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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Bruce Bahmiller, **Appellee,** **vs.** **North Dakota Workforce Safety & Insurance,** **Appellant,** **and** **Matt's Automotive Service Center,** **Respondent.**	**Supreme Court No.: 20210033** **Cass County District Court** **Civil No.: 09-2020-CV-01662** **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT JUDGMENT DATED DECEMBER 18, 2020, AND ORDER REVERSING AND REMANDING CASE DATED DECEMBER 16, 2020
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEPHANNIE N. STIEL

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STATEMENT OF THE ISSUES

[1] Whether the District Court erred in reversing the Findings of Fact, Conclusions of Law and Final Order dated May 8, 2020, because the ALJ could reasonably conclude Appellant Bruce Bahmiller ("Bahmiller") knew or should have known he had an injury related to his employment and failed to timely file the claim.

[2] Whether the District Court erred in reversing the Findings of Fact, Conclusions of Law and Final Order dated May 8, 2020, because the Court construed N.D.C.C. § 65-05-01 to require specific knowledge of a "compensable injury."

REQUEST FOR ORAL ARGUMENT

[3] Pursuant to North Dakota Rule of Appellate Procedure 28(h) Appellant Workforce Safety and Insurance ("WSI") requests oral argument. This appeal involves important issues of statutory construction and application of N.D.C.C. § 65-05-01 regarding when a claimant knew or should have known of an injury related to employment and failed to timely file a claim and proper application of prior precedent of this Court in interpreting N.D.C.C. § 65-05-01.

STATEMENT OF THE CASE

[4] On April 25, 2019, a First Report of Injury form was filed with WSI relating to a claimed injury by Bahmiller described as "carpal tunnel syndrome." (Appx. 65-66) On June 13, 2019, WSI issued a Notice of Decision Denying Benefits. (C.R.[1] 15) Bahmiller requested reconsideration. (C.R. 16-18) On August 15, 2019, WSI issued an Administrative Order denying the claim. (Appx. 16-20) Bahmiller requested rehearing. (Appx. 21-23)

[1] "C.R." refers to the Certificate of Record on Appeal to District Court filed pursuant to N.D.C.C. § 28-32-44.

[5] An Administrative Hearing was held March 31, 2020. (C.R. 27-31; 185) Following post-hearing briefing, (C.R. 132-169), on May 8, 2020, Administrative Law Judge John Allen ("ALJ") issued Findings of Fact, Conclusions of Law and Final Order, affirming WSI's Order of August 15, 2019. (Appx. 24-38)

[6] On June 3, 2020, Bahmiller filed an appeal of the ALJ's Findings of Fact, Conclusions of Law and Final Order with the District Court, Cass County, North Dakota. (Appx. 39-45) On December 16, 2020, the District Court, the Honorable Stephannie N. Stiel, issued an Order Reversing and Remanding The Case. (Appx. 46-56) Order for Judgment and Judgment were entered December 18, 2020. (Appx. 57-58)

[7] WSI has appealed from the District Court Order and Judgment. (Appx. 60-64)

STATEMENT OF FACTS

[8] In April of 2019 Bahmiller asked his employer, Matt's Automotive, to file a claim for benefits with WSI. (Appx. 66; C.R. 285-286) Matt Lachowitzer ("Lachowitzer"), owner of Matt's Automobile, received a call from his manager that Bahmiller needed surgery and wanted to file a workers compensation claim. (C.R. 285) Lachowitzer called Bahmiller to discuss the request. (Id.) When Lachowitzer questioned Bahmiller about the claim and that he had been doctoring for these issues for a long time, Bahmiller responded that the doctor told him to file the claim. (Id.) Lachowitzer responded that it was Bahmiller's right to file a claim and he did fill out the paperwork when he returned to the office. (Id.) Lachowitzer testified Bahmiller told him at the Christmas party in January of 2019 that he was having problems with his hands and more than likely that he was going to have to have surgery. (C.R. 286)

