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JUNE 27, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ronald Kershaw,	)	
	)	
Appellee,	)	
	)	
-vs-	)	
	)	Supreme Ct. No. 20130131
Workforce Safety and Insurance,	)	
	)	
Appellant.	)	
	)	
and	)	
	)	
Bobcat Company,	)	
	)	
Respondent.	)	
.....	)	

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT AND ORDER FOR JUDGMENT OF THE DISTRICT COURT DATED MARCH 6, 2013, REVERSING THE ADMINISTRATIVE LAW JUDGE'S DECISION DATED JUNE 29, 2012
SARGENT COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE DANIEL NARUM

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Statement of the Issues

[1] Whether WSI's determination that Kershaw's hernia is not compensable is based on competent medical evidence.

[2] Whether WSI's determination that Kershaw's employment triggered symptoms of a hernia but is not compensable for lack of substantial worsening of an assumed preexisting susceptibility is sustained by the facts and law.

Statement of the Facts

[3] Ron Kershaw (Kershaw) filed a claim for benefits with North Dakota Workforce Safety and Insurance (WSI) in connection with an inguinal hernia he relates to lifting at his job at Bobcat Company, claiming in the description of injury that he injured his right groin: "Aggravate working cab line." (Appendix at 15; Certified Record, p. 1).

[4] In response to WSI's "hernia questionnaire," Kershaw reported that he first noticed the symptoms on "about March 29, 2010," when he was "squatting on the cab line." (CR 2). Kershaw testified at the hearing that he chose this as the injury date, even though he did not even see a doctor until October, 2010, because, thinking back, he had begun noticing "pressure," in the groin around that time. (CR 69, lines 3-9).

[5] Kershaw first consulted Dr. Jondahl on October 31, 2010, and was diagnosed as having a probable hernia. (CR 19). Dr. Jondahl's note does not contain any history regarding the length of time Kershaw had been experiencing symptoms. *Id*. Nor did Dr. Jondahl and Kershaw discuss his employment at Bobcat. *Id*. Kershaw simply reported that he had some pain in the right inguinal area on and off, "related to the use of Mountain Dew." (CR 19).

[6] Kershaw testified at the hearing that he saw Dr. Jondahl about his blood pressure, and happened to mention this "pressure … with urination." (CR 70, lines 2-12). He explained "I assumed it was something wrong with urination. I never connected it [pain] with [a] hernia." (CR 70, lines 10-12). Kershaw said he didn't know he had a hernia until Dr. Jondahl told him, and didn't make the connection to lifting at Bobcat until after opportunity to reflect later on. *Id*.

[7] On April 22, 2011, Dr. Jondahl noted that Kershaw was "here today under Workforce Safety and Insurance regarding his right inguinal hernia," which "[h]e has asked [ ] about in the past." (CR 20). Dr. Jondahl's medical record states that Kershaw told him that it "hurts when he goes to the bathroom and when he does some lifting." *Id.* In a capability assessment of May 23, 2011, Dr. Jondahl checked "No" to the question whether the hernia is reported with "preexisting/associated conditions." (CR 27).

[8] Dr. Jondahl referred Kershaw to a surgeon, Dr. Kane, who examined Kershaw on May 11, 2011. (CR 22). Kershaw also told Dr. Kane that he had first noticed "some pressure in the right groin" since "back in March of 2010." *Id*. More significantly, Dr. Kane reported that Kershaw "does state that it gets worse with lifting especially of heavier objects." *Id.*

[9] In his letter of May 23, 2011, Dr. Jondahl said "I do believe that it is more likely that repetitive duties did become a significant contributing factor to the development of the right inguinal hernia. I also feel that these duties are likely substantial contributing factors accelerating the progression of or aggravating the severity of the right inguinal hernia." (CR 28).

[10] At hearing Kershaw testified to the lifting activities on the cab line at Bobcat that caused the hernia. Kershaw testified that they were assembling two types of cab: a smaller, lighter cab, and the Gen-Five, which weighed about 700 pounds. (CR 74, lines 5-14). The cab frames are moved to the place of assembly "on a suspended overhead line that runs throughout the factory, like a big cable car." (CR 75, lines 6-12). To do the work to assemble the cab, Kershaw had to lift the 700 pound cab "up off the hooks it was on. … And then you pull the hooks out. Then you let it down [onto a cart.] Then you push it over to your area." (CR 76, lines 12-15).

