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STATE OF NORTH DAKOTA

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

Tobias Lemer,)	Supreme Court Case No. 20090158
)	
Appellant,)	
)	
vs.)	
)	
North Dakota Workforce Safety and Insurance,)	
)	
Appellee,)	
)	
And)	
)	
Siemens Power Generation, Inc.,)	
)	
Respondent.)	
_____)	

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**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

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**APPEAL FROM ORDER DATED APRIL 23, 2009, AND JUDGMENT
ENTERED MAY 4, 2009, MERCER COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD L. JORGENSEN**

+++++

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STATEMENT OF THE CASE

1. Appellant Tobias Lemer (“Lemer”) submitted a claim for benefits with North Dakota Workforce Safety and Insurance (“WSI”) in connection with a claimed injury on June 5, 2005, to his neck, back and right knee. (App. 29¹; C.R.² 2) Lemer claimed that he had been injured in a fight with another employee while both were employed by Siemens Westinghouse Power Corporation and working at the Antelope Valley Power Plant. (C.R. 2) WSI initially denied Lemer’s application for benefits under N.D.C.C. § 65-01-02(10)(b)(4), after finding that Lemer was the aggressor in the altercation. (App. 32-37; C.R. 6-11) Lemer requested reconsideration and a formal hearing, which was held on March 7, 2006.³ The issue at the hearing was limited to whether Lemer was the aggressor in the altercation. (App. 151, C.R. 193)

2. On May 8, 2006, ALJ Bailey issued a recommended decision reversing WSI’s Dismissal Order, finding that WSI had not proved by a preponderance of the evidence that Lemer was the aggressor in the altercation. (App. 42-52; C.R. 16-26) The ALJ further determined that Lemer had established that he had sustained compensable injuries to his neck, back and right knee. (Id.) In its final order, WSI rejected the findings that Lemer had proven he was injured in the altercation, but adopted the findings that Lemer was not the aggressor. (App. 53; C.R. 27) Lemer did not appeal from WSI’s Final Order.

¹ “App.” refers to the Appendix filed in connection with this appeal.

² “C.R.” refers to the Certificate of Record on Appeal to District Court, dated January 28, 2009, filed pursuant to N.D.C.C. § 28-32-44.

³ App. 151 and C.R. 193 both reference the transcript from the administrative hearing held on March 7, 2006. Citation to this transcript will be “App. 151, C.R. 193” followed by the individual page within the transcript.

3. On November 14, 2006, WSI issued its Notice of Decision Denying Benefits, finding that Lemer's claimed injuries were the result of a preexisting degenerative disease and the altercation of June 5, 2005, acted as a trigger to produce symptoms in degenerative disease but did not substantially accelerate its progress or worsen its severity. (App. 56-57; C.R. 38-39) Accordingly, Lemer had not suffered a "compensable injury" as defined by N.D.C.C. § 65-01-02(10). WSI issued its Dismissal Order on January 29, 2007, and Lemer requested a formal hearing. (App. 61-68, 71; C.R. 43-50, 53)
4. The administrative hearing on WSI's Dismissal Order was held before ALJ Bailey on July 30, 2007.⁴ Two issues were identified for resolution: (1) whether Lemer suffered a compensable injury and (2) whether administrative res judicata barred WSI from litigating its liability for the condition of Lemer's neck, back and right knee. (C.R. 57) ALJ Bailey's Recommended Findings of Fact, Conclusions of Law and Order were issued on September 24, 2007. (App. 122-138; C.R. 58bb-58rr) ALJ Bailey first determined that administrative res judicata did not bar WSI from litigating the compensability of Lemer's neck, back and right knee. She further found that Lemer had suffered a muscle spasm in his neck and back as a result of the work-place altercation. However, Lemer also had pre-existing degenerative disease in his spine and right knee, and the altercation may have triggered symptoms but did not substantially accelerate the progression of, or substantially worsen the severity of the degenerative processes. (App. 136-137; C.R. 58pp-58qq) WSI adopted ALJ Bailey's

Recommended Decision as its Final Order on October 25, 2007, with comment. (App. 119; C.R. 58y)

5. Lemer appealed from WSI's Final Order to the Mercer County Court by Notice of Appeal and Specification of Error dated December 13, 2007. On July 1, 2008, District Court Judge Donald Jorgensen issued an Order Reversing Administration Decision and Remand for Further Hearing. (App. 139-141; C.R. 58ss-58uu) Judge Jorgensen ruled that WSI's Final Order did "not demonstrate an analysis of the evidence consistent with the standard established by the Supreme Court in Manske." (Id.) The Court went on to direct that "the standard to be employed by the Appellee is to determine whether or not the injury sustained by the Appellant on June 5, 2005, when attacked by a co-worker constitutes a 'substantial contributing factor' to the Appellant's injury and resulting claim." (Id.) The matter was remanded back to the Office of Administrative Hearings and ALJ Bailey on August 7, 2008.

