20090167

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dion J. Schoch,	**Supreme Court Case No. 20090167**
Appellant,	
vs.	
North Dakota Workforce Safety and Insurance Fund,	
Appellee,	
and	
Funshine Express, Inc.,	
Respondent.	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 10, 2009
STATE OF NORTH DAKOTA

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BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE FUND

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APPEAL ORDER DATED MARCH 27, 2009, AFFIRMING FINAL ORDER OF WORKFORCE SAFETY AND INSURANCE DATED DECEMBER 17, 2008, AND FROM ORDER FOR JUDGMENT ENTERED APRIL 3, 2009, AND JUDGMENT ENTERED APRIL 9, 2009
STARK COUNTY DISTRICT COURT
SOUTHWESTJUDICIAL DISTRICT
THE HONORABLE WILLIAM A. HERAUF

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STATEMENT OF THE CASE

[1] On October 16, 2001, Appellant Dion J. Schoch ("Schoch") submitted a claim for benefits with WSI concerning an alleged work injury sustained on October 1, 2001. (App.[1] 18) On that date, Schoch was employed by Funshine Express, Dickinson, North Dakota, as a production manager. (App. 18) On November 27, 2001, WSI issued a Notice of Decision accepting Schoch's claim. (WSI App.[2] 1)

[2] On March 15, 2007, WSI issued a Notice of Decision Denying Benefits for willfully filing a false claim or making a false statement pursuant to N.D.C.C. § 65-05-33 and failure to establish a compensable injury by accident arising out of and in the course of employment. (App. 21-28) Schoch submitted a request for reconsideration. (App. 29) On May 9, 2007, WSI issued an Order reversing acceptance of the claim for failure to prove his injury was caused by work and for willfully made false statements about prior spine injuries or treatment. (App. 30-39) Schoch, through counsel, submitted a request for reconsideration/demand for formal hearing. (App. 40)

[3] On December 12, 2007, an administrative hearing was held before ALJ Robert Keogh ("ALJ Keogh"). (App. 167) On January 24, 2008, ALJ Keogh submitted his recommended findings of fact and conclusions of law to WSI's Claims Director. (App. 108-134) On January 30, 2008, WSI adopted the recommended decision as its Final Order. (App. 135-162) Schoch requested reconsideration from the Final Order (App. 163-165), which was denied by WSI on March 5, 2008. (App. 166)

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[1] "App." refers to the Appendix filed by the Appellant in connection with this appeal.
[2] "WSI App." refers to the Appendix filed by Appellee WSI in connection with this appeal.

[4] Schoch took an appeal from WSI's Final Order of March 5, 2008, to the District Court. See Schoch v. North Dakota Workforce Safety and Insurance, et al., Stark County Civil No. 08-C-216. (C.R.[3] 196-197) Schoch then filed a Motion to Adduce Additional Evidence pursuant to N.D.C.C. § 28-32-45. (C.R. 201-202) Following briefing to the Court on the Motion, on August 22, 2008, the Court issued its Order Granting Motion to Adduce Additional Evidence. (App. 239-240) WSI then requested re-appointment of the administrative law judge to consider the additional evidence and issue a further recommended decision. (C.R. 259-264) Robert Keogh was once again appointed. (C.R. 265) It was agreed that the matter would proceed with inclusion of the additional exhibits requested by Schoch pursuant to the Motion to Adduce Additional Evidence, and arguments of counsel. (C.R. 266-270) Exhibits 196 and 197 were admitted into the record, consisting of a letter from Stephen D. Little to Dr. Terrance R. Mack dated February 20, 2008, and Dr. Mack's letter of February 22, 2008 to Stephen Little (App. 242-244), and letter from Stephen D. Little to Dr. Monasky dated February 18, 2008 and Dr. Monasky's letter to Stephen Little dated March 11, 2008 (App. 245-247). See also Transcript of Oral Arguments of November 14, 2008. (App. 288-302). On November 26, 2008, ALJ Keogh issued Amended Recommended Findings of Fact and Conclusions of Law. (App. 250-286) On December 17, 2008, WSI adopted the Amended Recommended Findings of Fact and Conclusions of Law as its Final Order. (App. 248-249)

[5] On January 13, 2009, Schoch filed an appeal from WSI's Final Order of December 17, 2008, to the District Court, Stark County. (App. 2-7) On March 30, 2009,

[3] "C.R." refers to the Certificate of Record on Appeal to District Court dated February 3, 2009, and filed pursuant to N.D.C.C. § 28-32-44.

the District Court, the Honorable William A. Herauf, issued its Order affirming WSI's Final Order of December 17, 2008. (App. 8-10) Order for Judgment and Judgment were entered pursuant to the Court's Order. (App. 11-12) Notice of Entry of Judgment was served April 9, 2009. (App. 13-14) On May 28, 2009, Schoch filed an appeal to this Court. (App. 15-17)

STATEMENT OF FACTS

[6] On October 16, 2001, Schoch submitted a claim for benefits with WSI alleging that he had sustained a "ruptured disk between L4 & L5." (App. 18, 174) Schoch alleged the injury occurred when he was "unloading 65 cases of paper, three of us lifting cases and stacking them according to color." (App. 18) On his claim form, Schoch denied that he had any prior problems or injuries. (App. 18, 175) He also reported that his treating doctor(s) was Dr. Terrance Mack and that he had received treatment at West River Health, both in Hettinger, North Dakota. (App. 18)

[7] Schoch's claim was assigned to claims adjuster Margaret Wood at WSI. (App. 177) Wood documented in the notepad the date of injury, how the injury happened, and type of injury. (App. 19, 177) Because the claim was filed as a "medical only" claim and there was no preexisting injuries or conditions reported on the claim form, Wood did not contact Schoch concerning the claim. (App. 178) Requests for copies of records where Schoch identified he had received treatment on his claim form, Dr. Mack and West River Health, were also sent out. (App. 178) A fax follow-up request for the medical records was also sent on November 6, 2001. (App. 19)

