

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota by and through
Workforce Safety and Insurance,

Appellant,

vs.

Jason E. Tolman,

Appellee.

Supreme Court No.: 20200025
Dunn County District Court
Civil No.: 13-2019-CV-00058

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANT NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT JUDGMENT DATED DECEMBER 5, 2019,
AND NOVEMBER 5, 2019, MEMORANDUM OPINION AND ORDER
AFFIRMING THE ALJ'S ORDER OF ADMINISTRATIVE LAW JUDGE
LYNN C. JORDHEIM, DATED MAY 15, 2019
DUNN COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE RHONDA R. EHLIS

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STATEMENT OF THE ISSUES

[1] Whether the ALJ erred in construction and application of N.D.C.C. § 65-01-02(10)(a)(6) which allows benefits for a mental or psychological condition caused by a physical injury but *only* when the condition did not pre-exist the work injury.

[2] Whether the ALJ erred in concluding Jason Tolman (“Tolman”) had established his depression and anxiety are compensable psychological conditions when the evidence unequivocally established that both conditions pre-existed the work injury.

[3] Whether the ALJ did not reasonably consider the evidence in determining the compensability of the mental and psychological condition because he relied on notations that WSI previously paid for psychological treatment encompassed within programs to treat his other compensable medical conditions.

REQUEST FOR ORAL ARGUMENT

[4] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellant Workforce Safety and Insurance (“WSI”) requests oral argument. This appeal involves an issue of statutory construction and application of N.D.C.C. § 65-05-02(10)(a)(6) which defines when mental or psychological conditions are compensable. Oral argument is important to understand how WSI interprets and applies this statute and why the ALJ’s construction is not in accordance with accepted principles of statutory construction.

STATEMENT OF THE CASE

[5] On September 26, 2014, Tolman sustained an injury when a tanker truck he was driving rolled. (C.R.¹ 1) WSI accepted the claim. (C.R. 4)

¹ “C.R.” refers to Certificate of Record on Appeal to District Court dated August 6, 2019, filed pursuant to N.D.C.C. § 28-32-44

[6] On July 25, 2018, WSI issued an Order denying benefits in connection with Tolman's depression and anxiety because these conditions were not caused by his physical injury and existed prior to the work injury. (Appx. 43-47) Tolman requested rehearing. (Appx. 48) An administrative hearing was held on April 17, 2019, before ALJ Jordheim. (C.R. 62-65; 849-905)

[7] On May 15, 2019, ALJ Jordheim issued Findings of Fact, Conclusions of Law and Order reversing WSI's Order dated July 25, 2018. (Appx. 49-66) WSI submitted a request for reconsideration under N.D.C.C. § 28-32-40(2). (Appx. 67-83) On June 18, 2019, ALJ Jordheim issued a Denial of Request for Reconsideration. (Appx. 84-85)

[8] On July 11, 2019, WSI appealed the decision of the ALJ to the District Court, Dunn County. (Appx. 86-88) On November 5, 2019, the District Court, the Honorable Rhonda R. Ehlis, issued a Memorandum Opinion and Order Affirming the ALJ's Order. (Appx. 89-100) Order for Judgment and Judgment were entered December 5, 2019. (Appx. 101-102) On January 28, 2020, WSI filed its appeal to this Court. (Appx. 103-104)

STATEMENT OF THE FACTS

[9] On September 26, 2014, Tolman was injured when a tanker truck he was driving rolled. (C.R. 1, 574) Tolman was seen at St. Alexius Medical Center, Emergency Trauma Center in Bismarck. (C.R. 569-574) His past history confirmed *depression* and *anxiety* and chronic low back pain. (C.R. 572, 574) His current medications included Cymbalta. (C.R. 572) Tolman sustained injuries to his head, face and neck. (C.R. 580) He submitted a claim for injuries to WSI. (C.R. 1-3) WSI accepted liability for his facial

injuries, knee and rib injuries and head injury. (C.R. 4, 5) Follow-up evaluations immediately after the accident continued to reflect the history of depression and anxiety. (C.R. 591, 598, 602, 614)