6. WSI and Lemer submitted briefs to ALJ Bailey but no new evidence was offered on rehearing. The issue specified by ALJ Bailey on rehearing was whether Lemer's employment was a substantial contributing factor to Lemer's injury and resulting claim under Manske v. Workforce Safety & Insurance, 2008 ND 79, 747 N.W.2d 394. (C.R. 58vv) Oral arguments were heard on November 12, 2008. (App. 204; C.R. 235) On December 11, 2008, ALJ Bailey issued her Summary of Facts, Conclusions of Law, and Order. (App. 193-202; C.R. 224-233) She concluded that, except for a muscle spasm, Lemer failed to show by a

⁴ App. 72 and C.R. 58a both reference the transcript from the administrative hearing held on July 31, 2007. Citation to this transcript will be "App. 72, C.R. 58a" followed by the

preponderance of the evidence that the work-place altercation of June 5, 2006, or his work as a millwright were substantial contributing factors to the condition of his neck, back and right knee. (App. 200-201; C.R. 231-232)

7. Lemer appealed from WSI's Final Order to the Mercer County District Court by Notice of Appeal and Specification of Error dated January 13, 2009. (App. 17-18) District Court Judge Donald Jorgenson issued his Order Affirming Administrative Decision on April 23, 2009. (App. 22-23) Judgment was entered May 4, 2009, and Notice of Entry of Judgment was served on May 8, 2009. (App. 25-26) Lemer now appeals to this Court by Notice of Appeal dated May 20, 2009. (App. 28)

STATEMENT OF FACTS

8. On June 5, 2006, Lemer was involved in verbal altercation with a co-worker that escalated to a physical altercation.⁵ At the time, Lemer was employed by Siemens Westinghouse Power Corporation at the Antelope Valley Station located near Beulah, North Dakota. During the altercation, the co-worker grabbed Lemer by the neck and pushed him down into a sitting position on the bench seat of a picnic table. (App. 151, C.R. 193 at 30-31, 53) Both men were pushing and shoving, but no punches were thrown. (Id. at 52-53) Lemer's right foot became stuck under the picnic bench seat during the altercation. (App. 151, C.R. 193 at 30-31, 53) The entire incident lasted approximately 15 to 25 seconds. (Id. at 77)

individual page within the transcript.

⁵ A more detailed recitation of the facts regarding the altercation is contained in the transcript from the administrative hearing held on March 7, 2006, which appears at App. 151 and C.R. 193 to the record.

9. On June 6, 2005, Lemer saw Dr. A.W. Gehring complaining of “pain from the neck down to the right hip and down into the right knee.” (C.R. at 138) X-rays obtained of the spine that day showed degenerative disc disease in Lemer’s neck and lower back but no acute trauma. (C.R. 99, 100, 102, 138 and 140) Dr. Gehring found that Lemer had a muscle spasm in the neck and right lower back, which Dr. Gehring believed were secondary to trauma. (C.R. 138) Dr. Gehring also noted the presence of degenerative joint disease throughout the neck and back. (Id.) In his note from June 10, 2005, Dr. Gehring indicated he felt “that [Lemer] does have degenerative joint disease but it was exacerbated by the trauma that he recently experienced. He really does have quite a bit of muscle spasm present.” (C.R. 140)
10. An MRI of the cervical spine obtained on July 14, 2005, showed not only mild to moderate sized diffuse disc/spur complexes present at C3-C4, C4-C5 and C5-C6, but also mild central canal stenosis at C3-4, bilateral neural foraminal stenosis at C4-C5 and bilateral foraminal stenosis at C5-C6. (C.R. 103, 145) An MRI of the lumbar spine obtained on August 25, 2005, confirmed the presence of degenerative disc disease, particularly at L4-L5 and L5-S1. Also observed at both levels was a mild-broad based disc bulge with associated hypertrophic changes. (C.R. 104)
11. Lemer consulted with RN, FNP Carol Miller on October 6, 2005, reporting pain in the low back and extending into the right leg. (C.R. 149) FNP Miller noted that Lemer’s neck pain was well-controlled. She also acknowledged the absence of any objective acute findings following the June 5,

