

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20160275
Stark County Case No. 45-2015-CV-00936

Stanley Moline,	Claimant and Appellant
v.	
Workforce Safety and Insurance,	Appellee

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT DATED JUNE 2, 2016, AFFIRMING THE ORDER OF WORKFORCE SAFETY AND INSURANCE OF NOVEMBER 13, 2014, STARK COUNTY DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT, THE HONORABLE DANN GREENWOOD.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
FACTS	2
STANDARD OF REVIEW	9
ISSUES:	
I. WSI erred in failing to use a reasonable person standard in determining whether Moline had good cause to accept employment	10
II. Moline was justified in refusing transitional job offer from Wyoming Casing	12
CONCLUSION	17
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

	<u>Paragraph</u>
<u>STATE CASES</u>	
Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979).....	41
Lawrence v. North Dakota Workers Comp. Bureau, 2000 ND 60, 608 N.W.2d 254	41
Fuhrman v. ND Worker's Comp, 1997 ND 191, 569 N.W.2d 269	50
Lambott v. Job Service North Dakota, 498 N.W.2d 157, 159 (ND 1993)	50
Lawrence v. North Dakota Workers Comp. Bureau, 2000 ND 60, 608 N.W.2d 234	51
Hoffman v. North Dakota Worker's Compensation Bureau, 592 N.W.2d 533, 1999 ND 66.....	51
<u>STATUTES</u>	
Section 28-32-46 N.D.C.C.....	40, 41
Section 28-32-49 N.D.C.C.....	40
Section 65-05-08(7) N.D.C.C.....	43, 51
Section 65-08-05(1) N.D.C.C.	46
Section 65-08-05 N.D.C.C.....	49
Section 65-05-28 N.D.C.C.....	71

STATEMENT OF THE ISSUES

1. I. WSI erred in failing to use a reasonable person standard in determining whether Moline had good cause not to accept transitional job offer.
2. II. Moline was justified in refusing transitional job offer from Wyoming Casing.

STATEMENT OF THE CASE

3. On November 13, 2014, Workforce Safety and Insurance issued an Order determining that the claimant, Stanley Moline, was eligible for medical benefits but discontinuing disability benefits effective August 21, 2014. Moline appealed the denial of disability benefits and the hearing was held on July 8, 2015. Following the hearing, the administrative law judge issued Findings of Fact, Conclusions of Law and Final Order on November 30, 2015 affirming the November 13, 2014 order issued by Workforce Safety and Insurance.
4. From that final Order of the administrative law judge, Stanley Moline appealed to the District Court, Stark County, Southwest Judicial District. The Court on June 2, 2016, issued its Memorandum Decision and order for Judgment affirming the final Order of WSI (App Pgs. 4-8) and from that Judgment of the District Court, Moline appeals to the Supreme Court of the state of North Dakota. (App Pgs. 40-44).

FACTS

5. Moline was one of the large number of out of state workers who came to North Dakota to work in the oil fields because of the employment opportunities and high wages. Moline was an older worker, he was 59 years old at the time he filed his claim, born August 8, 1955.
6. Moline had about a year and a half of college, played some professional baseball, and his work history prior to North Dakota consisted primarily in installing and refinishing hardwood floors and various heavy construction jobs in the state of California. (Hearing Transcript, Pgs. 27-28) Upon Moline's arrival in North Dakota, he found employment

at Wyoming Casing working on a clean and drift crew, where you clean the pipe before it goes in the hole during the process of drilling an oil well.