[8] On November 9, 2001 records were faxed from West River Regional Medical Center to WSI relating to the October 3, 2001 treatment. (App. 100-102) The medical

note of October 3, 2001, reflected that Schoch had been seeing a chiropractor for the past six weeks for problems with his hips. (App. 100) The note also reflected that Schoch had been "active on his hands and knees laying some carpet when he started to have some low back pain." (App. 100) The record further stated that Schoch's back "ha[d] not bothered him up until this past weekend." (App. 100) It was noted that Schoch had went to the chiropractor "on Monday" which helped alleviate his pain but it returned on Tuesday." (App. 100) He again went to a chiropractor on Tuesday. (App. 100) When he was seen on October 3, 2001 at West River Regional Medical Center, he described his pain "as tingling and burning type sensation," which was "intense" and ran "from his left buttock region all the way down his leg to his Achilles tendon." (App. 100) Schoch was assessed as having a herniation of the nucleus pulposus in the region of L4/L5." (App. 101, 103) Schoch underwent an epidural steroid injection. (C.R. 130) Schoch was discharged from West River on October 5, 2001, after reporting that he was much improved after his injection. (C.R. 132; WSI App. 15)

[9] Upon receipt of the medical notes from West River and Dr. Mack, Wood reviewed the notes to verify treatment, diagnosis and recommendations for treatment. (App. 179) Although there was a notation to treatment by a chiropractor in the October 3, 2001 note, Wood did not contact Schoch. (App. 179) Wood noted that based on the medical note Schoch had been having problems with his hip which was chronic, however, the low back pain appeared to have been an acute as the record reflected the back pain was of recent onset. (App. 179) In addition Wood did not find it significant that although the reported date of injury was October 1, 2001, the medical treatment note for first treatment was from October 3. (App. 179) Wood testified it is quite common for

injured workers to wait a day or two to actually seek medical treatment. (App. 179) After receiving the medical records, Wood made a determination to accept the claim because there was no indication or prior treatment to the low back, and there was an onset of low back pain based on the medical notes. (App. 179) On November 27, 2001, Wood issued a Notice of Decision Accepting Claim and Awarding Benefits. (WSI App. 1)

[10] In March of 2003, Schoch contacted WSI concerning his back and again wanting to see a doctor. (C.R. 5; App. 45) At that time, Schoch's claim had been reassigned to claims adjuster Charlotte Kurtz. (App. 182) Schoch reported to Kurtz that he had not seen a doctor concerning his back since October of 2001. (WSI App. 2; App. 45, 182) Kurtz advised Schoch he could see a doctor and that WSI would review based on what the doctor reported in the notes concerning his visit. (WSI App. 3; App. 182-183)

[11] Schoch was offered a further epidural steroid injection when he saw Dr. Mack on March 5, 2003. (App. 46) Schoch declined, and he was referred to Dr. Teuber at the New England Clinic. (App. 56) Schoch saw Dr. Teuber on April 8, 2003. (WSI App. 18-23) He reported a history to Dr. Teuber of lifting paper at work and feeling a pulling sensation in his back. (WSI App. 18) Schoch complained of his current condition worsening. (WSI App. 18) An updated MRI was recommended. (WSI App. 23) That MRI was conducted on April 24, 2003, which showed a broad based left posterolateral disk protrusion which appeared to displace the left L5 nerve root posteriorly, as well as a broad based posterior disk protrusion which contacted the S1 nerve roots bilaterally in the lateral recess. (App. 47) Dr. Teuber recommended continuing conservative treatment with medication, therapy and possible additional epidural steroid injection. (C.R. 63)

[12] Claims adjuster Kurtz next had contact with Schoch in April of 2006. (App. 183) At that time, a request for Schoch to undergo surgery had been submitted to WSI's utilization review department and found to be medically necessary. (App. 183) As the claims adjuster, Kurtz was responsible to determine whether WSI would be responsible for payment of the surgery. (App. 183) Claims adjuster Kurtz spoke with Schoch on April 10, 2006. (WSI App. 6; App. 183) Because there appeared to have been no medical treatment between 2003 and 2006, and recent medical records had noted he had sought treatment in October or November of 2005, Kurtz inquired of Schoch about medical treatment during that period of time. (App. 50, 183) Schoch advised Kurtz that he may have seen a chiropractor, Dr. Ficek in Dickinson or New England or a massage therapist. (WSI App. 6, 17; App. 183) Schoch also informed Kurtz he may have been seen at the West River Clinic in New England. (WSI App. 6; App. 183) Following this conversation, claims adjuster Kurtz phoned the West River Clinic and Dr. Ficek's office and requested copies of medical records. (WSI App. 6; App. 183)

[13] When WSI received the chiropractic records from Dr. Ficek in May of 2006, they revealed that Schoch had been seen in August of 2001 for increased hip and low back pain on and off for the past 2-3 days. (WSI App. 11) Schoch had denied any recent specific trauma, but reported that he had been doing some increased bending and lifting at home the last 2-3 days cleaning out rooms. (WSI App. 11) He was diagnosed as having SI segmental dysfunction and pain, as well as lumbosacral segmental dysfunction and pain. (WSI App. 11) Schoch was seen again on August 16, 2001, reporting improvement in his low back and left hip, which had been exacerbated by yard work.