[11] Kershaw testified "[s]ometimes you had to fight the hooks because they were freshly painted. And with a little bit of work – you know, the paint would stick to the hook and the cab." (CR 76, lines 17-20). Asked whether this meant lifting harder on the cab to remove the sticky hooks, Kershaw simply said, "Fighting it, yeah." *Id.*, line 22.

[12] After assembly of all cab types—whether the heavier Gen-Five or the lighter cab—Kershaw testified that to move them along "[w]e had to put them on a hoist. … You had to hook them up, lift them up, then put them in the position they needed to be in order to pin them to put them on this automated line." (CR 80, lines 7-9).

[13] Kershaw testified that lifting caused the onset of the right inguinal pain, which we now know is a hernia. Kershaw testified that the injury occurred due to an event at work: "The hoist moved rather easily, but – a big six, 700-pound cab … I was trying to stop it too fast to put it down exactly where I wanted it, and then a felt a little pressure down there, or a pull like." (CR 82, lines 10-16).

[14] The Administrative Law Judge issued an opinion on October 6, 2011, denying the claim. (CR 125-134). The ALJ did not rely on the sole medical opinion

offered, but conducted her own search of the medical literature citing the National Institutes of Health website. (CR 129). The ALJ made a specific finding that:

> There are two types of inguinal hernias: indirect and direct which have different causes. Indirect inguinal hernias are congenital, thus not caused by work activities. Direct inguinal hernias result from connective tissue degeneration of the abdominal muscles, thus are also not caused by work activities. Inguinal hernias may be aggravated by several factors pressuring the abdominal muscles, such as sudden twist, pull, or muscle strains; lifting heavy objects; straining on the toilet; weight gain; and chronic coughing.

(CR 131, Finding of Fact 8).

[15] The ALJ concluded that there were "no objective medical findings supporting the opinion of Dr. Jondahl," (CR 132, Conclusion of Law 3), yet agreed that "[w]hile evident that Kershaw's work activities triggered symptoms in his right groin, Kershaw failed to establish that his work activities substantially accelerated the progression of, or substantially worsened the severity of, his right inguinal hernia." (CR 133, Conclusion of Law 4).

[16] Kershaw requested reconsideration, arguing that the ALJ could not substitute her own medical judgment for the sole medical opinion on offer. (CR 136-142). The ALJ granted the petition in an Order on November 11, 2011 (CR 146-147), with remand to WSI authorizing an Independent Medical Review.

[17] On reconsideration/rehearing, WSI hired EvaluMed to conduct a 'records-only' review. (See WSI Counsel's February 14, 2012, letter to EvaluMed, CR 34-35). In his opinion dated March 15, 2012, the IME examiner, Dr. Brown, said: "I do not agree with Dr. Jondahl's opinion that the nature of Mr. Kershaw's work on the cab assembly line was a significant contributing factor to the development of the right inguinal hernia." (CR 39, discussion #2-3). But, Dr. Brown also acknowledges that while there are many

causes of hernias, "[h]eavy lifting can cause a hernia." (See *id.* at discussion #1; *see also* Dr. Brown testimony at CR 44—Depo Transcript at p. 13, lines 20-23).

[18] Interestingly, Dr. Brown rejected the distinction between direct and indirect hernia's the ALJ relied on in conducting her research on cause: "In this case, it is immaterial whether Mr. Kershaw had an indirect hernia or a direct hernia, as the causes for both are generally regarded as similar." (CR 39, discussion #1). Dr. Brown noted that the operative report at CR 32-33 "indicated both a direct and an indirect hernia." (CR 43—Depo transcript at p. 10, lines 1-5).

[19] Dr. Brown does not disagree with Dr. Jondahl that lifting is a cause of hernias. Rather, he does not agree with Dr. Jondahl's opinion *only because* that the lifting history is not contained in Dr. Jondahl's initial October 31, 2010, medical note:

> Q. [Mr. Gigler] Now, I provided you with Dr. Jondahl's opinion that the – it's his opinion that it was Mr. Kershaw's work on the cab assembly line that was a significant contributing factor to the development of the hernia. Do you agree with that opinion?"
>
> A. I agree that heavy lifting can be a significant risk factor. But looking at his history in this case, it appears that the work was not a significant risk factor based on the history in the record.

(CR 43—transcript at p. 11, lines 18-25, and transcript p. 12, lines 1-3).

