

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

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OCTOBER 14, 2009
STATE OF NORTH DAKOTA

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

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

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**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 CASE

1 Claimant Kari Curran (“Curran”) submitted a claim for benefits with WSI alleging a work injury on February 13, 2007, to her mid to right low back, while employed by MeritCare Health System (“MeritCare”), Fargo, ND. (App.¹ 28) On April 23, 2007, WSI issued an informal notice denying Curran’s claim for benefits. (App. 29) WSI denied Curran’s claim because of a prior history of non-work related low back problems and an absence of medical evidence establishing a new injury to her low back suffered during the course of her employment with MeritCare. (Id.)

2 Curran requested reconsideration from the informal denial. (App. 31) WSI issued its formal order dismissing the claim on June 18, 2007. (App. 36) Curran requested a formal evidentiary hearing on October 4, 2007. (App. 45)

3 The formal evidentiary hearing was held on March 18, 2008,² and continued until April 29, 2008,³ to accommodate the testimony of WSI’s medical director. The issue to be resolved was whether Curran suffered a compensable injury to her lumbar spine on February 13, 2007. (App. 49) On June 12, 2008, Administrative Law Judge Norman Anderson (“ALJ Anderson”) issued his Recommended Findings of Fact, Conclusions of Law and Order affirming WSI’s formal dismissal the claim. (App, 252-262) On June 19, 2008, WSI adopted ALJ Anderson’s recommended decision as its Final Order. (App. 265)

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

² “App.” pgs. 53-60 is an excerpt of the transcript from the administrative hearing held on March 18, 2008. “App.” pgs. 61-227 is a second excerpt of the transcript from the administrative hearing held on March 18, 2008.

³ “App.” pgs. 228-241 is the transcript of the continued administrative hearing held on April 29, 2008, and consists of the testimony of Dr. Luis Vilella, WSI’s medical director.

4 On July 16, 2008, Curran filed a Notice of Appeal and Specification of Error with the District Court, Cass County, North Dakota. (App. 278) On July 28, 2009, the District Court, the Honorable Douglas Herman, issued a Memorandum Opinion and Order reversing WSI's Final Order of June 19, 2008. (App. 284) Order for Judgment was entered on August 11, 2009, (App. 290), and Judgment was entered on August 13, 2009. (App. 291) Notice of Entry of Judgment was served on August 17, 2009. (App. 292) On September 3, 2009,

STATEMENT OF FACTS

5 Kari Curran ("Curran") submitted a claim for benefits with WSI in connection with a claimed injury on February 13, 2007, to her mid to right low back. At that time, Curran was working as a nurse with MeritCare Health System in Fargo, ND. She claimed that she experienced sudden and intense lower back pain while bending over to pick up a band aid from the floor. (C.R.⁴ 1)

6 Curran saw Dr. Robert Martino on February 14, 2007. She told Dr. Martino that she injured her right lower back while picking up something at work the previous day. She reported a pain level of 6/10. On examination, Curran had pain and tenderness with palpation over the right lower aspect of the quadratus lumborum. She had a negative straight leg-raising bilaterally. Dr. Martino's assessment was lumbar pain, and he recommended a course of physical therapy. He released Curran to return to work but restricted her lifting and pushing and/or pulling to 10 lbs. (C.R. 104, 106)

7 After seeing Dr. Martino, Curran reported to physical therapy, where she reported as her chief complaint "low back pain," exacerbated by forward bending

⁴ "C.R." refers to "Certificate of Record, filed with the District Court on August 14, 2008, followed by the bate stamp page number of the referenced page number of the exhibit.

and transitional movement from standing to sitting. She also denied any prior history of injuries or impairments to the same area. (C.R. 107)

8 Curran returned to Dr. Martino for a follow-up on February 16, 2007. She reported her back pain was down to 3/10. She continued to have a negative straight leg-raising bilaterally. Dr. Martino's assessment was lumbar strain, but he noted Curran was continuing to improve. (C.R. 114) Dr. Martino indicated in his note from February 22, 2007, that Curran's pain was down to 2/10, and she had been doing her regular work activities without difficulty. She still had some slight pain but no new symptoms and no radiation of symptoms. (C.R. 120) Dr. Martino released Curran to her regular duties without restrictions following the appointment. (C.R. 122)

9 Curran returned to Dr. Martino on February 23, 2007, and reported that her pain had been improving until that day when she began experiencing right leg pain with increased aching and burning. Curran requested an emergent MRI, and Dr. Martino referred her to the emergency room where she was seen by Dr. Paul Bilstad. (C.R. 126) Dr. Bilstad diagnosed Curran with acute back pain with questionable radiculopathy. He did not believe that Curran required an emergent MRI. He noted that Curran's symptoms "could be an early disk[.]" (C.R. 131-32)

