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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Warren Parsons, Appellant -vs- Workforce Safety and Insurance Fund, Appellee	)	Supreme Ct. No. 20130197

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT DATED JUNE 4, 2013, AFFIRMING THE FINAL ORDER OF WORKFORCE SAFETY AND INSURANCE OF NOVEMBER 28, 2012,
RAMSEY COUNTY DISTRICT COURT
NORTH EAST JUDICIAL DISTRICT
THE HONORABLE DONOVAN FOUGHTY

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Statement of the Issues.

[1] Whether the ALJ's factual findings that Parsons sustained a work-related cervical strain and a microscopic tear to his discs resulting in discogenic and myofascial pain requires an award under the Act.

[2] Whether the Act bars compensation for Parson's work-related disc tear as not morphologically or structurally "significant" as to be visualized on an MRI.

[3] Whether the Act bars a claim for benefits because the work injury eventually resolves or cannot resolve because it combined with a preexisting condition to be of a longer duration than would otherwise be the case.

[4] Whether the ALJ's finding that Parsons' preexisting asymptomatic degenerative disc disease made him vulnerable and susceptible to these injuries to the intervertebral discs in his cervical spine is a complete defense as a noncompensable natural progression of a preexisting condition under N.D.C.C. § 65-01-02(10)(b)(7).

[5] Whether Parsons' work injury that resulted in the above described physical injuries and chronic myofascial pain is compensable under N.D.C.C. § 65-01-02(10)(b)(7) by acting on a preexisting susceptibility, or whether the work injury must be the sole cause of his damages.

[6] Whether the ALJ has adequately addressed the substantial medical evidence favorable to Parsons.

Statement of the Case.

[7] Warren Parsons ("Parsons") filed an application for workers compensation benefits with North Dakota Workforce Safety and Insurance ("WSI") in connection with

an injury to his left shoulder and cervical spine sustained on October 12, 2010, while working for Ames Construction. Appendix at 29. ("App.").

[8] WSI denied the claim by order dated May 16, 2011. (App. 30-32). Parsons requested a hearing, which was held on March 6, 2012. (Certified Record, 492-845). ("CR"). The ALJ affirmed WSI by order dated May 2, 2012. (CR 134-152). Parsons took an appeal to the District Court, which remanded for consideration of *Mickelson v. North Dakota Workforce Safety & Insurance*, 2012 ND 164, 820 N.W.2d 333. (App 24-25).

[9] On remand, the ALJ made nearly identical findings, affirming the denial by order dated November 28, 2012. (App. 12-23). The District Court affirmed. (App. 26-27). Parsons appeals.

Statement of the Facts.

[10] Warren Parsons, age 57 at the date of injury, was hired by Ames Construction as a truck driver. (App. 29). Parsons drove the truck over uneven washboard-like gravel roads, bouncing his shoulder against the shoulder harness, causing severe left shoulder and neck pain beginning around October 12, 2012. (CR 521-523; 528). Parsons had never had neck or left shoulder pain before this. (CR 530, lines 12-14).

[11] Parsons sought medical care from Dr. Fleissner, an occupational health specialist, on October 14, 2010. (App. 34-36). Dr. Fleissner noted that Parsons developed pain at the "base of the neck and his left shoulder," from "bouncing over [] washboard-type roads ... quite violently, pulling against the base of the neck with his seatbelt on the left." (App. 34). On exam, Dr. Fleissner found that Parsons was tender at the base of the neck and over the supraclavicular and superior trapezius musculature to the left. (App.

35). Dr. Fleissner diagnosed Parsons with "cervical sprain and left shoulder strain associated with repetitively bouncing up and down in a truck seat against seatbelt." *Id.*

[12] Parsons reported an exacerbation to Nurse Practitioner Zwilling on November 16, 2010, reporting increased neck and shoulder pain as a result of the long hours operating truck over bumpy roads, 12-14 hours per day, 6-7 nights per week. (App. 37-39). Her exam showed neck stiffness and her neurological review was "positive for weakness and numbness in the left upper extremity." (App. 38).

[13] On November 23, 2010, Dr. Fleissner confirmed the diagnosis of "left shoulder and cervical strain," noting Parsons' increasing discomfort in the left shoulder and neck, and recommended physical therapy. (App. 40-41). In the initial exam on November 28, 2010, (*see* App. 42-45), the physical therapist's musculoskeletal evaluation showed Parsons had an objective loss of strength in the left upper extremity, "4/5 strength for shoulder abduction and supraspinatus strength." (App. 43). In addition to strength loss, the physical therapist noted muscle tightness and pain with range of motion in the left upper extremity. (App. 44—"Assessment"). Therapeutic exercises were given, and home instructions provided. (App. 45).

[14] On December 9, 2010, Dr. Fleissner continued to find Parsons "tender on the left side from the base of the skull along the paravertebral musculature to the upper thoracic back on the left," with "tenderness and tightness … a few trigger points. … This is all on the upper aspects of the trapezius musculature." (CR 333). An MRI of the cervical spine on December 16, 2010, showed "chronic mild disc degeneration." (App. 46).