[9] Lachowitzer noted on the WSI claim form that Bahmiller "had these issues when he started & he is aware it's from doing this his entire career. He has been doctoring for this problem for years." (Appx. 66) Lachowitzer explained that Bahmiller would frequently rub arms and wrist area and shake them, making comments that it's from work or getting old. (C.R. 287) Lachowitzer testified Bahmiller used a brace on his wrist at work. (C.R. 287) Bahmiller testified at the hearing that he only had symptoms with his shoulders from doing work overhead. (C.R. 205) Lachowitzer disputed that testimony. (C.R. 288) Lachowitzer confirmed that whether Bahmiller was working with his arms up or down, he would rub his arms/wrists as well as shake them. (C.R. 288) Lachowitzer testified this was not a recent phenomenon; instead, Bahmiller had these symptoms since he started at Matt's Automotive, dating back to 2011. (Appx. 66; C.R. 287-288) Lachowitzer also testified that Bahmiller informed him in 2013 that he was having problems with his hands and seeking medical attention. (C.R. 288) Lachowitzer testified Bahmiller specifically discussed treatment relating to problems with his hands, not his shoulders as testified by Bahmiller at the hearing. (Id.) Lachowitzer knew from Bahmiller that he was undergoing physical therapy and seeing a doctor related to his hand condition. (C.R. 290-91)

[10] Reena S., WSI claims adjuster, contacted Bahmiller to gather information to process his claim for benefits. (C.R. 261-262) On April 25, 2019, Reena conducted what is called a 3-point contact with Bahmiller. (Appx. 67; C.R. 261-262) In response to questions about when he first had treatment for the condition for which he was seeking benefits, Bahmiller responded it was in 2013. (Appx. 67, 69; C.R. 265) Reena asked additional questions about the 2013 treatment because that raised issues about why

Bahmiller didn't file a claim at that time. (C.R. 265) When Reena asked about the treatment Bahmiller received in 2013, he responded he had an EMG in 2013 which showed "nerve slowing." (Appx. 67, 69; C.R. 265) Reena also asked Bahmiller if he was aware in 2013 if his condition was related to work and he responded that he did. (Appx. 67, 69; C.R. 265) When asked why he didn't file a claim at that time, Bahmiller responded he was aware of its relationship to his work, but the condition was not bad enough, it wasn't debilitating, and the severity wasn't bad enough because he didn't need surgery at that time. (Appx. 67, 69; C.R. 265-266)

[11] Reena also completed the Prior Injury & Pre-Existing Condition Questionnaire while speaking with Bahmiller. (Appx. 70-71; C.R. 267) Bahmiller reported to Reena that he had EMG studies in 1996, 2013 and 2019. (Appx. 70; C.R. 268) He also reported physical therapy through Rehab Authority in 2013, and that he had treated his prior symptoms with Ibuprofen and a wrist brace. (Id.) When Reena asked Bahmiller how his past problems or condition is different from his current problem for which he filed the claim he responded it was more severe and previously he just had tingling in his fingers. (Appx. 71; C.R. 268)

[12] Reena then completed the Repetitive Motion Questionnaire with Bahmiller. (Appx. 72-75; C.R. 269) Reena again confirmed with Bahmiller in completing this form that he first became aware that his condition was work related in 2013. (Appx. 74; C.R. 270-271) Bahmiller confirmed he treated for his wrists in 1996 and 2013. (Appx. 74; C.R. 270) Bahmiller did not assert to Reena that his condition in 2013 was something different than what he was filing his claim for and did not claim that his condition in 2013 was related to his shoulder rather than his hand/wrists. (C.R. 272) The only thing

Bahmiller told Reena about his shoulders was an injury to his shoulders in an ATV accident in 2017. (Appx. 74; C.R. 272-273)