[20] Dr. Brown clearly confirmed in his testimony that he would not draw a causal relationship between lifting at Bobcat and Kershaw's hernia solely because of the absence of that reported history in the initial medical note of Dr. Jondahl on October 31, 2010:

> Q. [Mr. Haas] So I was going to ask you some questions about some studies that I found … that repetitive strain [sic] affecting heavy manual labor may contribute to a hernia development. I have more studies that suggest that that's true. But you already agree that that –
> A. Absolutely, yes –
> Q. – is a risk factor, right?
> A. –it is a risk factor.

> Q. All right.
> A. Yes, it is a risk factor.
> Q. So your testimony, Dr. Brown, is that ***[if] you'd seen in the medical records themselves that Mr. Kershaw's initial report of hernia*** was due to heavy lifting, and then was you saw he testified to [history] then you would link it, is that true, to work?
> ***A. If he has reported problems at work and with possible bulging, yes, I would—I would link the two.***
> Q. And that's based on his testimony at the hearing where he did lifting [sic] of the heavy cabs….
> ***
> A. I remember him reporting that.
> ***
> Q. Being that lifting [sic] these cabs off a hoist … that could, in fact, cause the hernia, is that right?
> A. Yes, it could.

(CR 44—Transcript at p. 13, lines 24-25, p. 14, lines 1-25, p. 15, lines 1-17) (Emphasis added).

[21] Dr. Brown's 'causation opinion' here is not actually based on any medical factors, but the significance of a history in a chart. Dr. Brown's opinion rests on an assumption that to be believed, Kershaw must have identified the cause of his injury in his initial medical visit. Dr. Brown does not deny the mechanism of injury is medically likely to cause Kershaw's hernia, as Dr. Jondahl has opined.

[22] In her final Order of June 29, 2012, the ALJ simply says that "[i]n October 2010, Kershaw does not report to Dr. Jondahl that every time he pushes or lifts at work he has pressure or pain his groin, and he certainly does not relate it back to the onset of symptoms in March 2010." (CR 167-168). Rather, Kershaw articulated his "reasonable layperson's guess to Dr. Jondahl," as being a medical condition involving urination. *Id.* However, the ALJ does recognize: "[a]s time goes on and his condition progresses, there is no reason to believe that straining or lifting would not trigger groin symptoms, but this does not in itself support a finding of causation, significant contribution to the

development of, substantial acceleration of the progression of, or substantial worsening in the severity of, Kershaw's right inguinal hernia." (CR 168).

[23] As in the first order, the ALJ again determined that: "[w]hile evident that Kershaw's work activities triggered symptoms in his right groin, Kershaw failed to establish that his work activities substantially accelerated the progression of, or substantially worsened the severity of, his right inguinal hernia." (CR 169).

LAW AND ARGUMENT

I. Kershaw has proven by a preponderance of evidence that his employment caused his hernia.

[24] An employee seeking WSI benefits has the burden of proving by a preponderance of evidence that he suffered a compensable injury. N.D.C.C. § 65-01-11. The Court has said that "[a] preponderance of the evidence is 'evidence more worthy of belief,' 'the greater weight of evidence,' or 'testimony that brings the greater conviction of truth.'" *Kraft v. State Board of Nursing*, 2001 ND 131, ¶ 21, 631 N.W.2d 572, citing *Jimison v. N.D. Workmen's Comp. Bureau*, 331 N.W.2d 822, 824 (N.D.1983).

[25] The Court explained, "the preponderance standard is met by evidence which is more convincing or of greater weight than the opposing evidence, namely, evidence which as a whole shows the fact to be proved is more probable than not. … We have defined the preponderance of the evidence standard in terms of whether a reasoning mind reasonably could have determined factual conclusions reached were proved by the weight of the evidence from the entire record." *Kraft*, ¶ 21 (citations omitted).

[26] The ALJ does not discount Kershaw's credible claim that his lifting at Bobcat triggered the inguinal pain that reflects he sustained the hernia. The ALJ stated it "evident that Kershaw's work activities triggered symptoms in his right groin," (CR 169),

recognizing "[a]s time goes on and his condition progresses, there is no reason to believe that straining or lifting would not trigger groin symptoms." (CR 168). Rather, the ALJ explained, triggering symptoms "does not in itself support a finding of causation, significant contribution to the development of, substantial acceleration of the progression of, or substantial worsening in the severity of, Kershaw's right inguinal hernia." (CR 168).