7. Moline worked long hours performing heavily repetitive work for about fifteen months. (Hearing Transcript, Pgs. 29-31) (Certified Record, Pg. 614). Eventually Moline started developing numbness in his hands and went to a chiropractor, Dr. Berger, in April of 2014 claiming numbness in both arms and hands. (Certified Record, Pg. 53) Moline received treatment, but he was not placed on any restrictions and did not file any workers compensation claim for benefits with his employer. Moline saw Dr. Berger twice in April, 2014, and on July 7, 2014. Dr. Berger's treatment provided only temporary relief. (Hearing Transcript, Pg. 33).
8. The pain in Moline's hands and arms worsened with continuing numbness, tingling at night, and pain from the elbow down into the wrists, which was causing Moline sleepless nights. (Hearing Transcript, Pg. 36) (Certified Record, Pg. 615) Because the pain in his hands and arms was getting worse, Moline decided that he wanted another opinion besides that of Dr. Berger and went to the Great Plains Clinic in Dickinson on August 8, 2014. (Exhibit Pg. 46) (Hearing Transcript, Pg. 37) (Certified Record, Pg. 646) Moline saw Erin Prkerl, a physician's assistant, who diagnosed Moline with neuropathy and her assessment was that Moline's symptoms were definitely related to the work he was doing. She recommended Moline find a different job as his symptoms were likely to progress if he continued to do his current job. While at the Great Plains Clinic, Moline was asked if he wanted to file for Worker's Compensation, but Moline indicated he had to speak with his supervisor first. (Hearing Transcript, Pg. 37) (Certified Record, Pg. 616) The office notes indicated Moline was as to talk with his

- boss about switching to a different type of job.
9. After the visit to the Great Plains Clinic and being told his condition was work related Moline went to the offices of Wyoming Casing and spoke to Kristi Baumgartner, of Human Resources, about his injury and employment. Baumgartner decided that day (August 8, 2016) to take Moline to Wyoming Casing's designated medical provider, Dr. Mosely, at Work Partners.
 10. Dr. Mosely advised Moline that he did not think his symptoms were really a repetitive type of injury that was caused by work and advised Moline that he could work "as tolerated". Dr. Mosely did not place any other restrictions on Moline, as he assumed that if Moline had been working up to that point, he could continue to work with the pain. (Hearing Transcript, Pgs. 193-197) (Certified Record, Pgs. 653-656)
 11. At that time, Dr. Mosely told Moline that he had some hard choices or decisions to make as an EMG was necessary to determine if it was work related. He could either wait until the claim was already accepted, or he could bill it under his own insurance and then once his claim was accepted, it would go back to Worker's Compensation. They also discussed options if it was not accepted as a Worker's Compensation case. (Hearing Transcript, Pg. 132) (Certified Record, Pg. 639) Dr. Mosely further stated that it would take some time, a lengthy process, for Moline to get the testing done to confirm whether he had carpal tunnel and whether it was work related. (Hearing Transcript Pg. 200) (Certified Record, Pg. 656) As Dr. Mosely did not place any formal restrictions on Moline and did not feel his conditions was work related, there was no discussion at that time about a transitional job offer for Moline.
 12. Moline indicated during the visit with Dr. Mosely that he was going to go to California,

where he had a sister and that he would seek treatment in California.

13. Whether Moline had planned the trip to California prior to August 8, or whether he made the decision to go on August 8 was a matter of some disagreement at the hearing. Moline left for California the following day, August 9, 2014.
14. The plan that was decided on at that time in Dr. Mosely's office was that even though Dr. Mosely felt that it was not a workforce safety condition, that they would file a claim with Workforce Safety and Insurance to see whether they would pay for the testing necessary to make a determination of whether it was work related, which could take three to five weeks and that Moline would go to California to see about obtaining the required testing sooner.
15. Baumgartner from Wyoming Casing testified that they advised Moline of their policy that they would offer modified work if it was a work related injury, but that since Moline was leaving for California they did not discuss a modified position. (Hearing Transcript, Pg. 157) Dr. Mosely had placed no restrictions on Moline, believing that if Moline had tolerated the work up to that point that he could continue to tolerate the work. (Hearing Transcript, Pg. 193)
16. On August 11, 2014, Moline had a phone conversation with the claims adjuster with WSI. (Certified Record, Pg. 5)
17. On August 13, 2014, Moline had another phone conversation with another analyst from WSI who noted that Moline was now in California and indicated that his sister was ill and that he was needed there to help. He had apparently at that time told WSI that he was going to see a chiropractor who was going to refer him on to a specialist. In another phone conversation that day with a second claims analyst, it was noted that Moline had a

