

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JLY Transport, Inc.,)	Supreme Court Case No. 20100156
)	
Appellant,)	
)	
vs.)	
)	
North Dakota Workforce Safety and Insurance Fund,)	
)	
Appellee,)	
)	
and)	
)	
John Holmgren,)	
)	
Respondent.)	
_____)	

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

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APPEAL FROM MEMORANDUM OPINION
DATED APRIL 20, 2010, AND ORDER FOR JUDGMENT DATED APRIL 22,
2009, AND JUDGMENT DATED APRIL 26, 2009
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE WADE L. WEBB

+++++

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STATEMENT OF THE CASE

1 Respondent John Holmgren (“Holmgren”) submitted a claim for benefits with North Dakota Workforce Safety and Insurance (“WSI”) alleging a work injury to his lower back on May 12, 2008, while employed as an over-the-road truck driver for JLY Transport, Inc. (“JLY”). (App. 27¹; C.R.² 1) Holmgren reported that he had been driving on what he described as a “bad” truck seat for the last three months. (Id.) JLY reported to WSI there was nothing wrong with the truck seat, and it was questioning Holmgren’s claim. (App. 30; C.R. 4)

2 On June 20, 2008, WSI issued a Notice of Decision Denying Benefits. (C.R. 10) WSI denied the claim because Holmgren and his treating physician had failed to provide medical records substantiating any treatment. (Id.) On June 24, 2008, Holmgren requested reconsideration and WSI subsequently received medical records from Thomas Bossart, D.C. (C.R. 11)

3 On July 22, 2008, WSI sent to Holmgren a proposed Stipulation. (App. 32-35; C.R. 21-24) Under its terms, WSI agreed to pay medical expenses for treatment to Holmgren’s lumbar spine from May 12, 2008, through June 30, 2008. (Id.) In addition, Holmgren would receive a lump sum payment of \$4,664.29 for temporary total disability benefits. (Id.) The Stipulation further provided that WSI was not admitting liability for Holmgren’s low back condition but was paying medical expenses and disability benefits to settle a disputed claim. (Id.) Holmgren signed the Stipulation on July 28, 2008. WSI’s Claims Director, Kim

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

² “CR” refers to “Certificate of Record, filed with the District Court on August 25, 2009.

Ehli, signed the Stipulation on August 14, 2008. (Id.) JLY refused to sign off on the Stipulation and instead requested a formal hearing. (C.R. 26)

4 The formal evidentiary hearing was held on April 28, 2009.³ On May 22, 2009, ALJ Ben Thomas (“ALJ Thomas”) issued his Findings of Fact, Conclusions of Law and Order affirming the terms of the Stipulation between WSI and Holmgren. (App. 54-58; C.R. 63-67) ALJ Thomas found that “[t]he 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.” (App. 57; C.R. 66)

5 On August 13, 2009, JLY filed a Notice of Appeal and Specification of Error with the District Court, Cass County, North Dakota. (App. 9-10) On April 20, 2010, District Court Judge Wade Webb issued an “Order on Administrative Appeal & Specification of Error” affirming ALJ Thomas’ Findings of Fact, Conclusions of Law and Order, dated May 22, 2009, which affirmed the terms of the Stipulation between WSI and Holmgren. (App. 14-19) Order for Judgment was entered on April 22, 2010, (App. 21), and Judgment was entered on April 26, 2010. (App. 22) Notice of Entry of Judgment was served on April 30, 2010. (App. 23) JLY filed its Notice of Appeal to this Court on May 25, 2010. (App. 24)

³ “App.” Pages 61-161 is the transcript from the administrative hearing held on April 28, 2009. See also C.R. 71.

STATEMENT OF FACTS

6 John Holmgren began his employment with JLY as an over-the-road truck driver on February 14, 2008. (App. 28-29; C.R. 2-3) Holmgren drove a 2001 Freightliner truck that was equipped with an “air ride” seat. (App. 82) An air ride seat can be adjusted by the driver to provide varying degrees of lumbar support. (Id. at 82-83) Holmgren worked five days per week. Over the course of a day, he drove approximately 10 hours over a distance of between 500 and 600 miles. (Id. at 102-103, 135)

7 Around March 15, 2008, Holmgren complained to the president of JLY, James Yantzer (“Yantzer”), that the driver’s air ride seat in his truck was not working properly, and he was developing stiffness and soreness in his lower back. (App. 28-29; C.R. 2-3; App. 91) Holmgren testified that his complaint was the air bag beneath the seat could not be inflated high enough to get his feet off the floor of the cab. (App. 131-132) As a result, the seat lost its capacity to “float” with the truck’s movement and the ride became rough. (Id. at 131) Holmgren was actually “bounced” completely out of seat, which caused pain in his lumbar spine. (Id. at 127, 132) Holmgren complained to Yantzer about the air ride seat on a number of occasions. (Id. at 139) Yantzer responded that he had checked out the seat and the problem was the foam needed to be replaced. (Id. at 132)

8 On May 12, 2008, Holmgren told Yantzer that his back was hurting and he intended to see a doctor. (App. 129-130) Holmgren saw chiropractor Thomas Bossart that same day, complaining of severe lower back pain. (App. 37; C.R. 46) He reported to Dr. Bossart that he could hardly move or walk or change

position because of the pain. He further reported that his lower back became a problem after he began driving a truck with a “really bad seat.” (Id.)

