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SUPREME COURT

JUN 16 2009

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20090167

DION J SCHOCH)
)
 Appellant,)
)
 vs.)
)
 THE NORTH DAKOTA WORKFORCE)
 SAFETY & INSURANCE,)
)
 Appellee,)
)
 FUNSHINE EXPRESS INC.,)
)
 Respondent.)
)
 _____)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 16 2009

STATE OF NORTH DAKOTA

APPEAL FROM THE ORDER AFFIRMING ADMINISTRATIVE DECISION DATED
MARCH 27, 2009; ORDER FOR JUDGMENT DATED APRIL 3, 2009;
AND JUDGMENT DATED APRIL 9, 2009
STARK COUNTY, SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE WILLIAM A. HERAUF, PRESIDING
STARK COUNTY CIVIL NO.: 09-C-21
SUPREME COURT CIVIL NO.: 20090167

APPELLANT'S BRIEF

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I. STATEMENT OF ISSUES

- A. Did Workforce Safety & Insurance prove, by the greater weight of the evidence, that Dion Schoch committed willful, material fraud in his claim for workers compensation benefits?
- B. Has Dion Schoch, shown by the greater weight of the evidence, that he sustained a compensable, work-related injury, on October 1, 2001?

II. STATEMENT OF FACTS

Dion Schoch was unloading and stacking 65 cases of paper for his employer, Funshine Express, Inc., on October 1, 2001, when he felt the sudden onset of low back and leg pain (Appendix (App.) 18). Mr. Schoch consulted with Dr. Terrance Mack at West River Regional Medical Center in Hettinger, North Dakota on October 3, 2001 (App. pp. 43-44). Dr. Mack diagnosed Mr. Schoch as having an L4-5 disc herniation with a large disc fragment. A CT scan performed the next day, on October 4, 2001, by Dr. Mark Kristy showed a large, left-sided herniated disc at the L4-5 vertebral level (App. p. 103). Dr. Mack administered an epidural steroid injection which relieved Mr. Schoch's low-back and leg pain and allowed him to return to work (App. p. 105).

Prior to his work injury, Mr. Schoch had consulted on a few occasions with Dr. Dion Ficek, a Dickinson chiropractor, for treatment of sacroiliac and left-hip pain with referred low-back pain (App. p. 107; App. p. 177 - [2/12/2007 - HT p. 29]). Dr. Ficek's chiropractic treatment of Mr. Schoch's left hip was successful, and Mr. Schoch never missed work because of left hip pain (App. p. 200 [12/12/2007 - HT pp. 123-124]). Mr. Schoch had never had low back symptoms similar to those he experienced on October 1, 2001, after lifting 65 cases of paper

(App. p. 198 [12/12/2007 - HT p. 116]). Mr. Schoch explained to Dr. Mack on October 3, 2001, that he had seen a chiropractor (Dr. Ficek) on Monday, October 1, 2001 (App. p. 100). That disclosure played no role in Dr. Mack's evaluation or treatment of Mr. Schoch.

Mr. Schoch, who worked primarily as a heavy equipment operator, continued to work at Funshine Express, Inc., after Dr. Mack's epidural steroid injections relieved his low-back and leg pain (App. p. 199 - [12/12/2007 - HT p. 120]). Seventy to eighty percent of Mr. Schoch's job at Funshine Express involved physical activities such as lifting and stacking cases of paper (App. p. 200 - [12/12/2007 - HT p. 121]). Mr. Schoch had private health insurance both before and after his October 1, 2001, work injury (App. p. 78). He filed a claim for workers compensation benefits on October 16, 2001, noting that he had seen a doctor on October 1, 2001, for nonwork-related low-back pain (App. p. 18). Mr. Schoch did not attribute his low-back and leg pain to lifting boxes at work until after he was hospitalized and had medical evidence that he had a herniated disc (App. p. 200-201 - [12/12/2007 - HT pp. 124-125]). WSI accepted his lumbar spine claim on November 26, 2001 (App. p. 20).