10 During her follow-up with Dr. Martino on March 3, 2007, Curran reported that her low back pain was continuing to improve and rated the pain at 2/10. (C.R. 149) The MRI of Curran's lumbar spine was performed on March 11, 2007, and showed a mild central and right posterior herniation of the L5-S1 disc, but without any compromise of the nerve root. The MRI also showed mild disc

degeneration at L5-S1 and what appeared to be a small annular tear at the same location. (C.R. 155)

11 Dr. Charles Koski at MeritCare Occupational Health saw Curran on March 13, 2007. Sensory evaluations were normal, as was the muscle strength testing in the lower extremities. Curran's deep tendon reflexes were normal, and straight leg-raising bilaterally was negative. Dr. Koski also reviewed Curran's MRI. He saw a small annular tear in the L5-S1 disk, which did not produce any significant compromise of the nerve roots. He saw no herniation of the nucleus pulposus at the point of the annular tear. Dr. Koski diagnosed Curran with radiculitis, which he believed was most likely related to what had happened on February 13, 2007. Dr. Koski did not believe that Curran was a candidate for surgery but recommended further conservative therapy. (C.R. 160)

12 Curran returned to Dr. Koski on March 27, 2007. He reported that Curran had been having problems with "a left sciatica," but she had no neurological deficits. She denied any sciatic-like pain on the right side. Dr. Koski noted that WSI was looking into the possible relationship between her current symptoms and a 2004 motor vehicle accident. Based on the history Curran provided about the 2004 motor vehicle accident, Dr. Koski concluded it was most likely a completely separate event from her current symptoms. (C.R. 170) He believed Curran's back pain and radicular symptoms were "reasonably related" to the annular tear noted on the MRI. (C.R. 171)

13 Curran saw Dr. Martino on April 2, 2007, and reported feeling severe back pain, which she rated at 9/10. She also reported that activities at work "caused

her back to worsen and she felt something distinctly change in her back.” She requested a second MRI and a consultation with neurosurgery. (C.R. 176-77)

14 Curran returned to Dr. Koski on April 10, 2007. Following his examination, Dr. Koski wrote that “[a]t this time, it appears that Miss Curran’s pain is primarily axial in nature. This would suggest that this is primarily diskogenic pain and that the radicular component is not a significant aspect at this point and [sic] time.” (C.R. 183)

15 WSI had its medical director, Dr. Luis Vilella, review Curran’s available medical records. Based on his review of the records, it was Dr. Vilella’s opinion that the disc degeneration of the lumbar spine noted on the MRI pre-existed the work incident of February 13, 2007. Furthermore, the degradation of the disc lead to the annular tear which produced the pain symptoms that Curran was experiencing. Dr. Vilella concluded that, at most, the work incident of February 13, 2007, would have acted to trigger the symptoms but did not substantially accelerate or worsen the degenerative process. (C.R. 9-11)

16 On April 23, 2007, WSI denied Curran’s claim on the basis of a lack of objective medical evidence supporting a new injury to her low back. The Notice of Decision Denying Benefits (“NOD”) indicated that Curran had a history of back problems dating back to the motor vehicle accident in February of 2004, and she had been treating with a chiropractor for sharp low back pain as recently as November of 2006. (C.R. 12) The NOD also relied on Dr. Vilella’s opinion following his review of Curran’s medical records. (Id.)

17 Curran saw Dr. Koski again on May 1, 2007. He noted that Curran was having problems with back pain and peroneal symptoms. Dr. Koski advised

Curran that he could not relate the peroneal symptoms to whatever happened on February 13, 2007. He wrote that, “[i]n regard to her 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 chronic degenerative changes [sic] but rather a [sic] phenomena.” (C.R. 201)

18 In conjunction with her appointment with Dr. Koski, Curran also saw Dr. Robert Johnson for a neurosurgical consultation. Dr. Johnson reviewed the MRI and noted the degenerative changes at L5-S1. He referenced the annular tear, but noted there was no evidence of mass effect, canal stenosis or nerve root compromise. He stated that he was not sure what was causing Curran’s symptoms. (C.R. 205-06)

19 Curran returned to Dr. Koski on May 5, 2007, to discuss her status. She and her husband were concerned about Dr. Koski’s impressions in regard to her symptoms. Dr. Koski reported history provided by Curran that her symptoms worsened on March 15, 2007, which was a busy day at work. When she sat down to do her charting, she had pain in the sacral area, and she could not sit, stand or lie down. She continued to be in pain the next morning and could not complete her shift. Dr. Koski advised Curran that some of her symptoms could not be related to what had happened on February 13, 2007. He specifically advised Curran that it was highly unlikely that her elevated blood pressure was related to a work injury. (C.R. 219-20)