[15] Parsons consulted a physical medicine and rehabilitation specialist, Dr. Podduturu, on January 6, 2011, reporting the history of neck and shoulder pain bouncing and jarring against his seatbelt while operating a dump truck over rough roads. (App. 47-51). He found objective evidence of trigger points in the left supraspinatus muscle. (App. 50). Dr. Podduturu diagnosed Parsons with myofascial pain (ICD Code 729.1)[1] and neck sprain and strain (ICD Code 847.0).[2] *Id.* Dr. Podduturu advised Parsons to continue his physical therapy, reviewed his pain medication options and use of heat or ice, and prescribed Flexeril for muscle spasm. *Id.* He noted that while Parsons has the normal aging of degenerative disc disease, his "Primary" diagnosis is myofascial injury, ICD 729.1. (App. 51).

[16] Dr. Podduturu confirmed his diagnoses in his exam on March 24, 2011, noting that Parsons continued to exhibit trigger points, associated with myofascial injury. (App. 52). He reported that Parsons was taking Flexeril for muscle spasm relief, and Tramadol for pain control. *Id.* Dr. Podduturu thought that Parsons should consider a TENS unit and traction, continue physical therapy and medications (Flexeril and Tramadol), and opined that he would benefit from trigger point or epidural steroid injections. (App. 53).

[17] An x-ray of Parsons shoulder on August 8, 2011, showed typical "[e]arly arthritic change AC joint." (CR 381). An orthopedic consult with Dr. Johnson on August 17, 2011, indicated that the left shoulder joint was not the likely source of his pain, and he is not a surgical candidate. (CR 365-367). A neurologist, Dr. Roller, noted on

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[1] Defined as "an acute, sub-acute, or chronic painful state of muscles, subcutaneous tissues, ligaments, tendons, or fasciae." ICD-9-CM Diagnosis Code 729.1.
[2] Defined as "[s]oft tissue injury of cervical spine due to sudden hyperextension or hyperflexion or hyperrotation of neck or limbs." ICD-9-CM Diagnosis Code 847.0.

September 12, 2011, that Parsons had responded favorably to steroids, with unremitting shoulder pain, which Parsons has always identified at the trapezius. (CR 370). No further testing was done. *Id.* He prescribed the anti-inflammatory, Prednisone, the pain medications, Tramadol and Ibuprofen, and the muscle relaxant, Flexeril, for muscle spasm. (CR 371).

[18] Parsons saw Dr. Fleissner four more times, from October 2011, to January, 2012. (CR 372-379). Since WSI had denied his claim, Parsons could not afford additional treatment. In a letter to counsel, Dr. Fleissner opined that the bulging discs apparent on the MRI were caused or at least aggravated by the repetitive injury that Parsons sustained from working at Ames. (App. 89). In reply to counsel's follow-up questions, Dr. Fleissner affirmed his many medical notes, opining that Parsons' job duties bouncing in the truck over uneven terrain were likely a substantial contributing factor to Parsons' cervical and left shoulder soft tissue (strain) injuries. (App. 90). He also opined that Parson's employment substantially worsened his previously asymptomatic degenerative disc disease. *Id.*

[19] While hearing was pending, WSI obtained an Independent Medical Exam from Dr. Janssen. (App. 55-80). Dr. Janssen reviewed the medical records and took a history, noting that Parsons reported "two [employment] injuries," both with the same "mechanism of injury." (App. 75). He admitted that "the impact of the safety belt over the trapezius area ... caused cervical strain over the left trapezius area." *Id.* According to Dr. Janssen, Parsons' employment also "aggravated his already existing degenerative disc disease and caused the current symptoms in his left neck and shoulder." *Id.*

[20] Dr. Janssen noted that Parsons did not have any neck or shoulder pain prior to his work injuries. (App. 77). He opined that "Parsons suffered a cervical strain, which triggered the cervical degenerative disc disease to be symptomatic." *Id.* Also in reply to question #5, Dr. Janssen said the cervical strain aggravated the prior condition, and "he now has chronic discogenic and myofascial pain secondary to his aggravation." *Id.*

[21] Dr. Janssen thought a normal strain would resolve itself, but also noted that "[t]o a reasonable degree of medical certainty, he now has chronic discogenic and myofascial pain," due to his work injury. (App. 77). In reply to WSI's question #7 whether Parsons sustained a "cervical strain independent of any disc issues," Dr. Janssen said that there was indeed medical evidence to support this:

> Mr. Parsons had pain in his left neck and shoulder immediately after [his] describe[d] injury on October 12, 2010, and as well the injury in November 2010. *Physical exam findings* from physical therapy, Dr. Fleissner, and the physiatrist noted muscle tightness and trigger points over the left neck and shoulder area. To a reasonable degree of medical certainty, the impact of the safety belt on to [sic] the trapezius area *did cause cervical strain* in October 2010 and November 2010.

(App. 78)(Emphasis added).

[22] This is consistent with Dr. Janssen's own examination of Parsons on November 12, 2011, which continued to show evidence of an injury over a year after the work injury: "cervical spine examination did reveal areas of taut bands over the left trapezius muscle, as well as the left levator scapulae muscle." (App. 72—"cervical spine.").

