IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kari Curran, Appellee, vs. **North Dakota Workforce Safety and Insurance Fund,** Appellant, and **MeritCare Health Systems,** Respondent.	**Supreme Court Case No. 20090260**

BRIEF OF APPELLEE KARI CURRAN

APPEAL FROM MEMORANDUM OPINION AND ORDER DATED JULY 28, 2009, AND ORDER FOR JUDGMENT DATED AUGUST 11, 2009, AND JUDGMENT DATED AUGUST 13, 2009
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE DOUGLAS R. HERMAN

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STATEMENT OF THE ISSUES

1 Whether as a matter of law, WSI misinterpreted N.D.C.C § 65-01-02(10) to deny Curran's injury as a non-compensable injury when at least five of Curran's treating doctors agreed that Curran suffered a work-related injury on February 13, 2007.

2 Whether it was unreasonable when at least five of Curran's treating doctors agreed that Curran suffered a work-related injury on February 13, 2007, and the only doctor opining differently was WSI's own Medical Director for WSI to conclude that Curran did not prove her compensable injury.

STATEMENT OF THE CASE

3 Ms. Kari Curran ("Curran") filed a claim for benefits with Workforce Safety and Insurance ("WSI") on February 14, 2007, for an injury to her back which occurred at work on February 13, 2007. WSI App. 28.[1] WSI denied the claim for Curran's injured back. Id. at 29. Curran requested reconsideration of the denial. Id. at 45. After a hearing, on June 12, 2007, Administrative Law Judge Norman G. Anderson ("ALJ Anderson") recommended that WSI's initial Order denying Curran's claim for benefits be affirmed. Id. at 252. On June 19, 2008, WSI accepted ALJ Anderson's recommended decision as its final Order. Id. at 265. Curran appealed WSI's final Order to the District Court. Id. at 278 & 280. On July 28, 2009, the Honorable District Judge Douglas R. Herman ("Judge Herman") issued a

1 "WSI App." refers to the Appendix filed by WSI in conjunction with this appeal.

Memorandum Opinion and Order Reversing Workforce Safety and Insurance Order dated June 13, 2008. Id. at 284. Thereafter, on August 11, 2009, an Order for Judgment and on August 13, 2009, a Judgment were entered. Id. at 290 & 291. On September 3, 2009, WSI appealed that Judgment to this Court. Id. at 294.

STATEMENT OF FACTS

4 On February 13, 2007, Curran, a nurse, was working at MeritCare Hospital ("MeritCare"). While caring for a patient a used band aid fell to the floor. WSI App., Curran testimony, at 165. As Curran testified, as part of her nursing duties she bent quickly to her side and down toward the floor to retrieve the used band aid that had fallen due to bodily fluid contamination and cleanliness concerns. Id. at 169-70. As she bent down Curran felt an extreme pain in her back. Id. at 165-67. The pain took her breath away. Id. Curran had a great deal of difficulty returning to an upright position because of her severe pain. Id. The patient she was attending and the patient's wife both offered to help her. Id. Eventually, overcoming the pain Curran was able to stand up and leave the room. Id.

5 Curran's co-worker, Cory Haverkamp ("Haverkamp") testified that when Curran came out of the patient's room, she observed Curran displaying obvious pain behaviors including tears in her eyes, holding her back, and grimacing. Id., Haverkamp testimony, at 57. Haverkamp asked Curran what was wrong and Curran responded that she had just bent over in the patient's room to pick something up and had sudden onset of severe back pain. Id. Haverkamp testified that throughout the

years she had worked with Curran, she had never seen Curran have any previous back problems while working. Id.

6 As required by MeritCare policy (C.R. 264-65[2]), Curran immediately reported her injury to her supervisor, the charge nurse, Kathy Pearson ("Pearson"). WSI App., Pearson testimony, at 58. Pearson testified that Curran came to her on February 13, 2007, and reported that she had been bending over to pick something up in a patient's room and had severe pain suddenly occur in her back. Id. Pearson also testified that she observed Curran with pain behaviors during what time remained in the shift. Id. Pearson also testified that in the time that she had worked with Curran prior to this day, she had never heard nor seen Curran have any complaints related to her back. Id.

7 The next day, February 14, 2007, Curran contacted MeritCare's Human Resource department and spoke to Ms. Vickie Manske ("Manske"). WSI App., Curran testimony, at 170-172. Manske told Curran she was to file a claim with WSI and also who she was to go to for medical treatment. Id. Manske had supposedly kept a note of the phone call which she provided to WSI (C.R. 2) and Curran later received a copy of that note from WSI which revealed that Manske had included in her note of their phone call that Curran had said she did not know if she hurt her back at work or not. Manske did not testify at the hearing and Curran specifically denied Manske's statements made in that note. WSI App., Curran testimony, at 170-72.

