (C.R. 84) X-rays showed degenerative changes in the cervical spine at C5-C6 and C6-C7. PA Olson-Fitzgerald noted that Albright might need to see a neurosurgeon if her symptoms continued to progress. (C.R. 86)

[15] An MRI of Albright's cervical spine, performed on September 11, 2007, revealed degenerative changes most severe at C5-C6 and C6-C7, with a broad-based, right-sided disc herniation at C5-C6, possibly impinging the right C6 nerve root. At C6-

C7 there was a broad-based posterior calcified disc protrusion and osteophyte, although there was no cord compression or significant foraminal narrowing. (C.R. 88)

[16] Albright saw Dr. Marc Eichler on October 29, 2007, for a neurologic consultation regarding her cervical pain. Dr. Eichler noted Albright was complaining of both neck pain and low back pain. Albright explained that the neck pain had been present for years with no history of preceding trauma. (C.R. 92) She returned to Dr. Eichler on December 19, 2007. At that time, Dr. Eichler noted that Albright had multiple level degenerative disc disease with the disc collapsing at C5-C6 and C6-C7. (C.R. 98) Dr. Eichler further noted that Albright had other complaints including low back pain, leg pain, leg numbness and tingling. (C.R. 99) Dr. Eichler eventually performed a corpectomy for spinal cord compression with bilateral C5-C6 and C6-C7 foraminotomies for decompression of the C6-C7 nerve roots. (C.R. 147-156)

C. Medical opinions.

[17] WSI requested Dr. Gregory Peterson to review Albright's current and prior medical records to determine whether her claimed injury was work-related. On July 21, 2010, Dr. Peterson noted that her records indicated an extensive prior history of cervical and lumbar spine problems associated with degenerative disk disease. (C.R. 8) He further noted that the "working diagnosis" of L1 disc herniation was "plausible" but uncertain to confirm from the EMG results. He provided the opinion that Albright had pre-existing symptomatic multi-level lumbar degenerative disk disease that was made symptomatic by "her performing the trivial act of bending." (Id.) Dr. Peterson, however, noted the weaknesses in his opinion: "If one defines the 'condition' as L1 disc herniation rather than DDD, then I would not be able to demonstrate that specific condition as pre-existing." (Id.)

[18] WSI retained Dr. Charles Burton, a neurosurgeon, to review Albright's current and prior medical records and provide a written report and opinion on the cause of the disc herniation. (C.R. 266) Dr. Burton responded that Albright was a high-risk candidate for a disc herniation due to her long-standing degenerative disc disease of the lumbar spine, and the June 8, 2010, incident at work resulted in a L1-2 right-side herniation. Dr. Burton noted that the L1-2 disc was abnormal to begin with and the bending action was the "straw that broke the camel's back." Dr. Burton opined that the work incident of June 8, 2010, acted as a trigger to produce symptoms in Albright's multi-level pre-existing chronic condition, but did not substantially accelerate its progression. Furthermore, the disc herniation could have occurred at any time or any place and just happened to be at work. (C.R. 268-277)

[19] WSI sent a copy of Dr. Burton's IMR report to Dr. Eichler and asked whether or not he agreed with Dr. Burton's opinions. Dr. Eichler responded by indicating "no" but provided no supporting objective medical findings. (C.R. 249) On October 8, 2010, Dr. Eichler wrote WSI and provided the reasons he disagreed with Dr. Burton's opinions. He agreed with Dr. Burton's opinion that Albright's pre-existing degenerative disc disease put her at an increased risk for a herniated disc but disagreed she was "doomed to have a herniated disc in the future." Dr. Eichler opined that the single event at work led to the herniated disc. (C.R. 248)

[20] Following WSI's denial of Albright's claim for benefits, PA Olson-Fitzgerald wrote a "To Whom It May Concern" letter to WSI, dated December 8, 2010. Olson-Fitzgerald provided the opinion that Albright's pre-existing degenerative disk disease of the lumbar spine was "due to the demanding physical activities required in the course of her work." She wrote, "[t]his physically demanding work certainly does place

Ms. Albright at risk for degenerative changes of the musculoskeletal system and dating back to 2002 [sic] began complaining of back pain. This is a degenerative process that is ongoing and places her at risk for exacerbating injuries that I anticipate occurred on 06/08/10.” (C.R. 260)

