20090158

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

TOBIAS LEMER, Appellant, vs. NORTH DAKOTA WORKFORCE SAFETY & INSURANCE, Appellee, and SIEMENS POWER GENERATION, INC. Respondent.	)

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STATE OF NORTH DAKOTA

APPEAL FROM THE ORDER AFFIRMING ADMINISTRATIVE DECISION DATED APRIL 23, 2009; ORDER FOR JUDGMENT DATED APRIL 30, 2009; AND JUDGMENT DATED MAY 4, 2009
MERCER COUNTY, SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD L. JORGENSEN, PRESIDING
MERCER COUNTY CIVIL NO.: 29-09-C-1011
SUPREME COURT CIVIL NO.: 20090158

APPELLANT'S BRIEF

DIETZ & LITTLE LAWYERS

STEPHEN D. LITTLE (ID# 03323)
ATTORNEY AT LAW
2718 GATEWAY AVENUE
SUITE 302
BISMARCK, ND 58503

ATTORNEYS FOR APPELLANT
(701) 222-1761

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I. STATEMENT OF THE ISSUE

Has Tobias Lemer shown by the greater weight of the objective medical evidence that his cervical spine, lumbar spine, and right knee conditions are substantially work related?

II. STATEMENT OF THE CASE

Tobias Lemer suffered an injury to his neck, low back, and right knee on June 5, 2005, while working as a millwright for Siemens Power Generation, Inc., in Hazen, North Dakota (Certified Record (Appendix (App.) p. 29). Workforce Safety & Insurance (WSI) dismissed Mr. Lemer's claim for workers compensation benefits on August 24, 2005, asserting that his injuries were caused by an altercation in which he was the aggressor (App. pp. 32-37). See: N.D.C.C., Section 65-01-02(10)(b)(4). Administrative Law Judge Susan L. Bailey issued a recommended decision on May 8, 2006, finding that Mr. Lemer had established injuries to his neck, low back, and right knee; that his injuries arose out of and in the course of employment; that his injuries were supported by objective medical findings; and that Mr. Lemer's co-employee, Chris Dahners was the aggressor who caused his injuries (App. pp. 42-52).

On November 14, 2006, WSI issued a second Notice of Decision Denying Benefits on Mr. Lemer's claim, asserting that the injuries he incurred on June 5, 2005, were mere triggers in producing symptoms in an underlying condition (App. pp. 56-58). Mr. Lemer requested reconsideration on November 30, 2006, asserting that WSI's informal decision was barred by administrative res judicata and that his injuries were, in fact, substantially work-related (App. pp. 59-60). WSI then issued a formal order denying Mr. Lemer's workers compensation

benefits on January 29, 2007 (App. pp. 61-68). Mr. Lemer demanded formal hearing on February 26, 2007, asserting that any pre-existing condition was, itself, work related; that the injuries suffered on June 5, 2005, were work related; and, finally, that WSI's serial decision-making was barred by administrative res judicata (App. p. 71).

A second hearing was held on Mr. Lemer's claim for workers compensation benefits on July 31, 2007, at which Administrative Law Judge Susan L. Bailey again presided (App. p. 72). ALJ Bailey issued a second set of Recommended Findings of Fact, Conclusions and Law and Order on September 24, 2007 (App. pp. 122-138). In sum, ALJ Bailey found that Mr. Lemer had pre-existing neck, low back, and right knee conditions which were principally the result of genetics and personal habits; that he had suffered only a muscle spasm to his neck, low back, and right knee in the June 5, 2005, assault; that his soft-tissue injuries should have resolved (and presumably did resolve) within a few weeks following the assault; and that WSI's serial denial of benefits was not precluded by administrative res judicata (App. pp. 122-138). WSI issued a Final Order adopting the ALJ's recommendations on October 25, 2007 (App. pp. 119-121).

Mr. Lemer filed a Petition for Reconsideration and Rehearing on November 21, 2007, which was denied by letter from Kim Ehli, WSI's claims director, on December 3, 2007 (App. p. 71). Mr. Lemer then appealed to the District Court on December 13, 2007. On May 28, 2008, the Honorable Donald L. Jorgenson, District Judge, issued an Order Reversing Administration [sic] Decision and Remand for Further Hearing. Judge Jorgenson determined that ALJ Bailey and WSI had not "demonstrate[d] an analysis of the evidence consistent with the standard

established by the Supreme Court in Manske v. WSI, 2008 ND 79, 748 N.W.2d 394" (App. pp. 139-141).

Following remand to WSI, ALJ Bailey reviewed the written briefs and listened to the arguments of counsel (App. p. 204). In accordance with the authority granted by 2008 Measure No. 4, ALJ Bailey then issued a final Order on December 11, 2008 (App. pp. 193-202). Mr. Lemer again appealed to the District Court.

