

THE SUPREME COURT

STATE OF NORTH DAKOTA

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| JOSE ALFRED MEDINA GONZALES, |) | COUNTY OF WILLIAMS |
| |) | |
| Appellant, |) | Supreme Court No. 20180365 |
| |) | Civil Case No: 53-2018-CV-00482 |
| |) | |
| vs. |) | |
| |) | |
| NORTH DAKOTA |) | APPELLANT'S BRIEF TO THE |
| WORKFORCE SAFETY INSURANCE |) | SUPREME COURT OF NORTH |
| FUND, |) | DAKOTA |
| Appellee. |) | |

.....

ORDER ON DISTRICT COURT'S ORDER ON ADMINISTRATIVE APPEAL ENTERED ON AUGUST 8, 2018, INDEX #42, APPEAL FROM DISTRICT COURT JUDGMENT ENTERED AUGUST 10, 2018, INDEX #47, WITH NOTICE OF ENTRY OF JUDGMENT SERVED AUGUST 14, 2018, INDEX # 48.

**COUNTY OF WILLIAMS
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE PAUL W. JACOBSON**

**STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58503
(701)222-1761
(littlelaw@littlelawnd.com)**

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TABLE OF AUTHORITIES CITED

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Blanchard v. North Dakota Workers Comp. Bureau,
1997 ND 118, para. 23, 565 N.W.2d 485 17

[1]

Issue Presented

[2] Does the greater weight of the evidence establish that Jose Medina suffered a compensable, work-related injury on April 21, 2015?

[3]

Statement of the Case

[4] WSI denied Jose Medina's claim by formal order dated August 20, 2015, concluding that he had not proven that he had suffered a compensable injury (APP. 12-14). Mr. Medina's entitlement to workers compensation benefits was the subject of an administrative hearing held on August 22, 2016 before Administrative Law Judge Robert A. Keogh (APP. 15-49). ALJ Keogh issued Findings of Fact, Conclusions of Law and Order on September 9, 2016 finding that, based on Fuzion Energy Service Field Tickets and payroll records, Mr. Medina had not worked on the day of the claimed injury, on April 21, 2015 (APP. 50-58). Mr. Medina petitioned for reconsideration and rehearing, asserting that Fuzion's documentary evidence was unreliable on its face and that newly obtained documents (Safe Work Permits) from Flatiron Midstream, LLC, the customer for which Fuzion's crew had performed work on April 21, 2015, showed that Mr. Medina was listed as having worked for Fuzion on that day (APP. 59-61).

[5] ALJ Keogh granted a rehearing, over WSI's objection, with the following conditions:

- 1.) That, Mr. Medina would have a witness to lay foundation for the Flatiron Safe Work Permits.
- 2.) That, a witness would testify that he/she had personal knowledge that Mr. Medina worked for Fuzion on April 21, 2015.
- 3.) That, WSI would be given an opportunity to rebut whatever new evidence and testimony Mr. Medina provided (APP. 62-65).

[6] A second, continued, hearing was held on February 17, 2017 (APP. 66-90). John Hippe, operations manager for Flatiron Midstream, LLC, testified, as did Jesus Contero Fillas, who had worked with Mr. Medina at Fuzion. Mr. Hippe testified that the Flatiron Safe Work Permits were used to keep track of which Fuzion employees were working on Flatiron property on any particular day (APP. 70). Each Safe Work Permit was generally signed by a representative of Fuzion and a representative of Flatiron (APP. 70). Mr. Hippe testified that the Safe Work Permits were filled out when the contractor (Fuzion) showed up at the Flatiron worksite (APP. 71). He noted that every employee of the contractor (Fuzion), had to stop in the control room before he could enter the plant, and that Fuzion employees would have been present when the Safe Work Permit was filled out (APP. 71,72). The Safe Work Permit dated April 21, 2015 was signed that day and showed the Fuzion employees who were there (APP. 72). Flatiron's Safe Work Permit shows Jose Medina working for Fuzion on April 21, 2015 (APP. 91-97).

[7] Mr. Contero testified that he had also worked for Fuzion on April 21, 2015 (APP. 74). He also recalled that Mr. Medina had also worked for Fuzion on that date (Id.). He remembered some of the Fuzion crew who had worked that day but had no knowledge of who Lynn Mechun was (APP. 75). Mr. Contero recalled that Mr. Medina had finished his shift after being injured on April 21, 2015 but did not return to work the following day (APP. 76).