- full RFW (release for work) from Dr. Mosely.
18. Moline again called WSI on August 14, 2014, and indicated to them that he was at the doctor's office and wanted to update them on the situation. (Certified Record, Pg. 6)
 19. Moline called WSI on August 15, 2014, indicating that he had seen the chiropractor in California, who had called Dr. Mosely to discuss this case and they agreed that he would see a nerve specialist. (Certified Record, Pg. 7)
 20. There were several phone calls from Moline on August 21, 2014, where Moline indicated he had seen a specialist, Dr. James Petros, who performed an EMG and that he had been diagnosed with carpal tunnel syndrome. Moline followed up on August 22, 2014, with another phone call to WSI indicating that notes were forthcoming and they would decide by November whether surgery was necessary and that he was removed from work. (Certified Record, Pg. 7)
 21. On August 26, 2014, Moline again contacted WSI regarding the wage loss denial and indicated that he was faxing some medical notes from his most recent appointment.
 22. Later that day, Moline's claim was accepted for bilateral carpal tunnel syndrome and medical benefits. The claims adjuster noted that in the beginning wage loss was denied on the claim and indicated that the doctor in California still has him released for work but had put some minor restrictions on him.
 23. In the meantime, Dr. Newton, who Moline had originally seen in California and was his treating physician upon referral from Dr. Mosely and was the only doctor who could certify disability took Moline off all work.
 24. Upon his arrival in California, Moline immediately made an appointment to see Dr. Gary Newton, a chiropractor who was certified as a qualified workers compensation

- examiner under California's workers compensation system.
25. The first date that Moline saw Dr. Newton was on August 14, 2014, although there is some discrepancy in the dates in Dr. Newton's records, which were caused in part by Moline's putting down erroneous dates on his patient questionnaire.
 26. On Moline's first visit to Dr. Newton, Dr. Newton placed a phone call to Dr. Mosely in North Dakota for the purposes of discussing Moline's situation and arranging for transfer of care from Dr. Mosely to Dr. Newton. Also at that time on August 14, 2014, Dr. Newton took Moline off all work, pending an MRI.
 27. Dr. Newton referred Moline to Dr. Petros to perform an EMG which took place on August 21, 2014. Dr. Petros, based upon the EMG results determined that Moline's condition was related to repetitive work during the course of his employment and referred Moline back to Dr. Newton. Dr. Petros did not initially set any work restrictions for Moline.
 28. In the interim, on August 21, 2014, Moline contacted Kristi Baumgartner of Wyoming Casing and inquired about available work, leaving her a message. He called again on August 26, 2014, and spoke with Baumgartner.
 29. They had a discussion regarding Wyoming Casing's policy on transitional work for his injury were his WSI claim to be accepted and Moline expressed his displeasure at the pay cut that transitional work would involve. Baumgartner then advised Moline that WSI would pay partial disability benefits to make up a portion of the difference to what Moline was making in the transitional job and what he had been making prior to the injury.
 30. On August 21, 2014, Moline saw Dr. James Petros who conducted an EMG rather than

an MRI. He diagnosed moderate carpal tunnel syndrome, right greater than left. Dr. Petros' notes say that Moline has not received any prior treatment for his hands and conservative care was recommended.

31. Moline saw Dr. Petros again on August 25, 2014, who recommended physiotherapy as an initial treatment strategy and stated that he would provide Moline with work restrictions. (Exhibit H, Pg. 78) Dr. Petros then backdated a work restrictions document to August 21, 2014, restricting Moline to modified duty, with no repetitive push, pull, lift, grasp, pinch or rotation with bilateral extremities. (Certified Record, Pg. 271) At that point, Moline had Dr. Newton, who had recommended that he be taken off all work and Dr. Petros who had provided the above stated restrictions.
32. Dr. Petros later rescinded his restrictions and clarified it was Dr. Newton who was to certify restrictions as the treating physician. (Certified Record, Pg. 297)
33. On August 27, 2014, WSI accepted Moline's claim for bilateral carpal tunnel syndrome.
34. Subsequently, Wyoming Casing sent via certified letter dated August 28, 2014, a transitional job offer payable at \$18/hour for 40 hours beginning September 2, 2014 and asking Moline to contact them within 24 hours of its receipt.
35. Not once during the whole course of these events in August and September of 2014 did WSI or Wyoming Casing ever contact Dr. Newton even though he was the treating physician, the only one who was qualified or had the legal authority to place restrictions on Moline. (N.D.C.C. Section 65-05-08.1)
36. Moline did not accept the transitional job offer. Dr. Newton had taken him off all work and restricted his driving to no more than twenty minutes. (Certified Record, Pg. 135)