20 On May 9, 2007, JaNyne Aker, D.C., who began treating Curran after February 13, 2007, wrote WSI in support of Curran’s claim for benefits. She

conceded that the degenerative disc predated February 13, 2007. She also stated that, although the disc herniation and annular tear were recent, their “exact date” could not be pinpointed. It was her opinion that whatever happened on February 13, 2007, substantially worsened the severity of the pre-existing degenerative processes in Curran’s lumbar spine. She came to that conclusion by comparing the clinical observations before and after February 13, 2007. She emphasized that all Curran’s disc herniation tests (Straight Leg Raise and Slump tests) were negative prior to the work incident but positive after it. (C.R. 64-65)

21 On May 11, 2007, Curran returned to Dr. Martino for a follow-up. Dr. Martino reviewed her medical history, including her complaints of persistent perineum numbness and tingling. He noted there was a repeat MRI in April of 2007 that showed “a loss of L2 signal with an L5-S1 disk consistent with degenerative change.” (C.R. 224) Dr. Martino referred Curran to Dr. Manuel Pinto for further evaluation. (C.R. 225)

22 On September 7, 2007, Thomas Solien, D.C., provided a letter to WSI in support of Curran’s claim for benefits. He described treating Curran for cervical, upper back, shoulder, thigh pain and low back pain following a motor vehicle accident on February 14, 2004. He also described providing chiropractic treatment for low back symptoms in March of 2005, and again on November 2, 2006 for right-sided low back pain, particularly with bending and twisting activities. (C.R. 245) Dr. Solien acknowledged that Curran had pre-existing problems with her lumbar spine, but it was his opinion the incident on February 13, 2007, resulted in the annular tear and disc herniation that produced the on-going symptoms. (C.R. 46)

23 Curran saw Dr. Majid Ghazi for a pain consultation on September 23, 2007. Dr. Ghazi observed that Curran had neuropathic pain with a radicular pattern. He related that “[h]er pain might be the result of disk disease at the L5-S1 level. (C.R. 247)

24 On September 25, 2007, Curran saw PA-C Teresa Reinholz for a neurological consultation. PA Reinholz noted that Curran had seen Dr. Pinto, who indicated she was “nonsurgical.” Dr. Pinto did not think the disk at L5-S1 was the source of Curran’s symptoms. (C.R. 255-56) PA Reinholz reported that she reviewed the MRI with Curran and her husband and advised them that “we do not know where her pain is coming from and certainly the multiple providers that she has seen in the past probably have that feeling.” She suspected a component of facet pain and scheduled Curran for a L5-S1 intrarticular facet block. (C.R. 257)

25 Curran underwent a discogram of her lumbar spine on November 15, 2007. The discogram indicates degenerative disc disease at L5-S1 with an annular tear and prompt posterior leak. (C.R. 288) An “upright MRI” of Curran’s lumbar spine was performed on January 25, 2008, and showed a desiccated disc at L5-S1 with a mild annular bulge, mild epidural space compromise and mild degenerative facet changes. (C.R. 284)

26 Curran saw Dr. Michael Martire on January 15, 2008, for a pain management consultation at the request of Dr. Martino. Dr. Martire performed an EMG which showed a “chronic right S1 radiculopathy without any new active denervation. No other significant abnormalities noted.” (C.R. 266) Dr. Martire opined that the radiculopathy was directly related to February 13, 2007, incident.

He wrote that, “[a]t work on the day where she bent over quickly, this caused an acute lumbar radiculopathy due to the chemical changes that occur with acute disc protrusion.” Dr. Martire added that Curran’s many years working as a nurse was a significant contributing factor to the degeneration of her disc at the L5-S1. (C.R. 267)

27 On Feb 22, 2008, Curran underwent disc replacement surgery in Germany. The preoperative diagnosis was “severe osteochondrosis (DDD) L5/S1 with local lumbar and pseudo radicular pain syndrome S1 right>left side.” The report also stated “[t]here was a clear indication for surgical intervention of the advanced DDD (severe progressing osteochondrosis) causing the patient’s chronic progression of lumbar syndrome (with pseudo-radicular pain syndrome related to L5/S1).” (C.R. 272)

28 As noted previously, WSI obtained Curran’s prior treatment records for her lumbar spine. On February 12, 2004, she was involved in a motor vehicle accident. She presented to the emergency room complaining of neck pain and lumbar back pain with a mild headache. The attending physician reported mild tenderness to palpation of the paraspinal muscles of the lumbar region. The diagnostic impressions were neck strain and back strain. (C.R. 74-75)

29 Curran saw Dr. Solien for low back and right posterior thigh pain on February 16, 2004. Curran described “frequent aching and burning into the low back and right posterior thigh, cervical and right upper back and shoulder region following a motor vehicle accident[.]” She described worsening symptoms with general activities and noted “more prominent low back and cervical, upper back

pain in these last 2 hours.” She also reported difficulty with prolonged standing and walking. (C.R. 76)

