

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

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
NOVEMBER 30, 2009  
STATE OF NORTH DAKOTA

<b>Kari Curran,</b>	)	<b>Supreme Court Case No. 20090260</b>
	)	
<b>Appellee,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>North Dakota Workforce Safety and Insurance Fund,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>MeritCare Health Systems,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

+++++

**REPLY BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE  
SAFETY AND INSURANCE FUND**

+++++

**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**

+++++

**Douglas W. Gigler, ID # 04984  
Special Assistant Attorney General for  
Workforce Safety and Insurance  
1800 Radisson Tower  
201 North 5<sup>th</sup> Street  
P. O. Box 2626  
Fargo, ND 58108  
(701) 237-5544  
ATTORNEYS FOR APPELLANT**

**TABLE OF CONTENTS**

**Paragraph No.**

LAW AND ARGUMENT .....1

    I. The Rule of Liberal Construction Has No Application To This Case.....1

    II. Judge Herman Improperly Reweighed The Evidence And Submitted His  
        Judgment For That Of The Agency’s .....3

    III. If WSI’s Final Order Is Not Affirmed, This Matter Should Be Remanded Back  
        To WSI For A Determination Whether N.D.C.C. § 65-05-15 Would Have  
        Application.....9

CONCLUSION.....13

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>Paragraph No.</u></b>
<u>Aga v. Workforce Safety and Insurance,</u> 2006 ND 254, ¶ 12, 725 N.W.2d 185 .....	4
<u>Feist v. North Dakota Workers Compensation Bureau,</u> 1997 ND 177, 569 N.W.2d 1 .....	2
<u>Grace v. North Dakota Workmen’s Compensation Bureau,</u> 395 N.W.2d 576, 580 (N.D. 1986) .....	2
<u>Kiecker v. North Dakota Department of Transportation,</u> 2005 ND 23, ¶ 8, 691 N.W.2d 266 .....	4
<u>Linser v. Office of Attorney General,</u> 2003 ND 195, ¶ 11, 672 N.W.2d 643).....	4
<u>Makedonsky v. North Dakota Department of Human Services,</u> 2008 ND 49, 746 N.W.2d 185 .....	4
<u>Mikkelson v. N.D. Workers Comp. Bureau,</u> 2000 ND 67, ¶ 13, 609 N.W.2d 74 .....	10
<u>Saari v. North Dakota Workers Compensation Bureau,</u> 1999 ND 144, ¶ 16, 598 N.W.2d 174 .....	2
<u>Torstenson v. Moore,</u> 1997 ND 159, ¶ 8, 567 N.W.2d 622.....	4

**STATUTES AND REGULATIONS**

N.D.C.C. § 28-32-46.....	4
N.D.C.C. § 65-01-01.....	2
N.D.C.C. § 65-01-02(10)(b)(7).....	1
N.D.C.C. § 65-01-11.....	2
N.D.C.C. § 65-05-15 .....	9, 10, 15
1995 N.D. Sess. Law ch. 605 § 1.....	2

## LAW AND ARGUMENT

### **I. The Rule Of Liberal Construction Has No Application To This Case.**

1 Curran argues in her brief that WSI’s decision to deny her claim for benefits was based on an erroneous interpretation of N.D.C.C. § 65-01-02(10)(b)(7), and the interpretation of a statute is fully reviewable on appeal from an administrative decision. (Curran’s Brief at ¶ 16.) The case does not involve the interpretation of § 65-01-02(10)(b)(7) or any other statute. What this case does involve is ALJ Anderson’s evaluation of the evidence in the record as a whole. Curran is using the “statutory interpretation” argument to justify her urging of this Court to depart from its limited review and apply a rule of liberal construction to the evidence.

2 The flaw in Curran’s argument is the rule of liberal construction is a method for construing ambiguous statutes, but has no application to a review of the evidence in the record. See Grace v. North Dakota Workmen’s Compensation Bureau, 395 N.W.2d 576, 580 (N.D. 1986) (affirming that rule of “liberal construction” is not a substitute for proof). Furthermore, in 1995 the Legislature amended N.D.C.C. § 65-01-01 to read: “This title may not be construed liberally on behalf of any party to the action or claim.” 1995 N.D. Sess. Law ch. 605 § 1; Saari v. North Dakota Workers Compensation Bureau, 1999 ND 144, ¶ 16, 598 N.W.2d 174. Thus, there is no basis for modifying this Court’s standard of review on appeal as it relates to WSI/ALJ Anderson’s decision to deny Curran’s claim for benefits. See Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177, ¶ 8, 569 N.W.2d 1 (stating whether or not Court construes a workers’ compensation statute liberally, under N.D.C.C. § 65-01-11, “a claimant

has the burden of proving he or she is entitled to participate in the workers compensation fund.”).

**II. Judge Herman Improperly Reweighed The Evidence And Substituted His Judgment for That Of The Agency’s.**

3 Curran also argues that Judge Herman did a well-reasoned and thorough analysis of the facts and law and this decision should be given “due respect.” In reality, Judge Herman overturned WSI/ALJ Anderson’s decision without any analysis and, more importantly, without any regard for a district court’s limited review of administrative decisions. Instead of evaluating whether a reasoning mind could have decided that WSI’s findings were proven by the weight of the evidence from the entire record, Judge Herman simply reweighed the evidence and substituted the District Court’s judgment for that of the agency, which heard all the evidence.