(WSI App. 11) He was again assessed as having SI segmental dysfunction and pain as well as lumbosacral segmental dysfunction and pain. (WSI App. 11)

[14] The Ficek chiropractic records also revealed that Schoch had been seen for treatment on the day of his alleged work injury, October 1, 2001, for "increasing pain in the left hip, low back area." (WSI App. 12) The notes reflect that he had noticed this pain over the weekend when playing catch with a football with his son." (WSI App. 12) Schoch was also seen by Dr. Ficek on October 2, 2001 (the day following the alleged work injury). (WSI App. 12) Schoch continued to complain of pain in the left hip and low back area. (WSI App. 12) There was no mention in these records of any injury as described in Schoch's claim for benefits from WSI nor any mention that Schoch believed the problems he was having were related to any type of work-related incident. (WSI App. 12)

[15] After the chiropractic records were received from Dr. Ficek, claims adjuster Kurtz routed the claim for a medical review to determine if the current condition was related to the work injury. (WSI App. 24; App. 183-184) The medical review was conducted by Dr. Gregory Peterson, a medical consultant for WSI. (WSI App. 8, 25-26) Dr. Peterson reported that he "could find no record of work injury until Mr. Schoch's 10/19/01 C1 form at which time he denied any history of prior problems." (WSI App. 26) Dr. Peterson went on to state that Schoch's "L4 disc herniation is unrelated to his reported 10/1/01 work injury." (WSI App. 26) He further noted: "Based on the currently available information, one might suspect fraud." (WSI App. 26)

[16] After receiving Dr. Peterson's medical review, claims adjuster Kurtz requested a compensability investigation. (App. 184) Kelvin Zimmer was assigned to perform the

investigation. (App. 187) In connection with that investigation, Zimmer interviewed Schoch as well as Beth Strube of the employer. (App. 60-95; 187) Thereafter, a follow-up request was sent to the medical director for review of the claim. (WSI App. 27) The medical director responded that he did not believe there was a work injury on October 1, 2001. (WSI App. 28)

[17] On March 15, 2007, WSI issued a Notice of Decision Denying Benefits, concluding the evidence reflected that Schoch did not sustain a compensable injury and that he willfully and intentionally made material false statements regarding prior injury to his lumbar spine. (App. 21-28) Schoch requested reconsideration. (App. 29) WSI then issued its Order reversing acceptance of the claim concluding Schoch failed to establish an injury caused by his employment and he had willfully made false statements about prior lumbar spine injuries and treatment. (App. 30-39) Schoch requested rehearing. (App. 40)

[18] A hearing relating to WSI's Order was held on December 12, 2007. (App. 167) At that hearing, Schoch confirmed that he had seen Dr. Ficek on October 1, 2001, the day of the alleged work injury. (App. 175-176) Schoch could not recall whether he saw Dr. Ficek on October 1, 2001, before or after the alleged work injury. (App. 176) Schoch also confirmed that he saw Dr. Ficek on October 2, 2001, the day after the alleged injury. (App. 176) He also confirmed that he did not report anything to Dr. Ficek about lifting paper at work as being the source of his problems. (App. 176) Schoch also confirmed that he did not report to WSI on the claim for that he had seen Dr. Ficek for prior back pain in August of 2001 and on October 1-2, 2001. (App. 176-177)

[19] Schoch testified at the administrative hearing that he is certain that the injury date was on Monday, October 1, 2001. (App. 203) He also testified that he had experienced pain going down his leg the weekend prior to his alleged work injury, specifically, the Sunday before the work injury allegedly occurred. (App. 203) Schoch acknowledged that when he went to the West River Regional Medical Center in Hettinger on October 3, 2001 (C.R. 48-51), upon referral by Dr. Mack, he did not report the alleged work incident of lifting cases of paper, but instead reported that over the weekend he had been active on his hands and knees laying carpet and that is when he began having low back pain, including pain down his left leg causing numbness in the posterior aspect of his left leg. (App. 203) Again, these records make no mention of an incident/injury as described in the claim Schoch filed for benefits with WSI. (WSI App. 13-14; App. 100-102)

[20] Also testifying at the hearing was Dr. Gregory Peterson, a medical consultant for WSI. (App. 192) Schoch's claim came to his attention through referral via a C141 (WSI App. 24), which asked for a review as to determine whether the current problems are related to the original work injury and if the current treatment is related to the work injury. (WSI App. 24; App. 193) To perform this type of review, Dr. Peterson looked back to determine a history of prior similar conditions, look at whether the work injury could reasonably have caused the condition, and then follow through with the subsequent medical care to determine whether the work related condition can be substantiated. (App. 193)

[21] In reviewing Schoch's claim, Dr. Peterson found it significant that there were medical records that had come in some time later that showed Schoch having substantially similar pain complaints prior to his reported work injury, specifically the

notes of Dr. Ficek. (App. 193-194) Dr. Peterson testified that if there is a tear in the outer covering of a disk, that tear can cause back pain and buttock pain. (App. 194) If the tear allows the "jelly inside the disk to push out through the tear and put pressure on a nerve" that can cause additional symptoms going down the leg in addition to back and buttock pain. (App. 194) Dr. Peterson went on to explain that "[a]ny number of different mechanisms of injury" could cause a tear in a disk. (App. 194) This would include a "big injury" that will cause the disk to tear further or "no specific injury" and the tear will go through the covering of the disk and cause more pain down the leg." (App. 194) Dr. Peterson testified that "doctors have a very hard time attributing a disk condition to any one specific injury." (App. 194) Dr. Peterson also testified that hip pain can also be associated with a herniated disk. (App. 195)

[22] Dr. Peterson went on to testify that based upon the review of Dr. Ficek's records and the records of October 3, 2001, of Dr. Mack, it is "consistent with an evolution of a disk herniation or a disk problem rather than separate causes for the same thing." (App. 195) Dr. Peterson testified that he did not make the reference to suspecting fraud lightly, but that there was some lack of sincerity in reporting how the prior complaints in the Ficek records might relate to a pre-existing condition. (App. 195) Dr. Peterson also testified that it is important to know about prior complaints or problems when a claim is filed in order to have an educated opinion about how the current condition may relate to a specific work injury, and that if one looks back and the individual has complained of nearly the same thing before the work injury, causation can come into question. (App. 195)

[23] After reviewing the exhibits and listening to the witnesses at the hearing, ALJ Keogh issued his recommended findings of fact and conclusions of law on January 24, 2008. (App. 108-134) ALJ Keogh found that a preponderance of the evidence established that Schoch experienced a L4-5 disc herniation diagnosed in October 2001, but a preponderance of the evidence did not establish that the condition was due to a work injury suffered on October 1, 2001. (App. 129) ALJ Keogh noted that Schoch failed to report to Dr. Ficek and Dr. Mack anything about a work injury as described, and that when he saw Dr. Mack he had mentioned he had "increased pain in the previous 4 days "at least since Sunday." (App. 129) ALJ Keogh also found Dr. Peterson's testimony persuasive that "such disc herniation was a normal aging development, or due to other causes including Claimant's work laying carpet or playing football, or that at most any incident at work merely accelerated the symptoms." (App. 129)