30 Curran returned on Dr. Solien on February 20, 2004, with continued complaints of cervical and bilateral low back pain. She reported a 30% improvement with her symptoms, but she continued to have difficulties with sitting, prolonged standing, carrying and lifting. Jackson compression and Spurling tests were positive on the right for local lumbosacral and cervical pain. The diagnosis was cervicalgia and mechanical low back pain. (C.R. 80)

31 Curran returned to Dr. Solien for further treatment on February 25, 2004. Her complaints continued to be cervical and low back pain. She reported her pain level as 2/10. (C.R. 82) She returned to Dr. Solien on March 5, 2004. At that time, she reported cervical and right-side predominant lumbosacral pain at a level of 3/10. (C.R. 84)

32 On March 17, 2004, Curran saw Dr. Solien again complaining about cervical and low back pain. She reported that she continued to have difficulties in her low back with some moderate lifting activities. She described her pain level as 5/10. Dr. Solien’s diagnosis was lumbosacral sprain/strain from the motor vehicle accident. (C.R. 86) Curran saw Dr. Solien on March 24, 2004, for cervical and right side predominant lumbosacral pain. She reported having more low back pain with prolonged sitting. (C.R. 88)

33 On April 1, 2004, Curran returned to Dr. Solien. She reported an approximately 70% improvement in her symptoms with a pain level at 2/10. (C.R. 90) Curran saw Dr. Solien again on May 17, 2004. She reported that her

low back pain because “insidiously more prominent last Friday waking with pain.” (C.R. 92)

34 Curran’s next appointment with Dr. Solien was March 8, 2005. On that date, Curran’s primary complaint was left-sided cervical and upper back pain with dysesthesia into the left upper extremity. (C.R. 94) When she returned on March 17, 2005, Curran was again complaining of dull and achy mid-lumbar pain. Dr. Solien was able to produce tenderness over the L3, L4 and L5 spinous process. (C.R. 98)

35 On November 2, 2006, Curran returned to Dr. Solien complaining of right side low back pain at a level of 4/10. She described ongoing pain from a motorcycle accident that occurred in June of 2005. She reported sharp pain with bending and twisting activities and a catching sensation in the right side low back region. The Yeoman test was positive for low back pain. (C.R. 100)

36 On November 7, 2006, Curran saw Dr. Solien and reported no improvement with her low back pain since her last visit. She continued to have difficulty with bending, prolonged sitting and sit to stand transitions. Upon examination, Dr. Solien was able to produce pain at the L5 level. His diagnosis was mechanical low back pain. (C.R. 102)

STATEMENT OF ISSUES

37 Whether WSI could reasonable conclude that Curran failed to establish a compensable injury to her low back on February 13, 2007?

LAW AND ARGUMENT

I. Burden of Proof and Scope of Review.

38 Curran bears the burden of establishing her right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129 ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. This burden requires a proof by a preponderance of the evidence that Curran is entitled to benefits available from the Fund. Reynolds v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 247 (N.D. 1982); Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730 (N.D. Ct. App. 1988). To establish a causal connection, Curran must demonstrate that her employment was a substantial contributing factor to the injury, but she does not have to show that the employment was the sole cause of the injury. Myhre v. N.D. Workers Comp. Bur., 2002 ND 186 ¶ 24, 653 N.W.2d 705.

39 This Court exercises a limited review in appeals of WSI decisions. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d at 789. On appeal, this Court reviews the decision of WSI, not the District Court. Zander v. Workforce Safety and Insurance, 2003 ND 193 ¶ 6, 672 N.W.2d 668. 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 (N.D. 1997).

40 When reviewing the decision, the Court should exercise restraint in determining whether WSI's decision is supported by a preponderance of the evidence. Elshaug, supra, 2003 ND 177 ¶ 12, 671 N.W.2d at 790. The Court should not reweigh the evidence, make independent findings of fact or substitute

its judgment for that of the agency. Rooks v. North Dakota Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993); Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436 (N.D. 1988); Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court need determine “only whether or not a reasoning mind could have decided the agency’s findings were proven by the weight of the evidence from the entire record.” Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290.

41 In case of conflicting medical opinions, a factfinder may rely upon either party’s expert witness. Elshaug, supra, 2003 ND 177 ¶ 11, 671 N.W.2d 892; Swenson v. Workforce Safety and Insurance, 2007 ND 149 ¶ 26, 738 N.W.2d 892. However, WSI must adequately explain its reason for disregarding evidence favorable to the claimant in denying benefits. Hein v. North Dakota Workers Compensation Bureau, 1999 ND 200 ¶ 14, 601 N.W.2d 576, 578. The explanation for rejecting medical evidence favorable to the claimant may consist of the analysis of why the agency accepted contrary evidence. Id. at ¶ 15.

