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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Roger Frith, **Appellant,** **vs.** **North Dakota Workforce Safety and Insurance,** **Appellee,** **and** **DMI Industries, Inc.,** **Respondent.**	**Supreme Court Case No. 20130240**

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BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

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APPEAL FROM MEMORANDUM OPINION AND ORDER
DATED APRIL 16, 2013
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN C. IRBY

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STATEMENT OF THE ISSUE

[1] In his Brief, Appellant has enumerated nine issues. However, most of the issues he raises can be subsumed within the issue of whether ALJ Anderson could reasonably conclude that Appellant failed to establish a compensable injury to his lumbar spine. The other issues raised by Appellant are whether he is entitled to an award of benefits based on any type of "breach" by the employer, whether the preexisting statute violates federal law, and whether he was provided a fair hearing before the District Court.

STATEMENT OF THE CASE

[2] On September 20, 2010, Claimant signed a First Report of Injury alleging a work related injury took place on August "18 or 19", 2010. (C.R.[1] 1) On December 8, 2010, WSI issued a Notice of Decision Denying Benefits. (C.R. 6) Appellant requested reconsideration from this decision. (C.R. MS30)

[3] On June 16, 2011, WSI issued an Order denying Appellant's claim because Appellant had not proven his injury was caused by his employment and that Claimant had not proven, through objective medical evidence, that his current condition was causally related to a work injury. (C.R. 10-16) WSI also denied benefits on the basis that Appellant had a preexisting condition and he had not proven that his work injury had substantially accelerated the progression of or substantially worsened the severity of his lumbar spine condition (C.R. 13) Appellant requested rehearing from WSI's Order. (C.R. 17)

[4] On November 17, 2011, ALJ Anderson issued a Notice of Hearing and Prehearing Order setting the hearing for February 8, 2012, along with a Specification of

[1] "C.R." will refer to the Certificate of Record on Appeal to District Court dated August 2, 2010.

Issues. (C.R. 18-23) Appellant disagreed with the Specification of Issues as issued by ALJ Anderson. (C.R. PO1-PO2) Because the parties were unable to agree to a stipulation as to the issues, a telephone conference was held January 16, 2012, to address the dispute concerning the Specification of Issues. (C.R. 24) During this conference, ALJ Anderson reaffirmed the Specification of Issues that had previously been issued inasmuch as Appellant had no objection to the original specification of issues. (C.R. 24) ALJ Anderson denied Appellant's request to add three additional issues, the first regarding whether DMI could contest his claim, inviting briefing on that issue; the second rejecting Appellant's request to include whether WSI had "the legal foundation" to deny his claim; and third, questioning whether he must be required to prove a compensable injury when there is not a legal definition of "injury" that was provided to him. (C.R. 25-26)

[5] The hearing date of February 8, 2012, was continued to April 10, 2012, which took place as scheduled. (C.R. 27a-27e; PO 75) The record was closed on May 9, 2012, after receipt of the hearing transcript. (C.R. PO 75)

[6] On June 9, 2012, ALJ Anderson issued his Findings of Fact, Conclusions of Law and Order. (PO 75-86) ALJ Anderson concluded that Appellant had a preexisting degenerative condition in his lumbar spine at the time of the work incident that occurred on or about August 18, 2010, but that work incident did not substantially accelerate the progression or substantially worsen the severity of the condition. (C.R. PO 85) ALJ Anderson affirmed WSI's Order of June 16, 2011. (C.R. PO 85)

[7] On July 2, 2012, Appellant petitioned the Court to reconsider its previous Order. (C.R. PO 89) On July 6, 2012, WSI responded to Appellant's Petition for

Reconsideration. (C.R. PO 96) On July 17, 2012, ALJ Anderson issued an Order denying the request for reconsideration stating: "All the evidence in this matter was carefully considered and was found to overwhelmingly support WSI's denial of Frith's claim for benefits." (C.R. PO 104).

[8] On July 6, 2012, the same day WSI filed its Response to the petition for reconsideration, Appellant filed his Notice of Appeal to the District Court. (District Court Docket #1) The certificate of record was filed August 2, 2012. (District Court Docket #5)

[9] On November 26, 2012, Appellant filed a Motion to allow into the District Court record the hearing record of a second injury claim. (District Court Docket # 446) WSI submitted a response to that Motion on December 12, 2012. (District Court Docket # 448) Appellant filed his Brief on January 2, 2013. (District Court Docket # 450) WSI filed its Brief on February 4, 2013. (District Court Docket # 507) Appellant filed a response to WSI's Brief on March 1, 2013. (District Court Docket # 511) WSI filed a Response to Motion to Supplement on March 8, 2013. (District Court Docket # 513)

[10] On March 11, 2013, the District Court entered its Order Denying Appellant's Motion to Expand Record. (District Court Docket # 515) Oral argument on the District Court appeal was held before the Honorable John C. Irby, on March 12, 2013.

[11] On March 18, 2013, Appellant filed a document entitled "Motion for Mis-Trial and Complaint against the Cass County District Court." (District Court Docket # 518) WSI filed its Response to that "Motion" on April 1, 2013. (District Court Docket # 522) On April 16, 2013, the District Court, the Honorable John C. Irby, issued an Order Denying Appellant's Motion for Mistrial and Complaint Against Cass County District

Court. (District Court Docket # 524) On that same date, the District Court issued its Memorandum Opinion and Order Affirming Denial of Benefits. (District Court Docket # 525). Order for Judgment was entered April 29, 2013 (District Court Docket # 530) with Judgment entered May 3, 2013. (District Court Docket # 531) This appeal followed.