[24] ALJ Keogh also concluded that Schoch's statement on the claim form that he had no prior problems or injuries was not a willful false statement. (131-132) However, Schoch's failure to disclose on the claim form that he had received treatment on October 1, 2001, from Dr. Ficek was a willful false statement and was material to WSI's evaluation and handling of the claim. (App. 132) WSI adopted ALJ Keogh's recommended decision as its Final Order on January 30, 2008. (App. 135-136)

[25] After WSI issued its Final Order on January 30, 2008, counsel for Schoch forwarded the recommended decision to two physicians, Dr. Mack (App. 234) and Dr. Monasky (App. 235) drawing the doctors' attention to Findings of Fact 19, 20, 22, 24, 26 and 27, and asking their "comments" on the "factual findings and whether you believe – based on the enclosures as well as your treatment of Mr. Schoch and your education and

training – that any pre-existing condition or prior treatment had any appreciable effect on his post-October 2001, low-back condition." (App. 234-235) Dr. Mack responded:

> I have to tell that when I see someone such as Dion with acute back pain, my main goal is not to figure out the exact moment the pain came, but to figure out what is causing this problem so we can fix it.
>
> I would not take a history the way a Workmen's Compensation person would take the history. My main goal is just to help him get over his pain and not to figure out the exact moment the pain started so that either Workman's Compensation has responsibility for fixing it or his private insurance has the responsibility.
>
> Most often, when someone in his age group has a problem with back pain and leg radiation, it is a ruptured disk, but there could be other medical problems, such as spinal stenosis or soft tissue tumors that impinge the nerve.
>
> In my history, I just document the start of the pain, the intensity of the pain and I am not so worried about the exact onset of the pain.
>
> . . . I certainly cannot go back at this time and say that I remember some additional details of an event that happened on October 3, 2001. I just have to rely on my record. . . .

(App. 232-233) Dr. Monasky responded:

> In preparation of this statement, I have reviewed the above document and in addition have reviewed the medical records that were generated by myself regarding Dion's preoperative consultation performed March 22, 2006, my operative note dated March 31, 2006, and my postoperative visit on April 24, 2006. **I specifically did not review the medical record of Dr. Mack or Dr. Ficek nor did I review any documents of Dr. Greg Peterson or Charlette Kurtz or any documents prepared by Kelvin Zimmer.** Dion did convey to me in my initial consultation that he sustained a work related injury related to unloading bundles in which he injured his back. He stated this was in 2001, but did not give a specific date. There were numerous references to statements contained within notes that were were written by Dr. Ficek and Dr. Mack.
>
> It appears that the patient essentially had sacroiliac pain and perhaps some back pain prior to the October 1, 2001, incident. There was also contained within a note from Dr. Mack that the patient had some pain down the posterior left leg on a Sunday which would have been the day prior to the alleged work injury on October 1, 2001. **I simply cannot state one way**

> **or the other whether the patient symptoms prior to the alleged work injury were related to a ruptured disk.** He never had any neuroimaging or spinal imaging done. While the symptoms certainly may be compatible with developing ruptured lumbar disk, it is also very possible that the symptoms of sacroiliac, hip, and back pain may have not been related at all to ruptured lumbar disk.
>
> **Given the uncertainty of what was going on prior to the alleged work injury, it is difficult for me to say one way or the other whether the work injury accelerated or substantially worsened the patient's symptoms. I cannot state definitively that the alleged work injury did substantially worsen his symptoms based on preponderance of the medical evidence, but I also cannot state with certainty that the alleged work injury did not substantially worsen Dion's symptoms based on preponderance of medical evidence. I simply do not know. . . .**

(App. 236-237, emphasis supplied).

[26] After considering the additional evidence and arguments of counsel, ALJ Keogh in his Amended Recommended Findings of Fact and Conclusions of Law found, as to this new evidence, that "Dr. Mack's letter adds nothing to the record" and that Dr. Monasky "really does not know what happened." (App. 280) Although each of the physicians, Dr. Mack, Dr. Monasky and Dr. Ficek were supportive of Schoch, "none of these physicians expressed a clear medical opinion that would either establish that a work injury occurred, that such a work injury caused Claimant's medical condition, or that such work injury substantially worsened any pre existing condition. (App. 280)

[27] ALJ Keogh again concluded that Schoch committed willful fraud by his failure to disclose on the claim for his treatment with Dr. Ficek on October 1, 2001. (App. 283, 285) ALJ Keogh also concluded that Schoch had failed to establish by a preponderance of the evidence that he sustained a work injury on October 1, 2001. (App. 282-283, 285) WSI once again adopted this decision as its Final Order. (App. 248-249)

STATEMENT OF THE ISSUES

[28] 1. Whether WSI could reasonably determine that Schoch willfully made material false statements concerning treatment he received from Dr. Ficek and therefore pursuant to N.D.C.C. § 65-05-33, Schoch must forfeit additional benefits and repay WSI the sum of $6,718.81 for benefits paid in error.

[29] 2. Whether WSI could reasonably determine that Schoch failed to establish that his L4-5 disc herniation was due to a work injury suffered on October 1, 2001.

LAW AND ARGUMENT

I. BURDEN OF PROOF AND SCOPE OF REVIEW OF AGENCY DECISION.

[30] 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. However, to trigger the consequences of N.D.C.C. § 65-05-33 for a false statement, WSI must prove: "(1) there is a false claim or false statement; (2) the false claim or false statement is willfully made; and (3) the false claim or false statement is made in connection with any claim or application under this title." Jacobson v. North Dakota Workers Compensation Bureau, 2000 ND 225 ¶ 9, 621 N.W.2d 141, citing Hausauer v. North Dakota Workers Compensation Bureau, 1997 ND 243 ¶ 12, 572 N.W.2d 426. "Wilfully" has been defined as "conduct engaged in intentionally, not inadvertently." Forbes v. Workforce Safety & Insurance, 2006 ND 208 ¶ 13, 722 N.W.2d 536, citing Dean v. North Dakota Workers Compenastion Bureau, 1997 ND 165 ¶ 15, 567 N.W.2d 626. In addition, WSI must prove that the false statement was "material." Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536.