[23] WSI didn't like his answers, and asked follow-up questions. In his February 1, 2012, reply, Dr. Janssen confirmed that degenerative disc disease is part of natural aging—i.e., that DDD is "age-dependent,"—which on imaging studies is shown by "real or apparent disc desiccation, fibrosis, narrowing of disc space, diffuse bulging of the

annulus beyond the disc space." (App. 82). He confirmed that "[d]egenerative disc disease may or may not be symptomatic. The above MRI findings have been found in studies of asymptomatic individuals." *Id.*

[24] Dr. Janssen confirmed that Parsons indeed suffered an "injury" from work "after driving over uneven roads that caused bouncing and subsequent impact on his left trapezius by the safety belt." (App. 82). Dr. Janssen said:

> This impact caused strain in his left trapezius muscle. A strain can be defined as over-stretching or tearing of a muscle or tendon. This was confirmed by increasing pain in the left trapezius muscle as well as physical exam findings and taut bands over that area. To a reasonable degree of medical certainty, the stretching of the trapezius muscle caused compression and torsional forces on the cervical spine. The trapezius is directed connected to the cervical spine, and the increasing impact on this muscle caused the cervical spine to left lateral flex, which caused compression and torsional forces on the cervical intervertebral discs which already had some level of degeneration. *To a reasonable degree of medical certainty, these forces caused an injury to the disc such as a stretch or microscopic tear of the annulus fibers that would not be seen on an MRI.*

(App. 82)(Emphasis added).

[25] Dr. Janssen continued:

> To a reasonable degree of medical certainty, the stretching of the trapezius muscle caused compression and torsional forces on the cervical spine. The trapezius is directly connected to the cervical spine, and increasing impact on this muscle caused the cervical spine to left lateral flex which caused compression and torsional forces on the cervical intervertebral discs which already had some level of degeneration. *To a reasonable degree of medical certainty, these forces caused an injury to the disc such as a stretch or microscopic tear of the annulus fibers that would not be seen on an MRI.* To a reasonable degree of medical certainty, this level of trauma to the disc triggered his symptoms, but did not substantially accelerate the progression of Mr. Parsons' preexisting degenerative disc disease as it is defined above [that is, DDD is age-dependent, and may or may not be symptomatic]. Even though this type of injury is unlikely to cause worsening degeneration over time, *Mr. Parsons has developed chronic discogenic pain secondary to the microscopic injury described above. To a reasonable degree of medical certainty, because part of the disc has been injured, it is no longer able to bear its part of the load, causing*

> *increased stress on the remainder of the disk. In this case, this is unlikely to cause further degeneration, but it is causing chronic pain.*

(App. 83)(Emphasis added).

[26] He further opined that "symptoms from the cervical/trapezius strain and the cervical discogenic pain overlapped," so "given the overlapping nature of the cervical strain and cervical discogenic pain, I am not able to provide a date as to when the cervical strain resolved." *Id.* While most strain injuries "resolve on their own," (he did not specify the 'normal' timetable) Dr. Janssen could not provide a date as to when *Parsons'* cervical strain should have resolved. *Id.*

[27] In reply to question #3, Dr. Janssen again admitted that:

> The injuries that Mr. Parsons sustained in October 2010 and November 2010 caused a cervical/left trapezius strain which, to a reasonable degree of medical certainty, caused compression and torsion forces that *caused an injury to an already degenerated cervical intervertebral disc, most likely at C4-5 or C5-6.* His current neck and periscapular pain are consistent with cervical discogenic pain secondary to this *injury to the cervical intervertebral disc.*

(App. 83)(Emphasis added).

[28] Dr. Janssen opined said that Parsons' work injury caused the symptoms that now require treatment, but that an injury will not "substantially accelerate the progression" of preexisting degenerative disc disease itself—that is the imaging findings. (App. 82-83).

[29] Incredibly, WSI did not amend its order to accept as compensable the acknowledged cervical/left trapezius strain and injury to the cervical intervertebral disc. Equally incredible, on May 2, 2012, the ALJ affirmed the denial. (CR 151-152). Parsons appealed, and the District Court remanded for consideration of *Mickelson,* 2012 ND 164. On remand, the ALJ repeated, nearly verbatim, his prior findings and conclusions. (App. 12-23). The ALJ's factual findings and the sole conclusion of law are in conflict. The

first five factual findings require an award to Parsons, since the ALJ found, in pertinent part, that:

> 1. On or about October 12, 2010, Warren Parsons *was injured* while working for Ames Construction.
>
> 2. The *injury caused cervical strain and a microscopic tear to his disc at C4-C5 of C5-C6, resulting in discogenic and myofascial pain.*
>
> 3. At the time of the work injury, Parsons had a preexisting condition of cervical DDD ... making them *especially vulnerable to injury.* In effect, Parsons' cervical DDD created a "weak link" in his back, which *resulted in a microscopic tear to the disc* from bouncing on the truck seat and hitting the seat belt.
>
> 4. The cervical strain has resolved, and Parsons' taut bands and pain in the area of his left shoulder is the result of *damage to his disc and discogenic pain.*
>
> 5. The work injury did not cause *significant* damage to Parsons' disc.
>
> 6. Parsons' pain after the work injury was not a substantial worsening of his DDD.

(App. 21)(Emphasis Added).

[30] Rather than reason his way through the evidence and recognize as compensable the trapezius/cervical strain and disc tear injury documented in his findings of fact, the ALJ conflated these injuries with the DDD, and concluded:

> Warren Parsons had a preexisting degenerative condition of cervical DDD at the time of his work injury, and the work injury did not substantially accelerate the progression or worsen the severity of the condition. The greater weight of the evidence fails to show that Parsons' preexisting cervical DDD would likely not have progressed similarly in the absence of the work injury. Therefore, under N.D.C.C. § 65-01-02(10)(b)(7), his work injury is not a compensable injury, and he is not entitled to benefits.