37. The driving restrictions prevented Moline from driving back to North Dakota from California.
38. Moline testified that he did not have the financial ability to take an alternative from of transportation, other than driving his personal vehicle, and that he was skeptical of Wyoming Casings offer to drive him to and from work and doctor's appointments. (Hearing Transcript, Pgs. 109-110) (Certified Record, Pg. 634).
39. Moline subsequently saw a surgeon, Dr. Michael Butcher, on January 21, 2015, and who determined Moline was temporarily totally disabled from his usual line of work and took him off all work.

STANDARD OF REVIEW

40. In an appeal of a WSI order, under N.D.C.C. §§ 28-32-46 and 28-32-49, we are required to affirm an order by an administrative agency unless:
1. The order is not in accordance with the law.
 2. The order is in violation of the constitutional rights of the appellant.
 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
 6. The conclusions of law and order of the agency are not supported by its findings of fact.
 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

41. N.D.C.C. § 28-32-46. "[W]e do not make independent findings of fact or substitute our judgment for that of the agency. We determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979). Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an agency decision. Lawrence v. North Dakota Workers Comp. Bureau, 2000 ND 60, ¶ 11, 608 N.W.2d 254.

ISSUES

42. **ISSUE NUMBER ONE:** WSI erred in failing to use a reasonable person standard in determining whether Moline had good cause to not accept transitional job offer.

43. Moline's disability benefits were terminated pursuant to N.D.C.C. section 65-05-08(7), which provides that "if the employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, the employee is not entitled to any disability or vocational rehabilitation benefits during their limitation of income or refusal to accept employment unless the organization determines the limitation or refusal is justified."

44. In other words, an injured worker must establish that he had good cause to refuse an employment offer and such good cause is to be determined using the reasonable person standard.

45. Moline took the position at the hearing that the Court was to apply the justifiable cause based on a reasonable person standard. (Hearing Transcript, Pg. 14) However,

the ALJ did not even mention the reasonable person standard in her decision.

46. Modified employment or a transitional job is generally employment that is modified to lower the physical demands of such employment or is different employment with physical demands that meet the employee's restrictions placed upon him by his treating physician pursuant to N.D.C.C. section 65-05-08.1.
47. This section provides that an injured employee's doctor shall certify the period of disability and the extent of the injured workers abilities and restrictions.
48. It is the restrictions placed upon an injured worker by his treating physician that the modified employment is supposed to meet and if the transitional job exceeds the employee's restrictions he is subject to a penalty under ND law.
49. The penalty for an injured worker accepting employment that exceeds his limitations is found at N.D.C.C. section 65-05-28, which provides that "if an employee undertakes activities that exceed the treatment recommendations of the employees doctor and that employees injury or condition is aggravated or worsens as a result of those activities, WSI may not pay benefits relevant to the aggravation or worsening, unless the activities were undertaken at the demand of the employer."
50. This Court, in dealing with the phrase "good cause" in *Fuhrman v. ND Worker's Comp*, 1997 ND 191, 569 N.W.2d 269, "claimant has good cause for failing to attend the rehabilitation program if the claimant has a reason that would cause a reasonable person to refuse to attend the rehabilitation program under the same or similar circumstances." The *Fuhrman* Court quoted from *Lambott v. Job Service North Dakota*, 498 N.W.2d 157, 159 (ND 1993) in "determining whether a claimant for an employment compensation had good cause to refuse to apply or accept suitable work.

The Court similarly defined it as a reason that would compel a reasonably prudent person to refuse to apply for employment under the same or similar circumstances.”

51. This Court applied the definition of “good cause” in evaluating whether an injured worker’s justification for refusing a job offer under N.D.C.C. Sec 65-05-08(7) in *Lawrence v. North Dakota Worker’s Compensation Bureau* 608 N.W.2d 234, 2000ND 60. See also *Hoffman v North Dakota Worker’s Compensation Bureau*, 592 N.W.2d 533, 1999 ND 66 applying the good cause based on reasonable person standard in refusing vocational rehabilitation.