8 The same day Curran spoke to Manske, Curran did file a claim for her injury with WSI. WSI App. 28. In the WSI claim form she filled out, Curran obviously knew what had happened, and that it had happened at work, as she wrote in the claim form for the body part injured: "mid to right low back [,]" for the nature of the injury: "bending, reaching to pick up[,]" and for the description for how the injury occurred: "…not exactly sure but bent to pick something up, felt pulling et[and] difficult to stand up." Id.

9 That same day, February 14, 2007, Curran went to the MeritCare Occupational Health Clinic as required by her employer. Id., Curran testimony, at 172. The medical notes for that visit include: "Patient is a 35-year-old employee of MeritCare who on February 13, 2007, was picking something up and injured her right lower back while at work." C.R. 104. Curran told each medical provider with whom she treated from that first treatment thereafter this very same mechanism of injury consistent with her claim form descriptions and her testimony (WSI App., Curran testimony, at 165-70). It defies logic or common sense that Curran would have not known or said that she had hurt her back at work when she talked to Manske.

10 Curran has never disputed that she did have a prior back injury in February 2004 following a motor vehicle accident and that she received treatment for her low back at the MeritCare emergency room. C.R. 74-75. Following that injury, Curran received eight subsequent chiropractic treatments by a MeritCare chiropractor, Dr.

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2 "C.R." refers to the Certificate of Record filed with the District Court on August 14, 2008.

Thomas P. Solien ("Dr. Solien"), three in February 2004, three in March 2004, one in April 2004, and one in May 2004. C.R. 76-93. Curran was released from treatment by Dr. Solien on May 17, 2004, and was to follow up only on an as needed basis. C.R. 92-93.

11 A year later in March 2005, Curran again had chiropractic treatments from Dr. Solien, two treatments for complaints of neck and upper back pain (C.R. 94-97) and a single treatment on March 17, 2005, which included a reference also to a complaint of low back pain which was described as "mechanical low back pain" (C.R. 98-99).

12 A year and eight months after that, Curran had two additional chiropractic treatments from Dr. Solien for neck and low back, both in November 2006, again described as "mechanical low back pain." C.R. 100-03. The total of Curran's medical treatment for her back prior to her work injury – **for three years** – is one emergency room visit and twelve chiropractic treatments.

13 In contrast, since her injury on February13, 2007, the medical records evidence Curran has treated over a hundred times with different medical providers, both chiropractic and medical, for her low back. C.R. 40-258a & 272-293. In addition, Curran ultimately had a disc replacement surgery in Germany for a herniated disc in her low back. C.R. 272-78.

14 WSI denied Curran's claim asserting because Curran had a "pre-existing condition to her lumbar spine" and "pre-existing degenerative changes to her lumbar spine" there could be no compensable work injury on February 13, 2007. WSI App.

41. As will be developed in detail, *infra*, Curran has had at least five treating doctors unequivocally opine that her low back problems post-injury were a result of her bending over incident at work on February 13, 2007. WSI rejected all those opinions in favor of the opinion of its own Medical Director, Dr. Vilella, who never examined nor spoke to Curran regarding her work duties, injury or medical treatment but, simply did a review of **only** a portion of her medical records. This Court will be asked to affirm the findings of Judge Herman rejecting the findings of WSI denying her claim for her back injury.

LAW AND ARGUMENT

I. Scope of Review.

15 It is well-settled that appeals from final WSI decisions are governed by N.D.C.C. §§28-32-46 & 65-10-01. N.D.C.C. §28-32-46, provides:

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

This same statute governs a review by this Court. Wendt v. North Dakota Workers' Comp. Bureau, N.W.2d 720 (N.D. 1991).

16 This case presents certain issues of law, which are fully reviewable by the Court. Jensen v. N.D. Workers Comp. Bureau, 1997 ND 107, ¶ 11, 563 N.W.2d 112; see, e.g., Born v. Mayers, 514 N.W.2d 687, 689 (N.D. 1994); Kallhoff v. North Dakota Workers' Compensation Bureau, 484 N.W.2d 510 (N.D. 1992). WSI in its decision states that its decision denying Curran benefits is based on its interpretation of a statute, specifically N.D.C.C. §65-01-02(10)(b)(7). WSI App. 267-77. This Court in Paul v. Workforce Safety and Insurance, 2003 ND 188, ¶ 11, 671 N.W.2d 795 reaffirmed: "Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision." Curran's appeal raises issues of WSI's statutory interpretation of N.D.C.C. § 65-01-02(10) which are fully reviewable and Curran further asserts that WSI's decision is not in accordance with law. Accordingly, based on WSI's erroneous interpretation of that statute, WSI's Order must be reversed.