4 Under N.D.C.C. § 28-32-46, this Court has reiterated on numerous occasions, not only in appeals from decisions of WSI but other administrative agencies as well, that the reviewing court does not make independent findings of fact or substitute its judgment for that of the agency. Aga v. Workforce Safety and Insurance, 2006 ND 254, ¶ 12, 725 N.W.2d 185; Kiecker v. North Dakota Department of Transportation, 2005 ND 23, ¶ 8, 691 N.W.2d 266; Torstenson v. Moore, 1997 ND 159, ¶ 8, 567 N.W.2d 622. In Makedonsky v. North Dakota Department of Human Services, 2008 ND 49, 746 N.W.2d 185, this Court commented that the reweighing of evidence of an agency implicates concerns of separation of powers, stating: “Recognizing the constitutional doctrine of separation of powers, our standard of review in cases such as this does not allow us to make independent findings of fact or to substitute our judgment for that of

an agency fact finder.” *Id.* at ¶ 16 (quoting Linser v. Office of Attorney General, 2003 ND 195, ¶ 11, 672 N.W.2d 643). Judge Herman’s decision reversing WSI Final Order does violate that constitutional doctrine of separation of powers and therefore should be reversed.

5           Curran in fact also invites this Court to abandon its standard of review and reweigh the medical evidence. She states, “[w]eighing 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.” (Appellee’s brief at ¶ 36) She states again that, “[w]eighing 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.” (Appellee’s brief at ¶ 37)

6           Curran, however, fails to mention that ALJ Anderson provided specific reasons why he did not find the opinions of her attending physicians and chiropractors persuasive. ALJ Anderson reviewed Curran’s medical records before and after February 13, 2007, and noted her complaints were substantially similar. (C.R. 339) Also, the MRI of Curran’s low back performed in March of 2007, showed a small annular tear and disc degeneration at L5-S1, which was the same area where Dr. Solien had reproduced tenderness and pain in November of 2006. (C.R. 155; C.R. 339)

7           ALJ Anderson also made specific findings regarding each of Curran’s medical providers and why he did not find them more persuasive than he did the opinion of Dr. Vilella. ALJ Anderson noted in his decision the numerous contradictions and inconsistencies contained in the opinions supplied by Curran’s

medical providers. Of Curran's medical providers, only JaNyne Aker, DC, testified at the hearing. ALJ Anderson found that Dr. Aker placed unwarranted significance to Curran's negative leg-raising tests prior to February 13, 2007, because she had negative tests even after an MRI revealed a mild disc herniation. (App. 272) He also found that Dr. Aker's opinion that the annular tear and disc herniation were "new injures" was based primarily on Curran's subjective complaints as opposed to objective medical findings.

8           On the other hand, ALJ Anderson found Dr. Vilella's elaboration and analysis of his opinions on the issue of causation to be more credible. What is important for purposes of this appeal is not that Curran presented more medical opinions in number than WSI. Rather, the question is whether ALJ Anderson adequately explained why he disregarded the medical opinions favorable to Curran, which he did. Contrary to Curran's assertions, WSI did not pick and choose medical evidence in an unreasonable manner to deny her claim for benefits.

**III. If WSI's Final Order Is Not Affirmed, This Matter Should Be Remanded Back To WSI for a Determination Whether N.D.C.C. § 65-05-15 Would Have Application.**

9           Curran in her brief offers an "alternative" theory wherein she admits to having pre-existing degenerative disk disease in her lumbar spine, but claims that condition was substantially accelerated or substantially worsened when she bent over to pick up a band aid on February 13, 2007. (Appellee's brief at ¶ 42) ALJ Anderson rejected that "alternative" argument when he accepted Dr. Vilella's opinion that the incident on February 13, 2007, acted only to trigger symptoms in Curran's degenerative disc disease. However, if this Court were to accept that

Curran's pre-existing condition was substantially aggravated by a work injury on February 13, 2007, then this matter should be remanded back to WSI for a determination whether N.D.C.C. § 65-05-15 would be applicable.

10           Section 65-05-15 applies when a “new” work injury combines with and aggravates a pre-existing condition. Under the statute, “an aggravation award is appropriate if the prior injury, disease or other condition is known in advance of a connected work injury and has caused previous work restriction or interference with physical function, and the work injury combines with the pre-existing condition to substantially accelerate the progression of, or substantially worsen the severity of, the preexisting condition.” Mikkelson v. N.D. Workers Comp. Bureau, 2000 ND 67, ¶ 13, 609 N.W.2d 74.

11           Here, Curran sought medical treatment following a motor vehicle accident on February 12, 2004. When she saw Dr. Solien on February 16, 2004, she described “frequent aching and burning into the low back and right posterior thigh.” She also described prominent low back pain and reported difficulty with prolonged standing or walking. (C.R. 76) When she saw Dr. Solien on February 20, 2004, she continued to have difficulties with sitting, prolonged standing, carrying and lifting. (C.R. 80) On May 17, 2004, Curran reported to Dr. Solien that her low back pain became “insidiously more prominent last Friday, waking with pain.” (C.R. 92) As late as November of 2006, Curran was complaining to her medical providers of sharp pain with bending and twisting activities and a catching sensation in the right side low back region. (C.R. 100) She also continued to have difficulty with bending, prolonged sitting and sit to stand transitions. (C.R. 102)



**CERTIFICATE OF COMPLIANCE**

The undersigned, as the attorney representing Appellee, Workforce Safety and Insurance, and the author of the Reply Brief of Appellee 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 1,546 words from the portion of the brief entitled "Law and Argument" 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 30<sup>th</sup> day of November, 2009.

/s/ Douglas W. Gigler

Douglas W. Gigler (ND ID # 04984)  
Special Assistant Attorney General for  
Workforce Safety and Insurance  
1800 Radisson Tower  
201 North 5<sup>th</sup> Street  
P. O. Box 2626  
Fargo, ND 58108  
(701) 237-55444