42 In evaluating the medical evidence and opinions, this Court has repeatedly refused to establish a presumption that a treating physician opinion is entitled to greater weight. Swenson, 2007 ND 149 ¶ 27, 738 N.W.2d 892; Symington v. North Dakota Workers Compensation, 545 N.W.2d 806, 809-10 (N.D. 1996); Myhre v. North Dakota Workers Compensation Bureau, 2002 ND 186 ¶ 24, 653 N.W.2d 705; Boger v. North Dakota Workers Compensation Bureau, 1999 ND 192 ¶ 16, 600 N.W.2d 877. Rather, it is WSI’s responsibility to weigh the conflicting medical evidence and adequately explain any reasons for rejecting

such evidence favorable to the claimant. Symington, 545 N.W.2d at 809-10; Thompson v. Workforce Safety and Insurance, 2006 ND 69 ¶ 11, 712 N.W.2d 309. In reviewing WSI’s resolution of conflicting medical evidence, this Court must not make independent findings or substitute its judgment for that of WSI. See id.

II. WSI/ALJ Anderson Could Reasonably Determine That Curran Failed to Prove She Suffered a Compensable Work Injury to Her Lumbar Spine on February 13, 2007.

43 Under North Dakota Workers Compensation law, a “[c]ompensable injury” is defined as “an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.” N.D.C.C. § 65-01-02(10). However, the term “compensable injury” does not include “[i]njuries attributable to preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progress or substantially worsens its severity.” N.D.C.C. § 65-01-02(10)(b)(7).

44 ALJ Anderson found that the incident at work on February 13, 2007, acted to trigger symptoms in her preexisting degenerative disc disease. The ALJ then went on to find that “[t]he greater weight of the evidence, however, does not show that her work injury substantially accelerated or substantially worsened her preexisting injury.” (App. 274) The District Court concluded those findings were not supported by the preponderance of the evidence, which warranted reversal of WSI’s Final Order. The District Court stated that “Dr. Solien’s testimony, largely supported by Dr. Koski and by chiropractors Aker and Ortman[,] clearly and

overwhelmingly demonstrates a workplace injury on February 13, 2007. This is all [Curran] needs to show in order to be entitled to benefits.” (App. 288) It is apparent the District Court did not follow the proper standard of review and instead reweighed the evidence.

45 In reaching his decision, ALJ Anderson indicated he compared Curran’s treatment records prior to the work injury of February 13, 2007, with her treatment records after the injury. He also evaluated the competing expert medical opinions, “which necessarily includes consideration of the normal progression of Ms. Curran’s underlying back condition as well as the cause of her injury.” (App. 271)

46 ALJ Anderson noted that the comparison of Curran’s treatment records before and after February 13, 2007, by themselves “clearly demonstrate that her work injury triggered symptoms of her preexisting back condition but did not substantially aggravate it.” (App. 271) According to the records, Curran complained to Dr. Solien of frequent aching and burning in her low back and right thigh following a motor vehicle accident in 2004. She noted that the activities that aggravated her back pain were sitting, sitting to standing, prolonged standing, bending, turning, carrying and lifting. (C.R. 76-79; 80-81; 82-83; 84-85; 86-87; 88-89; 90-91; 92-93) Curran was still complaining of lumbosacral pain in March of 2005, with documented tenderness over the L3, L4 and L5 spinous process and a positive Yoeman’s test for low back pain. (C.R. 98-99)

47 Curran returned to Dr. Solien on November 2, 2006, complaining of right-side low back pain. She noted sharp pain with bending and twisting; she also described a catching sensation in her right-side low back region in “sit-to-stand

transition.” A Yoeman’s test for low back pain was positive. (C.R. 100-101) When she returned to Dr. Solien on November 7, 2006, Curran reported no improvement in her low back pain. She described continuing difficulty with prolonged sitting and sit-to-stand transitions. Dr. Solien noted tenderness over the L5 spinous process and observed that the same level was positive for pain reproduction. (C.R. 102-103)

48 ALJ Anderson found that Curran, following the work incident in February of 2007, was complaining of right leg pain with increased aching and burning, symptoms very similar to those she reported to Dr. Solien following the motor vehicle accident in February of 2004. (C.R. 339) Furthermore, in February of 2007, Curran reported that sitting, sitting to standing, prolonged standing, bending, turning, carrying and lifting were activities that aggravated her back pain. (Id.) These symptoms were nearly identical to those she was complaining of back in February of 2004. 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) As stated by ALJ Anderson:

One has to look no further than Dr. Solien’s November 2006 treatment records to find a similar complaint from Ms. Curran: sharp pain with bending and twisting activities. It is also conspicuous that Dr. Solien detected tenderness and pain reproduction in the L5 area. These warning signs were present three months before Ms. Curran’s work injury. And while at the time they would not be sufficient signals to predict with certainty that Ms. Curran’s had experienced or soon would experience a mild disc herniation at L5-S1, in looking back from the time following Ms. Curran’s work injury, they are surely significant details in indicating a gradually worsening back condition and possibly a mild disc herniation.