17 Further, WSI's "Findings of Fact" are not supported by a preponderance of the evidence and its Conclusions of Law are not in any manner supported by the Findings of Fact or the record evidence. In addition, the Findings of Fact made by WSI do not sufficiently address the evidence presented by Curran. Therefore, again as a matter of law WSI's Order must be overturned.

18 Alternatively, WSI's Findings of Fact/Conclusions of Law are not supported by a preponderance of the evidence. Regarding the scope of review in this regard, in Wherry v. North Dakota State Hosp., 498 N.W.2d 136, 139 (N.D. 1993) (citations omitted) this Court said:

> In determining whether the Bureau's findings of fact are supported by a preponderance of the evidence, we exercise restraint and do not make independent findings of fact or substitute our judgment for that of the Bureau. Rather we determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached by the Bureau were proved by the weight of the evidence from the entire record.

It is fundamentally important that the "reasoning mind" test does not permit an abdication of the Court's independent duty to inquire whether WSI's Findings of Fact are supported by a greater weight of the evidence. This Court has made it clear that if the greater weight of the evidence does not support WSI's findings, WSI's findings will be reversed. See, e.g., Flink v. N.D. Workers Comp. Bureau, 1998 ND 11, ¶ 1; 574 N.W.2d 784; Fuhrman v. N.D. Workers Comp. Bureau, 1997 ND 191, ¶ 1, 569 N.W.2d 269; Spangler v. N.D. Workers Comp. Bureau, 519 N.W.2d 576, 578 (N.D. 1994); Syverson v. North Dakota Workmen's Compensation Bureau, 406 N.W.2d 688, 692 (N.D. 1987). Upon review of the record as a whole, even pursuant to the

"reasoning mind" test, WSI's decision is not supported by the weight of the evidence within the entire record.

II. This Court Reviews the Decision of the Agency on Appeal But Will Also Give Due Respect to the Analysis and Review of Judge Herman Who Overturned WSI's Denial of Curran's Claim for Benefits.

19 On appeal from the district court's decision, this Court will review an administrative agency's decision in the same manner the district court reviewed the agency's decision, giving due respect to the analysis and review by the district court. Von Ruden v. North Dakota Workforce Safety & Ins. Fund, 2008 ND 166, ¶ 8, 755 N.W.2d 885; Reopelle v. Workforce Safety and Ins., 2008 ND 98, ¶ 9, 748 N.W.2d 722; Swenson v. Workforce Safety & Ins. Fund, 2007 ND 149, ¶ 21, 738 N.W.2d 892. Judge Herman did a thorough review of the Order of WSI pursuant to the appropriate statute and issued a well reasoned analysis of the facts and law following which he overturned WSI's Order. WSI App. 284-89. This Court is urged to affirm Judge Herman's conclusion overturning the decision of WSI.

III. The North Dakota Workers Compensation Act Is To Be Liberally Construed So As To Avoid Forfeiture And Afford Relief Whenever Possible.

20 This Court, on countless occasions, has held that the provisions of the Workers Compensation Act must be liberally construed to promote the ends intended to be secured by its enactment. See, e.g., Flink, 1998 ND 11 at ¶ 9; Kallhoff, 484 N.W.2d 510, 513; Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469, 470 (N.D. 1992); Claim of Bromley, 304 N.W.2d 412, 415 (N.D. 1981); Balliet v. North Dakota Work. Comp. Bureau, 297 N.W.2d 791, 794 (N.D.

1980). Stated otherwise, the Act ". . . is to be construed liberally with the view of extending its benefit provisions to all who can fairly be brought within them." Syverson v. North Dakota Workmen's Compensation Bureau, 406 N.W.2d 688, 690 (N.D. 1987). Liberal review is to be done to "avoid forfeiture and afford relief." Balliet, 297 N.W.2d at 794.

21 The 1995 legislature amended N.D.C.C. § 65-01-01, by adding: "A civil action or civil claim arising under this title which is subject to judicial review, must be reviewed solely on the merits of the action or claim. This title may not be construed liberally on behalf of any party to the action or claim." S.L. 1995, ch. 605, § 1. However, even after the amendment to N.D.C.C. § 65-01-01, this Court stated emphatically: "The Workers' Compensation Act is remedial legislation, and we construe it to afford relief and avoid forfeiture with a view of extending its benefits to all who fairly can be brought within its provisions." Shiek v. N.D. Workers' Compensation Bureau, 2001 ND 166, ¶ 26, 634 N.W.2d 493; see, also, Zueger v. ND Workers Comp., 1998 ND 175, ¶ 12, 584 N.W.2d 530 ("We construe the Workers Compensation Act to afford relief and avoid forfeiture.") Any review must continue to be done to "afford relief and avoid forfeiture." Id. The "rule of liberal construction," comports, of course, with N.D.C.C. § 1-02-01 which states that:

> The code establishes the law of this state respecting the subject to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice.