On March 5, 2003, while still working at Funshine Express, Mr. Schoch notified his WSI claims analyst, Charlotte Kurtz, that his low-back pain was flaring up and he wanted to see a doctor. Mr. Schoch explained there had been no new incident (App. p. 45). Mr. Schoch saw Dr. Mack who noted on March 5, 2003, that the epidural steroid injections he had provided in October of 2001 had worked initially (App. p. 46). An MRI report dated April 25, 2003, noted an L4-5 disc protrusion displacing the L5 nerve root and an L5-S1 disc

protrusion which may have been in contact with the S1 nerve root (App. p. 47). Mr. Schoch noted that he had received no treatment for his low back from late October 2001 until March of 2003, after his symptoms gradually worsened (App. p. 201 - [12/12/2007 - HT p. 127]).

On February 6, 2006, Dr. Catherine Houle diagnosed lumbar degenerative disc disease stemming from Mr. Schoch's October 2001 work injury (App. p. 48). An MRI report dated February 27, 2006, found a large, old, extruded fragment at the L4-5 vertebral level impinging on Mr. Schoch's left-sided nerve root (App. p. 49). On March 22, 2006, Dr. Mark Monasky, a Bismarck neurosurgeon, diagnosed an L4-5 extruded disc fragment on the left side with inferior migration causing significant compression of Mr. Schoch's thecal sac (App. pp. 50-51). On March 31, 2006, Dr. Monasky performed an L4-5 discectomy on Mr. Schoch (App. pp. 53-54). Mr. Schoch left his employment at Funshine Express sometime in 2004, and returned to work as a heavy equipment operator (App. p. 107; App. p. 202 - HT p. 129)).

III. STATEMENT OF THE CASE

Dion Schoch filed a claim for injury on October 16, 2001, citing an October 1, 2001 injury date (App. p. 18). On November 6, 2001, Margaret W., Mr. Schoch's claims analyst at WSI, faxed a request to the West River Health Clinic for medical records dated October 3, 2001 (App. p. 19). Subsequently, on November 26, 2001, Margaret W. accepted Mr. Schoch's claim for a large left L4-5 disc herniation, which she believed was a compensable claim "as the injury did occur during and in the course of employment" (App. p. 20). The medical records relied on by WSI in accepting Mr. Schoch's claim in 2001 disclosed that he had

received chiropractic treatment on October 1, 2001 (App. p. 100). WSI did not request Mr. Schoch's chiropractic treatment records before accepting his claim. On March 15, 2007, WSI issued a Notice of Decision Denying Benefits to Mr. Schoch, indicating that the October 1, 2001, work injury was a mere trigger to a pre-existing low-back condition and asserting that Mr. Schoch had willfully had made false statements regarding a prior injury to his lumbar spine (App. p. 21-28).

Mr. Schoch requested reconsideration on April 2, 2007, denied committing fraud and asserted that his lumbar spine condition was substantially work related (App. p. 29). On May 9, 2007, WSI issued an Order Reversing Acceptance of Mr. Schoch's claim, denied his claim, and asserted that he had failed to prove that his injury was work related and that he had willfully made false statements about whether he had had prior lumbar spine injuries or treatment (App. pp. 30-37). Mr. Schoch demanded a formal hearing on June 22, 2007, again asserting that he had committed no willful misrepresentations, that his statements and actions were not material, and that he had suffered a work-related low-back injury as claimed (App. p. 40). There were four issues specified for the hearing:

1. Whether Mr. Schoch failed to disclose prior treatment of his low back;
2. Whether Mr. Schoch's failure to disclose prior treatment was material;
3. Whether Mr. Schoch must repay WSI \$6,718.81;
4. Whether Mr. Schoch had established a compensable injury to his low back.

(App. p. 41).