[21] Chiropractor Kevin Paape also provided a “To Whom It May Concern Letter” that was dated December 14, 2010. He opined that Albright’s job as a forklift/clamp truck operator was the most likely cause of the degenerative disc disease within her lumbar spine. (C.R. 278)

[22] On April 4, 2011, Dr. Eichler issued a “To Whom It May Concern” letter in support of Albright’s appeal. He noted that Albright operates a forklift “and the continued jarring as well as twisting and bending is known to lead to degenerative disc disease.” He went on to state that, “[s]he 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 overall degenerative disc disease.” He added that because “[i]t was 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.” (C.R. 30; C.R. 265)

[23] The opinions of Dr. Eichler, PA Olson-Fitzgerald, Kevin Paape and Dr. Burton were all received into evidence at the administrative hearing. In addition, Dr. Burton’s hearing deposition was taken and the transcript received into evidence.

STATEMENT OF THE ISSUES

[24] Whether ALJ Allen/WSI could have reasonably concluded, based on the weight of the evidence, that Albright did not prove that she suffered a compensable injury to her lumbar spine on June 8, 2010?

LAW AND ARGUMENT

I. Burdon of Proof and Standard of Review

[25] Albright bears the burden of establishing her right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129, ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. This burden requires a proof by a preponderance of the evidence that Albright is entitled to benefits available from the Fund. Reynolds v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 247 (N.D. 1982); Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730 (N.D. Ct. App. 1988). To establish a causal connection, Albright must demonstrate that her employment was a substantial contributing factor to the injury, but she does not have to show that the employment was the sole cause of the injury. Myhre v. N.D. Workers Comp. Bur., 2002 ND 186 ¶ 24, 653 N.W.2d 705.

[26] This Court exercises a limited review in appeals from administrative agencies under the Administrative Agencies Practice Act. Tverberg v. Workforce Safety and Ins., 2006 ND 229, ¶ 7, 723 N.W.2d 676. This Court reviews the decision of WSI, not the district court. Zander v. Workforce Safety and Insurance, 2003 ND 193 ¶ 6, 672 N.W.2d 668. WSI's Final Order must be affirmed unless its findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, or its decision is not in accordance with the law. N.D.C.C. §§ 28-32-46 and 28-32-49. Questions of law, including the interpretation of a statute, are reviewable on appeal from an administrative decision. Bachmeier v. N.D. Workers Comp. Bureau, 2003 ND 63, ¶ 10, 660 N.W.2d 217.

[27] This Court must exercise restraint in determining whether the administrative decision is supported by a preponderance of the evidence and should not make independent

findings of fact or substitute its judgment for that of the agency. Reopelle v. Workforce Safety and Ins., 2008 ND 98, ¶ 9, 748 N.W.2d 722. In reviewing an agency’s findings of fact, this Court determines only 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. Bruder v. N.D. Workforce Safety and Ins., 2009 ND 23, ¶ 7, 761 N.W.2d 588.

[28] When presented with conflicting expert medical opinions, it is for WSI, not the district court to weigh credibility and resolve conflicts:

WSI has the responsibility to weigh the credibility of medical evidence and resolve conflicting medical opinions. When confronted with a classic ‘battle of the experts,’ a fact-finder may rely upon either party’s expert witness. Although WSI may resolve conflicts between medical opinions, the authority to reject medical evidence selectively does not permit WSI to pick and choose in an unreasoned manner. 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 Ins., 2008 ND 47, ¶ 10, 746 N.W.2d 158.

II. ALJ Allen/WSI Could Have Reasonably Concluded from the Weight of the Evidence as a Whole That Albright Did Not Prove That She Suffered a Compensable Injury on June 8, 2010.

[29] A “compensable injury” is defined as an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. N.D.C.C. § 65-01-02(10). The term “compensable injury” does not include “[i]njuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing 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).