[10] In December of 2014, Tolman returned to his home in Idaho for continued treatment. (C.R. 162, 309, 617) His anxiety and depression were noted as a problem. (C.R. 162, 309, 311) The records documented that his depression was “stable” with the use of Cymbalta. (C.R. 166) On January 5, 2015, Tolman underwent a neuropsychological consultation for his brain injury. (C.R. 315-317) That consultation confirmed that Tolman had “a premorbid history of depression that seems about the same. Patient does have a lot of increased anxiety that is often triggered by his confusion or losing items.” (C.R. 316) See also C.R. 340 referencing “premorbid history of some depression.” The note reflects that Tolman was receiving treatment from his primary care physician with Cymbalta *for the depression*. (C.R. 316) Tolman was referred as part of the neuropsychological testing to undergo “complete psychological testing.” (C.R. 321) WSI approved that referral. (C.R. 6)

[11] On February 13, 2015, Tolman’s neuropsychological evaluation documented that Tolman “reported a history of some depression and some prior counseling after having a divorce” and that since the accident he “reported a great deal of depression and anxiety that has been exacerbated by *family stressors*.” (C.R. 341) The results of the testing confirmed that Tolman “does not have much in the way of any organic deficits at this time.” (C.R. 343) It was noted that his depression and anxiety were the “root cause of his processing speed and speech deficits.” (C.R. 343) There was a question of whether the depression and anxiety were caused by the accident because of

the documented premorbid history of depression. (C.R. 343) The medical notes reflect that with respect to the depression and anxiety, Tolman was transitioned off of Cymbalta to Paxil and Buspar. (C.R. 626) An inquiry was made to WSI about paying for that medication. (C.R. 8) The claims adjuster denied payment because the medical conditions of depression/anxiety were present prior to the work injury. (C.R. 9, 10) WSI issued a Notice of Decision on March 16, 2015, denying payment for treatment of anxiety and depression. (C.R. 11, 12) Tolman did not request reconsideration from those decisions.

[12] WSI did obtain Tolman's medical records from before the work injury that confirmed diagnosis and treatment for anxiety and depression. Those records reflect a history dating back to 2007 of depression/anxiety. (C.R. 141, 153, 155, 253, 256, 257, 259, 260) The first "episode" of depression occurred following his divorce. (C.R. 253) This was treated with medications. (C.R. 253-254) Treatment records from 2010 reflect that he continued to struggle with depression "in the context of multiple psychosocial stressors." (C.R. 255) In 2010 his diagnosis was major depressive disorder, *recurrent*. (C.R. 256) He was prescribed Cymbalta for his depression. (C.R. 256, 259-265) At a visit on December 30, 2011, the plan was to increase his dose for anxiety and pain symptoms, and he was open to counseling but lacked insurance. (C.R. 264) As of July 2013, the records reflect Tolman was discharged for further care to his primary care physician for continued medication management relating to his major depressive disorder. (C.R. 265) As noted above, when Tolman began treating for his work injuries in Idaho in December of 2014, he still carried the diagnosis of depressive disorder. (C.R. 162)

[13] In March of 2015, WSI requested a treatment plan for Tolman's care. (C.R. 630) A response was provided outlining the therapy prescribed and the goals and

duration of that therapy. (C.R. 632-633) In terms of the psychological issues, Dr. McMartin confirmed that the treatment was because the work injury “significantly exacerbated preinjury issues with anxiety.” (C.R. 633) Nonetheless, as part of his brain injury program, there was some treatment provided to Tolman for depression, which was approved by WSI. (C.R. 14-15, 17) Regarding his medications, Dr. McMartin’s notes confirmed the Cymbalta that Tolman was taking he had been on “for 6-7 years for mood stabilization.” (C.R. 637) WSI continued to authorize additional therapy to facilitate recovery from the brain injury. (C.R. 17) The additional therapy notes confirm that the additional sessions were to work on “outburst and impulsive act” issues as well as for “compensatory strategies for stress/Sx management & behavioral modifications to stressors.” (C.R. 488) Tolman’s continued treatment reflected he had anxiety regarding return to work issues in his work hardening program. (C.R. 513, 528) The notes also confirm that WSI was authorizing therapy sessions related to the work hardening program. (C.R. 528)

[14] In February of 2016, Tolman’s physician, Dr. Thomas, discussed medication management. (C.R. 178) There was a recommendation for a change from Cymbala to an SSRI. (C.R. 178) Dr. Thomas confirmed that Tolman “has been on Cymbalta prior to the injury occurring. **He had been on this for treatment of depression and chronic pain.**” (C.R. 178) Dr. Thomas also recommended transition of management of depression to neurology. (C.R. 181)