[27] The ALJ said that "Kershaw did testify to an incident of sharp pain while squatting at work, and there is no reason to believe that squatting would not trigger a symptom. However, Kershaw gave no specific date of time frame for the squatting incident, and clearly did not intimate or indicate that that even occurred at the onset of his symptoms in the spring of 2010. Kershaw did not testify that a memorable event or activity at work precipitated the onset of groin symptoms." (CR 168).

[28] This finding is not based on any evidence of record, and simply ignores Kershaw's testimony that he remembers the injury: "The hoist moved rather easily, but – a big six, 700-pound cab … I was trying to stop it too fast to put it down exactly where I wanted it, and then a felt a little pressure down there, or a pull like." (CR 82, lines 10-16). While he did not know the injury date this is common to hernias. At the hearing, Kershaw related all of his symptoms to lifting at work. The ALJ did not deny Kershaw's essential credibility. Rather, the ALJ simply believes that the medical evidence is not sufficiently strong, for the simple reason that Kershaw did not report a history of pain from lifting when he first consulted Dr. Jondahl on October 31, 2010.

[29] Inexplicably, the ALJ does not address the commonplace that a layperson might not link the hernia to lifting until being told he has a hernia. This lack of

knowledge is precisely the reason that N.D.C.C. § 65-05-01 allows an individual one year after an injury to file a workers compensation claim: "[t]he date of injury for [filing] purposes … is the first date that a reasonable person knew or should have known that the employee suffered a work-related injury." It is because it is so common that the causal link is not immediately made by the claimant, that the limitations period for filing a claim is one year from the date that the employee and the employees' doctor make the causal link. *See e.g., Klein v. North Dakota Workers Compensation Bureau*, 2001 ND 170, ¶ 4, 634 N.W.2d 530 (Klein did not file a claim for Workers Compensation benefits until May, 1999, though he had been experiencing symptoms at work since 1996. The Court reversed the determination that the claim was not timely filed.)

[30] The ubiquity of a delay in reporting of a history of symptoms is exemplified in *Claim of Murray*, 431 N.W.2d 651, 652-653 (N.D. 1988), wherein the Court reversed the agency's denial of benefits in connection with the claimant's low back pain simply because he had not reported any back pain symptoms to his doctors until about 11 months after the work-related injury to his feet. There is no true dispute here but that Kershaw's job assembling cabs for Bobcat required significant lifting. Nor is there any dispute that heavy lifting like Kershaw does at Bobcat is indeed a likely cause of a hernia. And there is no alternative explanatory cause.

[31] In sum, the ALJ credits this credible history of the triggering of symptoms by lifting, without any alternative explanation for the hernia, and without a medical opinion to deny the mechanism of injury is a likely one.

[32] Kershaw has presented a prima facie case of compensability under the preponderance of evidence standard: (1) Kershaw has given credible testimony that he

does heavy lifting at Bobcat that caused him to have the symptoms since diagnosed as a hernia; (2) there is no alternative cause of this hernia identified; and, (3) there is no dispute among the medical experts that heavy lifting causes hernias.

[33] Regarding this crucial third factor—the mechanism of injury—Dr. Brown admits that lifting is a cause of hernias. Moreover, Dr. Jondahl has provided an affirmative opinion on several occasions. First, in his April 22, 2011, medical note Dr. Jondahl states that Kershaw was there under a WSI claim (CR 20); second, Dr. Jondahl's May 23, 2011, capability assessment affirms that Kershaw's hernia is not caused by any preexisting/associated conditions (CR 27); and, third, Dr. Jondahl's letter dated May 23, 2011, opines that Kershaw's "repetitive duties did become a significant contributing factor to the development of the right inguinal hernia." (CR 28)

[34] WSI ignores that Dr. Kane's May 11, 2011 medical note also establishes that Kershaw first noticed right groin pressure in March 2010, which "gets worse with lifting especially of heavier objects." (CR 22).

[35] An increased susceptibility to hernia due to his weight is irrelevant as a legal matter, and there is no evidence that Kershaw was a chronic cougher, or has any bowel problems that make him strain to use the toilet. In sum, it was legal error for the ALJ to conclude that Kershaw did not met his burden of proof because he cannot wholly rule out every other potential contributing cause of a hernia; it is after all, impossible to prove a negative. "Objective medical findings," include "a physician's medical opinion based on an examination, a patient's medical history, and the physician's education and experience." *Myhre v. North Dakota Workers Compensation Bureau*, 2002 ND 186, ¶ 15, 653 N.W.2d 705.