[13] WSI also gathered medical information relating to Bahmiller's prior treatment in 2013. Those records confirmed that Bahmiller was having "paresthesias of both upper extremities." (C.R. 34) Bahmiller's reported complaints were "numbness in arms, and right hand locks up." (Id.) In addition, the history noted "symptoms seem to start with his work activities as a mechanic and he says it seems to be coming on more and more that it is getting somewhat worse as he keeps working as a mechanic." (C.R. 35) The medical notes confirmed that Bahmiller "does feel it is related to his work activities." (Id.) In the nerve conduction test performed, it did note "mild slowing of the median nerve . . . through the wrist segment . . . ." (C.R. 37) This is consistent with what Bahmiller told Reena when she made the three-point contact. It was suspected Bahmiller's symptoms were related to myofascial restrictions or mild thoracic outlet syndrome. (Id.) Therapy was prescribed. In the physical therapy notes, while there was treatment related to the shoulder it was also documented that Bahmiller's "main complaint remains the numbness and 'dead' feeling in his hands at work . . . ." (C.R. 113)

[14] Reena staffed the claim and the prior records with Dr. Jessica Carlson, WSI's medical consultant relating to the relationship between the symptoms Bahmiller was experiencing in 2013 and those for which he filed his current claim. (C.R. 58, 229) Dr. Carlson provided an opinion that the current symptoms were the same as reported in 2013 with expected progression. (C.R. 58, 230-231) Dr. Carlson testified that in her review, the medical notes linked the symptoms in 2013 to work activities. (C.R. 232) Dr. Carlson pointed to the history provided on July 16, 2013 (C.R. 35) and reports during

physical therapy that related problems and complaints to his work activities. (C.R. 113, 232-235) Dr. Norberg, who evaluated Bahmiller in April of 2019, also documented as far as a history the increasing "numbness and tingling" in his hands, which "has been slowly progressive over the last 6 years but particularly bad over the last several months." (C.R. 53, 237-238) Dr. Carlson testified that the reported history of increasing numbness, tingling and pain would be expected with ongoing activities. (C.R. 237-238)

[15] As for the references to the EMG being not completely diagnostic (C.R. 41i), Dr. Carlson testified that it was not known specifically in 2013 what was causing the slowing of the median nerve. (C.R. 234) Dr. Carlson also testified that in her experience, the references to the paresthesias in the medical note of September 26, 2013, were in fact indicative of carpal tunnel syndrome. (C.R. 235-236) Dr. Carlson also testified that as to the EMG findings from July 26, 2019 (C.R. 37), they did in fact correlate to a carpal tunnel syndrome. (C.R. 238)

[16] After WSI denied the claim, Bahmiller wrote to Reena relating to that denial. (C.R. 16) In that letter, Bahmiller quoted from portions of the 7/16/2013 medical note. (Id.) Bahmiller confirmed on cross-examination that at the time he initially spoke with Reena he did not have medical records in front of him to review. (C.R. 219) Thus, when Bahmiller responded to Reena's questions on April 25th that he knew in 2013 his condition as work related, he was referring to his hand/wrist condition for which he was filing a claim. Bahmiller claimed in that correspondence that he did not have symptoms in his hands/wrist (C.R. 16), which was inconsistent with the medical records and the observation of the employer. It wasn't until Bahmiller looked at some medical records that he made the claim that his problems in 2013 were related to his shoulder, not his

wrists, even though he made numerous admissions otherwise when he spoke with Reena and his employer. As to the references in the medical records to problems relating to his hands/wrists (C.R. 113), Bahmiller testified, without any substantiating evidence, that those were errors in the records. (C.R. 217)

[17] After hearing and considering all the evidence, as well as post-hearing briefing, ALJ Allen issued Findings of Fact, Conclusions of Law and Order on May 8, 2020. (Appx. 26-38) ALJ Allen concluded that Bahmiller knew or should have known in 2013 that his bilateral wrist and hand conditions were related to work. (Appx. 32) The ALJ further concluded that a reasonable person, not learned in medicine, of Bahmiller's age and intelligence, would know or should have known in 2013 that he had an injury related to work. (Appx. 32) ALJ Allen provided a detailed discussion/analysis of his decision and application of the law to the facts. (Appx. 32-36) In that discussion, ALJ Allen found that the medical records from 2013 were "more credible than Bahmiller's recollection of what took place in 2013." (Appx. 33) The ALJ affirmed WSI's denial of Bahmiller's claim as untimely filed. (Appx. 36)

[18] Bahmiller appealed ALJ Allen's Findings of Fact, Conclusions of Law and Final Order to the District Court, Cass County. (Appx. 39-45) The District Court entered an Order Reversing the ALJ's decision on December 16, 2020. (Appx. 46-56) This appeal followed.