STATEMENT OF FACTS

[12] Appellant filed a claim requesting benefits from WSI based on an alleged injury to his low back. (C.R. 1) Appellant responded "yes," to the question as to whether he had prior problems or injuries to that part of his body. (C.R. 1)

A. Medical History Prior to Filing Claim with WSI

[13] Prior medical records obtained by WSI reflected that on March 26, 2007, Appellant went to MeritCare Emergency/Trauma Center for an evaluation of low back pain. (C.R. 31) He reported the onset of low back pain radiating towards his right hip after doing some heavy lifting, moving carpet rolls, about a month before. Id. Appellant said he had slipped and fell on the ice two days after that and had persistent pain since then, worse on the right side. Id. Appellant questioned "whether or not he may have injured a disk." (C.R. 31) It was suggested that the pain may be myofascial in nature and a course of anti-inflammatories, muscle relaxants and analgesics was recommended, along with physical therapy. (C.R. 32) Appellant was seen for physical therapy with Greg Grenz for right sided low back pain on April 3, 2007. (C.R. 32a-32c) On April 24, 2007, the final PT note reflects that Appellant was seen for a total of six visits between April 3 and 24. (C.R. M46)

[14] On January 30, 2009, Appellant saw Eunah Fischer, MD, and complained of intermittent low back pain with occasional numbness in his left lower leg. (C.R. 33)

Dr. Fischer ordered an MRI of the lumbar spine, which was completed on February 1, 2009. Id. This MRI showed a disk protrusion at L4-L5 and mild degenerative disk and facet disease, most significant at L4-L5. (C.R. 38) Dr. Fischer wrote to Appellant on February 2, 2009, concerning the MRI and explained that it revealed "minor arthritis in all of your lumbar discs, and it is most noticeable at the L4-L5 level . . . [where] the disc is protruding slightly, however, there is no significant disc herniation." (C.R. M77) Dr. Fischer went on to explain that "[o]ther than minor disc arthritis, there are no other significant abnormalities." (C.R. M77)

[15] On August 13, 2010, Appellant saw Dr. Fischer again for what was described as "chronic low back pain with right radiculopathy, controlled, deteriorated." (C.R. 40) Appellant reported he had a recent exacerbation of his symptoms in his right lower extremity and a subjective sense of weakness there. Id. Dr. Fischer noted that he had a lumbar MRI in February of 2009 "which showed mild degenerative disc and facet disease" with findings "most significant at L4-L5 where a small right subarticular and forminal disc protrustion is abutting the traversing right L5 nerve root in the lateral recess, equivocal compression." (C.R. 40) Dr. Fischer documented that Appellant remembered "a significant injury several years ago when he landed on his buttocks" and that he had gone through the "Life back program through MeritCare." (C.R. 40) Dr. Fischer ordered another MRI of the lumbar spine. (C.R. 42) This medical visit took place five (or six) days prior to the "injury" Appellant filed his claim for benefits with WSI, that he alleges occurred on August 18 or 19 of 2010. (C.R. 1)

[16] On August 17, 2010, Dr. Mitchell prepared a report following the second MRI of Appellant's lumbar spine. (C.R. 44) That report noted: "[t]here are degenerative

changes particularly at L4-L5 on the right as is evident on the earlier study" in reference to the study done on February 1, 2009. (C.R. 44) There was no evidence of a disc herniation. (C.R. 44) This MRI was taken one (or two) days prior to the "injury" Appellant alleges occurred on August 18 or 19 of 2010. (C.R. 1)

B. <u>Medical History after Filing Claim with WSI</u>

[17] Claimant submitted a First Report of Injury on September 20, 2010, alleging he was injured at work on August 18 or 19 of 2010, when moving a large desk piece. (C.R. 1) On August 31, 2010, Appellant had submitted a note entitled "Injury Report" to his employer. (C.R. 29) Appellant alleged an injury to his lower back moving furniture on 8/19. He reported that he had made some comments about his back and not being much help lifting. (C.R. 29)

[18] One day prior to reporting the alleged injury to his employer, August 30, 2010, Appellant saw Dr. Fillmore, complaining of back and right-sided thigh pain from a bulging disk problem. (C.R. 45) Appellant reported a two year history of low back pain, but there is no mention of lifting a heavy desk at work. (C.R. 45-47) The history also reflects that "6 months ago" the low back pain recurred, with some leg pain. (C.R. 45) Dr. Fillmore's impression was a "mild disk bulge at L4-L5" without any definitive focal nerve root involvement. (C.R. 46) EMG/NCV of the right lower extremity was recommended to rule out L3-L4 radiculopathy. (C.R. 47)

[19] The employer conducted an investigation into the incident in which Appellant claimed he was injured. (C.R. IE18-IE20) During that investigation, Appellant admitted he had a history of problems to his back and has had two MRI's, that the initial trauma occurred several years ago when he slipped on cement and fell flat on

his back (not at DMI), and that he has had increased episodes over the years of his back popping out. (C.R. IE19) DMI provided Appellant with a First Report of Injury form to fill out and also how to file a report of injury online. (C.R. IE19)

[20] As a part of this First Report of Injury, Appellant noted that coworkers Rick Nesvold and Gerry Beutler witnessed his injury. Id. However, at the hearing these coworkers who helped him move the desk testified that they did not see Appellant in any obvious pain after moving the desk, nor did he say he had hurt himself. (C.R. PO 106 at 314, 316, 411; C.R. D28; C.R. IE19)