(App. 273)

49 In addition to the medical records, ALJ Anderson also noted in his decision the numerous contradictions and inconsistencies contained in the opinions supplied by Curran's medical providers. Dr. Thomas Solien provided a letter to WSI on September 7, 2007, stating that, while he recognizes that Curran had preexisting back pain, the act of bending down to pick up the band aid resulted in the annular tear and "a small disk protrusion[.]" (C.R. 245-46) ALJ Anderson observed that, "[e]ven if Dr. Solien were correct in his belief, it does not settle the matter in Ms. Curran's favor because the further question of whether Ms. Curran's herniation and annular tear are more related to her work injury or longstanding degenerative back condition is not addressed by Dr. Solien." (App. 273) It is worth noting that Dr. Solien's opinion is void of any reference to any specific diagnostic tests or other of Curran's treatment records that would support his conclusion. In fact, his opinion appears to be based on his past experience with patients having workers compensation claims, rather than objective medical findings establishing the causal connection between Curran's employment and her claimed symptoms.

50 Furthermore, Dr. Solien's reference in his letter to a "small disk protrusion" of Curran's L5-S1 disk is contradicted by the MRI performed on March 11, 2007. It is also contrary to Dr. Koski's note from March 13, 2007, where he reported "[t]here is some loss of hydration of the lumbosacral disk. There is a small annular tear in the posterolateral portion of the right L5-S1 disk. This does not produce any significant compromise of the L5 or S1 nerve roots. There does not appear to be any herniation of the nucleus pulposus." (C.R. 160)

51 Chiropractor JaNyne Aker also provided a letter opinion to WSI, dated May 9, 2007. (C.R. 62) In her letter, Dr. Aker, like Dr. Solien, concedes that Curran had preexisting degenerative disc disease prior to February 13, 2007, but Dr. Aker could "tell" that the annular tear and herniation were "recent." When she testified at the hearing, however, she admitted there was no way to age the annular tear, a fact her colleague, Dr. Jeff Rich, DC, advised her of in his letter to her on May 15, 2007. (C.R. 61) Her opinion that the annular tear and disc herniation are "new injuries" is based primarily on Curran's subjective complaints.

52 As objective findings that the work incident produced a "new injury," Dr. Aker claimed that, prior to February 13, 2007, disc herniation tests (Straight Leg Raise and Slump Test) performed were negative, whereas those same tests performed after the work incident were positive. (C.R. 64) According to Dr. Aker, the "positive" straight leg raise test after February 13, 2007, confirmed the annular tear/herniation occurred after that date. Dr. Aker, however, apparently did not look past Curran's own records on this issue. On February 14, 2007, the day after the work incident, when Curran saw Dr. Martino, she had a "negative" straight leg raising test. (C.R. 104) She also had negative straight leg raising tests at follow up appointments on February 16, 2007 (Id. at 114), February 22, 2007 (Id. at 120), February 23, 2007 (Id. at 126) and March 7, 2007 (Id. at 149). In fact, Curran did not have a "positive" straight leg raise test until she saw Dr. Akre on March 15, 2007. (Id. at 41-43)

53 ALJ Anderson found that Dr. Aker attached "unwarranted" significance to Curran's negative leg-raising tests prior to February 13, 2007. He explained the

negative tests gave little support to Dr. Akers opinion because Curran had negative tests even after an MRI revealed a mild disc herniation. (App. 272) ALJ Anderson also noted that Dr. Aker admitted that Curran had preexisting degenerative disc disease. She also admitted that degenerative disc disease can lead to an annular tear, and an annular tear can cause low back pain. (App. 268)

54 Dr. Aker also claimed that the work incident substantially worsened the severity of Curran's preexisting degenerative disc disease at L5-S1. (C.R. 64-65) The basis for that opinion appears to be limited to Curran's history that she never had problems with radiating pain prior to the February 13, 2007, work incident. The record contains no objective finding that would explain Curran's complaints of pain radiating from her back into her lower extremities. If there were a herniation at L5-S1, it was not compromising any nerve root, nor was it causing any central canal stenosis. Even Dr. Koski noted there was no "herniation of the nucleus pulposis" of Curran's L5-S1 disc. (C.R. 160) Furthermore, Dr. Vilella testified the only evidence of radiculopathy was the subjective pain complaints of Curran. (App. 232-33 at pgs. 20-21).