(App. 21).

[31] The ALJ's reasoning would end compensation for back strains and for disc injuries not visualized on an MRI. This is contrary to the Act; nothing in it precludes benefits for acknowledged injuries simply because a preexisting injury made the employee vulnerable to the injuries.

[32] WSI cannot point to any legal authority to deny Parsons' claim. Parsons takes this appeal to this Honorable Court to right these legal errors, and award him the benefits to which he is entitled, including remand for an award of his attorney's fees under N.D.C.C. § 28-32-50.

Law and Argument

I. The Uncontradicted Evidence is that Parsons Sustained a Compensable Injury to the Intervertebral Disc and Soft Tissue (Strain) Injury.

[33] Both Dr. Fleissner and Dr. Podduturu used ICD diagnosis code 847.0, diagnosing Parsons with "[s]oft tissue injury of cervical spine." (App. 36; 50). Dr. Janssen confirmed, testifying in response to questions from WSI counsel that Parsons' work injury caused "two different injuries," the strain injury to the trapezius, and the injury to the cervical spine itself, a tear of the disc, explaining:

> The safety belt contacted his trapezius muscle and caused a stretch or small tear of the trapezius muscle itself, which is consistent with a strain of the trapezius muscle. In addition, the impact of the safety belt over the trapezius muscle caused injury to the cervical spine itself, in particular the cervical intervertebral disc most likely at C4-C5 and C5-C6. The trapezius muscle ... directly attaches to the cervical spine. With the impact of the safety belt on the trapezius muscle, this caused a rotational and torsional force on the cervical spine which was enough to cause a very small, microscopic injury to one or both of the cervical intervertebral discs, most likely at C4-C5 or C5-C6. This injury could be as small as a very small stretch of the cartilage or a microscopic tear. Neither one would show up on the imaging findings.

(App. 94, lines 3-22).

[34] Based on the undisputed medical evidence, the ALJ found that Parsons did sustain a cervical/trapezius strain injury. (App. 21, findings 2 & 4). The ALJ was also forced to find that Parsons suffered an actual injury to the intervertebral disc: "*a microscopic tear to his disc at C4-C5 of C5-C6, resulting in discogenic and myofascial pain.*" (App. 21, finding 2)(Emphasis added). Whether the injury to the disc is one

visualized on an MRI or not is not relevant under the Act; the Act does not require that the disc injury be visualized on some 'objective medical test.' In *Myhre v. N.D. Workers Compensation Bureau*, 2002 ND 186, ¶15, 653 N.W.2d 705, the Court said "'[o]bjective medical evidence' may include 'a physician's medical opinion based on an examination, a patient's medical history, and the physician's education and experience.'" These admitted work injuries require compensation be paid as a matter of law.

[35] The ALJ found (*see* App. 21, findings 2 & 4) that the microscopic tear to Parsons' cervical intervertebral discs from the work injury resulted in "chronic discogenic and myofascial pain," as Dr. Janssen opined. (App. 77). This is *not* a case where there is no physical injury to the body that can be adduced. This is *not* a case where pain 'merely manifest' itself at work without an identifiable work-related mechanism of injury. Nor is this the case where pain waxes and wanes with a simple normal progression of an already symptomatic condition under usual and customary human activity levels.

[36] In finding #4, the ALJ found that Parsons' cervical strain had resolved. (App. 21). But he fails to recognize that the Act does not bar a claim for benefits because the injury eventually resolves, or cannot resolve because it combines with a preexisting condition to be of a longer duration than would otherwise be the case. WSI cannot cite any legal authority for that proposition. Even if Parsons' cervical strain is resolved—and even Dr. Janssen continued to find evidence of an injury in muscle spasm and taut bands in the trapezius in his exam over a year after the injury (App. 72; 100, lines 19-22)—the Act does not require that an injury result in permanent damage to the body in order to be compensable.

[37] Despite finding that Parsons' work injury caused the disc tear and his chronic myofascial pain, (*see* App. 21, findings 2 & 4), the ALJ states in finding #5 that the work injury "did not cause significant damage to Parsons' disc." (App. 21). But the Act does not require that an identifiable physical injury to the body be characterized as structurally or morphologically "significant," to afford compensation. If it did, no strain injury or disc injury involving a microscopic tear of the annulus fibers would ever be compensable: they are not visualized on an MRI or x-ray. Rather, the Act requires that damages—medical treatment or disability—flow from the injury.

[38] WSI cannot cite a single case which holds an injury to the body must meet some physical threshold of "significance" in order to be compensable. The significance of the injury is not measured by the how large the tear to the disc is, but on the effect of that physical tear in the disc to Parsons' life.

[39] For example, there was no controversy in *Pleinis v. North Dakota Workers Comp. Bureau,* 472 N.W.2d 459, 462 (N.D. 1991), that a soft tissue injury that eventually resolves is compensable, as the Bureau awarded Mr. Pleinis initial medical benefits for a localized contusion and strain of the right knee resulting from a slip and fall he sustained at work in September of 1984.