52. In a case such as this, a modified job or a transitional job offer is made in lieu of temporary total disability benefits that an injured worker would otherwise be entitled because he could not perform the physical requirements of his job. Whether such injured worker had good cause or justification to directly refuse such employment is the appropriate standard to determine whether he should receive temporary total disability benefits.

53. WSI failed to address the issue of whether a reasonable person under similar circumstances would act similarly in Moline’s circumstances and whether Moline had good cause or justification to refuse or not accept the transitional job offer. This matter should be reversed and remanded back to WSI.

54. **ISSUE NUMBER TWO:** Moline was justified in refusing transitional job offer from Wyoming Casing.

55. On August 8, 2014, Moline went to the Great Plains Clinic in Dickinson, North Dakota, because the pain, numbness and tingling in his arms was continuing to get worse. After being evaluated at the Great Plains Clinic where the Nurse Practitioner

there thought his condition was work related, Moline advised Kristi Baumgartner in human resources of that fact and she determined that Moline would go see Wyoming Casing's designated medical provider, Dr. Mosely. Dr. Mosely told Moline that he did not feel it was work related and that he was released to work 'as tolerated', which Dr. Mosely indicated he was released to continue doing his duties that he had been doing. (Certified Record, Pg. 655)

56. Dr. Mosely told Moline that he needed to have an EMG to see if he had some nerve damage, but that he was going to send this matter on to WSI to determine if they would pay for the test and that even if it was determined by WSI, that they would somehow pay for testing on a claim that the treating doctor did not feel was a work injury, that such testing would take three to five weeks to have completed. Dr. Mosely told Moline if he wanted to speed this up, he should probably put it on his personal insurance and if for some reason it was determined that maybe it was work related, then they could go back and look at it, but that was going to take a long time, because he didn't necessarily think this was work related, to get workers compensation to cover the injury. (Certified Record, Pgs. 200, 656)

57. The following day, Moline left for California. Whether his trip had been planned before that or whether Moline made the final decision in the doctor's office hoping to get faster and better treatment in California, is not really relevant.

58. What is relevant is whether Moline's choice after being advised by Dr. Mosely of his opinion of the situation, whether it was a reasonable decision.

59. As Kristi Baumgartner of Wyoming Casing said, they employ a lot of out of state workers and the situation arises where somebody gets hurt on the job and they want

to go home, because that is where the support system is and they know the doctors from whom they may get treatment. (Hearing Transcript, Pgs. 154-155) (Certified Record, Pg.155)

60. At the time Moline left for California, there was no transitional job offer in place from his employer, because there were no restrictions place on Moline upon which to base a transitional job offer. While Wyoming Casing may have told Moline that it would accommodate any work restrictions, it was a moot point, because Dr. Mosely did not place any restrictions on Moline.

61. At that time, Moline left for California, he had two choices. One was to go to California to seek medical treatment and diagnostic testing that was necessary to establish that his condition was work related, or to continue working his regular position on an "as tolerated" basis. At that point Moline's tolerance for the pain from his job had already been pushed to the limit which is why he sought medical treatment.

62. Moline's decision to go to California was a reasonable one and as it turned out, was the correct one, because he was able to get in to see Dr. Newton immediately upon arriving in California and within ten days had his EMG, which established that his condition was in fact work related. The problem arose because of the restrictions placed upon him by his treating physician, Dr. Newton.

63. Moline could not return to North Dakota from California and he never received a valid transitional job offer from Wyoming Casing.

64. When Moline went to see Dr. Newton, Dr. Newton called Dr. Mosely while Moline was still in his office and obtained the a referral from Dr. Mosely, Wyoming Casing's

