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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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JUN 30 2010

STATE OF NORTH DAKOTA

JLY Transport Inc. )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 NORTH DAKOTA )  
 WORKFORCE SAFETY & INSURANCE )  
 FUND, )  
 )  
 Appellee, )  
 )  
 JOHN HOLMGREN, )  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

APPEAL FROM THE ORDER ON ADMINISTRATIVE APPEAL & SPECIFICATION OF  
ERROR DATED APRIL 20, 2010; ORDER FOR JUDGMENT AND JUDGMENT DATED  
APRIL 22, 2010, CASS COUNTY DISTRICT COURT - EAST CENTRAL JUDICIAL  
DISTRICT

THE HONORABLE WADE L WEBB, PRESIDING  
CASS COUNTY CIVIL NO.: 09-09-C-03335  
SUPREME COURT CIVIL NO.: 2010 0156

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APPELLANT'S BRIEF  
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## I. STATEMENT OF ISSUE

Are the Administrative Law Judge's Findings of Fact and Conclusions of Law supported by the greater weight of the evidence?

## II. STATEMENT OF FACTS

John Holmgren began working as a truck driver for JLY Transport Inc., on February 14, 2008 (Appendix 28 (App)). On May 12, 2008, Mr. Holmgren claimed that he suffered low-back pain as a result of sitting on a bad truck seat for three months (the totality of his employment) (App. p. 27). James Yantzer, President of JLY Transport Inc., and two independent drivers, Jerry Rackley and Wally Siegel, all drove the truck used by Mr. Holmgren and found nothing wrong with the seat, the operation of the seat, or the ride of the seat (App. p. 31). Following submission of Mr. Holmgren's claim, Mr. Yantzer even had the truck seat inspected by Trucks of Bismarck, Inc., and the inspector found no mechanical problems or broken components. The seat was left "as is" without any repairs, adjustments or service work (App. p. 53).

Mr. Holmgren treated with Dr. Thomas D. Bossart, DC, from May 12, 2008, through June 30, 2008, for his low-back pain (App. pp. 37-51). In connection with his treatment of Mr. Holmgren, Dr. Bossart ordered a lumbar spine x-ray which revealed "mild degenerative narrowing of the L5-S1 disc space" (App. p. 52). Dr. Bossart believed, at the conclusion of his treatment on June 30, 2008, that Mr. Holmgren's "injury" had resolved (App. p. 50). Dr. Bossart, in concluding that Mr. Holmgren had suffered a work injury, accepted Mr. Holmgren's assertion that his seat "wasn't working right" and was "not functioning" and that he had no pre-existing or associated conditions (App. pp. 37, 44).

### III. STATEMENT OF THE CASE

John Holmgren filed a workers compensation claim on May 16, 2008, asserting that he had suffered low-back pain caused by sitting on a bad truck seat for three months (App. p. 27). Mr. Holmgren's employer, JLY Transport Inc., contested his claim, asserting that there was nothing wrong with the seat in the truck assigned to Mr. Holmgren (App. pp. 30, 31). On August 14, 2008, Kim Ehli, WSI's Claims Director, entered into a stipulation with Mr. Holmgren whereby WSI agreed to pay Mr. Holmgren limited medical benefits and provide a lump-sum payment of \$4664.29 in temporary total disability benefits (App. pp. 32-35). On September 4, 2008, Mr. Yantzer, as President of JLY Transport Inc., requested a hearing on WSI's Stipulation. The issue specified for the hearing was whether the employer had a reasonable basis for its objection to the Stipulation between WSI and Mr. Holmgren (App. p. 36). A formal hearing was held on April 28, 2009, before Temporary Administrative Law Judge Benjamin E. Thomas (App. p. 61). TALJ Thomas issued Findings of Fact, Conclusions of Law and Order on May 22, 2009, affirming the terms of WSI's settlement with Mr. Holmgren (App. pp. 54-60).

JLY Transport, Inc., appealed the TALJ's decision to district court. On April 20, 2010, the Honorable Wade L. Webb, Judge of District Court, issued an Order on Administrative Appeal and Specifications of Error affirming the ALJ's decision (App. pp. 14-20). Judge Webb issued an Order for Judgment on April 22, 2010 (App. p. 21) and Judgment was entered on April 26, 2010 (App. p. 22). JLY Transport has appealed to this Court.