LAW AND ARGUMENT

A. SCOPE OF REVIEW ON APPEAL.

[19] The scope of review of an independent administrative law judge decision is set out in N.D.C.C. § 28-32-46. Bishop v. North Dakota Workforce Safety and Ins., 2012

ND 217, 823 N.W.2d 257. On appeal, this Court reviews the decision of the administrative agency, not the decision of the District Court. Workforce Safety and Insurance v. Avila, 2020 ND 90 ¶ 6, 942 N.W.2d 811. "When an independent ALJ issues final findings of fact, conclusions of law and order under N.D.C.C. § 65-02-22.1, courts apply the same deferential standard of review to the ALJ's factual findings as used for agency decision." Id. at ¶ 5 (citing Sloan v. N.D. Workforce Safety and Ins., 2011 ND 194 ¶ 5, 804 N.W.2d 184; Workforce Safety and Ins. v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186). "[F]act findings are within the province of the ALJ who hears the witnesses, sees their demeanor, evaluates their credibility and is in a better position to ascertain the facts than an appellate court relying on a cold record." Workforce Safety and Insurance v. Larry's On Site Welding, 2014 ND 81 ¶ 20, 845 N.W.2d 310, 315, citing Muldoon v. Workforce Safety and Insurance, 2012 ND 244 ¶ 8, 823 N.W.2d 761. However, no deference is given to an ALJ's legal conclusions, and questions of law are fully reviewable on appeal. Id. at ¶ 6; Sloan, at ¶ 5; See Auck, at ¶ 9 (noting that deference to ALJ's legal conclusions is "not justified.")

[20] 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 v. Workforce Safety and Insurance, 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 (N.D. 1988);

Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court must decide only whether a reasoning mind reasonably could have decided that WSI's findings were proven by the weight of the evidence from the entire record. Industrial Contractors, Inc. v. Workforce Safety and Insurance, 2009 ND 157 ¶ 5, 722 N.W.2d 582. See also Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI's decision is supported by the evidence). 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). The District Court cannot substitute its judgment for that of the [ALJ]. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995).

B. THE ALJ COULD REASONABLY CONCLUDE AS HE DID THAT BAHMILLER KNEW OR SHOULD HAVE KNOWN HIS BILATERAL WRIST AHD HAND CONDITIONS WERE WORK RELATED IN 2013 AND THEREFORE HIS CLAIM FILED IN 2019 WAS UNTIMELY.

[21] Under N.D.C.C. § 65-05-01 "[a]ll original claims for benefits must be filed by the injured employee, or someone on the injured employee's behalf, within one year after the injury or within two years after the death." The date of injury for purposes of filing a claim for benefits "is the first date that a reasonable person knew **or** should have known that the employee suffered a work-related injury and has either lost wages because of a resulting disability or received medical treatment." N.D.C.C. § 65-05-01, emphasis supplied. The "reasonable person" standard used in conjunction with N.D.C.C. § 65-05-01 is defined as "the ordinary lay person of the same skill and knowledge as the claimant." Anderson v. North Dakota Workers Compensation Bureau,553 N.W.2d 496, 499 (N.D. 1996) (citing Teegarden v. North Dakota Workmen's Compensation Bureau, 313 N.W.2d

716, 718 (N.D. 1981) (emphasis supplied); Lechner v. Workforce Safety and Insurance, 2018 ND 270 ¶ 11, 920 N.W.2d 288.

[22] Bahmiller had filed a claim in 1996 when he had medical treatment, including therapy and an EMG, for a work-related elbow/arm/wrist condition. (C.R. 84-90; Finding of Fact #6, Appx. 28) In that claim, he underwent an EMG and had some physical therapy. (C.R. 78-90) He did not have any surgical procedure. Id. Nonetheless, Bahmiller filed a claim for benefits relating to that work-related condition.