On April 23, 2009, Judge Jorgenson issued an Order Affirming Administrative Decision. Judgment was entered on May 4, 2009, and Notice of Entry of Judgment was served on May 8, 2009. Mr. Lemer has appealed to this Court.

III. STATEMENT OF FACTS

Tobias Lemer suffered an injury to his neck, low back, and right knee on June 5, 2005, when he was assaulted by fellow employee Chris Dahners while working as a millwright for Siemens Power Generation, Inc., in Hazen, North Dakota (App. p. 29). As a result of that altercation, Mr. Lemer was never able to return to millwright work (App. pp. 30-31). Mr. Lemer was 61 years old at the time of his work injury (App. p. 155 [March 7, 2006 Hearing Transcript (3/7/06 HT p. 13]). He had been employed in "physical work" his entire life and had worked as a millwright for 15 years prior to his work injury (App. p. 77 [July 31, 2007, Hearing Transcript (HT 7/31/07) p. 14]). As a result of his work-related assault, Mr. Lemer had low-back surgery with Dr. Michael Moore, a Bismarck orthopedic surgeon, and never returned to work in any capacity (App. p. 80 [HT 7/31/07, p. 24]). Dr. Moore's surgery involved a 3-level fusion with instrumentation (App. p. 80 [7/31/2007, HT p. 25]).

Prior to his work injury, Mr. Lemer had used sick leave very sparingly and had worked shifts which averaged more than 10 hours per day (App. p. 80 [7/31/2007, HT pp. 25-26]). Also prior to his work-related assault, Mr. Lemer had no work restrictions concerning his neck, low-back, or right knee (App. p. 80 [7/31/2007, HT pp. 26-27]). Following the assault, Mr. Lemer continued to have difficulties with his neck, low back, and right knee (App. p. 81 [7/31/2007, HT pp. 28, 29]) and could no longer spend an entire night in bed and was forced to sleep in a recliner (App. p. 81 [7/31/2007, HT pp. 30-31]). Mr. Lemer explained that because of the heavy physical demands of millwright work, he had occasionally had aches and pains for which he had consulted a chiropractor (App. p. 84 [7/31/2007, HT pp. 40, 41]). He applied for and received Social Security disability benefits following his work injury (App. p. 84 [7/31/2007, HT pp. 42-43]).

Mr. Lemer's family doctor was A. W. Gehring, M.D., practicing in Hazen, North Dakota (App. pp. 148-149). Dr. Gehring, who had treated Mr. Lemer for a number of years before his work injury and continued to treat him afterwards, opined that Mr. Lemer had "wear and tear arthritis" in his cervical spine, lumbar spine, and right knee which was attributable to his 15 years of work as a journeyman millwright (App. p. 150). Dr. Gehring also opined that Mr. Lemer had suffered a "significant cervical spine injury" and had very limited range of motion of his cervical spine as a result of his work injury. Finally, Dr. Gehring indicated that Mr. Lemer's work injury had "substantially aggravate[d]" his work-related right knee, lumbar, and cervical spine conditions (App. p. 150).

WSI relied on the medical opinion of Dr. Luis Vilella, its medical

director (App. p. 89 [7/31/2007, HT p. 62]). Dr. Vilella's opinion was based only on Mr. Lemer's medical records; he never examined him (App. p. 94 [7/31/2007, HT p. 80]). Dr. Vilella had no experience in treating millwrights (App. p. 94 [7/31/2007, HT p. 80]). Dr. Vilella had no information regarding the size or strength of Mr. Lemer's assailant (App. p. 94 [7/31/2007, HT p. 83]). Consequently, he had no knowledge of how much force Mr. Dahners put on Mr. Lemer's neck, low-back, or right knee during the assault (id.). Dr. Vilella attributed Mr. Lemer's cervical, lumbar, and right knee conditions to a combination of genetics, environmental factors, and personal habits (App. p. 93 [7/31/2007, HT p. 77]). Dr. Vilella did not offer an opinion of the role of Mr. Lemer's work activities in his pre-existing condition. Dr. Vilella concluded that Mr. Lemer had suffered a "muscle spasm" secondary to trauma and that, based on "Official Disability Guidelines" published by the Work Loss Data Institute, he should have recovered within four to six weeks (App. p. 99 [7/31/2007, HT p. 101]). Dr. Vilella agreed that a muscle spasm would be considered an objective medical evidence of an injury (App. p. 100 [7/31/2007, HT p. 107]).

IV. LAW AND ARGUMENT

WSI's denial of Tobias Lemer's benefits is wrong both factually and legally.