[30] ALJ Allen found that Albright had a pre-existing, non-work related degenerative disk condition to her lumbar spine prior to the work incident of June 8, 2010. He further found that the L1-2 disc herniation was not the result of a single event that occurred on June 8, 2010. Rather, Albright's act of squatting and standing up triggered symptoms in the pre-existing degenerative disc disease but did not substantially accelerate or substantially worsen the condition. (C.R. 421, Findings of Fact 45-47) Those findings find ample support in the hearing record.

[31] There is no dispute that Albright had chronic degenerative disk disease and a L1-2 disc herniation that was corrected by surgery in July of 2010. There also seems to be no dispute that the chronic, degenerative condition of Albright's lumbar spine caused the L1-2 herniated disc. In his "To Whom it May Concern" letter to WSI dated April 11, 2011, Dr. Eichler reported that "[Albright] also had a clear acute disc herniation on the right side at L1-2 probably related to her overall degenerative disc disease[.]" (C.R. 30; C.R. 265) Dr. Charles Burton, who reviewed Albright's prior and current medical records, also concluded that the disk herniation at L1-L2 was the result of the degenerative condition of Albright's lumbar spine. (C.R. 276-277)

[32] Furthermore, there was evidence that the work incident of June 8, 2010, if anything, acted only to trigger symptoms in the pre-existing and chronic degenerative condition of Albright's lumbar spine. In his report to WSI, Dr. Burton stated that Albright was a high-risk candidate for a disc herniation because of her "longstanding degenerative pathology of the lumbar spine." (C.R. 276) He characterized the mechanical episode that occurred on June 8, 2010, as "the straw that broke the camel's back." (Id.) He further opined that, although the work incident triggered symptoms in Albright's underlying degenerative condition, it did not substantially accelerate its

progress, because the disc herniation could have happened any time or any place; it just happened to occur at work and was related to body mechanics and body dynamics. (C.R. 277)

[33] Dr. Burton testified at his hearing deposition that Albright's spine had multiple disk herniations, multiple-level degenerative pathology and multilevel segmental dysfunction. (C.R. 354, Dr. Burton depo. at 43). He further testified that the imaging studies revealed the L1-2 disc herniation to be a chronic rather than acute condition. (C.R. 15, 45) He again confirmed that, had the June 8, 2010, work incident had never occurred, the history and clinical course of Albright's lumbar spine would not have been any different. (15) The work incident merely focused attention on her clinical situation at that time. (C.R. 347, Dr. Burton depo. at 15-16)

III. ALJ Allen/WSI Adequately Clarified Inconsistencies in the Medical Evidence and Explained The Reasons For Disregarding the Medical Evidence Favorable to Albright.

[34] Based on the evidence in the record as a whole, ALJ Allen concluded that Albright had not proven that suffered a compensable injury to her lumbar spine on June 8, 2010. 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. In reaching the conclusion that he did, ALJ Allen relied in part on the medical opinion and hearing deposition testimony of Dr. Burton, who examined Albright's current and prior medical records at the request of WSI. ALJ Allen determined that Dr. Burton's opinion that Albright's lumbar spine injury was not casually related to her work activities was the most credible. (C.R. 426).

[35] In the "Discussion" section of the Final Order, ALJ Allen recognized that WSI has the responsibility to weigh the credibility of conflicting medical evidence. He

also recognized that WSI must consider the entire record, clarify inconsistencies and adequately explain its reasons for disregarding medical evidence favorable to the claimant. (C.R. 423) See Negaard-Cooley v. N.D. Workers Comp. Bur., 2000 ND 122, ¶ 18, 611 N.W.2d 898. ALJ Allen further noted that a claimant's treating doctor's opinion is to be controlling weight unless certain criteria have been met. See N.D.C.C. § 65-05-08.3.