> Based upon the language of N.D.C.C. § 65-05-33 and the civil penalty sought, two tests are used to determine "materiality." If WSI seeks

> reimbursement for benefits paid, the level of materiality required is proof by WSI that the false claim or false statement caused the benefits to be paid in error. If WSI seeks only forfeiture of future benefits, however, no such causal connection is required. Thus, a false claim or false statement is sufficiently material for forfeiture of future benefits if the statement simply could have misled WSI or medical experts in deciding the claim.

Id. (citations omitted).

[31] This Court reviews the decision of the agency. Thompson v. Workforce Safety and Insurance, 2006 ND 69 ¶ 9, 712 N.W.2d 309. The District Court's decision and analysis, however, is entitled to respect. Zander v. Workforce Safety and Insurance, 2003 ND 193 ¶ 6, 672 N.W.2d 668, citing Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96 ¶ 6, 664 N.W.2d 884; Nagel v. Workforce Safety and Insurance, 2007 ND 202 ¶ 10, 743 N.W.2d 112.

[32] This Court's review in appeals of WSI decisions. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d 784. 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, 3-4. The Court exercises restraint in determining whether WSI's decision is supported by a preponderance of the evidence and does not make independent findings of fact or substitute its judgment for that of the agency. Neuhalfen v. Workforce Safety and Insurance, 2009 ND 86 ¶ 10, 765 N.W.2d 681; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court need only determine "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. Thus, even if the Court would have taken a different view of the evidence, the Court must only determine whether a reasoning mind could conclude that Schoch made willful, material false statements under N.D.C.C. § 65-05-33. See Renault v. North Dakota Workers Compensation Bureau, 1999 ND 187 ¶ 22, 601 N.W.2d 580.

[33] "Ultimately, WSI's findings under N.D.C.C. § 65-05-33 must be affirmed if they are supported by a preponderance of the evidence." Fettig v. Workforce Safety and Insurance, 2007 ND 23 ¶ 13, 728 N.W.2d 301, quoting Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536; Neuhalfen, 2009 ND 86 ¶ 12, 765 N.W.2d 681. 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 the truth." Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

II. WSI COULD REASONABLY DETERMINE THAT SCHOCH MADE WILLFUL, MATERIAL FALSE STATEMENTS RELATING TO HIS FAILURE TO DISCLOSE ON HIS CLAIM FORM TREATMENT RECEIVED FROM DR. FICEK ON THE ALLEGED DATE OF INJURY AND THEREFORE MUST FORFEIT FUTURE BENEFITS AND REPAY BENEFITS PAID BY WSI.

[34] ALJ Keogh concluded that Schoch's failure to disclose on his claim form that on the day of his alleged injury, October 1, 2001, he had received treatment from a chiropractor, Dr. Ficek was a willful false statement, was material to WSI's evaluation of the claim, and had the effect of preventing WSI from obtaining medical records from Dr. Ficek which would have disclosed the prior chiropractic treatment he had received. (App. 285) Schoch's arguments ask this Court to conclude otherwise. On review of the facts and evidence based upon this Court's proper scope of review on appeal, Schoch's

arguments must be rejected by this Court – just as the ALJ rejected them – and WSI's decision affirmed.

[35] Schoch did not submit his claim for benefits with WSI until October 16, 2001. (App. 18) When he did, he testified he was certain that October 1, 2001, was the date of the alleged lifting event at work. (App. 203) When Schoch filled out his paperwork to make a claim for a work injury, however, he did not disclose anything relating to treatment that had occurred with Dr. Ficek on the day of the alleged injury, October 1, 2001, or the day following the alleged injury, October 2, 2001. (App. 18) Schoch only reported treatment by Dr. Mack and at West River Health. (App. 18)

[36] Furthermore, Schoch admitted at the administrative hearing held on his appeal of WSI's decision that on October 1 and 2, 2001, when he saw Dr. Ficek, he reported to him that he had left hip and low back pain on those dates. (App. 176) Schoch also testified that at first he thought his problems in early October of 2001 were related to his prior hip problems. (App. 200) However, he realized after his hospitalization that "something was wrong, this was an injury." (App. 200) Despite this apparent recognition that his initial thoughts were wrong and he had sustained an "injury," he still failed to identify the chiropractic treatment with Dr. Ficek on the claim form submitted to WSI.

[37] In his arguments, Schoch tries to justify his failure to disclose the chiropractic treatment by Dr. Ficek on October 1-2 because he did not believe the information was "relevant" to the diagnosis of the L4-5 herniated disc, that treatment could have been caused by other factors, and that the symptoms he had after his alleged October 1, 2001, work injury were "different." However, Schoch does not get to decide what he believes is "relevant" in determining what he does or does not disclose to WSI when he files a

claim for benefits. He must truthfully respond to the questions posed on the claim form. Schoch testified his "justification" for failing to put mark down that he had seen Dr. Ficek for back pain on October 1 and 2, 2001, was that there was no area of the claim for that asked if he had seen a chiropractor in the past and he had not had a problem with this area in the past. (App. 176) In addition, the claim form clearly asks for disclosure of "prior problems or injuries" as well as the names of treating doctor(s). (App. 18) After hearing Schoch's testimony and considering the evidence in the record, ALJ Keogh found that Schoch's failure to disclose his chiropractic treatment with Dr. Ficek on the day of the alleged injury was a willful false statement. (App. 285) "Like a trial court judge, an administrative law judge 'hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses,' and is therefore, 'in a much better position to ascertain the true facts than an appellate court relying on a cold record' without 'the advantage . . . of the innumerable intangible indicia that are so valuable to a trial judge." Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8. Thus, this court must "defer to the hearing officer's opportunity to judge the credibility of witnesses." Id. Thus, ALJ Keogh was in the best position, having seen and heard Schoch's testimony, to make this determination. Accordingly, because the ALJ/WSI could reasonably conclude, on this record, that Schoch willfully and intentionally made false statements, WSI's decision should be affirmed. See Jacobson, 2000 ND 225 ¶ 16, 621 N.W.2d 141 (affirming WSI's decision).