[15] In August of 2016, WSI wrote to Jason Gage regarding a request for neuropsychological evaluation and feedback sessions for depression and anxiety. (C.R. 533) WSI also asked: “Does Jason Tolman have any psychological conditions or issues

that pre-exist the work injury of 9/26/14?” (C.R. 533) To that question, Jason Gage responded: Yes.” (C.R. 533) Although Gage responded yes, that the physical injury was at least 50% the cause of mental or psychological condition compared with other contributing causes, he responded that he wanted “to update testing to be sure.” (C.R. 533) Gage further stated: “I suspect he has some residual PTSD w/etiology being his work-related accident. Premorbid conditions will be rated for apportionment. Want updated testing to rate validity, severity and cause more.” (C.R. 533) WSI’s notes reflect the additional testing was approved for clarification of the pre-existing issues. (C.R. 23) Based on the additional testing, Jason Gage submitted a report dated November 21, 2016. (C.R. 67-71) In that report, Jason Gage did not identify depression or anxiety as a psychological condition. (C.R. 70)

[16] In March of 2018, a request came in to WSI for an additional prescription for Abilify. (C.R. 39) This was a request from Mark Berger, NP-C who saw Tolman for “routine follow-up, discuss depression and anxiety.” (C.R. 235, 239) This treatment was at the same clinic where Tolman had previously been seen in 2008. (Id.) The request for payment was again denied by WSI because Tolman had a prior history of depression and anxiety. (C.R. 41) WSI issued a Notice of Decision Denying Medical Condition, which stated as follows:

Workforce Safety & Insurance (WSI) received medical information for medical services you received. WSI reviewed the information and determined that we are not liable for the medical condition. On 03/16/2015 Paraxetine was denied because this medication is appropriate for depression, generalized anxiety disorder, obsessive-compulsive disorder, panic disorder, post-traumatic stress disorder, social phobia disorder, and premature ejaculation. WSI did not have liability for any of those conditions and the medication was not medically necessary to treat the work injury.

WSI received a request for approval of Ariprazole (generic for Abilify) from Dr. Mark Berger. This medication is for treatment of anxiety and depression.

Depression and anxiety is a condition you had prior to your work injury of 09/26/2014. Therefore, WSI is denying these conditions.

(Appx. 40-41) Tolman requested reconsideration. (Appx. 42) WSI reviewed the medical information, staffed the claim and reviewed the prior medical history. (C.R. 53) WSI then issued an Order on July 25, 2018, denying liability for depression or anxiety and any benefits related to those conditions, including any prescribed medications to treat these conditions. (Appx. 43-47) WSI's Order cited N.D.C.C. § 65-01-02(10)(a)(6) and N.D. Admin. Code 92-01-02-2.5 as the legal basis for denying the claim. (Appx. 45) Tolman requested rehearing. (Appx. 48)

[17] Tolman's request for hearing was set on for a hearing before ALJ Jordheim on April 17, 2019. (C.R. 62, 849)² The hearing was conducted on that date via telephone. (C.R. 849) At the hearing, Tolman agreed that any therapy and treatment that WSI provided relative to psychological conditions prior to issuance of WSI's Order related to what he received as part of his brain injury program. (C.R. 853) Tolman agreed that he had initially been treated for depression following his divorce in 2007. (C.R. 853-854) He agreed his treatment continued long after 2007. (C.R. 854)

[18] On May 15, 2019, ALJ Jordheim issued Findings of Fact, Conclusions of Law and Order in which he reversed WSI's July 25, 2018, Order denying liability for depression and anxiety. (Appx. 49-66) In reversing WSI's Order, the ALJ found that the

² The hearing relating to the issue of liability for anxiety and depression was consolidated with Tolman's appeal of WSI's determination of entitlement to permanent impairment benefits. This appeal does not relate to the issues pertaining to the permanent impairment determination.

depression and anxiety that Tolman experienced following the work accident was not “attributable to the depression and anxiety he experienced following his divorce.” (Finding #33, Appx. 59) The ALJ’s legal analysis was as outlined in his Conclusions of Law as follows:

3. As used in N.D.C.C. § 65-01-02(a)(6):

1. “A mental or psychological condition” must be directly caused by a physical injury. To be directly caused it must be shown with objective medical evidence that the mental or psychological condition is the physiological product of the physical injury.
2. “Other contributing causes” include emotional circumstances, loss of self-esteem, loss of financial independence, divorce, loss of career or employment position, disruption to lifestyle or family units, anxiousness, uncertainty, or compromised ability to participate in lifestyles, hobbies, or pastimes.