A formal administrative hearing was held before Administrative Law Judge Robert Keogh on December 12, 2007 (App. p. 167). ALJ Keogh issued Recommended Findings of Fact, Conclusions of Law and Order on January 24, 2008 (App. pp. 108-134). WSI accepted ALJ Keogh's recommendations on January 30, 2008 (App. pp. 135-162). Mr. Schoch petitioned for reconsideration and provided additional evidence, on February 28, 2008 (App. pp. 163-165). WSI denied Mr. Schoch's Petition for Reconsideration on March 5, 2008 (App. p. 166). Mr. Schoch then appealed to the District Court.

On appeal, Mr. Schoch moved to adduce additional evidence i.e., letter opinions from Drs. Terrance R. Mack and Mark Monasky stating that Mr. Schoch was hard working and honest, that he had not had similar symptoms prior to his work injury and that, based simply on the medical records, there was no way to tell if Mr. Schoch's low-back condition pre-existed his work injury or not (App. p. 230-237). The District Court granted Mr. Schoch's motion and remanded the matter to WSI for consideration of the opinion letters (App. p. 239).

On November 24, 2008, ALJ Keogh heard oral arguments concerning the import and meaning of Drs. Mack's and Monasky's opinions (App. p. 288). ALJ Keogh issued Amended Recommended Findings of Fact, Conclusions of Law and Order on November 26, 2008 (App. pp. 250-286). ALJ Keogh found the opinion of WSI's medical consultant/records reviewer Dr. Greg Peterson persuasive because, "His opinions were not simply on paper or in a form that could not be cross examined" (App. p. 281). Consequently, ALJ Keogh disregarded the opinion letters the District Court directed him to consider and, again, ruled that Mr. Schoch had not shown that he had suffered a compensable injury and had

committed material, willful fraud (App. p. 285). Mr. Schoch, again, appealed to the District Court. On March 27, 2009, the Honorable William A. Herauf, District Judge, issued an Order affirming ALJ Keogh's decision (App. pp.8-10). Order for Judgment was entered on April 3, 2009 (App. p. 11) and Judgment was entered on April 9, 2009 (App. p. 15). Mr. Schoch has appealed to this Court (App. p. 15).

IV. LAW AND ARGUMENT

Dion Schoch has objected to certain findings of fact and conclusions of law proposed by ALJ Keogh and adopted by WSI: specifically: Finding of Fact 27, in which ALJ Keogh found that Mr. Schoch had an L4-5 herniated disc diagnosed in October, 2001 but not caused by Mr. Schoch's work injury on October 1, 2001. ALJ Keogh found that there was no objective medical evidence of an October 1, 2001, work injury, and found that WSI's consultant Dr. Greg Peterson's opinion that Mr. Schoch's low-back condition was more likely attributable to aging, playing football with his son, or carpet laying was persuasive; Finding of Fact 28, in which ALJ Keogh found that Mr. Schoch had failed to disclose "prior injuries or problems" to WSI and had failed to disclose prior chiropractic treatment from Dr. Ficek before and after the October 1, 2001, work injury; Conclusion of Law 8, in which ALJ Keogh concluded that Mr. Schoch had not shown a compensable injury by the preponderance of the evidence; and Conclusion of Law 10, in which ALJ Keogh concluded that Mr. Schoch's failure to disclose treatment from Dr. Ficek on October 1, 2001, was a willfully false statement which prevented WSI from obtaining Dr. Ficek's records which "quite likely resulted in a considerably different handling of Mr. Schoch's claim."

Following the District Court's remand, Mr. Schoch also objected to

certain amended findings of fact and amended conclusions of law proposed by ALJ Keogh and adopted by WSI: specifically, Amended Finding of Fact 30, in which ALJ Keogh found that Mr. Schoch's L4-5 disc herniation was the result of normal aging or laying carpet or playing football rather than his work-related activities; Amended Finding of Fact 31, in which ALJ Keogh found that Mr. Schoch had not shown that his low-back condition was substantially attributable to his work activities; Amended Finding of Fact 32, in which ALJ Keogh found that Mr. Schoch had not disclosed any prior low-back injuries or problems to WSI and had not disclosed his treatment from Dr. Ficek; Amended Conclusion of Law 8, in which ALJ Keogh concluded that Mr. Schoch had not proven that he suffered a compensable injury; and Amended Conclusion of Law 10, in which ALJ Keogh concluded that Mr. Schoch's actions were both material and willful and "quite likely resulted in a considerably different handling of his claim."