[21] Appellant was seen again by Dr. Fillmore on September 10, 2010, just 10 days after he told DMI he had been injured. (C.R. 48) On that date, Appellant underwent an EMG, which showed evidence of right L4-L5 radiculopathy/radiculitis. (C.R. 48) Once again, there is no reference in the medical note of Appellant reporting an injury while lifting a large piece of desk furniture at work. Id. Conservative treatment was recommended, as Appellant declined physical therapy, interventional injections or medications. (C.R. 48)

[22] On September 17, 2010, Appellant was seen in the neurosurgery department at Sanford by Angela Wagner PA-C. (C.R. M54-M59) The history provided was that he had "chronic low back pain and pain for years now." (C.R. M54) It was also noted that over "the last 6 months or so he's also developed pain in the right buttock, right anterior thigh, into his groin, into his right shin and occasionally into his left shin as well." (C.R. M54) He reported numbness and tingling in the same distribution. (C.R. 54) He complained of urinary incontinence, which was noted to not be related to his spine. (M54) The MRI was reviewed and noted to show a "very tiny disc bulge to the

right at L4-5 which does not appear to have any significant mass effect on the right L4 nerve." (C.R. M59) It was noted Appellant planned to discuss things further with Dr. Fillmore, and to hold off on any nerve root block. (C.R. M59)

[23] On October 15, 2010, WSI wrote to Dr. Fillmore inquiring as whether Appellant had a preexisting condition contributing to his current condition. (C.R. 8) Dr. Fillmore responded, "no." (C.R. 8) Despite there being no reference to the desk lifting incident n his records, Dr. Fillmore responded that the work injury significantly worsened and/or accelerated a preexisting condition. (C.R. 8)

[24] Dr. Gregory Peterson, a medical consultant for WSI, conducted a review of the current and prior medical records on Appellant's claim on November 20, 2010. (C.R. 5; C.R. PO106 at 172-173) In addition, Dr. Peterson reviewed the MRI images from February 1, 2009 and August 17, 2010. (C.R. PO106 at 176-177) It was Dr. Peterson's opinion that Appellant had a preexisting lumbar spine condition and that he may have triggered lumbar spine symptoms in that condition while working on August 18, 2010, but there was no evidence that the work incident worsened his preexisting condition. (C.R. PO106 at 177)

[25] Dr. Peterson explained that the preexisting condition was lumbar disk disease, specifically a disk bulge or disc protrusion at the L4-5 interpsace. (C.R. PO106 at 178-179) That bulge or protrusion is a manifestation of the degenerative condition, and is a tear on the outer covering of the disk allowing for a small disk protrusion as well as a decrease in the amount of hydration in the disk. (C.R. PO106 at 180) There were also noted changes in the facet joints that occur over time. (C.R. PO106 at 180) Dr. Peterson testified that the degenerative changes noted on the MRI's were substantially

similar in 2009 and 2010. (C.R. PO106 at 180) Because there was no interval change between the two MRI's, Dr. Peterson testified that would "argue against anything substantial happening that changed that condition at the time of the [alleged] work injury." (C.R. PO106 at 181, 187) Furthermore, Dr. Peterson testified that in Appellant's case, based on how long he had worked with this employer and that he had the condition in his lumbar spine before he started, it is unlikely that his work activities contributed to his degenerative disk disease. (C.R. PO106 at 184) Dr. Peterson based his opinions on review of the medical records, the MRI's and medical literature. (C.R. PO106 at 188, 191-192)

[26] On November 23, 2010, WSI forwarded Dr. Peterson's medical opinion to Dr. Fillmore for review and comment as to whether he agreed or disagreed with the opinion. (C.R. 9) This time, Dr. Fillmore responded: "I have no opinion on this matter. Suggest you ask Dr. Fischer." (C.R. 9) He also responded, "see medical dictation." (C.R. 9)

[27] On December 14, 2010, Appellant was seen again by Dr. Fillmore. (C.R. M34) It was noted that "most of the symptoms have gone away." (C.R. M34) Dr. Fillmore's impression was that Appellant had radiculitis that was "resolving". (C.R. M34)

[28] At the administrative hearing, ALJ Anderson reviewed and considered the evidence and testimony in particular the medical evidence submitted. (C.R. PO82-83) ALJ Anderson found it significant that when Appellant sought medical treatment in 2007 and 2009 the symptoms he reported were essentially the same, that being right sided low back pain extending into his lower extremities. (C.R. PO84) That medical evidence

included Dr. Fillmore's responses as well as the interpretation of the radiologist of the 2010 MRI, and Dr. Peterson's testimony. (C.R. PO 84-85) Based on his review of the evidence, ALJ Anderson concluded that the greater weight of the evidence showed that the work incident of August 18, 2010, triggered symptoms in the underlying condition but did not substantially accelerate the progression or substantially worsen the severity of the preexisting condition. (C.R. PO85) It is this decision that Appellant challenges on appeal.

LAW AND ARGUMENT

A. BURDEN OF PROOF AND SCOPE OF REVIEW.

[29] Under North Dakota law, Appellant bears the burden of proving a compensable injury. N.D.C.C. § 65-01-11; Darnell v. North Dakota Workers Compensation Bureau, 450 N.W.2d 721, 723 (N.D. 1990); Etler v. North Dakota Workers Compensation Bureau, 1999 ND 179 ¶ 15, 599 N.W.2d 315, 319. Thus, it was Appellant's burden to establish that the medical condition for which he seeks benefits is causally related to a work injury. Rush v. North Dakota Workers Compensation Bureau, 2002 ND 129 ¶ 6, 649 N.W.2d 207.