[36] ALJ Allen explained his reason for disregarding the opinions of Dr. Eichler, PA Olson-Fitzgerald and Kevin Paape, which were favorable to Albright. ALJ Allen found that Dr. Eichler's opinion in his letter of April 11, 2011, was couched in terms of possibility and therefore weakened his earlier opinion of October 8, 2010. (C.R. 424) As stated by ALJ Allen, "a review of Dr. Eichler's opinion shows that his opinion goes from a definitive single occurrence to 'possible' single occurrence incident. When reading the letter of April 11, 2011, there are multiple mentions of 'mere possibilities' including this injury not being a 'single occurrence incident' injury. This goes to the weight to be given the opinion." (C.R. 450)

[37] ALJ Allen noted that PA Olson-Fitzgerald's opinion regarding causation was different from Dr. Eichler's original opinion that the single incident at work was the cause of the L1-2 disc herniation. PA Olson-Fitzgerald offered the opinion that Albright's lumbar spine injury was not caused by a single incident but rather the result of her many years operating a fork lift. ALJ Allen further noted that PA Olson-Fitzgerald also couched her opinion in mere possibility or speculation, and in fact she simply recognized that Albright's "physically demanding work" put her "at risk for exacerbating injuries." ALJ Allen commented that, "[j]ust because somebody's work places them at risk, [sic] does not mean that an injury arose out of employment." (C.R. 424-425)

[38] ALJ Allen then went on to explain why he disregarded the opinion of Albright's chiropractor, Kevin Paape. Paape opined that multilevel degenerative disc disease was to be expected with Albright's job duties, and therefore it was her job duties which caused the disc herniation, rather than a single, mechanical episode. ALJ Allen noted that Paape's opinion, like PA Olson-Fitzgerald's opinion, was different from Dr. Eichler's original "single event" causation scenario. ALJ Allen also had concerns that there were no treatment records in evidence that would show when, how often or what examinations or treatments Paape provided Albright. Furthermore, Paape did not testify so ALJ Allen did not know what information he had concerning Albright's job duties. Finally, Albright presented no evidence concerning Paape's education, training or experience that would justify giving his opinion more weight. (C.R. 425)

IV. ALJ Allen/WSI's Final Order Satisfied the Criteria of N.D.C.C. § 65-05-08.3.

[39] The District Court claimed that ALJ Allen, "in a wholesale and indiscriminate manner," relied on the medical opinion of Dr. Burton and rejected the opinions Albright's medical providers in violation N.D.C.C. § 65-05-08.3. (App. 237-238) That statute provides as follows:

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

[40] The District Court contends that, under § 65-05-08.3 the opinions of Dr. Eichler, Heidi Olson-Fitzgerald and Kevin Paape were all entitled to controlling weight because they were “both well supported and completely consistent with the balance of the record, and the reasons ALJ Allen stated for not giving these opinions controlling weight did not “provide the compelling justification required.” (App. 237-238) The Court, however, does not elaborate on the “compelling justification” standard it apparently applied in coming to its conclusion.

[41] In Findings of Fact 48, ALJ Allen identified eight (8) reasons why he did not consider the medical opinions of Dr. Eichler, Heidi-Olson Fitzgerald and Kevin Paape to be consistent with the other evidence in Albright’s medical records:

- (1) Neither Eichler nor Paape had been treating Albright since the beginning of when she started having low, lumbar back problems;
- (2) There was no indication that either Eichler or Paape have reviewed the previous medical records of Albright;
- (3) None of the medical providers testified and subjected themselves to cross-examination;
- (4) None of the medical providers gave any details as to what facts they used to support their conclusions;
- (5) Eichler’s and Olson-Fitzgerald’s opinion[s] are not strongly worded;
- (6) None of the medical providers drew any connection between Albright’s past cervical back issues and her current back issues;
- (7) None of their education, training and experience was identified to indicate that additional weight should be given their testimony; and
- (8) Their opinions are not supported by the record as a whole

(C.R. 421-422)

[42] Furthermore, ALJ Allen, in the “Discussion” section of the Final Order, provided a detailed explanation as to why he did not find the opinions of Dr. Eichler, Heidi Olson Fitzgerald and Kevin Paape persuasive. (C.R. 424)

[43] On October 8, 2010, Dr. Eichler provided a letter to WSI following his review of Dr. Burton's written report. Dr. Eichler acknowledged that Albright had degenerative disease in her lumbar spine that put her at risk for a herniated disc, but it was "the single event at work that led to her herniated disc. (C.R. 248)

[44] ALJ Allen noted that Dr. Eichler's "To Whom It May Concern" letter, dated April 11, 2011 (C.R. 265), now espoused an additional causation theory, i.e., the disc herniation was related to her pre-existing degenerative disc disease which was related to her "repetitive activities at work." (C.R. 424) ALJ Allen further noted that Dr. Eichler's previous opinion that the single event at work caused the herniated disc had been downgraded to a possibility. (Id.) ALJ Allen found that Dr. Eichler's second opinion was couched as both a possibility and a probability, and the second opinion weakened the original opinion that the disc herniation was caused by a single event. (Id.)