[40] Similarly, in *Hein v. North Dakota Workers Compensation Bureau,* 1999 ND 200, 601 N.W.2d 576, the claimant was awarded benefits for a simple sprain to the coccyx. *Hein* ¶ 2. Again as in *Pleinis*, but unlike here, WSI accepted Hein's soft tissue injury claim, awarding benefits for a closed period of time. *Id.*

[41] The ALJ is unable to shift his view of the Necker Cube, focusing only on Parsons' susceptibility to injury from his aging discs that is DDD. But he admits that

Parsons' myofascial pain is not a mere manifestation of pain from a preexisting condition, but is due to an injury. (App. 21, finding 2 "[t]he injury caused cervical strain and a microscopic tear to his disc at C4-C5 of C5-C6, resulting in discogenic and myofascial pain."). The ALJ's conclusion of law does not follow from the findings. The ALJ's conclusion of law that Parsons' work injury did not substantially accelerate or worsen his preexisting (but asymptomatic) degenerative disc disease is an exclusive focus on the progression of its appearance on an MRI. (App 21).

[42] Rather than focus on the contribution of the work injury to Parsons' condition, the ALJ conflates and confuses the issues, simply concluding that an undisputed soft tissue injury and chronic myofasical pain syndrome from a work injury is not compensable in the presence of mild preexisting but asymptomatic DDD of the cervical spine. (App 21). His conclusion of law that the admitted work injuries are not compensable under N.D.C.C. § 65-01-02(10)(b)(7) is thus an exception that swallows the rule, and would do so for almost all cervical and lumbar injuries.

[43] WSI shows no comprehension of the significance of Parsons' chronic myofascial pain, which is a physiological reaction of the body to the disc tear injury. WSI erred as a matter of law by concluding that an injury: (1) must meet some threshold of physical "significance" to be compensable; (2) is not compensable at all if it eventually resolves; (3) is not compensable unless the employment is the sole cause; and, (4) is not compensable if it was made more likely to occur because of age or susceptibility to injury. All four of these arguments are frivolous.

II. Parsons' Susceptibility to Injury Due to His Previously Asymptomatic Degenerative Disc Disease Is Not a Defesnse.

[44] The ALJ's factual findings and conclusion of law are in conflict. In finding #3, the ALJ actually admits that his interpretation of the law is that a simple susceptibility to injury bars compensation under the preexisting injury defense. (App. 21). His elevation of a susceptibility to an injury as an absolute defense to compensation is clear legal error.

[45] Dr. Janssen confirmed that Parsons was wholly asymptomatic until his work injury "caused compression and torsion forces that caused an injury to an already degenerated cervical intervertebral disc, most likely at C4-5 or C5-6," causing "chronic cervical discogenic pain secondary to the microscopic injury described above." (App. 83). In fact, Parsons did not even know he had DDD, as he had never had any neck or shoulder pain until the injury described by Dr. Janssen as "injury to the disc such as a stretch or microscopic tear of the annulus fibers." (App. 82).

[46] Parsons' injury is not a simple natural progression of symptomatic DDD, with mere manifestation of pain at work. It is undisputed that Parsons' work injuries caused his chronic myofascial pain. There is a stark difference between a simple natural progression of a preexisting already symptomatic DDD, and the mere susceptibility to injury. To parrot the ALJ, the "significance" of the injury is measured in the effect of the injury on Parsons, not the abstraction of the MRI findings.

[47] The ALJ's superficial conclusion that the 57 year old Parsons' preexisting but asymptomatic degenerative disc disease was not worsened by the employment (App. 21), is an exclusive focus on the 'condition itself' rather than on the injury to the trapezius and intervertebral disc that is the sole cause of his chronic discogenic and myofascial pain syndrome and need for medical treatment.

[48] Dr. Janssen defined degenerative disc disease as "age-dependent." (App. 82). He explained that "degenerative disc disease may or may not be symptomatic. The above MRI findings have been found in studies of asymptomatic individuals." *Id.* He testified that by age 50 a significant portion of the population will have radiographic evidence of DDD. (App. 106, lines 6-12). Dr. Janssen further agreed that its appearance on an MRI as mild or severe does not necessarily correlate with symptoms. (App. 106, lines 2-4). Dr. Janssen testified that Parsons' work injury caused the disc tear and chronic discogenic and myofascial pain. (App. 97-98; App. 101, lines 6-25; App. 119, lines 23-24).

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

[50] More recently, in *Manske v. North Dakota Workforce Safety & Ins.,* 2008 ND 79 ¶ 12, 748 N.W.2d 394, the Court, citing *Satrom* v. *North Dakota Workmen's Compensation Bureau,* 328 N.W.2d 824, 831 (N.D. 1982), pointedly excluded such susceptibility to injury as grounds to deny a claim. 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.'" *Manske,* ¶ 12.

[51] In *Satrom*, the Court held compensable a disc injury that according to the treating physician, resulted from "minute trauma," from her hair-dressing job, causing the annulus "fibers supporting the disc give way." *Id.*, at 830. There, the Court held that a disc injury from work required an award. While the natural aging process of degenerative disc disease may render an individual more prone to an injury to the intervertebral disc, aging is not a defense in any state.