- designated medical provider to Dr. Newton.
65. Dr. Newton was then Moline's treating doctor for the purposes of certifying disability and restrictions. Dr. Newton remained Moline's treating doctor throughout the time frame relevant to this claim.
66. Dr. Newton referred Moline to Dr. Petros for the purposes of the EMG testing, which confirmed Moline's work related condition and Moline was referred back to Dr. Newton by Dr. Petros.
67. Dr. Petros did offer some restrictions on Moline, which were done at Moline's request, because he thought it was necessary for him to return to work in North Dakota.
68. Dr. Petros was never authorized to set restrictions on Moline and later confirmed that in a letter to whom it may concern, indicating that Dr. Newton was the one who was to set restrictions for Moline.(Certified Record pg 297)
69. WSI spent a lot of time attacking Dr. Newton, including issuing a fraud order on Dr. Newton because of discrepancies in the billing dates for treatments that he submitted to WSI.
70. WSI has argued that there is no objective basis for Dr. Newton's restrictions and that Dr. Newton's credibility places any restrictions that he may have imposed in doubt.
71. However at no time during these proceedings did WSI utilize the provisions of N.D.C.C. 65-05-28, which provide WSI with the ability to require an injured worker to be treated by another doctor to better direct the medical aspect of the injured employees claim. Section one of this statute also confirms that Dr. Newton was a continuously treating doctor for the purposes of certifying temporary disability.

72. However Moline was unaware during the time period, from August 9 through mid-September of the issues WSI was having with Dr. Newton and all Moline knew was the Dr. Newton was the treating physician for the purposes of setting forth his restrictions and certifying temporary total disability. Dr. Newton, in his deposition, made it clear that he did not want Moline doing any modified job that would require the use of his hands. He also made it quite clear that at no time during this process of developing a transitional job offer for Moline, did WSI or Wyoming Casing ever contact him regarding the details of the modified job offer and whether he would approve of it or what type of job Dr. Newton would potentially approve.
73. In order for there to be a valid modified or transitional job offer, it is incumbent upon either WSI or the employer to obtain the approval of such job offer by the doctor who is certifying disability and setting forth the restrictions.
74. Under a reasonable person standard the issue is whether Moline was justified in failing to return to North Dakota for the transitional job Wyoming Casing was offering. Moline testified he could not afford alternate means of travel and was suspicious of how Wyoming Casing's offer to drive him where he need to go.
75. In addition neither Wyoming Casing nor WSI ever contacted his treating doctor to obtain approval of the transitional job offer and Dr. Newton never approved any return to North Dakota.
76. Moline's actions are hat of a reasonable person with the intent that he would be reducing his period of disability to a minimum by maintaining the appropriate treatment and testing in California.

CONCLUSION

77. Using a reasonable person standard, it becomes clear that Moline had justifiable cause to turn down the transitional job offer offered by Wyoming Casing in late August of 2014.
78. From the time when Moline was sitting in the office of Dr. Mosely, Wyoming Casing's designated medical provider, and was told that Dr. Mosely did not think his condition was work related but that they would file a claim with WSI on his behalf to see whether WSI would agree to pay for the necessary testing to determine if Moline's condition was work related or he could seek such testing on his own, at his own expense or through his own insurance.
79. Moline's decision to go to California was a reasonable one, and in hindsight, was the correct decision.
80. Moline received the necessary treatment and testing to determine that his condition was work related.
81. At that point, the issue becomes if Moline was justified in not returning to North Dakota from California after Wyoming Casing made a transitional job offer.
82. At that time, Moline's treating physician, Dr. Newton, had him restricted to not working at all and driving for less than twenty minutes at one time.
83. Moline could not drive his own vehicle back to North Dakota and there was an issue of transportation once he arrived back in Dickinson, and the cost of alternative transportation from California to North Dakota.
84. There was also the issue of neither WSI nor Wyoming Casing contacting Moline's treating physician, Dr. Newton, for approval of any transitional job offer.

85. Moline was not aware at that point in time that WSI was going to assert that Dr. Newton was not a credible treating doctor and that his opinion should not be considered.

86. WSI did not require Moline to select another doctor to better direct his care. It was entirely reasonable that Moline would rely on the opinion of his treating doctor regarding his return to work abilities.

87. The decision of WSI should be reversed and the matter should be remanded back to WSI for an award of disability benefits continuing after August 21, 2014

Word Count: 5,082

Dated this 8th day of September, 2016.

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CERTIFICATE OF SERVICE

42. I HEREBY CERTIFY that on September 9, 2016, a true and correct copy of the foregoing **Brief of Appellant and Appendix** has been furnished electronically to North Dakota Supreme Court and electronically as follows:

Jacqueline Anderson
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/s/ Steven L. Latham
By: Steven L. Latham (ID 03322)