[45] ALJ Allen also addressed Heidi Olson-Fitzgerald's letter of December 8, 2010, which he noted was dated "two months after Eichler's original opinion about causation." ALJ Allen found that Olson-Fitzgerald's opinion's that Albright's work activities caused the degenerative disc disease was different from Dr. Eichler's original opinion that the single event caused the disc herniation. Furthermore, ALJ Allen found that Olson-Fitzgerald's opinion was couched in possibilities, and she was not called to testify. (C.R. 425)

[46] ALJ Allen also identified a number of concerns with the one-page letter opinion provided by Kevin Paape. First there were no records from Paape in evidence, so there was no information about the treatment provided. (Id.) It was not evident from his letter how long he had treated Albright or whether he even treated her lumbar spine. Second, Paape's opinion was that Albright's work duties were most likely the cause of

the degenerative disc disease, which, like Olson-Fitzgerald's opinion, was different than Dr. Eichler's original opinion. Third, other than the letter opinion itself, there was no other information about Paape in the hearing record that would justify giving his opinion more weight. Finally, because Paape did not testify, ALJ Allen had no way of knowing "what work duties [Paape] opined caused or contributed to Albright's DDD and it was unknown exactly what information he understood was Albright's job duties." (C.R. 425)

V. In Its Analysis of the Record, the District Court Reassessed the Credibility of Dr. Charles Burton's Medical Opinion and Medical Opinions provided by Albright's Medical Providers, Reweighed the Medical Evidence, Made Independent Findings of Fact and Considered Information Outside the Hearing Record.

[47] It is not the function of a reviewing court to make independent findings or substitute their judgment for that of the agency. Bruder, 2009 ND 23, ¶ 15, 761 N.W.2d 588. A court "that reassesses credibility and reweighs the evidence violates the separation of powers and calls into question the constitutionality of its acts." Id. (citing Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979)) It is within the province of WSI to weigh the credibility of medical evidence and resolve conflicting medical opinions. Huwe, 2008 ND 47, ¶ 10 746 N.W.2d 158. The function of the court is to determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence. Aga v. Workforce Safety and Ins., 2006 ND 254, ¶ 12, 725 N.W.2d 204.

[48] In both his Final Order and Order on Reconsideration, ALJ Allen explained why he found Dr. Burton's medical opinion to be more credible and why he did not find the medical opinions supporting Albright's claim for benefits persuasive. First, it should be noted that Dr. Charles Burton is a board-certified neurosurgeon. WSI retained Dr. Burton to review all of Albright's medical records and provide a

neurosurgical opinion answering questions posed in WSI's letter of August 18, 2010. (C.R. 266)

[49] In reversing ALJ Allen's Final Order, the District Court found that no reasoning mind could reject the opinions of Albright's medical providers and "substitute in their place the unfounded opinion expressed by Burton in his deposition testimony." (App. 242) Dr. Burton was characterized as "professional witness" seemingly because he stated in his report and his testimony that his opinions were expressed "to a reasonable degree of medical certainty." The Court wrote, [i]n fairness, such usage is only indicative of the extent of Burton's experience as a professional witness. It does nothing to add to the weight of his opinions." (App. 239)

[50] The District Court was also critical of Dr. Burton's testimony because the opinions he expressed were "unequivocal." The Court wrote that, "[i]t is not unusual for hired experts to use such emphatic terms, particularly when subjected to aggressive cross-examination. (App. 235)

[51] To further undermine Dr. Burton's credibility, the District Court relied on information outside of the hearing record, specifically the testimony in support of N.D.C.C. § 65-05-08.3(1). The Court wrote: "The legislative history makes the obvious case that treating physicians are in a better position to form credible and evidence-based opinions, as opposed to retained experts who see the claimant for only a few minutes during an IME or not at all in the case of a records review. There are also references in the history to a tendency on the part of WSI to ignore the claimant's own doctor in favor of a 'defense-minded' review it has commissioned." The Court's citation is to testimony of attorney Dean Haas before a legislative committee in support of H.B. 1561. (App. 238)

