

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20120189

PETE FRAZER

Appellant,

vs.

NORTH DAKOTA  
WORKFORCE SAFETY & INSURANCE  
FUND,

Appellee,

WARD-WILLISTON COMPANY,

Respondent.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAY 18 2012

STATE OF NORTH DAKOTA

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APPEAL FROM THE DISTRICT COURT ORDER DATED FEBRUARY 13, 2012  
ORDER FOR JUDGMENT DATED MARCH 16, 2012; AND  
JUDGMENT ENTERED MARCH 16, 2012  
MOUNTRAIL COUNTY DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
THE HONORABLE GARY H. LEE PRESIDING  
MOUNTRAIL COUNTY CIVIL NO.: 2011-CV-00144

SUPREME COURT CIVIL NO.: 20120189

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APPELLANT'S BRIEF

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## I. STATEMENT OF THE ISSUE

Is the opinion of the Administrative Law Judge supported by the greater weight of the evidence?

## II. STATEMENT OF THE FACTS

Pete Frazer worked as a truck driver for Ward-Williston Co. On July 11, 2009, Mr. Frazer arrived at work at 5:30 A.M. and, when he tried to lift the hood of his truck to check the oil and water, he found the inside of the hood caked with a heavy coating of mud, causing his right arm to give way (App. p. 25). Mr. Frazer informed the boss of Ward-Williston's Stanley yard, Darrell Eide, of the injury the same day it happened (App. p. 139). Mr. Frazer thought that he had simply pulled a muscle (Id.; App. p. 26). Mr. Eide gave no response and did not apprise Mr. Frazer of any rights or filing requirements (App. p. 140). Mr. Frazer went to a doctor and obtained an x-ray on his own volition and again informed Mr. Eide, without receiving any response (App. pp. 27-28; 37-39). When Mr. Frazer then consulted someone higher in Ward-Williston's chain of command, he was told that no workers compensation benefits were available to pay for an MRI or nerve conduction study (App. p. 26). Mr. Frazer was past normal retirement age but had intended to continue working as long as he was physically able (Id.). Ward-Williston protested Mr. Frazer's claim, asserting that his truck was new and the hood was not hard to open. Ward-Williston also asserted that it had terminated Mr. Frazer on September 14, 2009 "due to getting into a fight with a coworker" (App. p. 30).

Mr. Frazer's entitlement to workers compensation benefits was the subject of a formal hearing held on December 16, 2010 (App. p. 105). The

Administrative Law Judge issued Findings of Fact, Conclusions of Law and Order dated April 27, 2011, denying Mr. Frazer's claim for benefits (App. pp. 104 - 125). Mr. Frazer petitioned for reconsideration on May 24, 2011 (App. pp. 128-134). On July 28, 2011, the ALJ affirmed her earlier order (App. pp. 136-137). Mr. Frazer then appealed to the District Court (App. pp. 18 - 21) and, after obtaining no relief (App. pp. 142-147), he now appeals to this Court (App. p. 152).

### III. STATEMENT OF THE CASE

Workforce Safety & Insurance issued a Notice of Decision Denying Benefits on October 29, 2009. That notice asserted that Pete Frazer suffered from pre-existing tendinitis, osteoarthritis and degenerative changes, and that his July 11, 2009, work injury merely triggered symptoms in the underlying condition. The notice also asserted that Mr. Frazer had not suffered a loss of earnings, since Ward-Williston had fired him for cause (App. p. 31). Mr. Frazer requested reconsideration on November 20, 2009, asserting that he was being treated unfairly (App. pp. 33-35). On November 25, 2009, Lisa K., Mr. Frazer's WSI Claims Adjuster, asked him to submit additional evidence (App. p. 36). Mr. Frazer faxed his response on December 14, 2009, noting that Lisa K. did not want pictures of the mud under the truck hood and that no one from Ward-Williston had ever asked him how he had gotten hurt. Mr. Frazer denied doing anything to cause his termination and noted that he had received a \$1.00/hour raise the payday before he was fired (App. pp. 37-39). Mr. Frazer submitted a Nonmonetary Determination Notice from Job Service North Dakota dated November 16, 2009, indicating that, despite Ward-Williston's allegations, no evidence of misconduct was found (App. p. 40).