9 Accordingly to Dr. Bossart’s May 12, 2008, treatment note, “[p]alpation of the lumbosacral region reveals multiple tender points with multiple tissue components involved bilaterally.” (Id.) Dr. Bossart diagnosed Holmgren with an “overuse strain/sprain type injury to the lumbosacral paraspinal soft tissues with attendant spasm of the involved musculature and with attendant mild radiculopathy into the right upper and lateral thigh and with accompanying vertebral subluxation complexes of the cervical, cervicothoracic, lumbar and pelvic regions.” (Id.)

10 Holmgren followed up with Dr. Bossart on May 14, 2008. Dr. Bossart noted that Holmgren’s lumbosacral paraspinal musculature continued to be tender to palpation and remained in spasm. (App. 38; C.R. 47) Holmgren returned to Dr. Bossart on May 16, 2008. Dr. Bossart’s physical examination continued to produce lumbosacral tenderness at various levels, although there was improvement. (App. 39; C.R. 48) On that same day, Holmgren submitted a First Report of Injury to WSI indicating he had suffered an injury to his low back on May 12, 2008. (App. 27; C.R. 1)

11 Holmgren returned to Dr. Bossart for chiropractic treatment on May 19, 2008, May 21, 2008, May 23, 2008, May 27, 2008, May 28, 2008, May 30, 2008, June 4, 2008, June 11, 2008, June 23, 2008, and June 30, 2008. (App. 41-51; C.R. 49-60) On June 30, 2008, Dr. Bossart indicated that Holmgren had minimal lumbosacral tenderness, and his “Work Comp.” injury had resolved. Dr. Bossart

did not believe that Holmgren was going to have any residual problems as a result of the injury. (App. 50-51; C.R. 59-60)

12 On July 22, 2008, WSI sent to Holmgren a proposed Stipulation. (App. 32-35; C.R. 21-24) WSI proposed to pay medical expenses for Dr. Bossart’s chiropractic treatment of Holmgren’s lumbar spine from May 12, 2008, through June 30, 2008. (Id.) WSI also proposed to pay Holmgren a lump sum of \$4,664.29 for temporary total disability benefits. (Id.) The Stipulation provided that WSI was not admitting liability for Holmgren’s low back condition but was paying medical expenses and disability benefits to settle a disputed claim. (Id.) Holmgren signed the Stipulation on July 28, 2008, and WSI signed it on August 14, 2008. (Id.) JLY refused to sign off on the Stipulation and instead requested a formal hearing. (C.R. 26)

STATEMENT OF THE ISSUE

13 Whether ALJ Thomas Could Reasonably Determine from the Record as a Whole that WSI had a Reasonable Basis for Entering into the Stipulation with Holmgren to Resolve a Disputed Claim?

LAW AND ARGUMENT

I. Burden of Proof and Scope of Review.

14 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. 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).

15 On appeal, the Court should exercise restraint in determining whether the agency’s decision is supported by a preponderance of the evidence. Elshaug, supra. 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.

II. ALJ Thomas Could Reasonably Determine From the Record as a Whole That WSI had a Reasonable Basis for Entering into the Stipulation with Holmgren to Resolve a Disputed Claim.

16 The authority for WSI to enter into a stipulation with Holmgren to resolve a disputed claim is found in N.D.C.C. § 65-05-25(2), which states: “The organization and an employee may compromise to resolve a disputed claim. The contract of settlement made is enforceable by the parties.” Whether to compromise a disputed claim is entirely within the discretion of WSI. See Schiff v. N.D. Workers Comp. Bur., 480 N.W.2d 732, 735 (N.D. 1992); Gotchy v. N.D. Workmen’s Comp. Bur., 194 N.W. 663, 668-669 (N.D. 1923).

17 Following an evidentiary hearing, ALJ Thomas found there was sufficient evidence to establish that WSI had a reasonable basis for entering into the stipulation with Holmgren. He determined that Holmgren had presented evidence of a work injury that had occurred while Holmgren was employed by JLY. (App. 57 at Finding of Fact 10) That evidence consisted in part of the chiropractic treatment records of Dr. Thomas Bossart, who diagnosed Holmgren with an “overuse strain/sprain type injury to the lumbosacral paraspinal soft tissues with attendant spasm of the involved musculature and with attendant mild radiculopathy into the right upper and lateral thigh and with accompanying vertebral subluxation complexes of the cervical, cervicothoracic, lumbar and pelvic regions.” (App. 37-51; App. 55-56 at Findings of Fact 3, 6)

18 ALJ Thomas also found that Holmgren had complained to his employer that his air ride truck seat was not working properly and his back was getting stiff and sore as a result. (App. 55-56 at Finding of Fact 3) James Yantzer admitted on cross-examination that Holmgren had in fact made this exact complaint directly to him. (App. 90-91) ALJ Thomas further found that Holmgren’s back pain started within a few weeks of his beginning his employment with JLY, and he had not previously experienced similar low back symptoms. (App. 55 at Finding of Fact 2) JLY did not provide any medical evidence rebutting either Dr. Bossart’s treatment records or Holmgren’s testimony that he had never experienced the type of back pain that developed within a few weeks after he started driving for JLY.