Additionally, "liberal construction resolves reasonable doubt in favor of the injured worker because it was for the worker's benefit that the Act was passed." Kallhoff, 484 N.W.2d at 513.

IV. On February 13, 2007, Curran Injured Her Back at Work by Suffering a New and Separate Injury Different Than Any of Her Pre-existing Back Injuries.

22 On February 13, 2007, Curran went to work with no back pain or problems. She bent over to retrieve a used band aid as required by her work duties at MeritCare, and suffered an injury to her back. Curran (WSI App. 165-67), her co-worker Haverkamp (Id. at 57), and her charge nurse Pearson (Id. at 58), all testified that Curran was fine with no back complaints throughout the shift until the bending over incident in the patient's room.

23 WSI unlawfully requires a level of activity that is more than a "usual" or "ordinary" act which leads to an injury to qualify for benefits. WSI referred to Curran's act as "simply bending over" in its dismissal of Curran's claim. Id. at 41. As "simply" as bending over may be in any situation, it was that very act of bending over **at work while performing work duties** at MeritCare that resulted in Curran's back injury. Even what may be a "simple" act, when done for and at work, when that act causes an injury it is a compensable injury.

24 N.D.C.C. § 65-05-02(10) defines a compensable injury in part as an injury by accident arising out of and in the course of hazardous employment. Causation has never been based on an evaluation of the "difficulty of the task" being performed. Moreover, there is nothing within the statute for a physical injury that includes a

quantitative level of the activity being performed to qualify as a compensable injury. Nor has there been a minimum quantitative level ever required by this Court to meet the definition of a physical compensable injury pursuant to N.D.C.C. § 65-05-02(10).

25 Indeed, in N.D.C.C. § 65-05-02(10), it is included:

> Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that **unusual stress** is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. **Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.**

N.D.C.C. § 65-05-02(10)(a)(3) (emphasis added). Thus, when the legislature wanted to include a quantitative activity requirement to meet the definition of compensable injury they obviously knew exactly how to do so. There is no such "unusual stress" requirement for a back injury.

26 A claimant must show, by a simple preponderance of the evidence, a compensable injury in order to participate in the worker's compensation fund. Moses v. North Dakota Workers Comp. Bureau, 429 N.W.2d 436 (N.D. 1988). That is exactly what Curran has proven: Curran suffered an injury while at work and while performing work duties on February 13, 2007. An injury arises in the course of employment if it occurs within the period of employment at a place where the employee may reasonably be and while he was engaged in performing the duties of his contract or is engaged in something incident thereto and contemplated thereby. Westman v. North Dakota Workers Comp. Bureau, 459 N.W.2d 540 (N.D. 1990).

Curran has proven all of these requirements and her claim should have been accepted. Thus, as a matter of law, WSI's decision is wrong.

V. WSI Did Not Properly Weigh the Medical Evidence as Whatever Curran Had For Any Mild Disc Degeneration Disease Pre-injury, on February 13, 2007, Curran Suffered a New and Different Injury.

27 Dr. Solien, the MeritCare chiropractor who treated Curran prior to and after her work injury wrote a very detailed opinion regarding both his treatment prior to the work injury and what he saw on evaluation and treatment following her work injury. Curran Supp. App. at 1.[3] Indeed, Dr. Solien pointed out that there was **NEVER** a concern of a disc protrusion or annular tear with Curran **PRIOR** to her February 13, 2007, injury. Id. WSI ignored Dr. Solien's letter as ALJ Anderson essentially did also. Surely, Dr. Solien is in the best position to evaluate his treatment of Curran and her back conditions both before and after the February 13, 2007, work injury. Dr. Solien's very detailed opinion is that Curran suffered an annular tear and herniation as a result of her work on February 13, 2007. Id.

28 Another chiropractor, Dr. JaNyne Aker ("Dr. Aker"), who had also treated Curran both pre and post her work-related injury wrote a comprehensive letter to WSI giving her opinion (Curran Supp. App. at 3) and also testified at the hearing on Curran's claim (WSI App., Dr. Aker testimony, pp. 64-162). (It should be pointed out that Curran did not receive any low back related treatment from Dr. Aker prior to the work injury as Curran never presented to her with a low back complaint prior to

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3 "Curran Supp. App." refers to the Supplemental Appendix filed by Curran in conjunction with this Brief.

the work injury. Id. at 66-67). Dr. Aker's opinion is that Curran suffered a disc tear and herniation on February 13, 2007, while performing work duties and that this disc tear and herniation constituted a new and separate injury. Id. at 64-162. Obviously, Dr. Aker's opinion is consistent with Dr. Solien's opinion.