On December 16, 2009, Lisa K. submitted a Medical Director Referral, summarizing her opinion of the facts, providing Ward-Williston's opinion of the facts and soliciting a medical opinion of the role of any pre-existing condition and the mechanism of injury (App. p. 43). Dr. Gregory Peterson, WSI's retained medical consultant, responded on January 9, 2010, as follows:

Based on the available information I believe that Mr. Frazer's 7/11/09 work incident triggered but did not cause his current condition because:

- 1) The objective findings are primarily those of right shoulder impingement associated with AC joint and glenohumeral joint degenerative arthritis.
- 2) Based on the records, it appears likely that Mr. Frazer's pre-existing cervical spine condition contributes to his symptoms as least to some degree.
- 3) The contemporaneous notes indicate no clear causal relationship between Mr. Frazer's shoulder condition and an alleged work injury.
- 4) There(sic) are no objective findings specifically attributed to a work incident on or about 7/11/09.
- 5) Dr. Vermeulen's 11/3/09 report clearly outlines the relationship of Mr. Frazer's condition to age related changes and outlines reasons for the unclear relationship of Mr. Frazer's condition to a work injury (App. p. 44).

On February 4, 2010, WSI issued its order denying Mr. Frazer's claim for benefits. The order was based primarily on the opinion of Dr. Peterson (with Dr. Richard Vermeulen's alleged agreement) and the assertion of Ward-Williston that it could have accommodated Mr. Frazer's condition if only it had not fired him first (App. pp. 47-52). Mr. Frazer properly demanded a formal hearing asserting that his age had nothing to do with his injury and that Medicare should not be responsible for his work related injury (App. p. 53).

Following the hearing of this matter, both WSI and Ward-Williston had an opportunity to depose Dr. Ganzhorn. Neither WSI's records reviewer, Dr. Peterson, nor its IME provider, Dr. Kihm, were made available for deposition. Dr. Ganzhorn explained that the rotator cuff tear found during surgery "was worse than the MRI indicated" (App. p. 99 - Deposition Transcript (DT p.7, 1. 24). When asked whether it was common to find something in surgery that was not apparent on the MRI, Dr. Ganzhorn responded:

Yes. I find MRIs about 80 to 85 percent accurate, so you use MRIs with a grain of salt knowing that they're not always accurate. They don't always show all the pathology that you see at the time of surgery when you can clearly see what the problem is (App. p. 100 - DT p. 8, 11. 10-15).

Dr. Ganzhorn stood by the written opinions he had previously provided (App. p. 100 - DT p. 8, 11. 16 - 25; App. p. 100 - DT p. 9, 11. 1 - 25).

After two hours of questioning, Dr. Ganzhorn concluded by saying,

I think, you know, to me it's pretty clear that he had an accident and he got a cuff tear. But that's my opinion (App. p. 103 - DT p. 92, 11. 24-25; App. p 103 - DT p. 93, 1. 1).

Following receipt of Dr. Ganzhorn's deposition transcript, WSI again asked Dr. Peterson for his opinion. The gist of Dr. Peterson's revised opinion was that Mr. Frazer probably suffered a right shoulder rotator cuff tear after his work injury because, otherwise, the April 8, 2010, MRI would have shown the tear. Nevertheless, Dr. Peterson continued to believe that Mr. Frazer's July 11, 2009 work injury merely triggered symptoms in a pre-existing condition (App. p. 46).

#### IV. LAW AND ARGUMENT

Generally, an injured worker has the burden of proving his entitlement to benefits. See: N.D.C.C. Section 65-01-11. There are some exceptions to the general rule set out either by statute or case law. In

the instant case, Mr. Frazer has the burden of proving that he suffered a compensable injury. WSI has the burden of proving that Mr. Frazer's injury was merely a trigger producing symptoms or an aggravation of a pre-existing condition. If WSI proves that Mr. Frazer's compensable injury aggravated a pre-existing condition, Mr. Frazer must prove that the aggravation was greater than fifty percent. See: Tangen v. North Dakota Workers Compensation Bureau, 2000 ND 135, 613 N.W.2d 490; Satrom v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 824 (N.D. 1982); Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112, 595 N.W.2d 312.

The instant case is largely one of expert medical opinion. This Court has long held that WSI must act in a manner not fully adversarial to the injured worker and must clarify inconsistencies in the medical evidence and explain its rationale for disregarding medical evidence favorable to the injured worker. McDaniel v. North Dakota Workers Compensation Bureau, 1997 ND 154, 567 N.W.2d 833. Since Mr. Frazer is claiming a work injury which occurred on July 11, 2009 (App. p. 25), the provisions of N.D.C.C. Section 65-05-08.3 apply to his claim. Thus, in weighing the opinions of Dr. Gregory Peterson, WSI's records reviewer; Dr. John Kihm, WSI's IME provider and Dr. Richard Ganzhorn, the orthopedic surgeon who actually read the MRI films and performed the surgical repair on Mr. Frazer's right shoulder, Dr. Ganzhorn's opinion is entitled to controlling weight.