19 JLY takes issue with ALJ Thomas’ decision and points to evidence, including James Yantzer’s testimony, there was nothing wrong with the air ride seat. There was evidence in the record that Trucks of Bismarck, Inc. inspected the truck seat at James Yantzer’s request after Holmgren sought medical attention. (App. 53; C.R. 62) Yantzer told Trucks of Bismarck, Inc. that Holmgren’s complaint was the seat would not “lock” and would pitch him forward and actually out of the seat. (App. 93; C.R. 62) Trucks of Bismarck, Inc. did not find a mechanical problem with the seat. (App. 53; C.R. 62)

20 However, Holmgren testified that the problem with the air ride seat was not that it did not “lock” into place. Holmgren described a different problem with the air ride truck seat:

What was actually happening with the chair was, when I would bring the air bag to its fullest position, it would be about as low as this chair is right now. Okay? That was as full as the air would get. On a normal air ride seat—on a normal air ride semi truck when you’re sitting, it is just like it is right now. My feet are not touching the floor. Okay. If you can raise your seat that high, that’s the way it’s supposed to sit and then what it does is, it bounces up and down according to the weight of the person and the bounce of the truck. The air ride seat that he had me in is that high and your legs are always constantly bent and when it would throw you, it would actually lift you out of the chair and do this, an up-and-down motion throwing me up out of the chair.

Q. (Mr. Gigler) Now what you just explained to us about the seat, is that what you explained to Mr. Yantzer?

A. (Mr. Holmgren) Yes, I told him that the air ride seat did not air up enough and that it kept throwing me up out of the chair.

(App. 131-132)

21 James Yantzer admitted on cross-examination that the failure of the truck seat to “lock” was different than a problem with the air bag controlling the seat’s ride. (App. 95) He also admitted that he did not direct Trucks of Bismarck, Inc. to inspect the air bag under the driver’s seat. (Id.) Thus, the inspection performed by Trucks of Bismarck, Inc. did not rule out a malfunction in the air ride seat as described by Holmgren.

22 JLY further challenges ALJ Thomas’ decision based on an x-ray of Holmgren’s lumbar spine taken on May 21, 2008, that showed the presence of “mild degenerative narrowing of the L5-S1 disc space.” (App. 52; C.R. 61) JLY argues that pre-existing degenerative disc disease is not a compensable work injury, so it cannot be charged with the benefits awarded under the Stipulation. For this argument to have any merit, there would have to be competent, medical evidence that the mild, pre-existing degenerative disc disease was actually causing the low back pain that Holmgren was experiencing. There is, however, no medical evidence to support this argument. Holmgren denied having prior low back problems, and JLY failed to produce any treatment records placing that assertion into question. Furthermore, Dr. Bossart’s treatment records do not attribute Holmgren’s low back symptoms to any “mild” pre-existing degenerative disc disease, but instead identify the faulty air ride seat as the mechanism of injury.

23 Furthermore, JLY’s overall theory on this appeal has been that WSI cannot agree to pay a claimant benefits by Stipulation unless the greater weight of the evidence showed the claimant suffered a compensable injury as defined by

N.D.C.C. § 65-01-02(10). JLY, however, offers no authority that would require WSI to prove a compensable injury as a condition precedent to entering into a Stipulation with an injured worker to resolve a disputed claim. In fact, that argument defies common sense in that requiring WSI to first prove a compensable injury would completely defeat the purpose of a Stipulation. Additionally, JLY's argument cannot be reconciled with N.D.C.C. § 65-05-25(2), which expressly authorizes WSI to "compromise to resolve a disputed claim." (emphasis added) JLY's objection to the Stipulation between WSI and Holmgren simply has no merit.

CONCLUSION

24 Based on the evidence in the record taken as a whole, ALJ Thomas could have reasonably found that WSI had a reasonable basis to enter into the Stipulation with Holmgren to resolve a disputed claim. Furthermore, ALJ Thomas' decision is in accord with N.D.C.C. § 65-05-25(2). Accordingly, the Order, dated August 14, 2008, whereby WSI agreed to the Stipulation and to pay Holmgren the benefits according to the terms of the Stipulation should be affirmed.

Dated this 30th day of July, 2010.

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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 2,662 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 30th day of July, 2010.

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