[38] Schoch also contends that his failure to disclose the chiropractic treatment was not material to WSI's handling of the claim inasmuch as there is reference to prior chiropractic treatment in Dr. Mack's records. See App. 100. The ALJ/WSI found that

Schoch's failure to disclose the October treatment by Dr. Ficek was "material" to WSI's evaluation of the claim and had the effect of preventing WSI from obtaining medical records from Dr. Ficek and therefore WSI paid benefits in error and Schoch must forfeiture of future benefits and repay benefits paid by WSI. (App. 285) This Court has outlined two tests for "materiality" of false statements:

> Based upon the language of N.D.C.C. § 65-05-33 and the civil penalty sought, two tests are used to determine "materiality." If WSI seeks reimbursement for benefits paid, the level of materiality required is proof by WSI that the false claim or false statement caused the benefits to be paid in error. Hausauer, 1997 ND 243, 572 N.W.2d 426] at ¶ 17. If WSI seeks only forfeiture of future benefits, however, no such causal connection is required. Id. Thus, a false claim or false statement is sufficiently material for forfeiture of future benefits if the statement simply could have misled WSI or medical experts in deciding the claim. Jacobson v. North Dakota Workers Comp. Bureau, 2000 ND 225, 10, 621 N.W.2d 141.

Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536.

[39] The testimony of Margaret Wood, the initial claims adjuster handling the claim confirms that the lack of reporting of prior problems coupled with the disclosure of only Dr. Mack and West River Health as places where he had treated for the alleged work injury, limited WSI's medical inquiry to those facilities. (App. 178-179) Wood's testimony clearly reflects that the because of Schoch's failure to disclose the treatment by Dr. Ficek on his claim form, and the fact he reported no prior low back problems, WSI did not request those records. (App. 179) Furthermore, although WSI had received one of the October 3, 2001, records of Dr. Mack's treatment (App. 100-102), which referenced chiropractic treatment, Wood testified that she did not contact Schoch for further information as she relied on the references in the medical records to the prior chiropractic treatment being related to the hip, and there was no reported prior treatment

to the low back. (App. 179) The medical record reflects that Schoch reported that "[h]is back has not bothered him up until this past weekend." (App. 100) Wood also did not find it significant that the reported date of injury of October 1, 2001 was different than the day Schoch sought treatment, as she testified many times injured workers wait before seeking treatment. (App. 179)

[40] Wood's testimony reflects that when the claims adjusters process a claim for benefits, they rely heavily on the information supplied by the injured worker on the claim form in making compensability determinations. In fact, her testimony reflects she gave Schoch every benefit of the doubt and relied on his representations to WSI on the claim form that he had no prior low back problems, the identity of his treating physician for the alleged injury was Dr. Mack, and reported history to Dr. Mack that his prior chiropractic treatment was for hip problems. Therefore, the evidence demonstrates that the claim was accepted by the claims adjuster in reliance on the information supplied by Schoch. (WSI App. 1; App. 3, 179) The evidence also demonstrates that if Dr. Ficek's treatment on October 1, 2001, had been disclosed on the claim form, WSI would have obtained those records, as the claims adjuster determined where to request medical records from based on the information contained on the claim form. (App. 178) As ALJ Keogh pointed out, if WSI had requested Dr. Ficek's records, they would have learned of the prior treatment in August of 2001. (App. 253, 285) If information reveals prior treatments, claims adjusters would rely on a medical director's analysis for determinations of compensability. (App. 186) Based on this evidence, the ALJ/WSI could reasonably conclude that Schoch's failure to disclose the Ficek treatment on the day of the alleged injury, October 1, 2001, was "material" to WSI's acceptance of his claim and supported

by a preponderance of the evidence. See Dean, 1997 ND 165 ¶ 18, 567 N.W.2d 626 (noting giving false information on questions on claim form is clearly material to a worker's claim for benefits). Accordingly, WSI's determination should be affirmed. See Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d 536 (noting WSI's findings must be affirmed if supported by a preponderance of the evidence).

[41] Furthermore, as for forfeiture of future benefits, all that is required to be shown is that the statements "could have misled WSI or medical experts in deciding the claim." Forbes, 2006 ND 208 ¶ 14, 722 N.W.2d at 536. Not only does the evidence show that Schoch's failure to disclose his chiropractic treatment could have misled WSI, the evidence in fact shows it did. Accordingly, this test is also met.

[42] Schoch's arguments essentially ask this Court to reconsider/reweigh that evidence and come to an opposite conclusion, which this Court cannot do. See Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI's decision is supported by the evidence). In this case, as outlined above, ALJ Keogh's reasoned analysis meets that standard. Quite simply, "[i]t is within [WSI's] province to weigh the credibility of the evidence presented." Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). This Court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). Based upon the evidence presented at the hearing on this issue as outlined above, the ALJ could reasonably determine as he did. Accordingly, WSI's decision should be affirmed. See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93 ¶ 12, 576 N.W.2d

861; Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112 ¶ 22, 595 N.W.2d 312.

III. WSI COULD REASONABLY DETERMINE SCHOCH FAILED TO ESTABLISH HIS DIAGNOSED L4-5 DISC HERNIATION WAS SUSTAINED IN A WORK INJURY ON OCTOBER 1, 2001.

[43] Schoch argues that because there "is no objective medical evidence that Mr. Schoch's disc herniation pre-existed the work injury" Dr. Mack's "notes" are enough to demonstrate that he had a work-related disc herniation on October 1, 2001. Such arguments blatantly misconstrue and ignore what the preponderance of the evidence demonstrated in this case.