It is clear that, while Mr. Schoch did not consider his October 1, 2001, chiropractic treatment for left hip and sacroiliac pain to be related, in any way, to his work injury, he nevertheless did not hide that treatment from either WSI or his treating doctors. In fact, as already mentioned, he noted the October 1, 2001, treatment on the C1 claim form (App. p. 18). Further, Mr. Schoch informed Dr. Mack on October 3, 2001, that he had seen a chiropractor (Dr. Ficek) two days earlier (App. p. 100). Not only did Mr. Schoch's disclosure not have any effect on Dr. Mack's diagnosis or treatment, it also did not affect WSI's acceptance of his claim on November 26, 2001, after review of Dr. Mack's records and the C1 form (App. p. 20). Further, Mr. Schoch explained that he had never had back surgery or "major back issues" before his

October 1, 2001, work injury (App. p. 61). When Charlotte Kurtz, another claims analyst at WSI, specifically asked Mr. Schoch whether he had ever seen a chiropractor before and after his work injury, Mr. Schoch willingly disclosed treatment by Dr. Ficek and West River Clinic (App. p. 55). Mr. Schoch went so far as to release his medical records from Dr. Ficek (App. p. 56).

Even though Mr. Schoch willingly disclosed his treatment with Dr. Ficek, he nevertheless did not (and still does not) believe that his treatment for left hip and sacroiliac pain was relevant to a diagnosis of a L4-5 herniated disc (App. p. 62). All of the doctors offering opinions in this matter have concluded that Mr. Schoch's left hip and sacroiliac pain could have been caused by any number of factors (App. p. 107; App. pp. 164-165; App. pp. 243-244; App. pp. 246-247; App. p. 199 - [12/12/2007 - HT p. 119]). In fact, Dr. Greg Peterson, upon whom Judge Keogh and WSI relied, admitted that it was impossible to say if Mr. Schoch's herniated disc was present before October 1, 2001 (App. p. 172 [12/12/2007 - HT p. 111]). That was confirmed by Dr. Monasky's letter dated March 11, 2008, (App. pp. 246-247). Dr. Monasky further explained that Mr. Schoch, as he has claimed all along, did not have similar symptoms before his October 1, 2001, work injury (Id.)

As noted, WSI accepted Mr. Schoch's claim on November 26, 2001, after reviewing Dr. Mack's records. WSI determined that Mr. Schoch had, in fact, demonstrated a compensable work injury based on objective medical evidence. Subsequently, on February 6, 2006, Dr. Catherine Houle diagnosed lumber disc disease from Mr. Schoch's October, 2001 work injury (App. p. 48). Dr. Houle's assessment simply confirmed WSI's earlier decision based on Dr. Mack's records. Consequently, while there

is, in fact, objective medical evidence that Mr. Schoch's low-back disc herniation is substantially related to his October 1, 2001, work injury, there is no objective medical evidence that Mr. Schoch's disc herniation pre-existed that work injury.

Dr. Peterson's attribution of Mr. Schoch's disc herniation to aging, playing football with his son, or carpet laying is simply speculation. Again, there is no evidence that Mr. Schoch had a disc herniation prior to October 1, 2001, or that his low-back condition was caused by any of the factors mentioned by Dr. Peterson. As a matter of law, aging and personal habits cannot be the analytical focus in determining causation of work injuries See: Manske v. Workforce Safety and Insurance, 2008 ND 79, 748 N.W.2d 394 Furthermore, ordinary events of ordinary life are not, as a matter of law, causative factors in assessing work injuries Roggenbuck v. Workers Compensation Bureau, 481 N.W.2d 599 (N.D. 1992).