29 Moreover, Dr. Aker opined in her letter to WSI (Curran Supp. App. at 5) and testified that a disc tear and herniation following Curran's work injury dramatically and substantially – not just a little bit – changed the character of Curran's pre-existing minimal disc degenerative disease (WSI App. at 82-84).

30 Another chiropractor, Dr. Ryan Ortman ("Dr. Ortman"), treated and evaluated Curran. Dr. Ortman opined that the bending over incident at work on February 13, 2007, was the cause of Curran's back problems; that a "simple" task such as bending over can indeed cause the type of injury that Curran suffered; and, that the injury substantially accelerated any pre-existing disease that Curran had prior to the work injury. Curran Supp. App. at 7.

31 Dr. Robert Martino ("Dr. Martino") is the medical doctor who saw Curran the day after her work injury (C.R. 104-06) and continued to treat her thereafter. Dr. Martino is MeritCare's expert in occupational medicine and works at MeritCare's Occupational Health Center who is selected as the Preferred Provider for MeritCare employees injured at work pursuant to N.D.C.C. § 65-05-28.1. Dr. Martino completed a Physician Activity Status Report form at the conclusion of his first visit with Curran. Curran Supp. App. at 8. When completing that form, Dr. Martino at that very first visit and every visit Curran had with him thereafter opined that there

was **no** pre-existing/associated condition in Curran's case and that the mechanism of injury coincided with what he found on evaluation and treatment. Curran Supp. App. at 9 (February 16, 2007); 10 (February 22, 2007); 11 (February23, 2007); 12 February 28, 2007; 13 (March 7, 2007); 14 (March 30, 2007); 15 (April 2, 2007); 16 (April 5, 2007); 17 (April 12, 2007); 18 (April 19, 2007); 19 (May 4, 2007); 20 (May 11, 2007); 21 (May 24, 2007); 22 (June 7, 2007); 23 (June 25, 2007); 24 (July 18, 2007); 25 August 13, 2007); 26 September 12, 2007); and 27 (December 12, 2007).

32 Dr. Charles Koski ("Dr. Koski"), one of MeritCare's neurosurgeons, gave his opinion on several different occasions that Curran's disc annular tear and herniation were caused by her bending over at work on February 13, 2007. On March 13, 2007, Dr. Koski stated: "Ms Curran has some back pain and paresthesias in the right leg. She has no neurological deficits. She, therefore, has a radiculitis, which most likely was related to the incident of the 13th of February 2007." Curran Supp. App. at 29. On March 27, 2007, Dr. Koski also questioned Curran and her spouse related to treatment following the 2004 motor vehicle accident and he states: "Utilizing the history that Kari [Curran] gave me at that time, it appears that her motor vehicle accident most likely is a completely independent, separate event from her current problem." Id. at 31. Further, in that same note, Dr. Koski stated: "She is also having back pain. I think these can be reasonably related to the annular tear that was noted on the MRI." Id. at 32. On May 1, 2007, Dr. Koski reviewed WSI's denial of Curran's claim, discussed this with Curran, reviewed past records, in detail, and

stated: "In regard to her [Curran's] back pain the temporal sequence that she and her husband report to me would indicate that the incident of February 13th may be correlated with the annular tear. The annular tear in my opinion did occur in the recent history. I do not believe that this is a [sic] chronic degenerative changes but rather a[n] acute phenomena." Id. at 36.

33 Dr. Michael P. Martire ("Dr. Martire") evaluated and treated Curran and reviewed ALL of her pre and post injury medical records. Curran Supp. App. at 38. Dr. Martire also performed an EMG which revealed right sided nerve conduction problems. Id. at 40-41. Dr. Martire gave his opinion that Curran had developed both the right sided radiculopathy and the acute disc protrusion as a direct result of the February 13, 2007, work injury. Id. at 39.

34 WSI had its Medical Director, Dr. Luis S. Vilella ("Dr. Vilella"), a non-board certified specialist in physical medicine and rehabilitation (WSI App. 229), review **some** of Curran's records and had him testify that Curran suffered a "…longstanding, ongoing degenerative process of the structure of the lumbar spine…" and that the February 13, 2007, "…event acted as a trigger to produce symptoms in the already pre-existing lumbar degenerative disk disease which was already established in this case." WSI App. at 233. Dr. Vilella never reviewed Dr. Solien's pre-injury records for Curran prior to his written opinion on April 20, 2007 (C.R. 9-13), or his testimony at the hearing. WSI App. at 233-35. In spite of never looking at Curran's prior records, Dr. Vilella testified related to Curran's pre-injury condition and how that pre-injury condition completely precluded her from having a worker's

compensation injury. WSI App. at 233-34. Indeed, Dr. Vilella without looking at Curran's prior records does not even have the proper foundation to give an opinion related to Curran's pre-injury condition and how that condition relates to her post work injury condition. This reliance by WSI on Dr. Vilella's opinion is totally unreasonable.