[52] The foremost authority on workers' compensation law, Professor Larson, notes that "nothing is better established in compensation law," than the rule that an employee takes an employee as is—that susceptible employees are entitled to the same "sure and certain" relief as everyone else. 1 Larson, *Workmen's Compensation Law*, § 9.02[1], p. 9-15 (November 2007). "This is sometimes expressed by saying the employer takes the employee as it finds that employee." *Id.*

[53] Here, WSI continues to conflate Parsons' admitted work injury to the intervertebral discs with his preexisting asymptomatic DDD, focusing only on the irrelevant. The Court, in *Bjerke v. North Dakota Workers Compensation Bureau*, 1998 ND 180, 599 N.W.2d 329, explained that "*it is the work-related injury that is at the center of the legislature's attention.*" *Bjerke,* ¶ 21 (Emphasis added). Dr. Janssen testified that the medical relevance of Parsons' DDD is that it made him susceptible to the tear to the disc that has now resulted in chronic myofascial pain. Dr. Janssen testified:

> The relationship to the cervical degenerative disc disease, if there was a relation, would be that those discs ... predating the injury had abnormal morphology; therefore, they already had some weak link to them, making them more susceptible to injury.

(App. 117, lines 19-25).

[54] So, while the work injury "did not substantially accelerate the progression of Mr. Parsons' preexisting degenerative disc disease *as it is defined above,"* (App. 83) (as an age-dependent condition that may or may not cause any symptoms), Dr. Janssen explained that "Mr. Parsons has developed chronic cervical discogenic pain secondary to the microscopic injury described above." *Id.* Dr. Janssen testified that while the work injury will not cause further degeneration over time, the injury has caused Parsons' chronic myofascial pain. He testified:

> Q. Dr. Janssen, when we talk about substantially accelerated or worsened the degenerative disc disease, you're referring to whether or not the radiographic image of this degenerative disc disease looks different from one film to the next, aren't you?
>
> A. I'm talking about the pathophysiologic nature of the disease. Whether the imaging shows it or not, I don't believe ... *the disc is not going to degenerate more quickly* over time secondary to his injury.
>
> ...
>
> *[But, t]he work injury caused the current chronic discogenic pain that Mr. Parsons has.*

(App. 119, lines 6-24) (Emphasis added).

[55] Dr. Janssen explained that the disc tear from the injury is the cause of Parsons' chronic myofascial pain, not the preexisting asymptomatic DDD, explaining the "cervical discogenic pain [is] secondary to the microscopic injury described above." (App. 83). The significance of this fact is entirely lost on WSI. Dr. Janssen testified:

> A. Once again, I'm not attributing any of those things to his degenerative disc disease. So his degenerative disc disease is not making his symptoms worse or his clinical picture worse. His discogenic pain [from the work-related disc tear] has made his symptoms worse.
>
> Q. And his discogenic pain, Dr. Janssen, is related to his work injury?
>
> A. Yes.

(App. 112, lines 16-23).

[56] And again:

Q. And it would be fair to attribute Mr. Parsons' pain that he's having to the work injuries?

A. Yes.

Q. And pain itself is oftentimes the focus of medical treatment, including some medications we talked about earlier, physical therapy, TENS, all of these things. Is that true?

A. Pain can be a focus of medical treatment, yes.

Q. ... [A]t the time you saw him, he's still a candidate or should continue to follow up with a physician for his pain. Wouldn't you agree?

A. If he continues to have pain, he can continue to follow up with a physician.

Q. And that would be medically recommended, wouldn't it?

A. If he continues to have pain, he could continue to follow up with his physicians. It depends on Mr. Parsons – how it is affecting him.

(App. 113, lines 21-24; 114, lines 1-16).

[57] Dr. Janssen's testimony as a whole underlines the actual irrelevance of Parsons' DDD, as Dr. Janssen is attributing the entirety of the symptoms, need for medical care and disability on the disc tear, not the DDD that made Parsons susceptible to that tear. The preexisting injury defense under N.D.C.C. § 65-01-01(10)(b)(7) does not even apply to this claim; for if applicable, this would make a mere susceptibility to injury a defense.

III. Compensable Injury Includes a Substantial Worsening of a Preexisting Asymptomatic Condition by Employment.

[58] To the extent Parsons' DDD is even relevant, WSI misconstrues the law as to the circumstances in which a preexisting injury worsened by employment is compensable. While pre-existing conditions are generally excluded from the definition of compensable injury, a significant worsening of a preexisting condition is compensable under the Act. As it existed at the time of the litigation, the 'trigger statute,' N.D.C.C. § 65-01-02(10)(b)(7), provided 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.

[59] WSI concludes that because Parsons' degenerative disc disease predates his employment, and because the employment injury did not make the DDD look worse on an MRI, that this ends the matter. The ALJ reasons that triggering of even chronic pain by a work injury—and even if the condition had been asymptomatic prior to injury—does not suffice to prove a compensable injury if some preexisting susceptibility can be pointed out. In finding #3, the ALJ said Parsons was "especially vulnerable to injury," as his "cervical DDD created a "weak link" in his back, which resulted in a microscopic tear to the disc," which tear he said in finding #2 was caused by his employment. (App. 21).

[60] Under WSI's interpretation of the trigger language in N.D.C.C. § 65-01-02(10)(b)(7) only those workers young enough so that an even mild degenerative process cannot yet be detected by x-ray or MRI could ever receive compensation for neck or back pain. This is starkly illustrated here, showing WSI's predilection to blame the entirety of Parsons' shoulder and neck pain on the DDD, since WSI did not even pay benefits in connection with Parsons' contemporaneous disc tear and strain injuries. Under this view, the trigger statute swallows up all claims for benefits for injury to the spine, simply because we all develop DDD, and thus become "susceptible" to the injury that Parsons sustained.