[30] When an administrative agency requests designation of an administrative law judge from the Office of Administrative Hearings to issue a final decision, judicial review of the ALJ's factual findings is the same as used for agency decisions. Workforce Safety & Insurance v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186; North Dakota Securities Commissioner v. Juran and Moody, Inc., 2000 ND 136 ¶ 27, 613 N.W.2d 503. This is a limited, deferential standard of review. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186; Bruder v. Workforce Safety and Insurance, 2009 ND 23 ¶ 6, 761 N.W.2d at 588; Kershaw v.

Workforce Safety and Insurance, 2013 ND 186, 838 N.W.2d 429. The ALJ's decision must be affirmed unless the "findings of fact are not supported by a preponderance of the evidence, [the] conclusions of law are not supported by [the] findings of fact, [the] decision is not supported by [the] conclusions of law, or [the] decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. The Court must exercise restraint in determining whether the ALJ's 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. Bruder, 2009 ND 23 ¶ 7, 671 N.W.2d at 790; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court need determine "only whether or not a reasoning mind could have decided the agency's findings were proven by the weight of the evidence from the entire record." Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290; Kershaw, 2013 ND 186 ¶19. A preponderance of the evidence is defined as "evidence more worthy of belief," or "the greater weight of the evidence," or "testimony that brings the greater conviction of the truth." Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

[31] In the case of conflicting medical opinions, a factfinder may rely upon either party's expert witness. Elshaug v. Workforce Safety and Insurance, 2003 ND 177, 681 N.W.2d 784; Swenson v. Workforce Safety and Insurance, 2007 ND 149 ¶ 26, 738 N.W.2d 892. However, the ALJ must adequately explain the reason for disregarding evidence favorable to the claimant in denying benefits. Hein v. North Dakota Workers Compensation Bureau, 1999 ND 200 ¶ 14, 601 N.W.2d 576, 578. The explanation for

rejecting medical evidence favorable to the claimant may consist of the analysis of why it accepted contrary evidence. Id. ¶ 15. In reviewing the resolution of conflicting medical opinions, this Court must not make independent findings or substitute its judgment for that of the ALJ. See id.

B. APPELLANT'S APPENDIX HAS SUBMITTED DOCUMENTS NOT PART OF THE RECORD CONSIDERED BY THE ALJ WHICH MUST BE STRICKEN AND NOT CONSIDERED BY THE COURT.

[32] N.D.R. App. P. 30(a)(1) outlines the documents to be included in the Appendix on appeal, and provides: "Only items in the record may be included in the appendix." Appellant's Appendix violates this Rule. The Court has authority to take action it deems appropriate in such circumstances. Hurt v. Freeland, 1997 ND 194, 569 N.W.2d 266; Peterson v. DS Dispatch, Inc., 2008 ND 207, 758 N.W.2d 909. The following documents from Appellant's Appendix were not part of the record before the Administrative Law Judge:

[33] Appendix Pages 365-367 is an Order Denying Application for Supplementation of the Record from Case No. 09-2012-CV-01586, which is not the case before the Court in this appeal. Likewise, Appendix Pages 400-403 is Notice of Filing and the same (duplicate copy) of the Order Denying Application for Supplementation of the Record from Case No. 09-2012-CV-01586.

[34] Appendix Pages 429-433 are documents that were not admitted by ALJ Anderson. These documents were considered in connection with Appellant's proposed exhibits MS1 through MS39. Of those documents, MS9, 11, 12, 13, 15, 16, 17, 18, 22, 23, 24 and 38 were not admitted. (C.R. PO106 at 35) These documents at Appendix Pages 429-433 relate to the scheduling and cancelling of an independent medical

evaluation. ALJ Anderson allowed Appellant to make a record of why it is relevant, similar to an offer of proof, relating to why those documents should be admitted (C.R. PO106 at 22-34). However, these documents were not admitted by the ALJ into the record. See also C.R. PO106 at 64-65, 109-110 161-162.

[35] Appendix pages 463-472 and 520-523 are not part of the Certificate of Record on Appeal to District Court and appear to be correspondence between Appellant and Director of the Office of Administrative Hearings. WSI was not copied contemporaneously on these communications nor subsequently provided copies of these documents. Some of these documents are the subject of Appellant's pending Motion to Allow Entry and Consideration of the Record of Injury Claim Appeal 09-2012-CV-0168 (No. 20130286) into the Record of 09-2012-CV-02069 on appeal as Supreme Court No. 20130240 filed November 11, 2013.

[36] Appendix page 448 was excluded from the record by ALJ Anderson as irrelevant as it relates to a urology consultation. (C.R. PO106 at 74).

[37] Many documents submitted in the Appendix were excluded by ALJ Anderson as irrelevant, as they related to a complaint filed with the North Dakota Department of Labor concerning harassment and retaliation. Those documents include the following: Appendix page 462 (excluded at C.R. PO106 at 157); Appendix pages 478-479 (excluded at C.R. PO106 at 132); Appendix page 47 (C.R. PO 106 at 117); Appendix pages 486 to 490 (excluded at C.R. PO106 at 129-130); Appendix pages 491-492 are personal notes of Appellant (excluded C.R. PO106 at 158); Appendix page 493 (excluded at C.R. PO 106 at 119); Appendix page 494 (excluded at C.R. PO106 at 115); Appendix pages 514-519 (excluded at C.R. PO 106 at 157).