35 Ironically, it was Dr. Koski's description of what Curran's MRI of March 11, 2007, evidenced (Curran Supp. App. at 31) which Dr. Vilella used to opine in his written opinion that Curran's back injury preexisted her February 13, 2007, bending over at work incident. C.R. 9. Yet, when Dr. Koski further opined in that very same note that the new and separate disc tear and herniation were likely caused by her work incident of February 13, 2007, Dr. Vilella when confronted with Dr. Koski's opinion (Curran Supp. App. at 31-32), absolutely rejected that portion of Dr. Koski's opinion. WSI App. at 237.

36 Weighing Dr. Vilella's opinion with the other evidence of record should lead this Court to find that other medical evidence from Curran's treating medical providers far outweighs Dr. Vilella's opinion. In Swenson v. Workforce Safety & Ins. Fund, 2007 ND 149, 738 N.W.2d 892 (2007). This Court stated:

> A claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury and is entitled to workers compensation benefits. See N.D.C.C. § 65-01-11; Barnes v. Workforce Safety & Ins., 2003 ND 141, ¶ 20, 668 N.W.2d 290. In order to carry this burden, a claimant must prove by a preponderance of the evidence that the medical condition for which he seeks benefits is causally related to a work injury. Elshaug v. Workforce Safety & Ins., 2003 ND 177, P11, 671 N.W.2d 784. To establish a causal connection, a claimant must demonstrate that his employment was a substantial contributing factor to the injury, not that employment was

> the sole cause of the injury. Myhre v. N.D. Workers Comp. Bureau, 2002 ND 186, P10, 653 N.W.2d 705.

Swenson, at 2007 ND 149, ¶ 24, 738 N.W.2d 901. When discussing weighing medical evidence, the Swenson Court went on:

> WSI has the responsibility to weigh the credibility of medical evidence and resolve conflicting medical opinions. Thompson v. Workforce Safety & Ins., 2006 ND 69, ¶ 11, 712 N.W.2d 309; Negaard-Cooley v. N.D. Workers Comp. Bureau, 2000 ND 122, ¶ 18, 611 N.W.2d 898. Confronted with a classic "battle of the experts," a factfinder may rely upon either party's expert witness. Elshaug, 2003 ND 177, ¶ 11, 671 N.W.2d 784. However, although WSI may resolve conflicts between medical opinions, the authority to reject medical evidence selectively does not permit WSI to pick and choose in an unreasoned manner. Id. WSI must consider the entire record, sufficiently address the evidence, and adequately explain its reasons for disregarding the evidence presented to it by the appellant. N.D.C.C. § 28-32-46(7); Barnes, 2003 ND 141, ¶ 20, 668 N.W.2d 290. Thus, particularly in cases where expert medical testimony is desirable if not essential to a determination of causation, WSI may not reject competent medical testimony without sufficiently addressing in its findings of fact its reasons for doing so which are adequately supported by the record. Geck v. N.D. Workers Comp. Bureau, 1998 ND 158, ¶ 13, 583 N.W.2d 621 (quotation omitted). Adequate reasons for rejecting appellant's evidence set forth in the agency's findings and supported by the record are necessary for us to determine whether or not the decision of the agency is to be affirmed under N.D.C.C. § 28-32-46(5), (6) and (7).

37 Swenson, at 2007 ND 149, ¶ 26, 738 N.W.2d 901. Weighing the medical evidence in the instant case overwhelmingly supports that Curran's claim for benefits should have been accepted. There is no reasonable argument otherwise.

38 Moreover, Dr. Vilella did not bother to review all of Curran's post injury medical records prior to his testimony at the formal hearing on Curran's claim. The testimony went as follows:

> Q. (MR. PHILLIPS CONTINUING) So prior to your testimony today, you haven't reviewed any of those subsequent records either?
> A. Sir, one more time.
> Q. Prior to your testimony today, you haven't reviewed any of these subsequent records either; is that fair?
> A. Subsequent to what date?
> Q. Subsequent to your Notepad entry of April 20th, 2007.
> A. The only notations that I reviewed subsequent to that date were Aker Chiropractic from May 9th, '07 and, again, on '07 there's some documentation from what appears to be a surgical procedure that was done in Europe. Dr. Michael Martire, pain management consultation, that was done on 1-15-08.
> Q. So those are the records that Mr. Gigler would have recently sent you after our last hearing; is that right?
> A. Yes.
> Q. And you never looked at any of the other records that were in the file?
> A. No.