[44] Schoch must show that he was actually injured in the course of his employment. Inglis v. North Dakota Workmen's Compensation Bureau, 312 N.W.2d 318, 322 (N.D. 1981). ALJ Keogh/WSI found:

> A preponderance of the evidence does establish that Claimant experienced a L4-5 disc herniation that was diagnosed in October, 2001, but a preponderance of the evidence does not establish that such condition was due to a work injury suffered on October 1, 2001, or at any other time. There is no subjective medical evidence that supports the claim that Claimant was injured at work on October 1, 2001. Claimant did not report to Dr. Ficek an injury at work on October 1, 2001, when he saw him the same day, but attributed his pain to playing football the prior weekend, and did not suggest a work injury to Dr. Ficek on October 2, 2001. Claimant did not attribute his back pain to a work injury on October 3, 2001, when he saw Dr. Mack, but mentions increased pain in the previous 4 days, "at least since Sunday." In addition to the physical demands of his employment, amounting to 80% of his time, he had for some time been occupied laying carpet. Rather, the testimony of Dr. Peterson to the effect that such disc herniation was a normal aging development, or due to other causes including Claimant's work laying carpet or playing football, or that at most any incident at work merely accelerated the symptoms, is persuasive.

(Amended Finding of Fact #30, App. 282) As ALJ Keogh/WSI found, once all of the medical records for treatment in October of 2001 were finally obtained by WSI in 2006,

the full picture of Schoch's medical condition became known. The medical records, along with Schoch's admission at hearing, reflect quite a different history than a work injury occurring on October 1, 2001, while lifting paper:

> **Dr. Ficek** – August 8, 2001 - Schoch is seen for increased hip and low back pain off and on for the last 2-3 days. No recent trauma, but reported to have been doing some increased bending and lifting at home the last 2-3 days cleaning out some rooms. (WSI App. 11)
>
> **Dr. Ficek** – August 16, 2001 – Low back and left hip improved since last treatment, but over past couple days has been doing some yard work which exacerbated it. (WSI App. 11)
>
> **September 30, 2001** – Based on Schoch's testimony at the hearing, he began experiencing increased discomfort with pain not only in his left low back and buttock but radiating into his left leg causing numbness in the posterior aspect of his left leg on the Sunday prior to the claimed date of injury. (App. 203)
>
> **Dr. Ficek -** October 1, 2001 – Schoch complaints of increasing pain in his left hip, low back area, which he noticed over the weekend when playing catch with a football with his son. (WSI App. 12)
>
> **Dr. Ficek** – October 2, 2001 – Schoch continues to complain of pain in his left hip, low back area. (WSI App. 12)
>
> **West River Regional Medical Center** – October 3, 2001 – Schoch reported that he "had been active on his hands and knees laying some carpet when he started to have some low back pain. He suffered through the weekend taking no medication to ease the pain and saw a chiropractor on Monday. This helped alleviate the pain after some manipulation. The pain returned again on Tuesday. He went to see a massage therapist who recommended that he go to a chiropractor. On Tuesday evening, he saw a chiropractor who attempted to manipulate the joints. This did not help at all and he began to suffer from excruciating pain." (App. 100)
>
> **Dr. Mack** – October 3, 2001 – Schoch reported that "about six weeks ago he began to have increasing difficulty with pain in his low back and buttock area on the left side. In the last three or four days, at least since Sunday, he has had much increased discomfort with pain not only in his left low back and buttock area but radiating down his left leg and causing a numbness in the posterior aspect of his left leg. He states that in the last

> few days it has been unbearable and he is not able to lie down or sit. He is not able to sit." (App. 13[4])

This reported history makes absolutely no mention of or reference to any work activities remotely similar to that which is claimed by Schoch on his claim form of "unloading 65 cases of paper, three of us lifting cases and stacking them according to color." (App. 18)

[45] Dr. Peterson testified that there are a number of different mechanisms of injury that can cause a tear in a disk. (App. 194) He went on to explain that sometimes it is an aging process of a disk and sometimes it is a "big injury" that can cause a tear. (App. 194) In Schoch's case, based upon the records, Dr. Peterson testified the evidence was consistent "with an evolution of a disk herniation or a disk problem rather than separate causes for the same thing." (App. 195) Dr. Peterson also testified that the events/activities noted in the medical records such as playing football or laying carpet can also cause a disk condition to become more symptomatic or worsen it. (App. 196) Thus, any number of things could have occurred in this timeline to cause a disk herniation or worsening a pre-existing tear in the disk in Schoch's case.

[46] WSI does not have the burden of proving something else caused the disk herniation; Schoch has the burden of proving his injury was sustained in the course of employment. Inglis, 312 N.W.2d at 322. As ALJ Keogh/WSI found, the contemporaneous evidence here at or around the time Schoch claims his injury occurred, did not reflect any report of any injury occurring on October 1, 2001, let alone an injury occurring as alleged by Schoch while lifting cases of paper. Instead, the evidence demonstrates that Schoch had symptoms of a disk herniation (pain going down the leg)

[4] These medical records were not received by WSI until January 30, 2002, after it had accepted the claim.

on the day prior to October 1, 2001, had pain into his low back and buttock area some six weeks prior to October 1, 2001, and was engaged in a number of other non-work related activities that could have also caused or contributed to the disk herniation. The burden of proving a causal relationship between a medical condition and a work incident is not met by mere surmise, conjecture or guess. Rush v. North Dakota Workers Compensation Bureau, 2002 ND 129 ¶ 8, 649 N.W.2d 207.

[47] Finally, Schoch cites but two cases in his argument to this Court, Manske v. Workforce Safety and Insurance, 2008 ND 79, 748 N.W.2d 394, and Roggenbuck v. North Dakota Workers Compensation Bureau, 481 N.W.2d 599 (N.D. 1992), neither of which are applicable or have any relevance to the arguments in this case.