[23] Bahmiller had another EMG in 2013 and additional physical therapy, similar to what occurred in 1996. (Findings of Fact #9, 10, 11, 12 , Appx. 28-29) Thus, under the applicable legal standard, Bahmiller's knowledge and experience must be considered in that context. Specifically, Bahmiller knew a claim could be filed for conditions related to work and it did not require a referral for surgery before a claim could be filed. (See ALJ Discussion, Appx. 33)

[24] The ALJ's decision that Bahmiller knew or should have known he had a work-related injury was based in part on an analysis of the credibility of Bahmiller's testimony as compared to the testimony of Reena, the claims adjuster, and the medical records. (See Finding of Fact # 32, Appx. 32; ALJ Discussion, 34) Bahmiller testified that the reason he didn't file a claim in 2013 was because it related to his shoulders and it "subsided." (C.R. 211) However, that testimony was inconsistent with the history provided to Dr. Norberg in April of 2019, which confirmed his condition was progressive over the last six years. (C.R. 71; Finding of Fact #21, Appx. 30)

[25] Bahmiller's responses to Reena, the claims adjuster, reflected an understanding of what the EMG showed in 2013 before he looked at any of his medical

records. In addition, on multiple occasions on April 25, 2019, when Reena gathered information relating to his claim, Bahmiller affirmed to her that he knew in 2013 that he had the problem for which he was filing his claim in 2019, and that it was work related. The ALJ found Reena's testimony regarding her conversation with Bahmiller when he filed the claim "more credible." (Finding of Fact # 32, Appx. 32, 67-75) The ALJ found these facts to be significant and one of the reasons the medical records were more credible than Bahmiller's recollection and that the totality of the evidence supported that Bahmiller knew or should have known he had an injury related to his employment in 2013. (See Discussion, Appx. 33-34) In Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8, this Court stated that in reviewing decisions of an administrative law judge, the Court should defer to the findings of the ALJ on credibility issues because:

> [l]ike a trial court judge, an administrative law judge "hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses," and is, therefore, "in a much better position to ascertain the true facts than an appellate court relying on a cold record" without "'the advantage . . . of the innumerable intangible indicia that are so valuable to a trial judge.'" Guthmiller, at ¶ 7 (quoting Doyle v. Doyle, 52 N.D. 380, 389, 202 N.W. 860, 863 (1925)). Thus, "[w]e defer to the hearing officer's opportunity to judge the credibility of witnesses." Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, ¶12, 682 N.W.2d 308. See also Reynolds v. North Dakota Workmen's Comp. Bureau, 328 N.W.2d 247, 251 (N.D. 1982).

[26] In his legal analysis/discussion, the ALJ correctly distinguished Anderson, 553 N.W.2d 496, a case involving carpal tunnel syndrome, from the facts of this case. (Appx. 35) In Anderson, the claimant was diagnosed with carpal tunnel syndrome in 1984. Id. at 497. Her symptoms significantly worsened in 1994, at which time she filed a claim for workers compensation benefits. Id. at 498. WSI dismissed the claim as untimely after finding that claimant was aware her carpal tunnel was work related as early

as 1984. Id. This Court found that the fact the claimant sought medical attention in 1984 does not establish she knew or should have known at that time she had a compensable work injury. Id. at 499. Significant in Anderson, the claimant testified that she did not know her work was the cause of her injury even though she felt symptoms at work. Id. at 500.