[36] Kershaw has presented a credible history of groin pain from heavy lifting that is sufficient, as a matter of medical science, to cause this hernia. Dr. Brown did not deny that Kershaw's described lifting activities are the most likely cause of his hernia—if only he had mentioned it to Dr. Jondahl in his first visit, when first diagnosed. (CR 44, transcript at 14, lines 12-20).

[37] It would be another story if instead, the IME physician denied that the mechanism of injury is sufficient to cause the injury, or if a non-work cause had indeed been identified. And unless there is clear reason to reject credibility, WSI must not attempt to 'sew up' the claimant's case with guess-work credibility determinations. *See e.g. Inglis v. North Dakota Workmen's Comp. Bureau*, 312 N.W.2d 318, 323 (N.D.1981).

II. Kershaw's lifting at Bobcat triggered his hernia, worsening it so as to require surgery to repair.

[38] WSI found that: "[w]hile evident that Kershaw's work activities triggered symptoms in his right groin, Kershaw failed to establish that his work activities substantially accelerated the progression of, or substantially worsened the severity of, his right inguinal hernia." This language is from the 'trigger statute,' N.D.C.C. § 65-01-02(10)(b)(7), relating to preexisting conditions, providing that the term compensable injury does not include:

> injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

[39] North Dakota follows the universally accepted maxim that susceptibility to injury is not relevant, as the employer takes the employee as he finds him. *Bruns v. North Dakota Worker's Compensation Bureau,* 1999 ND 116, ¶ 16 n.2, 595 N.W.2d 298. In

Balliet v. North Dakota Workmen's Compensation Bureau, 297 N.W.2d 791, 795 (N.D.1980), the Court put it most plainly "[p]utatively, almost every injury could, with sufficient scrutiny, be linked to some preexisting weakness or susceptibility."

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

[41] As the Court recently noted again in *Mickelson v. North Dakota Workforce Safety and Insurance*, 2012 ND 164, ¶21, 820 N.W.2d 333, the root of the issue is whether the claimant's susceptibility or pre-existing condition is such that it would *naturally progress on its own timetable* without regard to the employment in which the employee was engaged. In distinguishing between a mere trigger of symptoms due to a natural progression of the underlying disease, or a compensable significant worsening, the Court said the employment contribution must "in some real, true, important, or essential way make[] the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful." *Mickelson*, at ¶ 20.

[42] The Court "decline[d] to construe those terms so narrowly as to require only evidence of a substantial worsening of the *disease itself* to authorize an award of benefits. Rather, the statute … requires consideration of whether the preexisting injury, disease or other condition would have progressed similarly in the absence of employment." *Id.*

(Emphasis added). *Mickelson* shows that the Court's central concern is to differentiate between the natural progression of an underlying condition that is already showing a worsening on its own timetable (that is, without regard to the employment), from a mere susceptibility to an injury and the significant triggering of symptoms that causes the damages (need for surgery).

[43] The salient question is whether Kershaw's heavy lifting of cabs at Bobcat triggered and significantly worsened his symptoms so as to require surgery. On this question, the ALJ found it "evident that Kershaw's work activities triggered symptoms in his right groin." (CR 169). Yet, absent any conclusion that the condition would have *progressed similarly* in the absence of employment under the *Mickelson* test, the ALJ also concluded that Kershaw "failed to establish that his work activities substantially accelerated the progression of, or substantially worsened the severity of, his right inguinal hernia." (CR 169).

[44] It is readily apparent that the ALJ has not considered just what it means for the hernia condition to have been triggered by work, as she found, but not to have been worsened by work. The ALJ's findings and conclusions are inconsistent, and the District Court correctly reversed under N.D.C.C. § 28-32-46 (the conclusions of law are not supported by the findings of fact).

Conclusion.

[45] For the reasons above stated, the Court should affirm the District Court.

Respectfully submitted this 27th day of June, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Ron Kershaw, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 3,958 words.

Dated this 27th day of June, 2013.

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THE SUPREME COURT

STATE OF NORTH DAKOTA

Ronald Kershaw, Appellee, -vs- Workforce Safety and Insurance, Appellant, and Bobcat Company, Respondent.	)	**CERTIFICATE OF SERVICE** Supreme Ct. No. 20130131
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

I, Dean J. Haas, hereby certify that on June 27, 2013, I served the BRIEF OF APPELLEE upon the following by emailing a true and correct copy to the following email addresses:

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