ALJ Keogh's recommended findings of fact and conclusions of law (whether original or amended) are as remarkable for what they fail to mention as for what they do mention. For instance, Mr. Schoch treated with Dr. Ficek for a left hip and sacroiliac pain (App. p. 197). His symptoms did not include the radiculopathy he experienced following his work-related injury (App. pp. 246-247). Dr. Ficek treated Mr. Schoch both before and after his work-related injury and Dr. Mack treated Mr. Schoch and his family for 34 years (App. pp. 99; 243-244).

All of the doctors upon whose opinions Dion Schoch relies examined and treated him rather than simply reviewing his medical records. That sort of hands-on treatment is the type of factor ALJ Keogh should have considered in weighing medical opinions, not which of the two parties, WSI or Mr. Schoch, could afford to have a doctor

review his medical records and testify at hearing. The Court's attention is directed to N.D.A.C., Section 92-01-02-11.1(8)(e). Even if an injured worker had the resources to pay a doctor the thousands of dollars one might expect to be charged for hearing preparation and testimony, WSI is only obligated to reimburse \$150.00, even if the injured worker prevails.

V. CONCLUSION

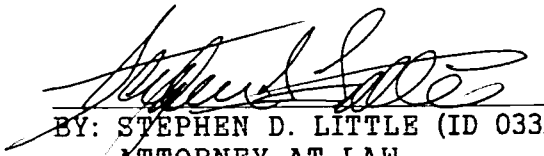
WSI considered Dr. Mack's medical notes sufficient to demonstrate that Mr. Schoch's low-back disc herniation was work related. Dr. Mack's notes were, themselves, objective medical evidence of a work-related injury. Those same notes revealed Mr. Schoch's earlier chiropractic treatment. He was not trying to hide his visits with Dr. Ficek from either Dr. Mack or WSI. Dion Schoch has shown, by the greater weight of the evidence, that he sustained a work-related low-back injury, subsequently diagnosed as a herniated disc, on October 1, 2001. WSI has failed to show, again by the greater weight of the evidence, that Dion Schoch intentionally misrepresented his chiropractic treatment for left hip and sacroiliac pain or that that treatment had any relationship to his subsequently diagnosed herniated disc.

Mr. Schoch treated with Chiropractor Dion Ficek for hip pain. Dr. Ficek's treatment of Mr. Schoch's hip was successful in alleviating that pain. The fact that Mr. Schoch's pain radiated to his low back does not mean that Mr. Schoch suffered from a low-back problem or low-back injury. WSI was aware of Dr. Ficek's treatment of Mr. Schoch when it accepted his claim for benefits. The fact that Mr. Schoch disclosed Dr. Ficek's treatment to Dr. Mack but did not disclose it to WSI on the initial claim form is convincing evidence that Mr. Schoch was not hiding

Dr. Ficek's treatment; he simply thought that treatment unrelated to his work injury. Finally, when WSI's claim form asks for "prior problems or injuries" to a specific part of the body, it necessarily requires an injured worker such as Dion Schoch to make some determination of relevance and materiality. Injured workers cannot be faced with documenting every ache and pain they have ever experienced, no matter how insignificant or remote in time. In the instant case, Dion Schoch reasonably considered his hip condition to be unrelated to his work injury. Instead, he believed that his work injury was attributable to lifting dozens of cases of paper at work. WSI may not be interested in common sense analysis, but Dion Schoch is.

Respectfully submitted this 16th day of June, 2009.

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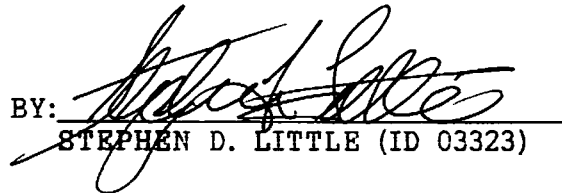
CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 16th day of June, 2009, 2009, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

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