55 A third chiropractor, Ryan Ortman, DC, provided a "to whom it may concern" letter on September 13, 2007. (C.R. 70) Dr. Ortman apparently saw Curran one time on June 18, 2007, however, the actual record from that date was never made available to WSI. ALJ Anderson found that Dr. Ortman's that Curran suffered an "acute" injury on February 13, 2007, that substantially accelerated a "preexisting instability" in the lumbar spine is based entirely on the subjective history and information provided by Curran, as opposed to any objective medical findings, and therefore had little evidentiary value.

56 Dr. Martire also offered his opinion that the act of bending over to pick up a band aid resulted in an “acute disc protrusion” and “acute lumbar radiculopathy[.]” (C.R. 267) However, none of the three MRIs of Curran’s lumbar spine performed after February 13, 2007, shows anything close to what Dr. Martire described. In fact, the MRI taken on March 11, 2007, specifically states there was “[n]o focal root compression, major disc herniations or central canal stenosis.” (C.R. 155) Furthermore, Dr. Koski, in his review of Curran’s MRI of March 11, 2007, noted the “small annular tear” did not produce any significant compromise of the L5 or S1 disc. He specifically noted there was no herniation of the nucleus pulposus. (C.R. 160)

57 In his note of May 1, 2007, Dr. Charles Koski offered his opinion that the annular tear was an acute phenomenon, rather than a result of chronic degenerative changes, based on what he saw in the MRI as mild degenerative changes to Curran’s L5-S1. (C.R. 201) At the hearing Dr. Vilella explained that he could not agree with Dr. Koski’s opinion. (App. 237 at pg. 39; App. 238 at pg. 43) As a basis for his disagreement, Dr. Vilella referred to Epicrisis records from the surgery performed on February 22, 2008. (App. 238 at pgs. 43-44) The German surgeons indicated in the preoperative diagnosis the presence of “severe osteochondrosis (DDD) with local lumbar and pseudo radicular pain syndrome S1 right side[.]” (C.R. 274) The surgeons further reported “[t]here was a clear indication for surgical intervention of the advanced DDD (severe progression osteochondritis) causing the patient’s chronic progression of lumbar syndrome (with pseudo-radicular pain syndrome related to L5-S1). (Id.) Dr. Vilella did not believe a lumbar disk disease could progress from mild to severe in a 35 year old

individual in such a relatively short period of time. (App. 238 at pgs. 44) As ALJ Anderson noted, “[i]t is certainly persuasive that the doctors who operated on Ms. Curran and actually saw her lumbar spine attributed her condition and need for surgery to an advanced and progressive degenerative disc disease rather than an acute event.” (App. 273)

58 ALJ Anderson also discounted Dr. Koski’s opinions because they relied on “questionable medical history” provided by Curran herself. ALJ Anderson observed Curran testify at the administrative hearing and noted that she “is convinced that her prior low back problems have nothing to do with her work injury. Ms. Curran very likely presented her prior low back problems to Dr. Koski in the same way Ms. Curran presented them at the evidentiary hearing, downplaying their significance.” (App. 273) As this Court has stated: “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 the 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.

III. WSI/ALJ Anderson Could Reasonably Determine That Curran Failed to Establish that Her Job as a Nurse was a Significant Contributing Factor to the Development of the Preexisting Degenerative Disc Disease.

59 Dr. Martire offered the opinion that Curran’s years of working as a nurse was a significant contributing factor to the degeneration of her L5-S1. (C.R. 279-280) ALJ Anderson rejected that opinion because it was based on Curran’s statement that her job “required a lot of repetitive lifting in awkward positions at

numerous different jobs she was worked as a nurse.” (App. 275) ALJ Anderson further pointed out that, while Curran provided Dr. Martire with extensive medical records, Dr. Martire did not refer to a single of those records to support his opinion. Nor did Dr. Martire provide any details or analysis of Curran’s work history in support of his opinion. ALJ Anderson noted Dr. Vilella’s testimony at the hearing that, while the type of activities a nurse performs at work may play a role in the development of degenerative disc disease, other factors such as heredity and genetics play a dominate role. (App. 275)

IV. WSI/ALJ Anderson Adequately Explained Why Medical Evidence Favorable to Curran Was Rejected.

60 ALJ Anderson accepted the opinion of Dr. Luis Vilella that the February 13, 2007, work incident may have acted to trigger symptoms in Curran’s preexisting degenerative disc disease, but it did not substantially accelerate or substantially worsen the severity of the degenerative process. ALJ Anderson found that Dr. Vilella’s opinion was consistent with Curran’s treatment records both before and after February 13, 2007. In particular, the Epicrisis surgery records confirms Dr. Vilella’s opinion that the degenerative process in Curran’s lower back was far more advanced on February 13, 2007, than any of her medical providers realized. ALJ Anderson also accepted Dr. Vilella’s opinion that Curran’s years of employment as a nurse was not a significant contributing factor to the preexisting degenerative disc disease.