2005, work altercation. (Id.) Lemer reported that 60% of his pain was in his right leg and 40% in his back. (Id.) On examination, FNP Miller found no evidence of pain over the sacroiliac notch or muscle spasm. She reviewed Lemer's MRI of August 25, 2005, and her evaluation was "[a]xial low back pain secondary to multi-level degenerative disk disease with a sensory L5 radiculopathy." (Id.)

12. On December 27, 2005, Lemer underwent lumbar fusion surgery at L4-L5 and L5-S1. (C.R. 75-77) On May 15, 2006, Lemer saw RN Kevin Chaussee as follow up to his fusion surgery. (C.R. 84) At that time, he was also complaining about neck pain with headaches stemming from an altercation at work on June 5, 2005. (Id.) RN Chaussee obtained new cervical spine x-rays that revealed "quite severe degenerative changes throughout his entire cervical regions. His changes are most pronounced at C3-4, C4-5 and C5-6 with massive anterior spurring and lack of normal lordosis at these levels." (Id.)

13. WSI obtained Lemer's prior medical records, which revealed a significant treatment history involving the neck, back and right knee. Dr. Gehring saw Lemer for right knee pain on November 9, 1989, who prescribed a knee brace and Motrin. (C.R. 109) An x-ray of Lemer's right hip and right lower back taken on December 8, 1989, indicated the presence of degenerative disc disease. (C.R. 111) Lemer returned to Dr. Gehring on July 5, 1990, complaining of a sharp, stabbing pain in his right knee. (C.R. 109) Dr. Gehring's medical note from October 24, 2000, indicates that Lemer was taking Celebrex daily for arthritis. (C.R. 118) An MRI of the right knee on August 7,

2003, showed complex tearing involving the mid body and posterior horn of the medial meniscus. (C.R. 120) Lemer had his right knee scoped in October of 2003. (C.R. 123)

14. Lemer's chiropractic records show that he was receiving treating at the Swanson Chiropractic since 1979. Lemer saw Dr. Swanson on several occasions complaining of neck pain and pain in the thoracic and lumbar spine. (C.R. 172, 173, 174, 175 and 176) Lemer saw Dr. Swanson on January 8, 2004, for pain in his right knee and hip after slipping on ice. (C.R. 182) On May 10, 2004, Lemer reported discomfort in his lower and mid back, as well as his right knee. (C.R. 183) On July 2, 2004, he reported tightness in his neck and upper back and leg symptoms on the right drawing down into the knee. (C.R. 184) In April of 2005, Lemer was complaining about irritation in his lower back and hip area and tightness in the right leg. (C.R. 187)

15. At the administrative hearing addressing compensability, Lemer provided an opinion letter from Dr. Gehring supporting his claim for benefits. Dr. Gehring opined that Lemer was always a "hard worker" and he did have "wear and tear arthritis present in his cervical spine, lumbar spine, and right knee," which he related to Lemer's work as a journeyman millwright. He further opined that Lemer never had any neck or cervical spine symptoms prior to the assault at work but now had a significant cervical spine injury and a limited range of motion. Dr. Gehring believed the assault "did substantially aggravate [Lemer's] right knee, lumbar, and cervical spine conditions." (App. 150, C.R. 192)

16. Dr. Vilella, WSI's Medical Director, testified in support of WSI's Dismissal Order. Dr. Vilella's opinion was based on a review of Lemer's medical records, both prior to and following the altercation on June 5, 2005. Dr. Vilella opined that the degenerative processes indicated by imaging studies of Lemer's right knee, cervical and lumber spine pre-existed the work-place altercation. Furthermore, the altercation may have acted to trigger symptoms with the pre-existing degenerative process, but it did not substantially accelerate the progression of, or substantially worsen the severity of the condition. (App. 72, C.R. 58a at 61-79; C.R. 34-37; C.R. 34-37) Dr. Vilella did agree that Lemer suffered a muscle spasm as a result of the altercation, but this would have resolved within four to six weeks with the appropriate treatment. (App. 72, C.R. 58a at 98-101)