[61] The broad sweep of WSI's stringent interpretation of the statute is not an overstatement—because even though radiographic evidence of the existence of DDD

does not necessarily correlate with symptoms, DDD always shows progressive 'worsening' radiographically. For make no mistake, degenerative disc disease is natural aging—we all develop it. Even the IME examiner admitted that DDD is part of the aging process, and "degenerative disc disease may or may not be symptomatic. The above MRI findings have been found in studies of asymptomatic individuals." (App. 82; 104-107).

[62] As the Court has noted in *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621, and *Mickelson v. North Dakota Workforce Safety and Insurance*, 2012 ND 164, 820 N.W.2d 333, the root of the issue is whether Parsons' pre-existing condition is such that it would naturally progress on its own timetable but for the employment contribution. Here, the ALJ, relying on the unanimous opinions of Dr. Fleissner, Dr. Podduturu, and Dr. Janssen, found that Parsons' employment driving truck over rough terrain caused his chronic discogenic and myofascial pain—and so caused damages—that would not otherwise have occurred.

[63] In *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621, the Court held that a compensable aggravation of arthritis includes a worsening of symptoms. Applying the statute, the ALJ concluded that "Geck's employment appears to be merely a trigger," and denied her claim. *Geck*, ¶ 11. The Court reversed and remanded, because there was evidence that her work activities "resulted in her latent underlying condition of arthritis becoming symptomatic and painful. Pain can be an aggravation of an underlying condition of arthritis." *Id.* ¶ 10. The majority found the distinction between worsening the "condition itself" and the symptoms to be without significance. *Id.* ¶ 10. Parsons' case is more compelling than Ms. Geck's was, for his injuries include microscopic tearing of the annulus fibers, which only then led to symptoms.

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

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

[66] *Bergum v. N.D. Workforce Safety and Insurance*, 2009 ND 52, ¶ 12, 764 N.W.2d 178 presents the legal issues in this case, but also with substantially different facts. Unlike Parsons, "Bergum has had a long history of treatment for back pain dating back to 1990, and there is no dispute that Bergum has a preexisting condition of chronic low back pain." *Bergum* ¶ 2. Bergum's 'baseline' condition included "daily low back discomfort, and ... the regular use of an anti-inflammatory drug and a muscle relaxant." *Id.* ¶ 19. Significant medical evidence established that Bergum's chronic recurrent back pain naturally progressed on its own timetable, not changing the overall course or nature

of the preexisting condition. Bergum's recurrent back pain at work did not accelerate or worsen the preexisting chronic low back pain condition. *Id.* ¶ 22.

[67] *Curran v. North Dakota Workforce Safety and Insurance*, 2010 ND 227, 791 N.W.2d 622, also details a long history of back symptoms prior to the alleged work injury. Curran had a non-work automobile accident in February 2004, with neck and low back pain. *Curran,* ¶ 3. She bent down to pick up a band-aid at work in February 2007, with significant recurrent low back pain. *Id.* ¶ 1. An MRI in March 2007 showed mild disc degeneration and a ring shaped tear in the disc. *Id.* ¶¶ 6-7. In November 2007, Curran underwent a disc replacement surgery for her degenerated disc, which was noted to be both "chronic and severe." *Id.* ¶ 10. WSI found that her disc tear was simply due to her advanced and progressive disc disease, wholly unrelated to her acute event at work. *Id.* ¶ 27. In *Curran,* WSI did not deny that a disc tear, if caused by work, is compensable. Curran simply failed to prove the causal connection to her disc tear that Parsons has established. (See App. 21, finding #2 "injury caused ... microscopic tear to his disc," and finding #3 "small microscopic tear to the disc from bouncing on the truck seat and hitting the seat belt.")

[68] *Albright v. N.D. Workforce Safety & Insurance*, 2013 ND 97, ___ N.W.2d ___, is also easily distinguishable on the facts. There, the claimant merely squatted down to pick up a roll of paper in June 2010 and had a recurrence of back pain similar to the past. *Id.*, ¶ 2. Like Bergum and Curran, Ms. Albright had a lengthy history of prior back problems, including in 2008 a "spinal cord compression with bilateral C5-C6 and C6-C7 foraminotomies for decompression of the C6-C7 roots." *Id.*, ¶ 5. As in *Curran*, the IME physician opined that the back problem was a simple progression of a floridly

symptomatic preexisting condition. Unlike here, the ALJ in *Albright* had not elevated a susceptibility to injury to a defense.

[69] Larson observes "denials of compensation in this category [due to a preexisting condition] are almost entirely the result of holdings that the evidence did not support a finding that the *employment contributed to the final result.*" 1 Larson, *Workers' Compensation Law*, § 9.02[4], p. 9-19 (November 2007) (Emphasis added). In other words, whether the claim is compensable depends upon whether, as a factual matter, the employment "contributed to the final result," *i.e*, whether employment contributed to the employees' *damages*. The ALJ has already answered this in the affirmative: he acknowledged that Parsons' employment caused the cervical/trapezius strain, disc tear, and chronic myofascial pain.