Mr. Frazer consulted with a number of doctors, both in North Dakota and in his home state of Michigan, before seeing Dr. Ganzhorn for surgical repair of his shoulder. On October 1, 2009, Mr. Frazer first consulted with Dr. Richard Vermeulen, a sports medicine specialist in



Marquette, Michigan (App. pp. 56-58). Dr. Vermeulen diagnosed Mr. Frazer with rotator cuff syndrome caused by lifting his truck hood on July 11, 2009 (App. p. 57). Dr. Vermeulen opined that:

I do not see any inconsistencies or any reason to discount his feeling that his is a worker's compensation injury unless the precedent is in place that rotator cuff syndrome is a non-workers compensable problem in the state where this occurred. (App. p. 58).

On November 3, 2009, Dr. Vermeulen limited Mr. Frazer to "lifting occasionally with objects with good body mechanics near the body at least 20 or 30 pounds" (App. p. 60). Two days later, Dr. Vermeulen restricted Mr. Frazer to no above-shoulder lifting (App. p. 61). On January 12, 2010, Liza K. wrote Dr. Vermeulen, summarized Dr. Peterson's records review opinion, and asked him whether he agreed, noting that if he did not respond in two weeks, she would assume that he agreed with Dr. Peterson (App. p. 62-63). Dr. Vermeulen responded in an office note dated January 15, 2010 (sic) as follows:

In all I do agree It is however understood Dr. Peterson impressions must stand as our impression. It is not my role to verify Dr. Peterson's impressions. I have circled what I believe are the primary causes of Pete's complaint (right shoulder impingement with AC joint degenerative arthritis). I have documented active cervical physical exam abnormalities. (App. p. 64)

Mr. Frazer also consulted with Dr. Rajnikant Mehta, a Bismarck neurologist, before returning to Michigan. Dr. Mehta restricted Mr. Frazer to light duty work with no heavy lifting on July 16, 2009 (App. p. 65). On July 28, 2009, Dr. Mehta noted that Mr. Frazer "would like to continue with his job and he is trying to do it as much as he can" (App. p. 67). Finally, on September 15, 2009, Dr. Mehta recommended electrodiagnostic testing (EMG/NCS) and an MRI if WSI would only approve them (App. p. 68).

To address Dr. Peterson's opinion that he had a pre-existing degenerative condition, Mr. Frazer consulted Ms. Bonnie Kilpela, PA-C, whom he had seen shortly before his work injury. Ms. Kilpela noted that she had seen Mr. Frazer for multiple reasons on July 1, 2009, a mere ten (10) days before his work injury, and that he had not complained of "arm pain" nor had she noticed any problems with his upper extremities (App. p. 69).

Mr. Frazer wrote Dr. Ganzhorn on May 5, 2010 and asked for his opinion of the causation of his right shoulder condition (App. p. 71). Dr. Ganzhorn responded on June 7, 2010, noting that an MRI of April 8, 2010, showed a rotator cuff tear and internal impingement syndrome as a result of his work injury and that Mr. Frazer had resulting functional limitations which left him unable to perform the routine duties of a trucker (App. p. 72).

Dr. Ganzhorn followed up with another letter on August 31, 2010, in which he opined that Mr. Frazer had suffered a significant rotator cuff tear of his right shoulder as a result of his July 11, 2009 work injury; that he had objectively demonstrated functional limitations as a result of his work injury; that his condition was not attributable to any pre-existing condition; and that he was "completely disabled from gainful employment" at that time (App. p. 82).

On October 22, 2010, Dr. Ganzhorn performed a right shoulder arthroscopy, synovectomy, excision of torn labrum, Neer-Mumford procedure (arthroscopic subacromial decompression and distal cervical resection), bursectomy and repair of Mr. Frazer's full thickness rotator cuff tear (App. pp. 83-84). Dr. Ganzhorn noted that no obvious rotator cuff tear was seen through the arthroscope, but when the deltoid

muscle was reflected off the clavicle and acromion and a bursectomy was performed, a three (3) centimeter, full thickness, medial tear was noted (Id.).

On November 15, 2010, Dr. John Kihm performed an Independent Medical Evaluation on Mr. Frazer at WSI's request (App. pp. 91-98). Dr. Kihm believed that Mr. Frazer's right shoulder condition was most likely attributable to a pre-existing condition but did not identify the alleged pre-existing condition. Similarly, Dr. Kihm did not say what Mr. Frazer's post-injury diagnosis was or how it was affected by any pre-existing condition.