STATEMENT OF THE ISSUE

17. Whether WSI/ALJ Bailey could reasonably have concluded from the weight of the entire record that neither the work place altercation on June 5, 2005, nor Lemer's work as a journeyman millwright were substantial contributing factors to the condition of his neck, back and right knee?⁶

⁶ In his brief, Lemer frames the issue as follows: "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?" (See Appellant's Brief at pg. 1) Lemer's issue, however, is an invitation for this Court to go beyond its limited review of WSI appeals and reweigh the evidence. As noted below, this Court's review is limited to determining "whether or not a reasoning mind could have decided the agency's findings were proven by the weight of the evidence from the entire record." Barnes v. Workforce Safety and Insurance, 2003 ND 141, ¶ 9, 668 N.W.2d 290. This Court cannot make independent findings of fact or substitute its judgment for that of the agency. See Bruder v. Workforce Safety & Insurance, 2009 ND 23, ¶ 15, 761 N.W.2d 588.

LAW AND ARGUMENT

I. Burden of Proof and Scope of Review of Agency Decisions.

18. A claimant bears the burden of establishing the right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129 ¶22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. This burden requires a proof by a preponderance of the evidence that the claimant is entitled to benefits available from the Fund. Reynolds v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 247 (N.D. 1982); Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730 (N.D. Ct. App. 1988). A preponderance of the evidence is defined as “evidence more worthy of belief,” or “the greater weight of the evidence,” or “testimony that brings the greater conviction of truth.” Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).
19. This Court's review is limited to the record before WSI. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d 784, 789; Fuhrman v. North Dakota Workers Compensation Bureau, 1997 ND 191, 569 N.W.2d 269. WSI's decision must be affirmed unless its “findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, or its decision is not in accordance with the law.” Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177, ¶ 8, 569 N.W.2d 1 (N.D. 1997).
20. The Court should exercise restraint in determining whether WSI'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. Elshaug, 2003 ND 177, ¶ 12, 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 need determine “only whether or not a reasoning mind could have decided the agency’s findings were proven by the weight of the evidence from the entire record.” Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290; Johnson v. North Dakota Workers Compensation Bureau, 496 N.W.2d 562, 564 (N.D. 1993); Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459, 462 (N.D. 1992).

21. As noted above, the District Court reversed and remanded this matter back to the administrative level because, in its opinion, WSI failed to analyze the evidence consistent with the standard established by the North Dakota Supreme Court in Manske v. Workforce Safety & Insurance, 2008 ND 79, 747 N.W.2d 394. In Manske, the Supreme Court determined that WSI had applied the wrong standard in its analysis of the causal connection between the claimant’s occupational asbestos exposure and his lung cancer. WSI had determined that the claimant’s long history of cigarette smoking was the more likely cause of his lung cancer, despite evidence from the claimant’s medical expert witness that the occupational asbestos exposure was also a “significant contributor.” Manske, 2008 ND 79 at ¶ 10. The Court reversed because WSI’s analysis did not focus on whether the asbestos exposure was a substantial contributing factor to the

lung cancer, once it had determined that the smoking was the more likely cause.
Id.

22. Manske did not establish the legal standard for determining the causal relationship between an employee's injury and his or her employment. Rather, this Court simply reiterated the well-settled rule that a claimant must prove by a preponderance of the evidence that the injury for which he seeks benefits is causally related to his employment, and to establish this causal connection, a claimant must demonstrate the employment was a significant contributing factor to the injury, not that the employment was the sole cause of the injury. See, e.g., Negaard-Cooley v. N.D. Workers Comp. Bureau, 2000 ND 122, ¶ 8, 611 N.W.2d 898; Hust v. N.D. Workers Comp. Bureau, 1998 ND 20, ¶ 20, 574 N.W.2d 808; McDaniel v. N.D. Workers Comp. Bureau, 1997 ND 154, ¶ 12, 567 N.W.2d 833; Lang v. N.D. Workers Comp. Bureau, 1997 ND 133, ¶ 15, 566 N.W.2d 801.