[38] Additional documents were excluded from the record by ALJ Anderson for various reasons, including they were hearsay or not relevant to the issue to be determined, including: Appendix page 475 excluded from the record by ALJ Anderson as hearsay and not relevant (C.R. PO106 at 113); Appendix page 476 excluded from the record by ALJ Anderson as not relevant. (C.R. PO106 at 118); Appendix page 484 excluded from the record by ALJ Anderson as not relevant (C.R. PO106 at 125 and C.R. PO106 at 124); Appendix pages 505-506 excluded from the record by ALJ Anderson as not relevant (C.R. PO106 at 87); Appendix pages 507-508 excluded from the record by ALJ Anderson as not relevant (C.R. PO106 at 113); Appendix pages 509-510 and 512 were excluded from the record by ALJ Anderson as not relevant (C.R. PO106 21-23); Appendix page 511 was excluded from the record by ALJ Anderson as hearsay (C.R. PO106 at 153).

[39] Appendix pages 485 and 513 are documents that WSI is unable, with due diligence, to identify as having been even offered as an exhibit at the hearing. However, they are not something that was included in the Certified Record on Appeal to District Court of the documents that were admitted by ALJ Anderson into the hearing record.

[40] Appendix pages 525-555 is a copy of a "Supplement to Response to Appellee Brief." N.D.R. App. P. 30(a)(2) provides that briefs in the district court "may not be included" in the Appendix unless they have independent significance. Appellant references in his Brief (page 36) that the District Court erred when it did not "accept extra material in my Supplement." By admission, therefore, the documents attached were not included in the record before the ALJ.

[41] The District Court issued an Order Denying Motion to Supplement Record (District Court Docket # 515). As argued in WSI's responses to the Motions submitted by Appellant to the District Court, N.D.C.C. § 28-32-45 provides a mechanism for application for leave to offer additional testimony, statements, documents or exhibits but only if it is shown to the Court's satisfaction that the additional evidence is relevant and material and material to the issues involved. However, the Court may not independently consider such documents or evidence on appeal. Rather, the Court must order the additional evidence be taken, heard or considered by the ALJ, a further record made, and the decision on remand is then reviewed by the Court. It is apparent that this is not what Appellant desires. Rather, Appellant is asking this Court to review the documents submitted which were excluded, and come to a different conclusion, which this Court may not do. See Kershaw, 2013 ND 186 ¶10 (stating constitutional doctrine of separation of powers does not allow Supreme Court to make independent findings of fact or substitute its judgment for that of the agency fact finder.)

[42] Despite his affirmation that he believes he has included only documents in the record in the Appendix, this is clearly not the case. The Court should therefore ignore the documents submitted by Appellant in the Appendix that are not properly for consideration on appeal, and take whatever action it deems appropriate under the Rules for the Appellant's violation of the Rules of Appellate Procedure.

C. THE ADMINISTRATIVE LAW JUDGE COULD REASONABLY CONCLUDE THAT APPELLANT FAILED TO ESTABLISH A COMPENSABLE INJURY.

[43] Appellant's arguments are difficult to follow, but it appears Appellant is asking the Court to reconsider/reweigh the evidence, consider some additional evidence,

and come to an opposite conclusion than ALJ Anderson. Appellant's attempt to do so should be rejected. ALJ Anderson painstakingly went through all of the documentary evidence that Appellant sought to enter, (taking almost four hours to review that evidence and making rulings on the same. ALJ Anderson then considered the testimonial and admitted documentary evidence and determined that Appellant had a preexisting condition in his lumbar spine and the greater weight of the evidence supported WSI's dismissal of the claim, concluding that Appellant failed to establish that his work activities substantially accelerated the progression of or worsened the severity of that preexisting condition. Quite simply, "[i]t is within [the ALJ's] province to weigh the credibility of the evidence presented." Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). This Court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). Based upon the evidence presented at the hearing, as outlined above, the ALJ could reasonably determine as he did. Accordingly, WSI's decision should be affirmed. See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93 ¶ 12, 576 N.W.2d 861; Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112 ¶ 22, 595 N.W.2d 312. See also Rooks v. North Dakota Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993)(noting appellate court does not substitute its judgment for that of WSI and determines only whether findings of fact adequately explain its decision).

[44] In this case, Appellant clearly had a pre-existing condition. On March 26, 2007, Appellant went to Meritcare Emergency/Trauma Center for an evaluation of low back pain. (C.R. 31) He reported the onset of low back pain radiating towards his right

hip after doing some heavy lifting, moving carpet rolls, about a month before. Id. Appellant reported he had slipped and fell on the ice two days after that and had persistent pain since then, worse on the right side. Id. Appellant underwent physical therapy for his low back condition through April of 2007. (C.R. 32a-32c; M46)

[45] On January 30, 2009, Appellant saw Eunah Fischer, MD, and complained of intermittent low back pain with occasional numbness in his left lower leg. (C.R. 33) Dr. Fischer ordered an MRI of the lumbar spine, which showed a disk protrusion at L4-L5 and mild degenerative disk and facet disease, most significant at L4-L5. (C.R. 38) Dr. Fischer explained to Appellant in correspondence following the February 2009 MRI that he had "minor arthritis in all of your lumbar discs, and it is most noticeable at the L4-L5 level . . . [where] the disc is protruding slightly." C.R. M77)

[46] On August 13, 2010, five or six days prior to the date Appellant alleged he sustained a work injury, Appellant saw Dr. Fischer again for was described to be "chronic low back pain." (C.R. 40) Appellant reported he had a recent exacerbation of his symptoms in his right lower extremity and a subjective sense of weakness there. Id. Dr. Fischer's impression was "chronic low back pain with right radiculopathy, controlled, deteriorated." (C.R. 40) Dr. Fischer ordered another MRI of the lumbar spine. Id.