N.D. Admin. Code § 92-01-02-2.5

...

5. The term “compensable injury” does not include injuries attributable to a preexisting condition. N.D.C.C. § 65-01-02(b)(7). The term “attributable” is not defined in the statute. The Oxford dictionary defines it as “regarded as being caused by”. Therefore, for a preexisting condition to bar eligibility for workers compensation benefits, the medical conditions for which benefits are sought must be “attributable” to the preexisting condition. In this case that would mean Mr. Tolman’s post-accident depression and anxiety must be “attributable” to the depression and anxiety that he experienced following his divorce. It is not enough to bar benefits under the statute merely to demonstrate that at some time prior to his life, Mr. Tolman experienced depression and anxiety, absent evidence of attribution.”

(Appx. 61-62)

[19] WSI submitted a request for reconsideration to the ALJ pursuant to N.D.C.C. § 28-32-40(2). (Appx. 67-84) With that request for reconsideration, WSI provided documentation relating to the legislative intent concerning the definition of a

compensable injury under N.D.C.C. § 65-01-02(10)(a)(6) which provides: “A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent the cause of the condition as compared with all other contributing causes combined **and only when the condition did not pre-exist the work injury.**” (Emphasis supplied.) (Appx. 70-83) WSI pointed out how and why the ALJ’s application of the compensable injury statutes conflicted with the method for construing statutes which is to ascertain the intent of the legislature. (Appx. 67-69) The ALJ denied WSI’s request for reconsideration. (Appx. 84-85)

[20] WSI then filed an appeal of the ALJ’s decision to the District Court, Dunn County. (Appx. 86-88) On November 5, 2019, the District Court issued its Memorandum Opinion and Order Affirming the ALJ’s Order. (Appx.89-100) The District Court noted there was “no dispute Tolman previously suffered from depression and anxiety.” (Appx. 99) The District Court agreed with the construction of N.D.C.C. § 65-01-02(10)(a)(6) applied by the ALJ and affirmed that decision. (Appx. 97-100) This appeal followed.

LAW AND ARGUMENT

A. SCOPE OF REVIEW ON APPEAL.

[21] On appeal, this Court reviews the decision of the ALJ. Bergum v. Workforce Safety and Insurance, 2009 ND 52 ¶ 8, 764 N.W.2d 178. The scope of review of a decision of an independent administrative law judge is set out in N.D.C.C. § 28-32-46, 28-32-49. Bishop v. North Dakota Workforce Safety and Ins., 2012 ND 217, 823 N.W.2d 257. 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.

[22] However, “[q]uestions of law, including the interpretation of a statute, are fully reviewable” on appeal. Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. “The primary objective of statutory construction is to ascertain the intent of the legislature.” Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶ 11, 602 N.W.2d 704, 708; Ash v. Traynor, 2000 ND 75 ¶ 6, 609 N.W.2d 96, 98. In doing so, courts look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 12, 687 N.W.2d 714 717; Goodleft v. Gullickson, 556 N.W.2d 303, 306 (N.D. 1996). Statutes are construed “as a whole to harmonize and give meaning to each word and phrase.” Baity ¶ 12, 687 N.W.2d at 717; Witcher, ¶ 11, 602 N.W.2d at 78; Ash, ¶ 6, 609 N.W.2d at 99.

[23] A statute is ambiguous when it is “susceptible to differing but rational meanings.” Ash ¶ 6, 609 N.W.2d at 96, citing Werlinger v. Champion Healthcare Corp., 1999 ND 173 ¶ 44, 598 N.W.2d 820. “Although courts may resort to extrinsic aids to interpret a statute if it is ambiguous,” it must “look first to the statutory language, and if the language is clear and unambiguous, the legislative intent is presumed clear.” McDowell v. Gille, 2001 ND 91 ¶ 11, 626 N.W.2d 666, 671. “When the meaning of the statute is clear on its face, there is no room for construction.” Baity ¶ 12, 687 N.W.2d at 718. As this Court has reaffirmed on numerous occasions:

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. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (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). Also, when a statute is clear and unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. § 1-02-05; see Bjerke v. North Dakota Workers Compensation Bureau, 1999 ND 180, 599 N.W.2d 329.