23. As applied to this matter, Manske requires Lemer to prove by a preponderance of the evidence that the work-place altercation was a substantial contributing factor to the condition of his neck, lower back and right knee. WSI submits that the ALJ did the appropriate analysis of the evidence, but within the statutory definition of "compensable injury" found at N.D.C.C. § 65-01-02(10)⁷. Under § 65-01-02(10) "compensable injury" means an injury arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. However, the term "compensable injury" does not include "injuries attributable to preexisting

⁷ ALJ Bailey issued her Recommended Decision as to compensability on September 24, 2007, whereas Manske was not issued until April 23, 2008. (App. 138; C.R. 58rr)

injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progress or substantially worsens its severity.” N.D.C.C. § 65-01-02(11)(b).

24. The ALJ previously found that Lemer had suffered a compensable injury in the form of a muscle spasm as a result of the work-place altercation on June 5, 2005. She further found that the muscle spasm should have resolved within four to six weeks with the appropriate treatment. (App. 137; C.R. 58qq) However, the ALJ rejected Lemer’s claim that he injured his cervical spine, lumbar spine and right knee during the altercation. Instead, the ALJ found that Lemer was afflicted with degenerative spine disease and degenerative disease of the right knee, both of which pre-existed the June 5, 2005, altercation. (App. 136; C.R. 58pp) At most, the altercation acted as a mere trigger to produce symptoms, but it did not substantially accelerate or worsen the progression of the degenerative processes. (App. 137; C.R. 58qq)

25. Upon remand, ALJ Bailey determined that the evidence in the record did establish that the work-place altercation was a significant contributing factor to a muscle spasm in Lemer’s neck and low back, and this spasm would have resolved within six weeks of the incident. On the other hand, ALJ Bailey found that Lemer had failed to prove by a preponderance of the evidence that the altercation was a significant contributing factor to the condition of Lemer’s right knee, neck and low back within six weeks of June 5, 2005. The symptoms Lemer experienced after that time were caused by pre-existing degenerative

disease throughout his spine and degenerative disease of his right knee. The altercation may have triggered symptoms, but it did not substantially accelerate or worsen the progression of the degenerative processes. ALJ Bailey further determined that Lemer's work as a millwright was not a significant contributing factor to the injuries for which he is claiming benefits. (App. 200-201; C.R. 231 and 232)

II. A Reasoning Mind Could Reasonably Determine That Lemer Failed to Prove that the Work-Place Altercation is a Substantial Contributing Factor to the Injuries for Which He is Seeking Benefits.

26. Lemer is claiming he injured his neck during the altercation. He further claims that he never had any problems with his neck until the altercation. As noted previously, x-rays and an MRI taken shortly after the altercation revealed what was described as "quite severe" degenerative changes throughout his entire cervical spine. (C.R. 84) The advanced state of the degenerative changes in the cervical spine establishes that this condition pre-existed the altercation by a significant period of time. (C.R. 58a) More importantly, despite what he told his doctors, Lemer had been seeking chiropractic treatment for his neck with Dr. Swanson, D.C., for several years prior to the altercation with his co-worker. (C.R. 172, 173, 174, 176, 177 and 184).

27. Lemer is also claiming an injury to his lumbar spine as a result of the altercation. Like his cervical spine, the medical records reveal the presence of degenerative disc disease dating back to as early as 1982. Dr. Swanson read a lumbar spine x-ray dated January 11, 1982, which showed a slight diminishment of the L5 disc. (C.R. 167) An x-ray of the lumbar spine obtained on December

8, 1989, revealed a narrowing of the interspace at L5-S1 which represented degenerative disc disease. (C.R. 111).

28. Furthermore, Lemer saw Dr. Swanson on February 7, 2001, complaining of pain in his neck and lower back. (C.R. 174) He saw Dr. Swanson again on June 12, 2001, with the same complaint, but the pain was greater in the lower back on the right side. (Id.) Lemer returned to Dr. Swanson on June 15, 2001, with “left lower back and thoracic ache.” (C.R. 175) On July 3, 2001, Dr. Swanson examined Lemer and noted “[t]enderness of the right iliac notch. Tenderness in the right lumbar spine at L3-4-5.” (C.R. 175) On August 27, 2001, Dr. Swanson treated Lemer for “right sciatica, lower backache, and some thoracic ache.” (C.R. 176)