[47] On August 17, 2010, one or two days prior to the date Appellant alleges he sustained a work injury, an MRI was conducted of the lumbar spine. (C.R. 44) The MRI showed "[t]here are degenerative changes particularly at L4-L5 on the right as is evident on the earlier study" i.e., the study completed on February 1, 2009. (C.R. 44) Dr. Fillmore, looking at the same MRI stated that Claimant had a bulging disk at the L4-L5 area. (C.R. 46-47)

[48] Based on the medical evidence, it apparent that Appellant had a pre-existing condition in his lumbar spine which was characterized as degenerative or arthritic changes, particularly at L4-L5. ALJ Anderson therefore could reasonably conclude (Finding of Fact #2 (C.R. PO85)) that Frith had a preexisting condition.

[49] ALJ Anderson also concluded, based on the evidence, that whatever type of injury Appellant sustained on August 18, 2010, it did not substantially accelerate his pre-existing condition. (Findings of Fact #3 1, 3, 4, (C.R. PO85)) On August 30, 2010, Appellant saw Dr. Scott Fillmore, on referral from Dr. Fischer. (C.R. 45) This is the first time Appellant was seen after the August 18, 2010, work incident, but there is no mention of any worsening or concerns relating to lifting a heavy desk at work. (C.R. 45-47) Rather, Appellant complained of back and right-sided thigh pain from a bulging disk problem. (C.R. 45-47) Frith reported a two year history of low back pain. (C.R. 45) Dr. Fillmore impression was Appellant had a "mild disk bulge at L4-L5" with possible radiculopathy. (C.R. 46-47) He was referred for EMG testing. (C.R. 47) On September 10, 2010, Appellant underwent an electromyogram, which showed evidence of a right L4-L5 radiculopathy/radiculitis. (C.R. 48-49)

[50] On September 17, 2010, Appellant was seen in the neurosurgery department at Sanford by Angela Wagner PA-C. (C.R. M54-M59) The history provided there was that he had "chronic low back pain and pain for years now." (C.R. M54) It was also noted that over "the last 6 months or so he's also developed pain in the right buttock, right anterior thigh, into his groin, into his right shin and occasionally into his left shin as well." (C.R. M54) He reported numbness and tingling in the same distribution. (C.R. 54) Again no mention of or reference to any effect or the existence of

any problem related to the work incident in August of 2010 as a cause or contributing factor to his reported pain in the right buttock, right anterior thigh, groin, right shin and left shin. (C.R. M54)

[51] The medical evidence demonstrated, therefore, that the physicians were evaluating Appellant for a L4-L5 disc bulge with evidence of right L4-L5 radiculopathy/radiculitis, which had been considered degenerative conditions. The MRI conducted prior to Appellant's alleged date of injury demonstrated the existence of the disc bulge. (C.R. 44, 46-47) However, in the medical records there was no mention, reference or indication of anything occurring as a result of the August 18, 2010, incident with moving a desk as a cause or contributing factor to the conditions which were being evaluated.

[52] Dr. Fillmore initially responded that Appellant did not have a preexisting condition. (C.R. 8) That opinion is clearly contrary to the medical evidence. Based on the medical evidence, ALJ Anderson could reasonably conclude that Dr. Fillmore's responses was inconsistent with that evidence and "gives little reason to put any stock in his opinion." (C.R. PO83) In addition, although Dr. Fillmore was given an opportunity to explain his opinion, on two occasions, he declined to do so and referenced his medical dictation. (C.R. 9) That dictation, however, provided no further insight into or reference to a connection between a work incident or work activities and Appellant's lumbar spine condition.

[53] ALJ Anderson then considered Dr. Peterson's opinions, who conducted a comprehensive review of all of the medical information and reviewed the MRI scans, and testified at length and under cross-examination. ALJ Anderson concluded that Dr.

Peterson's opinions found support in the medical records. (C.R. PO83) This included Dr. Peterson's explanation based on the records that the symptoms were essentially the same as before, and there was no change in the MRI scans between 2009 to 2010 that would demonstrate a link to a work injury or activity. (C.R. PO83-84) Thus, based on the medical information, ALJ Anderson could reasonably conclude Appellant failed to establish a compensable injury under North Dakota law.

[54] Appellant argues that ALJ Anderson erred in "discounting" Dr. Fillmore's opinion. He contends the ALJ should have remanded the matter to WSI. There is no basis to do so. When presented with conflicting testimony by experts it is for the administrative law judge, not the district court or this Court, to weigh credibility and resolve conflicts, so long as the administrative law judge does so in a reasoned matter. Bruder, 2009 ND 23, 761 N.W.2d 588. When considering the medical records and testimony cited-above, it is clear to see that ALJ Anderson was reasonable in giving Dr. Peterson's opinion the most weight. As this Court has stated: "[i]nconsistencies in a medical expert's opinions may be considered by [the ALJ] in assessing the credibility of medical evidence." Swenson v. Workforce Safety and Insurance, 2009 ND 97 ¶ 13, 775 N.W.2d 700. See also Reynolds v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 247, 251 (N.D. 1982)(giving deference to WSI ability to weigh credibility of testimony and evidence in light of inconsistencies and affirming WSI decision).