WSI's denial of benefits is premised on unspoken and incorrect assumptions that an injured worker must be both genetically perfect and "freshly minted" in order to qualify for benefits. Neither assumption is correct. Workers compensation in North Dakota is a "no fault" program offering "sure and certain relief" to "workers injured in hazardous employments." See: N.D.C.C., Section 65-01-01. Nothing in Title

65 or the wealth of case law interpreting that title requires injured workers to be problem-free before a work injury in order to qualify for benefits. If that were the case, workers with long histories of hard physical labor, such as Toby Lemer, would be per se ineligible for workers compensation benefits. Yet, year after year, WSI demands and accepts premium payments from those very same workers. Simply stated, workers compensation was created for the common man, not for the super man.

In the instant case, it is clear that Mr. Lemer's pre-existing neck, low back, and right knee conditions were, themselves, substantially work related. That evidence is uncontroverted. Thus, even if WSI's notion that the work-related assault that Mr. Lemer suffered on June 5, 2005, was (1) merely a trigger to produce symptoms in a pre-existing condition, or (2) a substantial aggravation of a pre-existing condition, is somehow correct, Mr. Lemer's neck, low back and right knee conditions are substantially the result of his work activities and remain compensable. It is unquestionable that Mr. Lemer's conditions--whether they're the result of repeated stress and strain in his usual heavy labor work, or substantially the result of his documented work-related assault, or both as opined by Dr. Gehring--are compensable under North Dakota law. See: Satrom v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 824 (ND 1982). Furthermore, neither "everyday activities" nor "personal habits" can, as a matter of law, be considered causative factors for workers compensation purposes. See: Roggenbuck v. North Dakota Workers Compensation Bureau, 481 N.W.2d 599 (ND 1992); McDaniel v. North Dakota Workers Compensation Bureau, 1997 ND 154, 567 N.W.2d 833 (1997). Finally, of course, work needn't be the sole cause of

an injury in order for that injury to be compensable; it's enough that work is a "substantial contributing factor" to the injury. See: Hust v. North Dakota Workers Compensation Bureau, 1998 ND 20, 574 N.W.2d 808; Manske, supra. This Court's rationale in Manske effectively disposes of WSI's primary argument for denying Mr. Lemer benefits.

Factually, Mr. Lemer relies on his own testimony and the written opinion of Dr. Gehring. Mr. Lemer doesn't possess a medical license or a law degree. He doesn't profess to be an expert in either of those areas. He was, however, the person who was subjected to Chris Dahners' assault. He was the person who performed heavy labor for years before that assault and has been unable to work since that assault. Dr. Gehring treated Mr. Lemer both before and after the 2005 assault. He is certainly in the best position to make any judgment of the effect of that trauma. Dr. Vilella, on the other hand, never even examined Mr. Lemer, much less treated him. He knew virtually nothing of Mr. Lemer's usual and customary work demands or the assault itself. He didn't know how much Chris Dahners weighed, how much force he exerted, where his hands were positioned or in what position Mr. Lemer's right knee ended up. Yet, Dr. Vilella and WSI have labeled that assault as "minor." Dr. Vilella's opinion is speculative and based more on his position as WSI's medical director than the uncontroverted facts. Dr. Gehring's opinion as Mr. Lemer's treating doctor, both before and after the assault, is more worthy of belief.

Dr. Vilella has suggested that Mr. Lemer's cervical spine, lumbar spine, and right knee conditions, are primarily the result of genetics, environmental factors and personal habits. Factors such as genetics, aging, and environmental factors are nothing more than "background

noise." We all have them. For a "no-fault" benefit provider to refuse benefits because of factors to which we are all exposed is unconscionable. WSI has reneged on its promise of "sure and certain relief." See: N.D.C.C., Section 65-01-01. Again, compensability does not demand genetic perfection. Furthermore, personal habits are not, as a matter of law, contributing factors to what would otherwise, be compensable injuries. See: McDaniel, supra. Again, we all have them. Dr. Vilella would have us focus on the background noise and ignore decades of heavy physical labor and an unprovoked assault. That focus is exactly what this Court proscribed in Manske, supra. Furthermore, the record indicates that, contrary to Dr. Vilella's prediction, Mr. Lemer did not recover within the 4 to 6 weeks the "Official Disability Guidelines" optimistically predicted for a "muscle spasm." Mr. Lemer was able to work without restriction as a millwright until he was assaulted, and he has been unable to work ever since. Dr. Vilella's surmise that this is simply coincidence is not worthy of belief.

The District Court remanded this matter to Workforce Safety & Insurance after determining that WSI's October 25, 2007, Final Order did not "demonstrate an analysis of the evidence consistent with the legal standard established by this Court in Manske, supra (App. pp. 139-141). The Manske decision stands for the proposition that WSI should not focus on extraneous factors such as personal habits, age and genetics in determining whether a medical condition is work related. In the instant case, Dr. Vilella, WSI's medical director, upon whom ALJ Bailey and WSI relied, attributed Mr. Lemer's post-injury medical condition to genetics, environmental factors, and personal habits (App. p. 93 [7/31/2007, HT p. 77]). Dr. Vilella had never treated a millwright and had never even

examined Mr. Lemer (HT p. 80). He had no knowledge or understanding of the physical force put on Mr. Lemer's neck, low back and right knee when he was attacked by Mr. Dahners (HT p. 83). Dr. Vilella did not even offer an opinion of the role of Mr. Lemer's work activities in his medical condition (HT p. 101). Dr. Vilella believed that Mr. Lemer suffered a "muscle spasm" which should have resolved in a matter of weeks (HT p. 101). There is no evidence that Mr. Lemer's condition ever resolved.