[52] The District Court also wrote that “[c]redibility determinations are typically based on impressions gained while watching the witness testify, something no reviewing court can replicate. In this case, however, there was no live medical testimony. Therefore the ALJ was not in a better position to assess either Burton’s credibility of the weight of his testimony.” (App. 238) The Court ignores that it for WSI and not the district court to weigh credibility. Huwe, 2008 ND 47, ¶ 10, 746 N.W.2d 158. More importantly, ALJ Allen never made a finding that Dr. Burton was a credible witness based on the transcript from his hearing deposition. ALJ Allen found that Dr. Burton’s medical opinion was more credible than those of Dr. Eichler, Heidi Olson-Fitzgerald and Kevin Paape. (See C.R. 422, Finding of Fact 49)

[53] One of the reasons ALJ Allen gave for finding Dr. Burton’s medical opinion more credible was the fact that he testified and was subject to cross-examination. The District Court rejected that reasoning, claiming that, under N.D.C.C. § 65-05-08.3, the “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) The Court went on to state it was “illogical and unfair to criticize any claimant for failing to present medical testimony or records in support of their claim” because WSI’s rules impose cost constraints on claimants which prohibits them from securing medical testimony; however, those same constraints do not apply to WSI and its attorneys. (Id.)

[54] A review of ALJ Allen’s findings of fact reveal he was not criticizing Albright but simply providing his reasoning for finding Dr. Burton’s medical opinion more credible, which is WSI’s well-settled obligation. Contrary to the District Court’s argument, whether a claimant relies on written medical opinions without calling his or her doctors to testify and provide further elaboration and support is a valid consideration

in weighing the credibility of expert medical opinions. See Aga v. Workforce Safety and Ins., 2006 ND 254, ¶¶ 14, 17, 725 N.W.2d 204. See also Bruder, 2009 ND 23, ¶ 14, 761 N.W.2d 588.

[55] The District Court also criticized ALJ Allen for not considering the potential for bias (presumably Dr. Burton’s bias), which it claimed was one of the factors under N.D.C.C. § 65-05-08.3. The Court referred again to testimony before a legislative committee that was not part of the hearing record: “There is truth to the adage that you get what you pay for. A recent study indicated that physicians performing ‘independent’ reviews on behalf of WSI disagreed with the treating physicians 65 percent of the time, and were unfavorable to WSI only 26 percent of the time.” (App. 240-241)

[56] Section 65-05-08.3, N.D.C.C. does identify “[a]pppearance of bias” as one of the factors for consideration; however, it is a factor for WSI’s consideration in whether to give the claimant’s treating physician controlling weight. See N.D.C.C. § 65-05-08.3(1)(e). Furthermore, Dr. Burton was deposed and cross-examined extensively by Albright’s counsel on his “potential bias,” and all this evidence was part of the record for ALJ Allen’s consideration. What is not part of the hearing record was the “testimony” before the legislative committee that the District Court relies on to suggest that Dr. Burton’s medical opinion was consistent with WSI’s position because it had retained him and paid for his review.

[57] ALJ Allen also noted that he gave medical opinion of Dr. Burton additional weight because he testified to his education, training and experience during his deposition. Because Albright’s medical providers did not testify, the same information was not available for consideration. (App. 240; C.R. 246) The District Court dismissed

this as a valid consideration, stating it was “simply a reflection of the practical inequalities in the claim system.” (App. 240)

[58] The District Court was critical of Dr. Burton’s written report, describing it as “hard to follow.” (App. 229) Conversely, the District Court accepted as highly credible the letter opinion submitted by Heidi Olson-Fitzgerald, despite finding it to be “short on detail” and only suggesting a connection between Albright’s nineteen years of physically demanding work and any degenerative changes of the musculoskeletal system. (App. 231)

[59] The District Court reassessed and elevated the credibility of Albright’s three medical providers because their letter opinions “[focused] on an issue that was initially ignored by both WSI and Burton[:]. To what extent was any underlying or pre-existing degenerative disc disease attributable to Albright’s work for Smurfit?” (App. 231)

[60] Dr. Burton’s Dr. Burton’s independent records review report to WSI was dated September 17, 2010 (C.R. 268-277). WSI sent Dr. Burton’s report to Dr. Eichler for review, and Dr. Eichler responded by letter to WSI dated October 8, 2010. While Dr. Eichler agreed that Albright had a preexisting degenerative disease in her lumbar spine, his opinion was the “single event at work led to her herniated disc.” (C.R. 248) There was no mention that her work activities over the years she worked at Smurfit were the reason for the development of the degenerative process to her lumbar spine.