[27] In contrast, as the ALJ recognized, Bahmiller knew and understood that the symptoms he was having were caused by his employment activities. He made statements to that effect to his employer and admitted that to the claims adjuster. The ALJ noted that Bahmiller "expressed this not only to his medical providers but to his employer." (See Discussion, Appx. 35) Bahmiller gave the same history to Dr. Norberg in 2019, and to Reena when she was processing the claim. "To have a compensable injury, a claimant must know or have reason to know the significance, or seriousness, of [the] condition and that the injury is work-related." Anderson, 553 N.W.2d at 499. Bahmiller clearly had that knowledge, and the ALJ could reasonably so conclude based on the evidence in the medical records, Bahmiller's statements to the employer dating back to when he began his employment at Matt's Automotive and admissions to the claims adjuster. Because the ALJ based this decision on credibility issues, this Court cannot re-weigh that evidence and come to a different conclusion. See Stewart, 1999 ND 174 ¶ 40, 599 N.W.2d 280. The District Court erred in reversing the ALJ's decision. Id.

[28] In White v. North Dakota Workers Compensation Bureau, 441 N.W.2d 908 (N.D. 1989) the claimant suffered a fall at work and sustained a sharp pain in his back. Although attributing his pain to the fall, the claimant in White was specifically told by his treating physician that he was suffering from arthritis, rather than an injury related to his

fall. Id. at 908, 911. As a result, the claimant did not believe his arthritis condition was a compensable work condition and therefore did not file a claim until over two years following the incident when he was informed that he had a herniated disc linked to his fall. Id. at 911-912. This Court concluded as follows:

> Under the circumstances of this case, we do not believe that a reasonable basis existed for the Bureau to conclude that, given his education and intelligence, White knew or should have known that he suffered a compensable injury on April 27, 1984. Rather, we believe that the evidence leads to one reasonable conclusion: the time for White to file a claim began in November 1986 when Dr. Kennedy informed him that he had a herniated disc and linked that injury to his fall. White's claim was filed within one year of that date and was therefore timely.

Id. at 912. Similarly, based on the specific medical advice Bahmiller received, as documented in the medical records and his own acknowledgement that his symptoms were related to the work in 2013, he had knowledge of the relationship of his medical condition to his employment. The law does not require that Bahmiller know the specific diagnosis associated with his condition as he is not to be judged as an individual learned in medicine. Klein v. North Dakota Workers Compensation Bureau, 2001 ND 170 ¶ 16, 634 N.W.2d 530. The ALJ so recognized. (Appx. 33) Rather, Bahmiller acknowledged he understood that the problems he was having, however they were medically characterized in terms of a diagnosis, were in fact related to his employment and he affirmatively expressed that awareness dating to 2013. "A claimant is not charged with knowledge of opinions and conclusions in medical records [he] has not reviewed." Anderson, 553 N.W.2d 499. Thus, whether Dr. Sollom specifically told Bahmiller about a diagnosis of carpal tunnel syndrome in 2013 is irrelevant if Bahmiller, as he did here, knew and understood the relationship of his condition and symptoms to the work activities. Bahmiller clearly expressed that understanding to his medical providers, to his employer

and to Reena, the claims adjuster. See Lechner, 2018 ND 270 ¶ 12, 920 N.W.2d 288, noting "[t]he statute does not require that a doctor specifically inform the claimant that his work activities caused his injury."

[29] The ALJ found Bahmiller's claim that he had no knowledge of a hand/wrist problem in 2013 and it was only a shoulder problem, inconsistent with the medical records and not credible. (Finding of Fact #31, Appx. 32) The ALJ noted Bahmiller related his knowledge of the work relatedness of his prior condition to Reena numerous times when she processed the claim. Only after he knew WSI was going to deny his claim did he then claim he only knew about a shoulder condition in 2013. His statements to the employer from 2013 onward also confirm that knowledge. (See Discussion, Appx. 34) "As fact-finder, the ALJ has the responsibility to weigh the credibility of [the] evidence." Auck, 2010 ND 126 ¶ 14. Because the ALJ acts as the factfinder and makes credibility determinations, the ALJ "is not required to believe a witness's testimony, even when no direct evidence is offered to the contrary." State v. Barendt, 2007 ND 164 ¶ 18, 740 N.W.2d 87 (emphasis supplied). In assessing credibility, the ALJ, acting as the finder of fact, is entitled to use common sense and general human experience and knowledge. See Pavek v. Moore, 1997 ND 77 ¶ 10, 562 N.W.2d 574.