[8] Mr. Medina testified that he was present at the Flatiron site on April 21, 2015 when the Safe Work Permit was filled out (APP. 78). He said that he had not known that Flatiron was the owner of the worksite when he was working for Fuzion and that he had difficulty locating Flatiron's records afterwards because neither Fuzion nor WSI would cooperate with him (APP. 78).

[9] At the close of the February 17, 2017 hearing, WSI was given a chance to offer rebuttal evidence. The ALJ was hopeful that Mr. Barnes would again testify to provide additional information (APP. 77). WSI offered no rebuttal to the testimony adduced at the continued hearing.

[10] ALJ Keogh issued Amended Findings of Fact, Conclusions of Law and Order dated February 28, 2018 (APP. 98-108). The ALJ determined that, while Mr. Hippe laid foundation for the Flatiron work permits, those documents did not indisputably prove that Mr. Medina actually worked for Fuzion on Flatiron property on April 21, 2018. The ALJ disregarded Mr. Contero's testimony and the terms of the Memorandum on Petition For Reconsideration (APP. 62-65) , holding instead that Mr. Medina should have provided that testimony at the August 22, 2016 hearing. As a result of the ALJ's analysis of the evidence presented at the continued hearing, he again affirmed WSI's denial of Mr. Medina's claim. Mr. Medina appealed to District Court. The Honorable Paul W. Jacobson affirmed ALJ Keogh's decision and Mr. Medina has now appealed to this Court.

[11] **Statement of Facts**

[12] Jose Medina suffered an injury to his right shoulder on April 21, 2015 at 6:30 in the evening while carrying a 100-foot roll of welder cable for his employer, Fuzion Energy Service, LLC (APP. 109-110). Fuzion initially confirmed that Mr. Medina had worked a full day on April 21, 2015 but had not returned to work thereafter (APP. 111). Mr. Medina was not able to see a doctor for his injury until April 27, 2015 and was immediately placed on restrictions limiting the use of his right arm (APP. 112). Russ Barnes, Fuzion's Safety Manager, initially told WSI that Fuzion contested Mr. Medina's claim because he had not followed Fuzion's policies and procedures (APP. 113). Fuzion then told WSI that Mr. Medina had not even worked on the date of injury, that he had last

worked on April 19, 2015, and that Fuzion's field tickets showed that Mr. Medina had been replaced by another employee, Lynn Mechun, on April 20 and 21, 2015 (APP. 114).

[13] Mr. Medina provided telephone records, text records and credit card records to show that he had intended to work and had, in fact, worked on April 21, 2015 (APP. 115-127).

[14] WSI denied Mr. Medina's claim by formal order dated August 20, 2015, concluding that he had not proven that he had suffered a compensable injury (APP. 12-14).

[15] None of the treating medical providers whom Mr. Medina saw following his injury doubted that he had hurt himself exactly as he had described. Lori Waldera, NP diagnosed shoulder pain and muscle tension from an April 21, 2015 work injury and imposed a 5-pound lifting restriction (APP. 128-129). Janis Green, NP diagnosed a rotator cuff injury (APP. 130-131). Jessica Heggen, FNP diagnosed shoulder pain and restricted Mr. Medina to 10 pounds lifting (APP. 132-134). Finally, Dr. Robert Barnett, an orthopedic surgeon, diagnosed shoulder strain and possible subacromial tendinopathy and restricted Mr. Medina from all work for three weeks (APP. 135-137). There was no evidence of any cause for Mr. Medina's right shoulder injury other than his work-related activities.

[16] **Law and Argument**

[17] This Court has repeatedly cautioned that WSI must not place itself in a position fully adversarial to the claimant. Blanchard v. North Dakota Workers Comp. Bureau, 1997 ND 118, para. 23, 565 N.W.2d 485. In the instant case, both WSI and the ALJ relied on the employer, Fuzion Energy Service, LLC and its Safety Manager, Russ Barnes, for evidence that Mr. Medina had not worked for Fuzion on April 21, 2015 and could not have suffered a work injury on that date. The ALJ noted, but discounted, the discrepancies in Fuzion's story and the obvious inconsistencies in Fuzion's exhibits. More troubling, however, is the ALJ's explanation for

disregarding Flatiron's Safe Work Permits as evidence that Mr. Medina worked on April 21, 2015, as claimed. While it is true that the permits do not *indisputably prove* that Mr. Medina was on Flatiron property, the purpose of the permits was to apprise Flatiron of just that. Furthermore, neither Fuzion nor WSI offered any explanation of the discrepancy between Flatiron's permits and Fuzion's field tickets. Certainly, all the documentary evidence should be weighed under the same standard. The unsigned and unverified Fuzion field tickets do not indisputably prove that Mr. Medina was replaced by Lynn Mechun and, consequently, was not working on April 21, 2015. If John Hippe could not be relied on to confirm Mr. Medina's presence at the work site, certainly Russ Barnes could not establish that Mr. Medina was absent from work or that Lynn Mechun was ever an employee of Fuzion. Most importantly, WSI and Fuzion did not produce any rebuttal evidence despite the ALJ's stated wish for such rebuttal testimony (APP. 77). Certainly, the ALJ is entitled to weigh the evidence, but that does not entitle him to use shifting standards in doing so.