[24] If a Court determines a statute is ambiguous, “extrinsic aids may be used to construe the statute to determine legislative intent, including the object sought to be obtained, the legislative history and the administrative construction of the statute.” Reopelle v. Workforce Safety and Insurance, 2008 ND 98 ¶ 15, 748 N.W.2d 722; N.D.C.C. § 1-02-39. “The practical application of a statute by the agency enforcing it is entitled to some weight in construing the statute, especially where the agency interpretation does not contradict clear and unambiguous statutory language.” Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992); see also Houn v. Workforce Safety and Insurance, 2005 ND 115 ¶ 4, 698 N.W.2d 271 (noting administrative construction of statute entitled to some deference).

B. THE ALJ ERRED IN DETERMINING THAT TOLMAN HAD ESTABLISHED HIS DEPRESSION AND ANXIETY WERE COMPENSABLE CONDITIONS BY FAILING TO PROPERLY APPLY N.D.C.C. § 65-01-02(10)(a)(6) WHEN THOSE CONDITIONS PRE-EXISTED THE WORK INJURY.

[25] The issue for determination by the ALJ was whether Tolman had proven that his depression or anxiety are compensable psychological conditions under North Dakota laws. (C.R. 62) The applicable statute that defines a compensable psychological injury is found in N.D.C.C. § 65-01-02(10)(a)(6), which provides as follows:

"Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.

a. The term includes:

...

(6) A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not pre-exist the work injury.

(Emphasis supplied.) There was no dispute that Tolman had diagnoses of anxiety and depression prior to the work injury. The medical information outlined clearly so confirmed. Even after the work injury, Tolman's treating physician, Dr. McMartin, documented the Cymbalta that Tolman was taking was for "mood stabilization" and he had taken that medication for the last 6-7 years. (C.R. 637)

[26] The ALJ found that Tolman did in fact have depression and anxiety that pre-existed the work injury. (Findings of Fact #14, 16, 17, Appx. 55-56) However, he concluded that the depression and anxiety after the work accident was not "attributable" to the preexisting depression and anxiety. (Conclusions of Law 5, 7, Appx. 62) Rather than

apply the plain language of N.D.C.C. § 65-01-02(10)(a)(6) which clearly and unequivocally defines when a psychological condition is compensable and precludes a mental or psychological condition from being compensable when it pre-existed the work injury, the ALJ utilized a *portion of* N.D.C.C. § 65-01-02(10)(b)(7). That subsection deals with preexisting injuries, diseases or other conditions that are excluded from the definition of compensable injury unless certain criteria are met. That statute provides:

b. That term does not include:

...

(7) Injuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity. Pain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a pre-existing injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening.

From that statute, the ALJ incorporated only the term “attributable” into N.D.C.C. § 65-01-02(10)(a)(6). The ALJ did not incorporate any other portion of N.D.C.C. § 65-01-02(10)(b)(7) including whether the work injury was a trigger in the preexisting anxiety or depression or whether the work injury substantially accelerated or worsened the severity of the preexisting anxiety or depression. The ALJ then went on to define “attributable” by using the Oxford dictionary and concluded that for a preexisting psychological condition to be barred under N.D.C.C. § 65-01-02(10)(a)(6), it must be “attributable” to the preexisting psychological condition. (Conclusion of Law #5, C.R. 62) The ALJ then concluded that the depression and anxiety that Tolman was experiencing was not “attributable” to the anxiety and depression that preexisted the work injury and therefore Tolman had established a compensable psychological condition. It is this construction and

application of N.D.C.C. § 65-01-02(10)(a)(6) that WSI asserts is erroneous and requires reversal.