29. On September 20, 2002, Lemer returned to Dr. Swanson complaining of a left lower backache but also pain radiating down the leg. (C.R. 178) Pain radiating down from his lower back and into his right leg was an often reoccurring symptom for which Lemer sought treatment from Dr. Swanson. (C.R. 179, 180, 181, 183, 184, 185, 186 and 187) In fact, Lemer saw Dr. Swanson for irritation in his S/I joint and irritation into his right leg in April of 2005, less than two months before the altercation. (C.R. 187) On September 8, 2005, some three months after the altercation, Lemer saw Dr. Attas Boutrous at the Pain Treatment Center. (C.R. 107) He described his symptoms as “low back pain with right lower extremity symptomology into the right foot.” (C.R. 108) Lemer was thus experiencing the same symptoms after the altercation as he was previous to the altercation.

30. It cannot be disputed that Lemer had lumbar spine fusion surgery following the altercation to relieve nerve root impingement. However, Dr. Vilella testified that the nerve root impingement was the result of a natural progression of the degenerative disc disease, as opposed to anything that occurred during the altercation. He gave the following opinion:

“It should be noted that progressive deterioration of the spine (degenerative disk/spine disease) contributes to the progression of spondylolisthesis (subluxation of one vertebral body on another) and also contributes to disk abnormalities including annular disk tears, internal disruption of lamellar architecture, and herniation of the disk nucleus. This progressive deterioration of the spine eventually results in spinal stenosis, which in turn may lead to neuroforaminal narrowing and consequent nerve root impingement.” (C.R. 37)

31. It should be noted that, although Dr. Gehring provided a medical opinion in this matter, he was not asked and therefore did not provide an opinion that the altercation substantially contributed to the condition of Lemer’s lumbar spine. (App. 148-149; C.R. 190-192)

32. Finally, Lemer claimed that he injured his right knee during the altercation of June 5, 2005. As with the cervical and lumbar spine, the record contains ample medical evidence revealing that the condition of Lemer’s right knee pre-existed the altercation. Lemer saw Dr. Gehring on November 9, 1989, after twisting his right knee. Dr. Gehring noted “quite a bit of swelling and pain over the right knee.” (C.R. 109) On July 5, 1990, Lemer returned to Dr. Gehring complaining of sharp, stabbing pain in the right knee, directly under the kneecap. (Id.) An MRI of the right knee obtained on August 8, 2003, showed “extensive tearing in the mid body and posterior horn of the medial meniscus.”

(C.R. 120) Dr. Gehring noted on October 2, 2003, that Lemer had injured the knee several years ago, but it did not really bother him until the previous spring when he injured it in a boating accident. (C.R. 135)

33. Lemer's right knee was surgically repaired in October of 2003. (Id.) Lemer told his physical therapists that he had no problems with the right knee between the surgery and the altercation. (C.R. 126, 128) However, Lemer saw Dr. Swanson on January 8, 2004, complaining of irritation in the right knee, which had been scoped in October of 2003. (C.R. 182) He returned to Dr. Swanson on May 10, 2004, again complaining of right knee discomfort. (C.R. 183) Despite what he told his medical providers, Lemer's right knee was symptomatic after the surgery and before the altercation.

34. The medical evidence is substantial that Lemer's claimed injuries pre-existed the altercation, which precludes a finding that they are "compensable injuries" under § 65-01-02(10). Lemer's pre-existing degenerative disease, however, could still be compensable under § 65-01-02(10)(b)(7), but Dr. Vilella provided a written opinion and testified that the altercation on June 5, 2005, did not substantially accelerate the progression of the pre-existing degenerative disease, nor did the altercation substantially worsened its severity. (C.R. 37)

35. Lemer provided no competent objective medical evidence in response to Dr. Vilella's opinion. Dr. Gehring was asked to address whether the altercation of June 5, 2005, "substantially aggravated" Lemer's cervical spine, lumbar spine and right knee conditions. (App. 148-149; C.R. 190-91) Dr. Gehring responded as follows:

“I feel from what Mr. Lemer indicated to me and also from his history, that he never had neck symptoms or cervical spine symptoms prior to the assault. Or if he did, he did not consult with me about that. He now has significant cervical spine injury and has very limited range of motion of his cervical spine, in fact to the point, where I am going to have him consult with a neurosurgeon. I feel that the assault on Mr. Lemer did substantially aggravate his right knee, lumbar, and cervical spine conditions.” (App. 150; C.R. 192)