#### IV. LAW AND ARGUMENT

JLY Transport, Inc., has challenged the following Findings of Fact and Conclusions of Law:

##### FINDINGS OF FACT

10. The greater weight of the evidence indicates that WSI had a reasonable basis for entering into a stipulation to resolve a disputed claim with Holmgren. Holmgren presented evidence of an overuse injury that occurred while Holmgren was employed by J.L.Y. (Ex. 20, p. 46).

##### CONCLUSIONS OF LAW

1. J.L.Y. argues that the evidence does not support a conclusion that Holmgren had suffered a compensable injury. However, that is not the issue. The issue is whether WSI had a reasonable basis to enter into a stipulation with Holmgren to resolve a disputed claim.
2. The greater weight of the evidence indicates that there is sufficient evidence for WSI to have entered into the stipulation with Holmgren.
3. The Order dated August 14, 2008 affirming the terms of the settlement stipulation is hereby AFFIRMED.

(App. pp. 57-58).

At the beginning of the administrative hearing, WSI's counsel acknowledged that the settlement proceeds paid to Mr. Holmgren by WSI were being charged against the premium paid by JLY Transport Inc. (App. p. 121). There is simply no provision in Title 65 for WSI to pay benefits to a claimant, and charge those benefits against an employer's premium account, for a condition which does not amount to a compensable injury (See: N.D.C.C., Sections 65-01-01(10), 65-05-07, and 65-05-08). In the instant case, TALJ Thomas found that Mr. Holmgren had presented evidence of an over-use injury that occurred while he was employed by JLY Transport Inc. (App. p. 37). TALJ Thomas based that Finding on Dr. Bossart's initial evaluation which, in turn, was

based solely on Mr. Holmgren's unchallenged assertion that his seat was malfunctioning and that he had no prior related or associated conditions. The overwhelming weight of the evidence, however, shows that there was nothing wrong with the seat in Mr. Holmgren's truck, that he had pre-existing degenerative disc disease in his low back, (App. p. 52) and that he was too large to allow Dr. Bossart to take the necessary x-rays (App. p. 38). This Court has ruled repeatedly that pre-existing degenerative disc disease which is made merely symptomatic by work activities does not constitute a compensable condition. See: Neuhalphen v. North Dakota Workforce Safety & Insurance Fund, 2009 ND 86, 765 N.W.2d 681; Swenson v. North Dakota Workforce Safety & Insurance Fund, 2009 ND 197, 775 N.W.2d 700.


TALJ Thomas concluded that WSI could pay benefits to a claimant and charge an employer's account for a condition which was not a compensable injury (App. p. 57 [Conclusion of Law 1]). TALJ Thomas failed to cite any legal authority for that conclusion, and there is none. The greater weight of the evidence simply shows a large individual with pre-existing degenerative disc disease developing low-back pain after sitting in a seat which was perfectly functional, mechanically sound, and caused no problems for other drivers. Although TALJ Thomas noted the employer's evidence that the seat in Mr. Holmgren's truck was functioning properly (App. p. 53) and that Mr. Holmgren had pre-existing degenerative disc disease (App. p. 52), he failed to address that evidence in concluding that WSI had a reasonable basis to enter into its stipulation with Mr. Holmgren. WSI does not have the authority to spend money from an employer's premium account for anything but a compensable injury. See: N.D.C.C., Sections 65-04-17 and 65-04-19.1.

V. CONCLUSION

For the foregoing reasons, the Appellant requests that the Findings of Fact, Conclusions of Law and Order be reversed. The Administrative Law Judge's Final Order is without substantial justification, entitling JLY Transport Inc., to attorney fees under N.D.C.C., 28-32-50(1).

Dated this 30th day of June, 2010.

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CERTIFICATE OF SERVICE

I, Stiffen D. Little certify that on the 30th day of June, 2010, a true and correct copy of the Appellant's Brief and attached Certificate of Service were mailed to the following:

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