[61] WSI’s formal Order denying Albright’s claim was issued on December 3, 2010. (C.R. 14-19) Albright’s argument that her lumbar degenerative disc disease was the product of years working as a forklift operator was raised in her counsel’s letter of January 13, 2011 (C.R. 23), which cited Heidi Olson-Fitzgerald’s “To Whom It May

Concern” letter dated December 8, 2010 (C.R. 260) and Kevin Paape’s “To Whom It May Concern” letter dated December 14, 2010. (C.R. 278) Dr. Eichler’s “To Whom It May Concern” letter is dated April 11, 2011. (C.R. 265) Thus, at the time WSI issued its formal order denying her claim for benefits, there was no medical evidence validating a claim that Albright’s job as a forklift operator was a substantial contributing factor to her pre-existing degenerative disc disease.

[62] The District Court considered Dr. Burton’s opinion to be unfounded because he performed a review of Albright’s medical records, while Dr. Eichler, Heidi Olson-Fitzpatrick and Kevin Paape all supposedly had intricate and detailed knowledge about not only Albright’s medical condition but also her specific job duties and how they resulted in the development of the degenerative condition found in her spine. The District Court reached that conclusion relying on Albright’s testimony to that she had provided this information to each of her medical providers. The District Court wrote, “[e]ach of these experts treated and examined Albright on multiple occasions, over an extended period of time. During their clinical discussions with Albright, they certainly gained an appreciation for significant details that goes far beyond the sketchy summaries captured in the records. According to Albright’s undisputed testimony, she discussed her job, and all it entailed, with Eichler, Paape and Olson-Fitzgerald. None of this is reflected in the treatment records, so a review of those records provides no meaningful insight regarding the role Albright’s work played in the development or progression of her degenerative disease.” (App. 234)

[63] As noted by ALJ Allen, the letter opinions submitted by Dr. Eichler, Paape and Olson-Fitzgerald, do not reflect that Albright did in fact provide her medical providers with the detailed information about her job duties that the District Court

assumes from her testimony. Dr. Eichler's letter opinion of April 11, 2011, states that her pre-existing degenerative disc disease "could be related to her work. [Albright] does operate a forklift, and the continued jarring as well as twisting and bending is known to lead to degenerative disc disease." (C.R. 265) Dr. Eichler does not state whether he received the information about the operation of the forklift from Albright or perhaps another source. None of Dr. Eichler's examination notes prior to April 11, 2011, reflect conversations with Albright regarding her specific job duties and her years of working at Smurfit. Furthermore, Dr. Eichler did not testify so he could not provide additional information about the objective findings underlying his medical opinion and in particular the appreciation he gained for how her job duties contributed to the development of the degenerative condition of her spine that is not reflected in his medical records or his opinion letter.

[64] Similarly, Heidi Olson-Fitzgerald, in her letter opinion of December 8, 2010, stated her "belief" that Albright's problems with degenerative disc disease were "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, clamp truck operator, and unloading rail cars and trucks. This physically demanding work certainly does place Ms. Albright at risk for degenerative changes of the musculoskeletal system and dating back to 2002 began complaining of back pain." (C.R. 260) There is no indication in the letter that Olson-Fitzgerald has anything more than general, non-specific information about Albright's work, and it is certainly not clear whether she obtained that information from Albright or another source. As with Dr. Eichler, Olson-Fitzgerald did not testify at the hearing, although Albright was entitled to obtain testimony from her.