61 In doing so, ALJ Anderson rejected contrary opinions offered by certain other medical providers. However, ALJ Anderson enumerated the reasons why each contrary opinion was rejected. In addition to his comparison of Curran’s treatment records before and after the work incident on February 13, 2007, ALJ

Anderson's evaluation of the competing medical opinions formed the basis for his decision that Curran had failed to prove by a preponderance of the evidence that she suffered a compensable injury to her lumbar spine. (App. 271)

62 ALJ Anderson rejected Dr. Aker's opinion that Curran suffered a new and separate injury as a result of the work incident of February 13, 2007. Dr. Aker relied in part on her impression that Curran had negative straight leg raise tests before the work injury but those same tests were positive after February 13, 2007, indicating the presence of a disc herniation. However, ALJ Anderson pointed out that Curran had numerous negative straight leg raise tests following the work incident, so Dr. Akers was placing undue emphasis on these tests. (C.R. 339) Furthermore, Dr. Akers conceded at the hearing that degenerative disc disease can lead to an annular tear, which in turn causes the acute low back pain that Curran experienced both before and after the February 13, 2007, work incident. (C.R. 346 at 50-51)

63 Finally, ALJ Anderson pointed out that Dr. Aker had testified that there was nothing in Dr. Solien's prior chiropractic records that would have indicated a herniated disc prior to February 13, 2007. ALJ Anderson disagreed and referenced Dr. Solien's treatment records from November of 2006, where he noted Curran's complaints of sharp pain with bending and twisting activities. In addition, Dr. Solien at that time had been able to reproduce tenderness and pain at the L5-S1, which would be consistent with a mild disc herniation or annular tear at that level. (C.R. 339)

64 ALJ Anderson also rejected the opinion of Dr. Charles Koski. The Final Order explains that Dr. Koski's opinions were based on questionable medical

history provided by Curran, who ALJ Anderson did not believe was a credible historian. Furthermore, ALJ Anderson found Dr. Koski's opinion that the annular tear was an acute phenomenon and not a chronic degenerative disease was more of an "educated guess," as opposed to an opinion given to a reasonable degree of medical certainty. Moreover, ALJ Anderson gave weight to the Epicrisis surgery records that reported Curran as having advanced degenerative disc disease, rather than the mild disc degeneration that Dr. Koski believed was present. The Epicrisis records were consistent with Dr. Vilella's opinion that Curran had an advanced and progressive degenerative disc disease prior to February 13, 2007. (C.R. 340)

65 ALJ Anderson also rejected Dr. Solien's opinion because it did not address the question whether the herniation and annular tear were caused by the work injury or the longstanding pre-existing disc disease. (C.R. 340) Dr. Martire's decision was rejected for the same reason, i.e., that he did not address whether the February 13, 2007, work incident substantially accelerated the progression of the preexisting degenerative disc disease or worsened its severity. (Id.)

66 Ryan Ortman, D.C., also offered an opinion that the work incident on February 13, 2007, was an acute injury that substantially accelerated a preexisting instability in the lumbar spine. (C.R. 70) ALJ Anderson found that Dr. Ortman's opinion had "little value," pointing out that it appeared to be based entirely on subjective history provided by Curran during a single office visit. Furthermore, there was nothing in the letter to indicate that Dr. Ortman had reviewed any of Curran's medical records and particularly those prior to February 13, 2007.

67 Curran's treatment records show that she was experiencing similar symptoms in the same location of her lumbar spine both before and after the incident of February 13, 2007. An MRI performed on March 11, 2007, showed a mild herniation and an annular tear at the L5-S1 level of Curran's spine. Although Curran's medical providers believed these abnormalities were acute events that occurred after February 13, 2007, their opinions were inconsistent with her treatment records (including their own treatment records) or simply based on Curran's own subjective complaints. Dr. Vilella testified at the hearing and explained the basis for his opinions by reference to specific medical records.

68 Based on the record as a whole, there was sufficient evidence for ALJ Anderson to conclude that Curran failed to prove that she sustained a compensable injury to her lumbar spine on February 13, 2007. Accordingly, this Court must affirm WSI's Final Order of June 19, 2008. See Rooks v. North Dakota Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993)(noting appellate does not substitute its judgment for that of WSI and determines only whether findings of fact adequately explain its decision.)

CONCLUSION

69 For the foregoing reasons, WSI respectfully requests that the Court reverse the decision of the District Court and *affirm* its Final Order of June 19, 2008.

DATED this 14th day of October, 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, Workforce Safety and Insurance, and the author of the 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 7,044 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 14th day of October, 2009.

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