[30] On appeal, the question is not whether this Court would have weighed the evidence differently or reached a different conclusion than that which was reached by the ALJ. In Re Claim of Vail, 522 N.W.2d 480, 482 (N.D. 1994). Rather, the issue on appeal is whether a reasoning mind could find that the weight of the evidence supports the ALJ's findings. Id. That standard is clearly met in this case, and therefore the District Court erred

in reversing the ALJ's decision and this Court must reverse that decision and remand with instructions to affirm the ALJ's decision. See id.

C. ITHE DISTRICT COURT ERRED IN REVERSING THE ALJ'S DECISION BECAUSE BAHMILLER MUST HAVE KNOWLEDGE OF A "COMPENSABLE" WORK INJURY IN 2013.

[31] N.D.C.C. § 65-05-01 requires that a claim be filed within one year after an injury, which date is "the first date that a reasonable person knew or should have known that the employee suffered a work-related injury and has either lost wages because of a resulting disability or received medical treatment." In reversing the ALJ's decision, the District Court concluded that it was "not enough to support a denial of a claim to simply show Bahmiller knew or should have known he had a work-related injury. The inquiry is whether Bahmiller knew or should have known he had a 'compensable' work injury in 2013." (Appx. 52) On this issue, the ALJ reasoned as follows:

> Bahmiller also argued that because Bahmiller was not diagnosed with CTS in 2013, he could not know or should have known he had a "compensable injury" in 2013. The Supreme Court has interpreted the term "work-related injury" to mean "compensable injury." The law and WSI do not require that a claimant have sufficient evidence to win their claim before filing for WSI benefits. WSI has amended orders in the past upon the production of new evidence by a claimant. The law is whether Bahmiller knew or should have known he had an injury related to his employment. To be considered compensable, the injury must be a significant contributing factor and not the sole factor. Based upon the earlier identified reasons, the evidence showed that Bahmiller knew or should have known he had a work-related (compensable) injury in 2013.

(Appx. 34-35) The ALJ properly applied the law, and thus the District Court erred in reversing that decision.

[32] In Klein, this Court reviewed the history of amendments to N.D.C.C. § 65-05-01 and confirmed that the "critical question . . . is whether a reasonable lay person, not learned in medicine, knew or should have known that he suffered a work-related injury."

Klein, 2001 ND 170 ¶ 16. This Court also acknowledged in Klein that N.D.C.C. § 65-05-01 "does not require knowledge of a 'compensable' injury, . . . the term must be read with reference to a compensable injury." Id. ¶ 17, citing Stepanek v. North Dakota Workers Compensation Bureau, 476 N.W.2d 1, 5 (N.D. 1991). However, this Court then went on to discuss whether there must be a specific diagnosis of a "compensable injury," noting as follows:

> The Legislature has removed the requirement that the employee be informed by his treating health care provider that the work is a substantial contributing cause of his condition, **and we do not mean to suggest that a doctor must specifically inform the claimant that his work activities caused the claimant's injury in every case.** 1997 N.D. Sess. Laws ch. 539, § 1. Certainly, some injuries are obviously caused by the claimant's work and do not require a doctor to inform the claimant his injuries are work related. In these situations, the limitations period begins to run in the absence of any medical advice. Other complex, insidious injuries, however, require knowledge in medical matters because their causes and effects are not immediately apparent to the reasonable lay person, not learned in medicine. These causes and effects can be complex and controversial even for physicians. A specific diagnosis of a claimant's condition, therefore, may not be sufficient to commence the limitations period when the diagnosis does not indicate that the condition is work related and when the condition is a common affliction suffered by many individuals.