[18] Despite requiring in the Memorandum on Petition for Reconsideration that Mr. Medina produced a witness (Jesus Contero) who could verify that he was working for Fuzion on April 21, 2015 (APP. 62-65), the ALJ disallowed Mr. Contero's eyewitness testimony because Mr. Medina had not called him as a witness at the first hearing. The only evidence regarding Mr. Contero's availability for the first hearing on August 22, 2016 was his testimony that he had been living at a different address with a different telephone number than when Mr. Medina was finally able to contact him (APP. 62-65). There was no evidence that Mr. Medina had known the whereabouts of Mr. Contero in August of 2016 or had been able to contact him. Furthermore, Mr. Medina produced Mr. Contero precisely because the ALJ required it in order to allow the continued hearing. Having ordered Mr. Medina to produce Mr. Contreras, the ALJ cannot ignore his own ruling. Both WSI's

counsel and the ALJ examined Mr. Contero and his testimony that Mr. Medina had worked for Fuzion on his claimed date of injury remains uncontroverted. Finally, again, WSI was allowed to and invited to provide rebuttal testimony and failed to do so. Consequently, the only eye witness testimony to the events of April 21, 2015 is that of Mr. Contero and Mr. Medina.

[19] Conclusion

[20] Clearly, Mr. Medina has provided both documentary evidence as well as testimony that he was working for Fuzion at the Flatiron worksite when he was injured on April 21, 2015. That evidence and testimony directly contradict Fuzion's Field Ticket and the testimony of Mr. Barnes. The information gathered at the February 17, 2017 hearing calls into question the authenticity of Fuzion's April 21, 2015 Field Ticket and the veracity of Mr. Barnes. The evidence adduced at the February 17th hearing confirms the testimony of Mr. Medina at the August 22, 2016 hearing and the phone, text and email evidence he provided. Mr. Medina has satisfied the conditions for rehearing imposed by the ALJ and WSI has offered no rebuttal. Clearly, the greater weight of the evidence shows that Jose Medina suffered a compensable work injury while working for Fuzion Energy Services, LLC on April 21, 2015.

[21] The ALJ cannot apply different standards to the documentary evidence. If Fuzion's altered Field Ticket for April 21, 2015 is evidence that Mr. Medina had been replaced by Mr. Mechun and was no longer working for Fuzion, surely Flatiron's Safe Work Permit of the same date is evidence that Mr. Medina was working as he claimed. Flatiron is not a party to this action and has no reason to alter its records. Mr. Medina produced Mr. Contero as an eye witness because the ALJ required him to do so. Both WSI's counsel and the ALJ examined Mr. Contero. There is no evidence that Mr. Contero was available for the August 22, 2016 hearing or that Mr. Medina was reasonably able to contact him. His testimony remains uncontroverted. Furthermore, it was Fuzion's and

WSI's refusal to cooperate with Mr. Medina that prevented him from having the Flatiron evidence at the first hearing. Jose Medina has shown entitlement to workers compensation benefits by the greater weight of the evidence.

[22] Dated this 13th day of November, 2018.

LITTLE LAW OFFICE



STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58503
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| vs. |) | CERTIFICATE OF SERVICE |
| |) | |
| |) | |
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| WORKFORCE SAFETY INSURANCE |) | |
| FUND, |) | |
| Appellee. |) | |

1] I, Stephen D. Little, hereby certify that on this 7th day of November, 2018, a true and correct copy of the Appellant’s Brief Certificate of Service and were served via email to the following:

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OFFICE OF THE CLERK
supclerkofcourt@ndcourts.gov

Mr. Douglas W. Gigler
DGigler@nilleslaw.com

2] Dated this 7th day of November, 2018.

3]

LITTLE LAW OFFICE


STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
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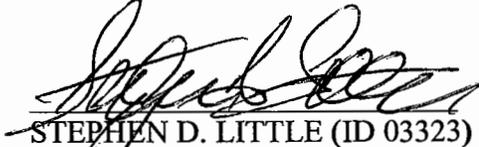
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STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58503
(701) 222-1761
littlelaw@littlslawnd.com