[27] N.D.C.C. § 65-01-02(10)(a) defines a compensable injury. In subsection (a)(6) the plain language of the statute explains that a mental or psychological injury must be caused by the physical injury and there must be reasonable medical certainty that the physical injury is at least fifty percent of the cause of the condition as compared with all other causes. In Davenport v. Workforce Safety and Insurance, 2013 ND 118 ¶17, 833 N.W.2d 500, this Court discussed the language of this subsection and applied the “plain language” of the statute in deciding the case. Although the Court did not cite the part of the statute that reflects that a psychological condition is only compensable “when the condition did not preexist the work injury” the Court’s analysis makes it clear that in construing the statute, we look first to the plain language of the statute. If that is done, the statute clearly precludes a psychological condition when the condition preexisted the work injury. It is undisputed that Tolman suffered from depression and anxiety prior to the work injury and thus by application of the plain language of N.D.C.C. § 65-01-02(10)(a)(6) he is not entitled to benefits for those conditions.

[28] The ALJ’s utilizing a portion of N.D.C.C. § 65-01-02(10)(b)(7) which relates to preexisting conditions in general is not in accordance with the rules of statutory construction. In North Dakota, specific statutes control over general. N.D.C.C § 1-01-06. This Court has steadfastly and consistently held that in interpreting statutes, the specific should control the general. Boumont v. Boumont, 2005 ND 20 ¶ 15, 691 N.W.2d 278; Johnson v. Nodak Mut. Ins. Co., 2005 ND 112 ¶ 12, 699 N.W.2d 45. As this Court has said: “[t]here exists a principle of statutory interpretation that the mention of one thing

implies the exclusion of another.” Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993)(citing In Re Township 143 North, Range 55 West, Cass County, 183 N.W.2d 520, 529 (N.D. 1971). Here, there is a specific reference to what constitutes a psychological condition, including when psychological conditions preexist a work injury. There is, therefore, no need to resort to application of the general statute relating to preexisting conditions under N.D.C.C. § 65-01-02(10)(b)(7).

[29] The ALJ’s construction also violates the principle of statutory construction that prohibits adding words to a statute to give additional meaning to a statute. First National Bank v. RPB 2, LLC, 2004 ND 29 ¶ 17, 674 N.W.2d 1; Larson v. North Dakota Department of Transportation, 2005 ND 51 ¶ 11, 693 N.W.2d 39. The word “attributable” does not appear in N.D.C.C. § 65-01-02(10)(a)(6). Rather, the statute provides that a mental or psychological condition is compensable “only when the condition did not pre-exist the work injury.” Adding the word “attributable” to the statute to require that there be a medical determination whether the current mental or psychological condition is “attributable” to the preexisting condition materially changes the plain meaning of the statute. That is precluded under the accepted rules of statutory construction. Id.

[30] This Court has stated that a statute is ambiguous if it is susceptible to differing, but rational, meanings. Jorgenson v. Agway, Inc., 2001 ND 104, ¶ 5, 627 N.W.2d 391; Ash, 2000 ND 75 ¶ 6, 609 N.W.2d 96. Assuming, without agreeing, that N.D.C.C. § 65-01-02(10)(a)(6) is ambiguous, the Court need only look to the legislative history to confirm (1) that this specific statute “governs claims for mental or psychological injuries” and (2) that “workers for whom the psychological condition preexisted the work injury, will not be covered.”

[31] The legislative history in the record from the 1997 amendments states as follows:

Paragraph 10(a)(6)

This change is similar to the change in paragraph 5(a)(3). **This paragraph governs claims for mental or psychological injuries allegedly caused by physical work injuries.** Under this Bill, workers would need to prove the work injury was at least half the overall cause of the mental condition. The most common claim is for “secondary depression,” in which the claimant seeks disability and medical benefits for depression that is allegedly caused by a physical work injury at work. Other states, particularly California, have had difficult experiences with a rapid growth of these claims, and we are seeing signs that trend may be beginning in our state as well. Some workers with very serious physical injuries do suffer depression as a result, and they will be covered by workers compensation for this real and debilitating condition. **However, workers with less serious physical injury, and workers for whom the psychological condition preexisted the work injury, will not be covered.** The current law creates an unhealthy incentive for workers to become and remain depressed in order to stay on benefits.

(Appx. 80, emphasis supplied.)