WSI App., Vilella testimony, at 236-37.

39 There is no other doctor beyond WSI's Medical Director, Dr. Vilella, which opines differently than Curran's treating doctors. All of the doctors that gave their opinions in Curran's favor saw her, talked with her, treated her, and had her records while Dr. Vilella did not. Curran, even with any pre-existing degenerative disc disease, suffered a new and separate injury with a disc tear and herniation as a result of her work duties on February 13, 2007. Weighing all the medical evidence of record, Dr. Vilella's testimony is far outweighed by the opinions of Curran's treating medical providers.

40 WSI did not adequately explain in any logical manner the disregard of the many medical opinions contrary to its own Medical Director, Dr. Vilella. ALJ Anderson – and WSI accepted – Dr. Vilella's opinion over the at least 5 other doctors opining quite differently and in favor of Curran's application for benefits.

This is picking and choosing in an unreasonable manner by WSI. Even in its brief to this Court, WSI continues to selectively pick and choose statements in some of Curran's post injury treatment records in an unlawfully adversarial manner to argue in support of its position. This Court in Blanchard v. ND Workers Comp. Bureau, 1997 ND 118, ¶ 23, 565 N.W.2d 485 stated: "Because the Bureau acts as both a fact finder and an advocate in considering a worker's claim and in resolving conflicting evidence, we have repeatedly cautioned that the Bureau 'must not place itself in a full adversary position to the claimant'." Thus, the Court should order that WSI's Order be overturned, that Curran's claim be accepted, and WSI pay the appropriate benefits.

VI. Curran's Pre-existing Back Degeneration Was Substantially Accelerated or Substantially Worsened by the February 13, 2007, Bending Over at Work Incident and Her Claim Should Be Accepted on That Basis.

41 Curran had some pre-existing degeneration in her back. But, the question is: What effect does that pre-existing degeneration have on her claim? The answer is none. As argued, supra, Curran's injury was in fact a new and separate injury rather than associated with any pre-existing condition.

42 In the alternative, any pre-existing back degeneration was substantially accelerated or substantially worsened by Curran bending over and injuring her back at work. N.D.C.C. § 65-01-02(10)(b)(7) excludes from the definition of "compensable injury":

> Injuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other

> condition unless the employment substantially accelerates its progression or substantially worsens its severity.

43 WSI attempted to show that Curran's pre-existing mild degenerative condition in her back was legally relevant by the testimony of its Medical Director, Dr. Vilella. WSI App. 233-34. Dr. Vilella certainly used the exact language from the subdivision cited above in discussing Curran's pre-existing back condition and his opinion that the February 13, 2007, injury was no more than a "trigger." Id. But, Dr. Vilella's testimony does not meet a common sense test related to Curran's back injury and it certainly does not trounce all of the medical opinions to the contrary.

44 At the hearing, Dr. Vilella testified that everyone has degeneration of the spine over time and that 70% of the population even has disc disruption over time with no neurological symptoms. Id. at 235. Taking Dr. Vilella's opinion to its logical conclusion, WSI could deny virtually every claim for a back injury because everyone – and at a minimum according to Dr. Vilella, at least 70% of the population has a non-symptomatic disc disruption – and, according to Dr. Vilella's opinion already has a legally relevant "pre-existing disease" in his/her back which would allow WSI to deny almost all back claims. This is ludicrous.

45 Dr. Aker wrote in her letter to WSI (Curran Supp. App. at 3) and testified at the hearing that a disc tear and herniation following Curran's work injury dramatically – not just a little bit – changed the character of Curran's pre-existing minimal disc degenerative disease (WSI App. at 82-85). Dr. Vilella's intimation during his testimony that a tear or herniation did not really change Curran's underlying degenerative disc disease is simply not credible. WSI App. at 234-35.

Especially since he reviewed none of Curran's treatment prior to the work related injury.

46 It has long been the standard that WSI must take the claimant as he/she is found and that employment need not be the sole cause of the work injury. See, Satrom v. N.D. Workmen's Comp. Bureau, 328 N.W.2d 824 (N.D. 1982). Satrom is especially relevant to the instant matter as Satrom suffered a back injury and WSI denied Satrom's claim for benefits. Id. The Satrom case was very recently cited for the virtually the same standard, take the claimant as he/she is found, in Manske v. Workforce Safety and Insurance, 2008 ND 79, ¶ 12, 748 N.W.2d 394 in a case discussing smoking and asbestosis and a work injury claim for cancer.