[70] WSI's conclusion of law that an injury must be shown to be morphologically "significant" and visualized via x-ray or MRI is illogical and contrary to law. This conclusion of law is fully reviewable by the Court, and no deference is given to the agency. In order to reach this conclusion, the ALJ conflates the disc tear and sprain injuries with his DDD, stating Parsons' 'preexisting condition' would naturally progress on its own. But this is not true of its effects: but for the injury, the only progression of DDD is on the film, as even Dr. Janssen admitted DDD is natural aging, and is not necessarily symptomatic.

[71] The *Mickelson* Court stressed that the root of the issue is whether the claimant's pre-existing injury or condition is such that its clinical course would naturally progress on its own timetable without regard to the employment in which the employee was engaged. To afford compensation, 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.

[72] The Court held:

> employment can also substantially worsen the severity, or substantially accelerate the progression of a preexisting injury, disease, or other condition when employment acts as a substantial contributing factor to substantially increase a claimant's pain. That conclusion is consistent with our decision in *Geck*, that pain can be a substantial aggravation of an underlying latent condition.

Mickelson, ¶ 20.

[73] Here, Parsons' employment driving dump truck for Ames Construction over pitted roads caused his chronic myofascial pain and damages that would not have occurred but for his employment. At most his DDD made him susceptible to this injury, and lengthened the period of recovery from the admitted work injury. Neither is a defense to compensation. Even under WSI's view of this Necker Cube (using the susceptibility to injury as a preexisting injury defense), Parsons' employment did make his degenerative disc disease "more unfavorable, difficult, unpleasant [and] painful," as the employment injury necessitated medical care and restricted his ability to work.

[74] The Court "decline[d] to construe [the statute] 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.*

[75] As in *Mickelson*, the ALJ here, "misapplied the law by looking too narrowly at … degenerative disc disease itself without considering whether his injury, disease, or other condition would likely not have progressed similarly in the absence of his employment so as to substantially accelerate the progression or substantially worsen the severity of his injury, disease, or other condition." *Mickelson*, at ¶ 23.

[76] In sum, the ALJ wholly ignored the evidence favorable to Parsons, and applied the wrong legal standard. The ALJ made the same error as occurred in *Mickelson*, despite that the facts here are even more favorable to the claimant.

IV. The ALJ Has Failed to Explain Reasons for Disregarding Medical Evidence Favorable to Parsons.

[77] The Court had long declared that WSI's primary mission is the "proper, fair, and just determination" of claims. *Steele v. North Dakota Workmen's Compensation Bureau*, 273 N.W.2d 692, 702 (N.D. 1978). WSI has a legal obligation to "consider the entire record, clarify inconsistencies, and explain its reasons for disregarding medical evidence favorable to the claimant." *Negaard-Cooley v. North Dakota Workers Compensation Bureau,* 2000 ND 122, ¶19, 611 N.W.2d 898.

[78] WSI has lost sight of its mission to fairly evaluate claims, and has not provided adequate reasons for disregarding the overwhelming medical evidence favorable to Parsons, and denying him compensation for the admitted work injuries. Here, the agency attempts to elevate a susceptibility to injury to the preexisting injury defense.

[79] N.D.C.C. § 65-05-08.3 provides that if WSI does not give an employee's treating doctor's opinion "controlling weight," it must "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record." The Court, in *Albright*, 2013 ND 97, ¶ 27, said that the legislature had intended "to codify caselaw stating that if WSI disregards medical evidence favorable to a claimant WSI must consider the entire record, clarify inconsistencies, and adequately

explain the reason for disregarding medical evidence favorable to the claimant, applying the two tests and the factors identified in N.D.C.C. § 65-05-08.3."

[80] In his findings after remand, the ALJ did not offer any explanation as to why he did not accept medical evidence favorable to Parsons. In his findings before remand, the ALJ simply commented that the IME "detailed his opinions in a 26-page IME report, followed by four hours of testimony." (CR 147-148). The length of an IME isn't relevant, nor is the fact that WSI can afford to present the testimony of its expert at hearing, while the injured worker cannot.

[81] The ALJ also says that Janssen's "credibility was basically unquestioned by either side." (CR 148). The statute does not require counsel argue with a witness. Most importantly, the ALJ has simply misconstrued the opinions of Dr. Janssen who documented a work injury. WSI has wholly failed to come to grips with the evidence favorable to Parsons.

Conclusion.

[82] The ALJ's conclusion of law does not follow from his factual findings confirming cervical strain and disc injuries, and is riddled with errors of law. For the reasons above stated, the decision of the ALJ denying benefits to Parsons must be reversed.

[83] The Court should also remand this matter to the District Court to determine Parsons' eligibility for attorney's fees under N.D.C.C. § 28-32-50.

Respectfully submitted this 6th day of August, 2013.

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CERTIFICATE OF COMPLIANCE

[84] The undersigned, as attorney for the Appellee, Warren Parsons, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7)(A) 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 7,816 words.

Dated this 6th day of August, 2013.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Warren Parsons,	)	
	)	
Claimant and Appellant	)	
	)	
-vs-	)	**CERTIFICATE OF SERVICE**
	)	Supreme Ct. No. 20130197
Workforce Safety and Insurance	)	
Fund,	)	
Appellee	)	
	)	
	)	
.....	)	
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF RAMSEY	)	

I, Dean J. Haas, hereby certify that on August 6, 2013, I served the APPELLANT'S BRIEF and APPELLANT'S APPENDIX upon the following by emailing a true and correct copy to the following email addresses:

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