[32] Contrary to the plain language of the statute and the legislative history, the ALJ construed N.D.C.C. § 65-01-02(10)(a)(6) in a manner to allow benefits for a psychological condition unless the post-injury psychological condition is “attributable” to the preexisting condition. The ALJ did so because he believed that it “is not enough to bar benefits under the statute merely to demonstrate that at some prior time in his life, Mr. Tolman experienced depression and anxiety, absent evidence of attribution.” (Conclusion of Law #5, Appx. 62) N.D.C.C. § 65-01-02(10)(a)(6) clearly provides otherwise. This Court has said “the function of the courts is to interpret the law as written, and if the plain language of a statute does not accurately reflect the legislature’s intent, it is for the legislature, not the courts, to amend the statutory language.” Vail v. S/L Services, Inc., 2017 ND 202 ¶ 25, 900 N.W.2d 271. Therefore, because the ALJ’s construction and

application is not in accordance with the law, the District Court's decision must be reversed. N.D.C.C. § 28-32-46(1).

C. THE ALJ DID NOT PROPERLY ANALYZE THE EVIDENCE UNDER THE APPLICABLE LAW IN DETERMINING COMPENSABILITY OF TOLMAN'S MENTAL AND PSYCHOLOGICAL CONDITION.

[33] In the ALJ's Findings of Fact, Conclusions of Law and Order, the ALJ referenced notations in WSI's claim notes where it approved for payment of some psychological treatment encompassed within his brain injury program. See Findings of Fact 24, 25 Appx. 57. When WSI issued its Notice of Decision Denying Medical Conditions, it did so after staffing with the legal department not a medical staffing. See Finding of Fact #28, Appx. 57-58. Given WSI's legal interpretation, as outlined above, this is entirely consistent with WSI's application of N.D.C.C. § 65-01-02(10)(a)(6).

[34] Under N.D.C.C. § 65-05-04 WSI may "at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may **end, diminish or increase the compensation previously awarded . . .**." Thus, even if WSI had previously paid for some medical treatment, on a limited basis, for psychological aspects of the injury, WSI may "at any time" review what it had previously done and "end" that compensation. Accordingly, the ALJ misapplied the law to those factual findings and erred in giving any weight to those factual findings in arriving at his decision. See Drayton v. Workforce Safety and Insurance, 2008 ND 178 ¶ 18, 756 N.W.2d 320 (discussing WSI's authority under N.D.C.C. § 65-05-04).

[35] In addition, the ALJ's Findings 9, 10 and 31 are not in accordance with the law because he misconstrued Dr. Gage's opinion. As noted above, in August of 2016, WSI wrote to Jason Gage regarding a request for neuropsychological evaluation and

feedback sessions for depression and anxiety. (C.R. 533) In response to WSI's inquiry, Jason Gage confirmed that Tolman had psychological conditions that pre-existed the work injury. (C.R. 533) Although Gage responded yes, that the physical injury was at least 50% the cause of mental or psychological condition compared with other contributing causes, he responded that he wanted "to update testing to be sure." (C.R. 533) Gage further stated: "I suspect he has some residual PTSD w/etiology being his work-related accident. Premorbid conditions will be rated for apportionment. Want updated testing to rate validity, severity and cause more." (C.R. 533) WSI's notes reflect the additional testing was approved for clarification of the pre-existing issues. (C.R. 23) Based on the additional testing, Jason Gage submitted a report dated November 21, 2016. (C.R. 67-71) In that report, Jason Gage did not identify depression or anxiety as a psychological condition. (C.R. 70) The ALJ relied upon Ph.D. Gage's initial opinion, without taking note that upon completion of the additional testing, Ph.D. Gage did not identify depression or anxiety as a psychological condition associated with the work injury.

[36] This Court in Davenport, 2013 ND 118 ¶17, 833 N.W.2d 500, made it clear that N.D.C.C. § 65-01-02(10)(a)(6) permits compensation for mental or psychological conditions "only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined." Ph.D. Gage's opinion does not meet that criteria in that his response to WSI was equivocal and dependent on further testing. Upon completion of that additional testing, he did not in fact confirm that the physical injury was at least 50 percent the cause of depression and anxiety. Rather, he stated: "When taking into account all of the psychological and neuropsychological findings as well as

observations and work with this patient over the last two years, the patient continues to have a primary diagnosis of Posttraumatic Stress Disorder (PTSD) that is directly related to his industrial accident.” (C.R. 70) Thus, Ph.D. Gage’s opinion does not support the Conclusion of Law #6 that the physical injury is at least 50 percent the cause of his mental or psychological condition as compared to all other contributing causes. The ALJ’s decision, therefore, must be reversed. N.D.C.C. § 28-32-46.