[48] In Roggenbuck, the claimant sustained a work injury on October 20, 1988, when she fell in the parking lot leaving her place of employment. Roggenbuck, 481 N.W.2d at 600. Roggenbuck filed a claim for workers compensation benefits and the claim was accepted. Id. Ultimately, she was diagnosed with a disk problem and referred to an orthopedic surgeon. Id. Subsequently, Roggenbuck helped a neighbor move a stove which caused her to experience increased pain, and was thereafter diagnosed with a herniated disk. Id. WSI (then referred to as the Bureau) attempted to apply the aggravation statute, N.D.C.C. § 65-05-15(3) to further benefits. The Court rejected WSI's attempt to do so, as it found that WSI could not have reasonably concluded the stove incident substantially contributed to Roggenbuck's condition. Id. at 607.

[49] Roggenbuck, therefore, did not deal with a determination of whether the circumstances supported a finding of a compensable injury. Instead, it dealt with events subsequent to a confirmed and accepted work injury for which there had already been a

determination made that there was a disk problem. Roggenbuck, therefore, does not address the situation in this case where the issue is whether the disk herniation was the result of a work injury in the first instance, or the result of a number of other non-work related activities that occurred prior to and at or around the same time of the alleged work injury. However, what Roggenbuck does recognize is that there can be an injury that damages a disk, but not have a herniation at that moment and it may come later. See Roggenbuck, 481 N.W.2d at 606. This is consistent with the testimony offered by Dr. Peterson at the hearing. Thus, the fact that there was no diagnosed disk herniation prior to October 1, 2001, does not call for a different result than that determined by the ALJ/WSI. Likewise, it does mean that simply because Schoch says the disk herniation occurred as a result of a work-related event on October 1, 2001, the claim must be compensable. As Dr. Peterson also testified, any of the other events noted in the medical records could have resulted in the disk herniation or worsening of a pre-existing tear in the disk.

[50] Likewise, Schoch's reliance on Manske that aging or personal habits cannot be considered in determination causation of work injuries is simply an incorrect statement of the holding and a mischaracterization of WSI's position in this case. In Manske, this Court reaffirmed what it has stated in the past, that a work injury need only be a substantial contributing factor to the disease or condition that is claimed to be work related. Id. at ¶ 12. This case was not a dispute about whether an incident at work was a "substantial contributing factor" to the disk herniation. This case was about whether an incident even occurred at work as alleged based on the reports of activities and symptoms to the doctors. Schoch presented no medical opinion at the hearing that an incident at

work on October 1, 2001, either caused or was a substantial contributing factor to the L4-5 herniated disk. The only medical evidence submitted by Schoch was a letter from Dr. Ficek relating to his prior treatment and his opinion that it was impossible for him to say whether the L4-5 herniated disk was present in August of 2001. (App. 107) Dr. Ficek was not asked and did not address any issues pertaining to when the herniated disk occurred, or whether it was present on October 1 or 2, 2001, when he also treated Schoch. See id.

[51] Furthermore, even the newly considered letters of Dr. Mack (App. 232-233) and Dr. Monasky (App. 236-237) do not offer anything that would change the decision. Dr. Mack acknowledged that he was not concerned with figuring out the exact moment the pain started. (App. 232) Thus, he could not offer an opinion on causation as his medical notes do not even reflect the event claimed by Schoch as the cause of injury in his claim for benefits with WSI. Likewise, Dr. Monasky noted that he did not see Schoch until March of 2006, and did not review the medical records of either Dr. Mack or Dr. Ficek. (App. 236) He therefore, "cannot state one way or the other whether the patient symptoms prior to the alleged work injury were related to a ruptured disk." (App. 236-237)

[52] Although ALJ Keogh found that Dr. Mack, Dr. Monasky and Dr. Ficek were supportive of Schoch, they could not express a clear medical opinion that a work injury occurred, caused Schoch's condition, or substantially worsened any pre-existing condition. (App. 280) There was, therefore, no medical dispute between experts about whether an event was a substantial contributing factor to the herniated disk, implicating

Manske. Instead, this is a case of establishing whether an event at work caused the claimed work injury, here a herniated disk.

[53] While Schoch could have subpoenaed these doctors to testify at the hearing, he also had many alternatives available to him to present supporting medical evidence. Schoch had the opportunity to consult with Dr. Mack, Dr. Ficek and Dr. Monasky prior to the hearing and to have any or all of them review all of the medical records. Each doctor could have discussed the issues freely with Schoch, their patient, and reviewed the medical evidence with them. Instead, he chose to write to Dr. Ficek only about the prior treatment (C.R. 133-134), and after the hearing provided only the recommended decision, without the supporting record, to Drs. Monasky and Mack and asked their opinions about the findings of the ALJ. (App. 232-127) Schoch, therefore, should not be heard to complain when the ALJ then finds the opinion of WSI's medical consultant who testified at the hearing to be more persuasive than any of the solicited report letters of physicians who could not state an opinion on causation sufficient to establish that the injury is related to an incident at work. See Aga v. Workforce Safety and Insurance, 2006 ND 254 ¶ 17, 725 N.W.2d 204 (noting claimant entitled to subpoena doctors for testimony or present evidence by written opinion when having ultimate burden of proof).

[54] After hearing the testimony and considering the evidence, ALJ Keogh determined that Schoch failed to prove the L4-5 disk herniation was related to his employment. Based on the medical evidence and Schoch's own testimony at the hearing, as outlined above, ALJ Keogh/WSI could reasonably conclude Schoch failed to do so. This Court should therefore reject Schoch's arguments and affirm WSI's decision that Schoch has failed to meet his burden of proof of a compensable injury. See Rooks v. North Dakota

Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993)(noting appellate court does not substitute its judgment for that of WSI and determines only whether findings of fact adequately explain its decision); Neuhalfen, 2009 ND 86 ¶ 27, 765 N.W.2d 681 (reaffirming it is not Court's function to reweigh the evidence even if it disagrees with WSI's determination).

CONCLUSION

[55] For the foregoing reasons, WSI respectfully requests that this Court *affirm* its Final Order of December 17, 2008, and the District Court Order of March 27, 2009, in all respects.

DATED this 10th day of July, 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Workforce Safety and Insurance, and the author of the Brief of Appellant 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 9,195 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 10th day of July, 2009.

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