[65] The District Court noted that Kevin Paape, DC, had treated and examined Albright on multiple occasions over an extended period of time. However none of Paape's treatment records were part of the hearing record, a fact noted by the Court only in passing, and Albright testified that she saw Paape for her neck. (App. 239) Nonetheless, the Court accepted Paape's chiropractic opinion that her work activities as a forklift/clamp truck for 18 years "is most likely the cause of her degenerative disc disease within her lumbar spine." (C.R. 278) Paape's letter does not reveal the source of this information or whether he met with or examined Albright prior to issuing his letter opinion. In fact, Albright testified that she did not see Paape on December 14, 2010, and in fact had not seen him since the previous July. (App. 147) Finally, as with Dr. Eichler and Heidi-Olson Fitzgerald, Kevin Paape did not testify at the hearing.

[66] The record shows that the District Court departed from its deferential standard of review and usurped WSI's responsibility to weigh the credibility of expert medical opinions. The District Court disregarded not only ALJ Allen's reasons for finding Dr. Burton's opinion the more credible but also his explanations why he did not find as persuasive the opinions of Albright's medical providers. The District Court not only reweighed and depreciated the credibility of Dr. Burton's medical opinion, using information outside the hearing record, it reassessed and accepted uncritically the letter opinions of Albert's medical providers.

[67] In addition to reweighing the credibility of the medical opinions, the District Court also made independent factual findings regarding Albright's prior medical records. On page 4 of its opinion, the Court noted that "any fair and reasoned analysis of the [Albright's] prior medical records must recognize" that the references to degenerative disc disease were localized in the neck and low back but not the mid-back. (App. 226)

The Court further stated that, “[i]n temporal terms, any prior complaints involving the low back were both transient and remote. The most significant event was triggered on November 9, 2004, when Albright bent over to pick up some towels.” (App. 227)

[68] The District Court commented extensively in its opinion about a lack of medical evidence showing any degenerative disease at L1-2, the location of the herniated disc. The Court found that “the prior medical records reflect no symptoms consistent with L1-2 radiculopathy, or any other form of pathology at that level. To the limited extent back problems are reflected in the prior records, they appear to have been attributable to simple muscle strains, or at most to some mild degenerate disease in the lower discs. Even healthy discs do herniate acutely, and bending, twisting or pulling is often the cause of such injury.” (App. 223) There is no evidence in the record that would support the Court’s factual finding/medical opinion.

[69] The Court also concluded that the degenerative disc disease present in Albright’s spine prior to June 8, 2010, would increase her risk of “acute herniation, simply because degenerated discs are less durable, more brittle, and more prone to rupture.” (App. 233) The Court further found that “[d]enerative changes tend to be progressive, and spreading to adjacent disc spaces is certainly a common form of progression. The unique stresses or loads imposed on Albright’s lumbar spine at work must also be considered. When normal alignment is maintained, the human spine is very strong. Jarring or axial loading, combined with extreme rotation, is another matter.” (Id.) There is no evidence in the record to support the Court’s finding of fact/medical opinion.

[70] Additionally, the District Court paraphrased Albright’s “undisputed testimony” that, “as she began to stand up on June 8, 2010, Albright suddenly began to

experience the most ‘ungodly’ pain she had ever felt. Unlike any previous sensation, this pain radiated down her back and around to her groin area.” The Court observed that, “[t]hese are the classic symptoms of an acute L1-2 disc herniation with nerve compression.” (App. 236) Again, there is no such medical evidence in the hearing record.

CONCLUSION

[71] ALJ Allen/WSI weighed the credibility of the expert medical opinions, clarified inconsistencies in the medical evidence and adequately explained the reasons for disregarding the medical evidence favorable to Albright, and a reasoning mind could have found that Albright had not proven that she suffered a compensable injury on June 8, 2010. Furthermore, the District Court, rather than following the proper standard of review, reweighed the credibility of the medical opinions and the evidence and substituted its own judgment for that of WSI/ALJ Allen. Accordingly, the WSI respectfully requests that the District Court’s Judgment of June 22, 2012, be reversed and ALJ Allen/WSI’s Final Order of November 1, 2011, affirmed.

Dated this 30th day of August, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, Workforce Safety and Insurance, and the author of the Brief of Appellant Workforce Safety and Insurance hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,843 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 30th day of August, 2012.

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