CONCLUSION

[37] The District Court erred in affirming the Findings of Fact, Conclusions of Law and Order of ALJ Jordheim dated May 15, 2019 because the ALJ misapplied N.D.C.C. § 65-01-02(10)(a)(6) and applying the law to the evidence in determining Tolman had met his burden to establish a compensable mental or psychological condition. Accordingly, the District Court and ALJ’s decision must be reversed, and an order entered affirming WSI’s July 25, 2018, which denied Tolman benefits for his anxiety and depression.

DATED this 3rd day of April, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant, 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 Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals 24.

DATED this 6th day of April, 2020.

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North Dakota Statutes Annotated - 2017

NDCC, 65-01-02(10)

10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.

a. The term includes:

(1) Disease caused by a hazard to which an employee is subjected in the course of employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. Disease includes effects from radiation.

(2) An injury to artificial members.

(3) Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.

(4) Injuries arising out of employer-required or supplied travel to and from a remote jobsite or activities performed at the direction or under the control of the employer.

(5) An injury caused by the willful act of a third person directed against an employee because of the employee's employment.

(6) A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not pre-exist the work injury.

b. The term does not include:

(1) Ordinary diseases of life to which the general public outside of employment is exposed or preventive treatment for communicable diseases, except that the organization may pay for preventive treatment for a health care provider as defined in section 23-07.5-01, firefighter, peace officer, correctional officer, court officer, law enforcement officer, emergency medical technician, or an individual trained and authorized by law or rule to render emergency medical assistance or treatment who is exposed to a bloodborne pathogen as defined in section 23-07.5-01 occurring in the course of employment and for exposure to rabies occurring in the course of employment.

(2) A willfully self-inflicted injury, including suicide or attempted suicide, or an injury caused by the employee's willful intention to injure or kill another.

(3) Any injury caused by the use of intoxicants or the illegal use of controlled substances.

(4) An injury that arises out of an altercation in which the injured employee is an aggressor. This paragraph does not apply to public safety employees, including law enforcement officers or private security personnel who are required to engage in altercations as part of their job duties if the altercation arises out of the performance of those job duties.

(5) An injury that arises out of an illegal act committed by the injured employee.

(6) An injury that arises out of an employee's voluntary nonpaid participation in any recreational activity, including

athletic events, parties, and picnics, even though the employer pays some or all of the cost of the activity.

(7) Injuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity. Pain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a pre-existing injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening.

(8) A nonemployment injury that, although acting upon a prior compensable injury, is an independent intervening cause of injury.

(9) A latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a subsequent injury.

(10) A mental injury arising from mental stimulus.

Current through the 2017 Regular Session of the 65th Legislative Assembly.

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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota, by and through Workforce Safety and Insurance,	Supreme Court No. 20200025
Appellant,	Dunn Co. District Court
vs.	Civil No.: 13-2019-CV-00058
Jason E. Tolman,	AFFIDAVIT OF ELECTRONIC SERVICE
Appellee.	

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

Melany J. Strendin, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that she served the attached:

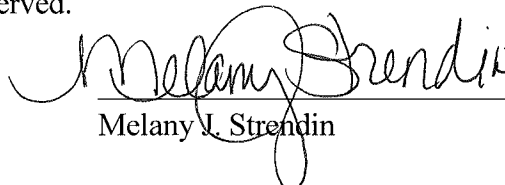
- 1. Brief of Appellant North Dakota Workforce Safety and Insurance; and**
- 2. Appendix of Appellant North Dakota Workforce Safety and Insurance.**

on the following persons:

Jason E. Tolman
436 Clark Street South
Vale, OR 97918

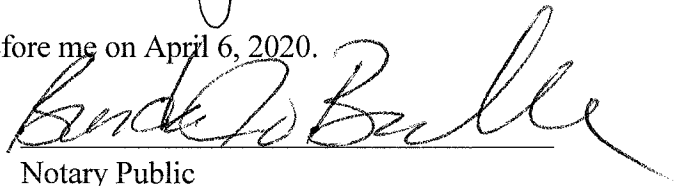
by depositing in the United States Post Office at Fargo, North Dakota, on April 6, 2020, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.



Melany J. Strendin

SUBSCRIBED AND SWORN to before me on April 6, 2020.



Notary Public