[55] The qualifications of a medical professional offering an opinion is a matter for the ALJ to weigh in determining the weight and credibility to be afforded that opinion. See generally Auck, 2010 ND 126 ¶ 14, 785 N.W.2d 186 (noting "[a]s the fact-finder, the ALJ has the responsibility to weigh the credibility of medical evidence.")

Thus, the matter of the weight to be given to a opinions was a matter for ALJ Anderson to consider, and this Court cannot substitute its judgment for that of the ALJ. See Renault v. North Dakota Workers Compensation Bureau, 1999 ND 187 ¶ 22, 601 N.W.2d 580 (stating even if court may have taken different view of the evidence if the ALJ could reasonably conclude as she did, court cannot substitute its judgment). Dr. Peterson evaluated all of the medical evidence and offered an opinion. Even if he was a medical consultant for WSI, this is not a reason to reject his opinion outright, and ALJ Anderson could reasonably rely upon Dr. Peterson's testimony. See Thompson v. Workforce Safety and Insurance, 2006 ND 69, 712 N.W.2d 309 (affirming decision where ALJ relied upon opinion of WSI medical consultant that was the only physician to review all medical records over opinions of treating physicians).

[56] The law requires objective medical evidence to support an award of benefits. N.D.C.C. § 65-01-02(10). ALJ Anderson found Dr. Peterson's testimony persuasive, and the notes and responses of Appellant's physician unsupported by the medical evidence. Again, based on how Appellant's medical providers analyzed his symptoms, ALJ Anderson could reasonably conclude as he did. See Myhre v. North Dakota Workers Compensation Bureau, 2002 ND 186, 653 N.W.2d 706 (noting treating medical provider's testimony that employment "aggravated" preexisting condition but no testimony of substantial acceleration or worsening insufficient to meet definition of compensability). The ALJ's reason for accepting certain medical evidence can serve as a basis for why it did not accept evidence favorable to the claimant. See Hibl v. North Dakota Workers Comp. Bureau, 1998 ND 198 ¶ 10, 586 N.W.2d 167 (citing Nemec v. North Dakota Workers Comp. Bureau, 543 N.W.2d 233, 238-39 (N.D. 1996).

[57] Simply put, the record is filled with evidence that supports ALJ Anderson's Findings of Fact, Conclusions of Law and Order. When deciding whether a reasoning mind could have reached the decision made by ALJ Anderson, from the weight of the evidence in the entire record, the Court must answer yes. ALJ Anderson explained his analysis as to why he was not giving "controlling weight" to the opinion of Dr. Fillmore, or Appellant's own interpretation of the MRI scans from 2009 and 2010. This Court cannot re-weigh the evidence, but must simply determine whether ALJ Anderson could reasonably conclude as he did. See Curran v. Workforce Safety and Insurance, 2010 ND 227, 791 N.W.2d 622 (reversing District Court decision where ALJ considered and explained reasons for rejecting medical evidence favorable to claimant and reasoning mind could reasonably conclude from weight of entire record the ALJ's decision). ALJ Anderson's decision meets this standard and therefore it should be affirmed. Id.

D. THERE WAS NO BREACH OF TITLE 65 BY THE EMPLOYER ENTITLING APPELLANT TO AN AWARD OF BENEFITS.

[58] Appellant's argument appears to be premised on ALJ Anderson's Order of March 20, 2012 in which the employer failed to provide notice to WSI of the injury for which Appellant claims benefits herein until October 7, 2010, despite being notified on September 1, 2010. (C.R. PO57-60) N.D.C.C. § 65-05-01.4 requires an employer file a first report of injury with WSI within 7 days from the date the employer receives notice. As a result of the employer's failure to do so, ALJ Anderson held that the failure to file the claim does not make the claim compensable, however, the employer may not contest the claim but still participate in the evidentiary proceeding. (C.R. PO59) Appellant apparently believes that this Court can then award him benefits based on this statutory

violation, to and including an award of benefits for an alleged decision by the North Dakota Department of Labor. Appellant's arguments are wholly without merit.

[59] ALJ Anderson uniformly and correctly refused to admit evidence and consider claims relating to alleged harassment or retaliation. The issues specified for the administrative hearing related to whether Appellant sustained a compensable injury to his lumbar spine. Although Appellant had filed a claim for discrimination and retaliation against his employer, neither WSI nor ALJ Anderson had any authority to make determinations on those claims nor award benefits. Those are exclusively within the purview of the North Dakota Department of Labor, or alternatively, a direct action against the employer under N.D.C.C. Ch. 14-02.4.

[60] Furthermore, ALJ Anderson correctly concluded that a technical violation of N.D.C.C. § 65-05-01.4 does not automatically mandate that Appellant's claim is compensable. To construe the language otherwise, would be improper. See Haggard v. Meier, 368 N.W.2d 539 (N.D.1985) (noting that when a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide); Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (id. emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442 N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). See also Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 19, 584 N.W.2d 530, 535 (J. VandeWalle, dissenting). Therefore, Appellant's arguments that he should be

awarded benefits based the employer failing to file the claim within 7 days of notification should be rejected.