Klein, 2001 ND 170 ¶ 19 (emphasis supplied). This Court reaffirmed that a doctor need not specifically inform the claimant that his work activities caused his injury in Lechner, 2018 ND 270 ¶ 12. Thus, neither a specific diagnosis of a "compensable injury" nor a statement from a doctor that the diagnosis is caused by work activities. Rather, this Court has reaffirmed that the applicable standard is "whether a reasonable lay person, not learned in medicine, knew or should have known that he suffered a work-related injury." Klein, 2001 ND 170 ¶ 16. The ALJ applied the correct standard. (Appx. 33)

[33] A case that illustrates this principle is Ringsaker v. Workforce Safety & Ins. Fund, 2005 ND 44, 693 N.W.2d 14. In Ringsaker, a claimant injured his shoulder while unloading a truck and was diagnosed with rotator cuff problems in 1997. Id. at ¶¶ 3-4. Claimant alleged that he was never told his shoulder pain was related to a possible rotator cuff tear and that he was told his problems were due to arthritis. Id. at ¶ 4. In 2000, claimant was diagnosed with a possible rotator cuff tear that would require surgery. Id. at ¶ 5. Claimant had surgery and filed a claim for benefits, which was denied by WSI as being untimely. Id. at ¶ 6.

[34] In Ringsaker, this Court found that the claimant had "at all times indicated his shoulder problems began when he was injured while unloading a truck at work." Id. at ¶ 18. Furthermore, this Court determined that the claimant had various medical visits regarding pain in his left shoulder in which he acknowledged that his shoulder problems were caused by the work incident. Id. at ¶ 19. This Court held that under these circumstances a reasoning mind could reasonably conclude that the claimant knew or should have known by early 1997 that he had suffered a work-related injury. Id. at ¶ 20. This case is comparable to Ringsaker in that both claimants were treated for symptoms that were attributed to work activities and the specific diagnoses of the condition may have been in doubt as to the cause of those symptoms. However, based on the knowledge of the relationship of the condition to work activities, both knew or reasonably should have known to file a claim for benefits.

[35] The District Court clearly erred in concluding that Bahmiller must have knowledge he had a "compensable injury." This Court specifically held to the contrary in Klein, 2001 ND 74 ¶ 17. The correct legal standard, which the ALJ applied is whether a

reasonable person, not learned in medicine, of claimant's age and intelligence, including his work life history, knew or should have known in 2013 he had a compensable injury. See Klein ¶ 19. In this case, the ALJ reasonably so concluded based on the evidence, including credibility of the testimony and medical evidence, as outlined above. Accordingly, the District Court erred in reversing the ALJ's decision because the ALJ properly applied the law. See Lechner, 2018 ND 270 ¶ 16 (affirming ALJ's finding the claimant failed to file a claim because it was supported by a preponderance of the evidence).

CONCLUSION

[36] For the foregoing reasons, WSI respectfully requests that this Court *reverse* the decision of the District Court and enter is decision to affirm the ALJ's Findings of Fact, Conclusions of Law and Final Order of May 8, 2020.

DATED this 31st day of March, 2021.

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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 22.

DATED this 31st day of March, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bruce Bahmiller, **Appellee** **vs.** **North Dakota Workforce Safety & Insurance,** **Appellant,** **and** **Matt's Automotive Service Center,** **Respondent.**	**Supreme Court No. 20210033** **Cass Co. District Court** **Civil No.: 09-2020-CV-01662** **AFFIDAVIT OF ELECTRONIC SERVICE**

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

Laurie A. Grimm, 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**
2. **APPENDIX TO BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE**

on the following persons:

Dean J. Haas **dhaas@bismarcklaw.com**

VIA E-MAIL to each person above named at the above e-mail address.

And on the following persons:

Matt's Automotive Service Center
1150 43 ½ St S
Fargo, ND 58103

by depositing in the United States Post Office at Fargo, North Dakota, on March 31, 2021, 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.

cc.: Al Schmidt, ND WSI
Claim No..: 2019 024,780
Nilles File No.: 19-300.029

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

Laurie A. Grimm

SUBSCRIBED AND SWORN to before me on March 31, 2021.

Notary Public

MELANY J. STRENDIN
Notary Public
State of North Dakota
My Commission Expires Jan. 21, 2023

cc.: Al Schmidt, ND WSI
Claim No..: 2019 024,780
Nilles File No.: 19-300.029