36. First, the medical records show that Lemer was treating regularly with a chiropractor for his neck since at least February of 2000. Second, and more important, the correct legal standard is not whether the altercation “substantially aggravated” Lemer’s right knee, lumbar and cervical spine conditions. The applicable definition of “compensable injury” allows for compensability of a preexisting condition only if the employment incident “substantially accelerated its progression” or “substantially worsened its severity.” See N.D.C.C. § 65-01-02(10)(b)(7). As noted above, Dr. Vilella provided a medical opinion that the altercation triggered symptoms in the pre-existing degenerative disease, but the altercation did not accelerate its progression nor did it substantially worsen its severity. Dr. Gehring’s response quoted above is not objective medical evidence of substantial acceleration or worsening of Lemer’s preexisting degenerative disease.
37. ALJ Bailey concluded that the work-place altercation was not a significant contributing factor to the condition of Lemer’s neck, back and right knee for which he is seeking benefits. She found that Lemer had pre-existing degenerative spine disease and degenerative disease of the right knee. She also found that Lemer had a substantial prior history of treatment for right knee pain

and pain in the neck, back and hip, all pre-dating the work-place altercation on June 5, 2006. ALJ Bailey determined there was no objective medical evidence attributing the degenerative condition of Lemer's back and knee to his work activities. She also found there was no objective medical evidence showing that the work-place altercation substantially accelerated or worsened the progression of the underlying degenerative condition. Her findings are supported by the greater weight of the evidence from the entire record.

III. A Reasoning Mind Could Reasonably Determine That Lemer Failed to Prove That His Employment as a Millwright is a Substantially Contributing Factor to the Injuries for Which He is Seeking Benefits.

38. In the absence of evidence that the altercation was (1) a substantial contributing factor to his claimed injuries or (2) substantially accelerated the progression or worsened the severity of his preexisting degenerative disease, Lemer attempted to prove compensability through Dr. Gehring's opinion that the claimed injuries were "substantially related" to "his 15 years of work as a journeyman millwright?"⁸ (App. 148; C.R. 191) In his one page letter to Attorney Steve Little dated July 3, 2007, Dr. Gehring stated that, "I feel that Mr. Lemer has always been a hard worker and that he does put 100% of his efforts in to his work no matter what endeavor his is working at. I feel that he does have wear and tear arthritis present in his cervical spine, lumbar spine and right knee and it, more than likely, is attributable to his work as a journeyman millwright." (App. 150; C.R. 192)

⁸ Whether an injury is "substantially related" to the employment is the incorrect legal standard. As noted previously, an injured worker has the burden to prove by a preponderance of the evidence that the employment was a "substantial contributing

39. ALJ Bailey rejected Dr. Gehring’s opinion, finding it was not supported by any objective medical evidence in the record. Although Lemer takes issue with ALJ Bailey’s finding in his brief, he does not direct this Court to any evidence in the record supporting the medical opinion provided by Dr. Gehring. Instead, he simply argues that Dr. Gehring, as a treating physician, was in the “best” position to pass judgment on that issue. However, this Court has on other occasions declined to establish a presumption entitling a treating physician’s opinion to “great weight.” See Myhre v. Workers Comp. Bureau, 2002 ND 186, ¶ 24, 653 N.W.2d 705; Symington v. N.D. Workers Comp. Bureau, 545 N.W.2d 806, 809-10 (N.D. 1996).

40. Dr. Luis Vilella, WSI’s medical director, testified at the hearing that age, genetics and lifestyle choices were the primary determining factors in whether a person develops degenerative joint disease. (App. 72; C.R. 58a at 78-79) It was his opinion that those factors more likely caused the development of substantial degenerative disc disease in Lemer’s cervical spine, lumbar spine and right knee, as opposed to his job as a millwright. (Id.) Specifically, Dr. Vilella noted the substantial load on Lemer’s lumbar spine and knees as a result of his weight, and he relied on x-rays that predated Lemer’s career as a millwright but nonetheless showed the presence of degenerative disease. (Id.)