Clearly, WSI has not learned the lesson of Manske, supra. The issue is not whether Toby Lemer had personal habits or genetic predisposition or work-related aches and pains from a lifetime of physical labor. The issue is whether Chris Dahners' unprovoked assault created a need for a three-level fusion and left Toby Lemer unable to continue working as a millwright. On that issue, the opinion of Dr. A. W. Gehring, Mr. Lemer's treating doctor both before and after the assault, is uncontroverted (App. p. 150).

WSI seems to be operating under the assumption that anyone who has ever had occasional aches and pains from a lifetime of hard, physical labor cannot claim benefits from a traumatic, work injury. After all, just exactly what does a prior irritation in Mr. Lemer's low back and hip area have to do with his post-injury symptoms and disability (App. p. 147)? Similarly, how do occasional complaints of neck or mid-back or low-back pain correlate with Mr. Lemer's symptoms following the unprovoked workplace assault (App. pp. 142-146)? How are Mr. Lemer's occasional visits to a chiropractor relevant to his post-injury disability? WSI's shotgun analysis amply evidences its institutional bias in attributing causation to anything but the traumatic assault which

precipitated Mr. Lemer's chronic pain, surgical treatment and disability.

V. CONCLUSION

When Chris Dahners grabbed Toby Lemer by the neck and bent him down as he sat on a picnic table bench, he pushed Mr. Lemer flat onto the bench and bounced on him so hard, it moved the table, with Mr. Lemer on it, across the floor (App. p. 165 [3/7/2006 HT p. 52]). That's how Mr. Lemer's right leg became caught underneath the table.

Under Manske, it simply doesn't matter if Mr. Lemer was an older worker or had personal habits. "The fact that an employee may have physical conditions or personal habits which make him or her more prone to such an injury does not constitute a sufficient reason for denying a claim." Manske, supra para. 12. *citing* Satrom v. Workmen's Compensation Bureau, 328 N.W.2d 824, 831 (N.D. 1982). Consequently, when WSI's Medical Director, Dr. Luis Vilella, opines that age, genetics, and lifestyle choices are the primary determining factors in whether a person develops degenerative joint disease, it's irrelevant. It's simply the wrong analysis.

Dr. Gehring's opinion, which is objective medical evidence, is persuasive. See: Swenson v. North Dakota Workforce Safety & Insurance, 2007 ND 149, 738 N.W.2d. Dr. Gehring is Mr. Lemer's treating doctor. His opinion, unlike that of Dr. Vilella, who simply reviewed Mr. Lemer's records, does not defy common sense. After all, Mr. Lemer's "muscle spasm" didn't resolve within six weeks so, apparently, Dr. Vilella was wrong, and Mr. Dahners' unprovoked assault caused more damage than a mere muscle spasm.

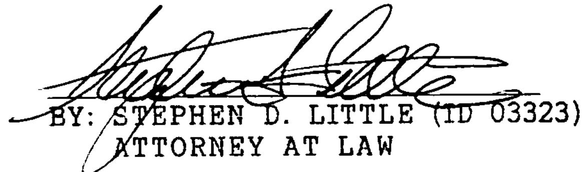
It is axiomatic that an employer takes an employee as he finds him, or her. Toby Lemer was able to work long hours and earn a good

living before his workplace assault. If WSI no longer wishes to cover older workers, it should go to the legislature and stop accepting their premiums.

Toby Lemer remains disabled following a work-related assault. The assault was not merely a trigger, it was a substantial contributing factor to his condition. He remains entitled to relief.

Submitted this 12th day of June, 2009.

DIETZ & LITTLE LAWYERS



BY: STEPHEN D. LITTLE (ID 03323)
ATTORNEY AT LAW

ATTORNEYS FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501

CERTIFICATE OF SERVICE

I, Stephen D. Little, certify that on the 12th day of June, 2009, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

MR DOUGLAS GIGLER
SPECIAL ASSISTANT ATTORNEY GENERAL
1800 RADISSON TOWER
201 NORTH FIFTH STREET
P O BOX 2626
FARGO ND 58108

MS TERRI BARRESI
SIEMENS ENERGY INC
4400 ALAFYA TRAIL MCQ3-049
ORLANDO FL 32826

BY:
STEPHEN D. LITTLE