When asked to review and comment on Dr. Kihm's IME report, Dr. Ganzhorn reiterated that Mr. Frazer's right shoulder condition was related to his work injury rather than any pre-existing condition. Dr. Ganzhorn also stated that his surgical repair of Mr. Frazer's right shoulder was a direct result of his July 11, 2009, work injury and that any pre-existing condition was also substantially the result of work activities (App. p. 85).

To some extent, this case turns on the credibility of Pete Frazer. As Dr. Mehta noted, "(Mr. Frazer) would like to continue with his job and he is trying to do it as much as he can" (App. p. 67). Both the weather reports (App. p. 90) he presented as well as the pictures of thick mud caked to the underside of the wheel wells (and part of the truck's hood) (App. pp. 86, 87, & 89) supported Mr. Frazer's account of his injury.

Principally, of course, the instant case is one requiring the weighing of expert medical opinions, specifically that of Dr. Ganzhorn against those of Drs. Peterson and Kihm. Certainly, Dr. Ganzhorn's

opinions that Mr. Frazer suffered a large, full-thickness rotator cuff tear as a result of the work injury described, that any pre-existing condition played no appreciable role in his injury; that, in any event, any pre-existing condition was the substantial result of his work activities; and that he is consequently functionally disabled from performing his regular work constitute objective medical evidence as this Court has defined it. See: Engebretson, supra.

Arguably, of course Drs. Peterson's and Kihm's opinions meet this Court's standard, as well. There are, of course, some very good reasons, both legal and factual, why Dr. Ganzhorn's opinion is more credible. First, while it is undeniably Pete Frazer's burden to prove a compensable injury and his entitlement to both medical and wage loss benefits, Dr. Ganzhorn's opinion is entitled to controlling weight. See: N.D.C.C. Section 65-05-08.03. While that presumption of correctness is not irrefutable, it places a heavy burden on WSI and Ward-Williston to do so. Simply put, WSI and Ward-Williston have not sustained that burden.

Dr. Ganzhorn's curriculum vitae is provided in the Certified Record (App. pp. 73-81). He is eminently qualified as both a practicing orthopedic surgeon as well as a published expert (App. pp. 70, 73-81). Most importantly, Dr. Ganzhorn was the only doctor to actually open up Pete Frazer's right shoulder and see what was causing the problem. None of the other doctors had that advantage. It was only after Dr. Ganzhorn was able to view the rotator cuff itself that he found the three (3) centimeter tear. No MRI or other test had revealed the tear and no other doctor had diagnosed it. Dr. Ganzhorn explained that even MRIs are accurate only 80-85 percent of the time. Dr. Peterson believes that MRIs are infallible and Mr. Frazer must have had some post-injury

tear (App. p. 45). Of course, that opinion is unsupported by a single shred of evidence. Dr. Kihm, for his part, was apparently unaware of the tear or how it could be related to some unknown, pre-existing condition. In summary, Dr. Ganzhorn's opinion is the most trustworthy because he was in the best position of any doctor to have an opinion. He had a view of Pete Frazer which no records reviewer or IME provider will ever have.

To the extent that the ALJ's opinion relied on medical opinions of possible, not probable cause, it is speculative and fails to meet the legal standard of proof. For instance, when Dr. Ganzhorn said Mr. Frazer's right wrist pain "could be" a nerve issue originating from (App. p. 108 - F.N. 5), his opinion fails to meet the legal standard for objective medical evidence. Similarly, while it is true that "Dr. Ganzhorn acknowledged that Dr. Mehta diagnosed impingement syndrome in July 2009," it is also true that Dr. Mehta diagnosed possible tendinitis and possible arthritis and failed to diagnose the large rotator tear found by Dr. Ganzhorn. The ALJ cannot simply assume the correctness of a single Mehta diagnosis while ignoring those diagnoses which were disproven (App. p. 109 - F.N. 7). The ALJ correctly noted that Dr. Ganzhorn agreed that rotator cuff syndrome can get worse over time without treatment (App. p. 109 - F.N. 7) but failed to note how that worsening affected Dr. Peterson's speculative opinion that Mr. Frazer must have had an intervening injury.