41. ALJ Bailey determined that Lemer’s work as a millwright was not a substantial contributing factor to the condition of his neck, back and right knee. She relied on Dr. Vilella’s opinion because it was supported by objective medical

factor” to the claimed injury. Myhre v. N.D. Workers Comp. Bur., 2002 ND 186, ¶ 10, 653 N.W.2d 705.

evidence, while Dr. Gehring's opinion was not. ALJ Bailey's conclusion is supported by the greater weight of the evidence found in the record.

IV. WSI/ALJ Bailey Adequately Explained the Rationale and Reasoning for Accepting Dr. Vilella's Opinion and Rejecting the Opinion of Dr. Gehring.

42. This case involved the conflicting opinions of Dr. Gehring and Dr. Vilella. It is well-settled that WSI has the responsibility to weigh and resolve conflicting medical opinions. Thompson v. Workforce Safety and Insurance, 2006 ND 69, ¶ 11, 712 N.W.2d 309. Furthermore, WSI must adequately explain its reason for disregarding evidence favorable to the claimant in denying benefits. Barnes v. Workforce Safety and Insurance, 2003 ND 141, ¶ 20, 668 N.W.2d 290; Hein v. North Dakota Workers Compensation Bureau, 1999 ND 200, ¶ 14, 601 N.W.2d 576. The explanation for rejecting medical evidence favorable to the claimant may consist of the analysis of why it accepted contrary evidence. Hein, 1999 ND 200, ¶ 15, 601 N.W.2d 576. In reviewing WSI's resolution of conflicting medical opinions, this Court must not make independent findings or substitute its judgment for that of the agency, even if the Court may not have reached the same result. Barnes, 2003 ND 141, ¶ 21, 668 N.W.2d 290.

43. ALJ Bailey accepted Dr. Vilella's opinion over that of Dr. Gehring regarding the issue of whether Lemer injured his cervical spine, lumbar spine and right knee during the work-place altercation.⁹ ALJ Bailey pointed out that certain of Dr. Gehring's opinions were contradicted by Lemer's own chiropractic records, which Dr. Gehring clearly had not seen. (C.R. 228) Furthermore, while

Dr. Gehring opined that Lemer's degenerative processes were substantially related to his work as a millwright, ALJ Bailey noted that he had not addressed in his opinion other factors such as Lemer's weight, smoking and absence of repetitive axial loading and vibration, as did Dr. Vilella in disagreeing with Dr. Gehring. (Id.)

44. Also, Dr. Vilella provided a written opinion to WSI and appeared live at the administrative hearing where he testified at length in support of his opinions. Dr. Gehring, on the other hand, did not testify live at the hearing. Rather, Dr. Gehring submitted a one-page letter containing what can only be described as conclusory statements that, in his opinion, Lemer's neck, back and right knee symptoms were related to the altercation on June 5, 2006, and the degenerative processes in his back and knee were caused by his years working as a millwright. (App. 150; C.R. 192) Dr. Gehring offered no explanation or foundation for his opinions. ALJ Bailey expressly noted that Dr. Gehring's opinion was unsupported by any objective medical evidence. (App. 200; C.R. 231 at Conclusion of Law 5 and 6) ALJ Bailey adequately explained why she rejected medical evidence favorable to Lemer in reaching her decision. See Bruder v. Workforce Safety & Insurance, 2009 ND 23, ¶ 14, 761 N.W.2d 588 (finding that WSI adequately explained its reason for rejecting opinion favorable to claimant when WSI's doctor testified at hearing and claimant's conclusory medical opinions were submitted on a one-page letter)

⁹ ALJ Bailey noted that Dr. Vilella was in agreement that Lemer suffered a muscle spasm of the neck and lower back as a result of the work-place altercation. (App. 197; C.R. 228)

CONCLUSION

45. A reasoning mind reasonably could have determined that the factual conclusions reached by WSI/ALJ Bailey were proved by the weight of the evidence from the entire record. Furthermore, WSI/ALJ Bailey adequately explained the reasons for disregarding medical evidence favorable to Lemer's claim for benefits. Accordingly, WSI respectfully requests that this Court affirm the Final Order of December 11, 2008, in its entirety.

Dated this 15th day of July, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, North Dakota Workforce Safety and Insurance, and the author of the Brief of Appellee North Dakota Workforce Safety and Insurance, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 6,032 words from the portion of the brief entitled “Statement of the Case” through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 15th day of July, 2009.

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