47 Taking Dr. Vilella's opinion and testimony and denying Curran's claim thereby would allow WSI to disregard any requirement that WSI must take injured workers as they are found, egg shell claimant or not. Therefore, as WSI has no credible evidence, medically or otherwise, that Curran had any legally relevant pre-existing back condition to deny her claim for benefits, WSI's Order should be overturned and WSI should be ordered to accept Curran's claim and pay benefits.

VII. Curran's Mild Degenerative Disc Disease Which Predated Her Work Injury Was Caused in Substantial Part by Curran's Work Duties as a Nurse for 14 years Prior to Her Injury of February 13, 2007.

48 N.D.C.C. § 65-01-02 (10)(b)(7) excludes pre-existing conditions "…**UNLESS** the employment substantially accelerates its progression or substantially worsens its severity." (Emphasis added). On this point, whether Curran's work as a nurse substantially accelerated or substantially worsened her

degenerative disc disease, Dr. Vilella was very careful in giving his opinion. WSI App. at 239-40. Dr. Vilella admitted that "there was research" that supported that one's job duties could influence or impact on the amount of degeneration in that person's back. Id.

49 Indeed, Dr. Vilella testified he just "did not have enough information" regarding whether Curran's work duties had caused or were a substantial contributing factor to her prior disc degeneration. Id. at 240. Yet, the information was available if Dr. Vilella had asked or looked. Dr. Vilella without any information of Curran's prior records or her work duties, does not even have the proper foundation to give an admissible opinion related to Curran's pre-injury condition, her work duties, and how the work duties or her condition relates to her post work injury condition. In spite of Dr. Vilella's complete lack of available information, WSI offered his opinion and relied on his opinion in denying Curran's claim.

50 Other doctors did not have the concern of "not having enough information of Curran's duties" as they personally evaluated Curran and discussed directly with Curran about her work duties as a nurse over the years. These other doctors also actually physically saw Curran also reviewed her pre and post-injury records. Dr. Aker gave her opinion that most certainly Curran's 14 year history as a nurse would have been a substantial factor in the development of the disc degeneration that was present in Curran's back prior to her February 13, 2007, injury. WSI App. 76-78. Dr. Aker went on to opine that in any event the February 13, 2007, work injury created a new and separate injury. Id. Dr. Aker also testified that the February13,

2007, work injury was much more than a "trigger" that produced symptoms in Curran's back. Id. at 84-87.

51 So, both for the proposition as a new and separate injury or as a substantial aggravation or worsening the severity of any pre-existing degeneration, Curran's back injury would meet **either** definition of "compensable injury" under N.D.C.C. § 65-01-02(10) is fully supported by Dr. Aker's testimony. Further, Dr. Aker's testimony credibly refutes the testimony of Dr. Vilella as to WSI inappropriately dismissing Curran's claim based on a legally relevant pre-existing disease under subdivision (b)(7). But, if there was degeneration in Curran's back that was on the level of legally relevant, Dr. Aker's testimony that this degeneration was substantially contributed to by Curran's work duties and is thus work related in any event, is yet another basis for the Court to order that WSI's Order be overturned and WSI accept Curran's claim for benefits. WSI App. 86-87.

52 In addition, Dr. Aker is not alone in her opinions of Curran's pre-existing back condition being substantially caused or contributed to by her duties as a nurse as other doctors have also given those opinions. Dr. Ortman stated that any pre-existing low back instability was worsened by Curran's work duties as a nurse over the years. Curran Supp. App. at 7. Dr. Martire also opined that her work as a nurse for years "substantially contributed" to developing degeneration. Curran Supp. App. at 39. Thus, even if there was legally relevant disc degeneration present in Curran's back pre-injury, it is work-related degeneration and is simply progression of a work related disease. Again, WSI properly weighing the medical evidence of record and

applying the statute appropriately, would only have led to WSI accepting Curran's claim for benefits.

CONCLUSION

53 Curran suffered an injury to her back arising out of her employment while she was at work and performing work duties and her claim should have been accepted on that basis standing alone. WSI's Medical Director Dr. Vilella's testimony is not credible and far outweighed by the other medical evidence and medical opinions in the record. Curran suffered a new and separate injury to her back at work on February 13, 2007. Alternatively, any degenerative disc disease present in Curran's back prior to February 13, 2007, was substantially accelerated or substantially worsened by the work injury. Alternatively yet again, any degenerative disc disease was itself caused or substantially accelerated/worsened by Curran's employment as a nurse for 14 years and any degenerative condition present is itself a work related condition. Therefore, the Court should overturn WSI's decision, order that WSI accept Curran's claim, and that benefits be paid accordingly.

Respectfully submitted this 12th day of November, 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, Kari Curran and the author of the Brief of Appellee Kari Curran hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,075 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 12th day of November, 2009.

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