None of Mr. Frazer's alleged pre-existing conditions soft-tissue or bony, symptomatic or asymptomatic, shoulder or cervical - explain the large rotator cuff tear found by Dr. Ganzhorn. Mr. Frazer, who had several decades of work-related wear and tear, was nevertheless able to

perform the usual and customary demands of his job for Ward-Williston without restriction and without accommodation before his July 11, 2009, lifting injury. After his injury, Mr. Frazer was only able to work if his truck was modified in a way so he was not required to lift above shoulder height (App. p. 141).

This Court has said repeatedly that, "the employer takes the employee as he finds him." See: Johnson v. Workmen's Compensation Bureau, 344 N.W.2d 480 (ND 1984); Bruns V. ND Workers Compensation Bureau, 1999 ND 116, 595 N.W.2d 298. In the instant case, there is no objective medical evidence that Mr. Frazer's rotator cuff tear pre-existed his work injury; that his rotator cuff tear triggered symptoms in or affected any pre-existing condition in any way or that an intervening injury ever occurred.

It is apparent that, until Dr. Ganzhorn was able to slice into Mr. Frazer's shoulder and view the actual three centimeter tear itself, none of the treating doctors, including Ganzhorn, appreciated the size and seriousness of the tear. Dr. Ganzhorn testified that MRIs are only 80-85% accurate. None of the tests performed before surgery accurately predicted the large tear Dr. Ganzhorn found. Dr. Vermeulen's attribution of rotator cuff syndrome to aging is patently ridiculous. Mr. Frazer was fully functional on July 10, 2009, and severely impaired the next day. That impairment and resulting disability were the result of a work injury, not simply one day's aging. Again, Ward-Williston took Pete Frazer as it found him. Mr. Frazer's symptoms improved when he was medicated to reduce inflammation and pain. Dr. Vermeulen's diagnosis of age-related rotator cuff syndrome was made before Mr. Frazer's large rotator cuff tear was known. No one asked either Drs. Mehta or

Vermeulen for their opinions based on Dr. Ganzhorn's discovery of a large rotator cuff tear.

The ALJ's repeated assertion that "Dr. Ganzhorn cites no objective medical findings" to support his opinion that Mr. Frazer's rotator cuff tear is work related is simply wrong. This Court has explained that a doctor's opinion, based on education, experience, and patient history, review of medical records, treatment and testing is objective medical evidence. See: Myhre v. North Dakota Workers Compensation Bureau, 2002 ND 186, 663 N.W.2d 705. In the instant case, only Dr. Ganzhorn, of the few doctors who actually examined Mr. Frazer, was able to view the rotator cuff tear itself. Only Dr. Ganzhorn did not have to rely on tests which were subsequently proven to be inaccurate. That is what makes his opinion more credible than the others. Dr. Ganzhorn's opinion that Mr. Frazer had a pre-existing, work-related shoulder condition but that his rotator cuff tear is unrelated to any such condition is supported by his operative findings. There is nothing "inconsistent" about Dr. Ganzhorn's opinions.

The only difference in Mr. Frazer's pre- and post injury condition was a large rotator cuff tear. There is no objective medical evidence of a pre-existing rotator cuff tear or an intervening injury.

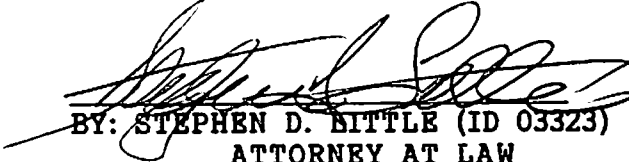
#### V. CONCLUSION

Pete Frazer has demonstrated by the greater weight of the evidence that he had no right shoulder restrictions before July 11, 2009, that he suffered a work-related rotator cuff tear on that date, that he has been restricted in the use of his right shoulder ever since that date, that his rotator cuff tear and consequent surgery are causally

related to that injury, and that any pre-existing condition is, itself, also work related.

WSI and Ward-Williston, for their part, have failed to overcome the statutory treating doctor presumption, have failed to show that Mr. Frazer is entitled to benefits on anything less than a 100 percent basis, and have failed to demonstrate the availability of medically approved modified work. Mr. Frazer respectfully asks that he be granted the benefits he both deserves and needs without further delay.

Respectfully submitted this 18th day of May, 2012.

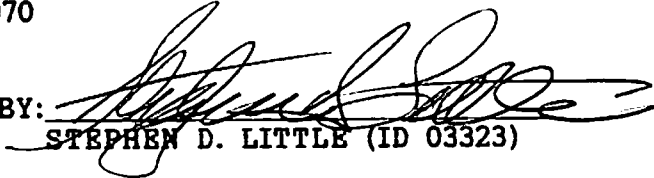
  
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#### CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 18th day of May, 2012, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

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