E. THERE IS NO VIOLATION OF FEDERAL LAW BY REQUIRING APPELLANT MEET THE REQUIREMENTS TO ESTABLISH A COMPENSABLE INJURY WHERE THERE HE CLEARLY HAD A PRE-EXISTING CONDITION.

[61] Appellant makes a brief argument that requiring him to establish the requirements of a compensable injury where there is a preexisting condition violates the Affordable Care Act and is "discriminatory." He cites no legal authority for this proposition. To the extent that Appellant's arguments may be construed as assertions of unconstitutionality of the statutory scheme, the Court must reject those arguments.

[62] "All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution." Grand Forks Professional Baseball, Inc. v. North Dakota Workers Compensation Bureau, 2002 ND 204 ¶ 17, 654 N.W.2d 426. A party "must do more than merely assert that a statute is [unconstitutional] to appropriately raise a constitutional issue." Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 178 (N.D. 1993) (citation omitted). Because Appellant has not met this standard, the Court should refuse to consider the same and reject his arguments in this regard. See Owens v. State, 2001 ND 15 ¶ 31, 621 N.W.2d 566 (stating the Court "will not consider issues where there is a failure to cite supporting authority and briefing is inadequate"); State v. Witzke, 2009 ND 169 ¶ 6, 776 N.W.2d 232 (rejecting consideration of constitutional claim where only bare assertions submitted and lack of legal authority and case law to support claim); see Weeks v. North Dakota Workforce Safety and Insurance, 2011 ND 188, 803 N.W.2d 601.

F. APPELLANT WAS PROVIDED A FAIR HEARING BEFORE THE DISTRICT COURT.

[63] Appellant asserts that he was not provided a fair hearing before the District Court. Again, there is no basis for Appellant's assertions. Appellant cites no case law that would support his claims. However, this Court has stated that to support a claim of unfair hearing would require a showing where there was a denial of elements of due process. Williams Elec. Co-op, Inc. v. Montana-Dakota Utilities Co., 70 N.W.2d 508 (N.D. 1956). The record establishes that Appellant was provided an opportunity to submit a brief on his claims. He was provided an opportunity for oral argument. Therefore, there is no basis for his contention that he was not provided with a fair hearing before the District Court.

[64] His main contentions appear to be focused on adverse decisions made by the District Court on motions he filed to supplement the record and serving him with a decision on that motion just prior to oral argument. As WSI pointed out in its Response to Appellant's Motion for Mis-Trial and Complaint against District Court, the Court provided Frith with a courtesy copy of the Order at the oral argument on March 12, 2013, and also mailed a copy, as Frith acknowledged receiving a copy of the same in the mail on March 12, 2013. The fact that Frith received a copy of the Order at the time of the hearing and via mail as he acknowledged demonstrates that the Court properly provided the same to him. N.D.R. Civ. P. 5(b)(2)(A) permits service of a paper by "handing it to the person" or by (C) "mailing it to the person's last known address in which event service is complete upon mailing." In this case the Court both provided Frith with a copy of the Order personally and mailed the same to him. N.D.R. Civ. P. 5(f) provides that a "court personnel's certificate showing that service was made under subdivision (b)

comforts with the Rules." The District Court Reporter's Notice is consistent with this Rule. Thus, there is no basis in law for a finding Frith was not properly served with the Notice or the Order Denying Appellant's Motion to Expand Record. The same was served in accordance with the Rules and therefore there is no basis for an argument this was "unfair."

[65] Furthermore, Judge Irby explained his decision and outlined the law supporting the same. Simply because Appellant does not like these decisions or disagrees with them, is no basis for arguing they were unfair. Adverse rulings cannot form the basis of unfairness as this Court has made clear that adverse rulings alone also do not form the basis of a claim of bias on the part of the Court. See Reems v. St. Joseph's Hosp. and Health Center, 536 N.W.2d 666, 671 (N.D. 1995). Therefore, there is no basis upon which this Court can conclude Appellant was not provided a fair hearing in the District Court.

CONCLUSION

[66] Appellant has provided no legal basis for the relief he seeks from this Court. Under the applicable standard of review for a decision of an administrative law judge, ALJ Anderson could reasonably conclude that Appellant failed to establish a compensable injury to his lumbar spine entitling him to benefits. Accordingly, WSI respectfully requests this Court affirm the District Court's decision of April 16, 2013, which affirmed ALJ Anderson's Findings of Fact, Conclusions of Law and Order of ALJ Anderson dated June 9, 2012.

Dated this 7th day of January, 2014.

/s/ Jacqueline S. Anderson

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, 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 7,717.

Dated this 7th day of January, 2014.

/s/ Jacqueline S. Anderson

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Roger Frith, Appellant, vs. State of North Dakota by and through Workforce Safety and Insurance, Appellee, and DMI Industries, Inc., Respondent.	**Supreme Court Case No.: 20130240** **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Sarah D. Klava, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

1. **Brief of Appellee North Dakota Workforce Safety and Insurance;**

on the following person by electronic mail only on January 7, 2014:

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To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

Sarah D. Klava

SUBSCRIBED AND SWORN TO before me on January 7, 2014.

(SEAL)
RACHEL D. HENRY
Notary Public
State of North Dakota
My Commission Expires Oct. 4, 2015

Notary Public

cc.: Al Schmidt, ND WSI
Claim No.: 2010 827,504
Nilles File No.: 11-300.030