IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MIKKEL HERING Appellant, vs. WORKFORCE SAFETY AND INSURANCE FUND, Appellees, and WILLISTON RV & MARINE Respondent.	SUPREME COURT NO.: 2014 0030 CIVIL NO.: 53-2013-CV-00742

APPELLANT'S BRIEF

APPEAL FROM THE COURT'S ORDER DATED OCTOBER 21, 2013, ORDER FOR JUDGMENT DATED DECEMBER 27, 2013, AND JUDGMENT DATED DECEMBER 2, 2013, ENTERED DECEMBER 2, 2013

WILLIAMS COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DAVID W NELSON

STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLEE
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501
(701) 222-1761
littlelaw@btinet.net

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I. STATEMENT OF ISSUE

[1] Are the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order supported by the greater weight of the evidence and in accordance with the law?

II. STATEMENT OF THE CASE

[2] After losing his job at Ray Company, Inc. because he was unable to take tolerate the job demands, Mikkel Hering reapplied for disability benefits, which WSI denied, finding that he had not shown a significant change in his work related medical condition, had not sustained an actual wage loss attributable to the significant change in condition, and had no medical verification of disability (Appendix 56 (hereafter App.). Mr. Hering petitioned for reconsideration (App. 58), which WSI denied by formal administrative order (App. 59). Mr. Hering had a formal administrative hearing on March 12, 2013, before the Honorable Reed Soderstrom, Administrative Law Judge (App. 85). ALJ Soderstrom issued Findings of Fact, Conclusions of Law and Order on April 5, 2013, affirming WSI's denial of disability benefits on reapplication (App. 16). Mr. Hering petitioned for reconsideration (App. 25) and when that was denied (App. 26), appealed to the District Court. The Honorable David Nelson, District Court Judge, affirmed ALJ Soderstrom's decision and Mr. Hering has again appealed (App. 165).

III. STATEMENT OF FACTS

[3] Mikkel Hering was a thirty-seven year old employee of Williston Honda and Chrysler on January 7, 1999, when, while clearing snow off the dealership's lot with a skid steer loader, he struck a concrete rise, causing him to strike his head on the roof of the skid steer's cab and injuring his head, neck and shoulder (App. 29). Mr.

Hering suffered two fractured cervical vertebrae as a result of striking his head on the roof of the skid steer loader and underwent six surgeries to address his neck injury and control his pain (App. 101 [Hearing Transcript p. 17, l.]; App. 104 [p. 18, l. 14]). Workforce Safety and Insurance accepted liability for Mr. Hering's cervical condition only after Mr. Hering and his attorney demanded a formal hearing (App. 31). Mr. Hering was able to return to work on February 10, 1999 (App. 38) and periodically received disability benefits when he was unable to work for a periods of time following surgeries (App. 39). He most recently returned to work on October 17, 2005 (App. 41) and worked until September 17, 2009, when he again reapplied for disability benefits (App. 42). Despite Mr. Hering's explanation that he had resigned from his job because his employer had refused to get him the help he needed to perform the assigned work, WSI denied further disability benefits (App. 44, 45).

[4] Mr. Hering was next employed in 2012 by Ray Company, Inc. to perform light office duties such as answering the telephone, taking inventory etc. (App. 50). Mr. Hering was unable to tolerate the physical demands of that job and, after leaving work early and missing several days of work entirely, he was terminated (App. 51). At about the same time that Mr. Hering went to work for Ray Company, Inc., he began treating with Dr. Carol Krause, a Bismarck doctor specializing in pain medicine and rehabilitation (App. 67). Dr. Krause diagnosed Mr. Hering with radicular pain in his left arm following four cervical surgeries including a C4-C6 fusion (App. 71). Dr. Krause continued treating Mr. Hering, noting on March 8, 2012, that,

> He did try doing some light duty work for a friend, light duty inventory. He states he couldn't do two days in a row. He couldn't work more than six hours a day. In two weeks, he worked 4-5 days (p. 716). (App. 78).

After several visits, Dr. Krause confirmed that Mr. Hering was disabled as a result of his work injury and likely was even before he went to work at Ray Company, Inc. (App. 84).

IV. LAW AND ARGUMENT

[5] Mr. Hering has appealed several Findings of Fact and Conclusions of Law, to wit:

FINDINGS OF FACT

> 11. Re-application of disability benefits has a three part test found in N.D.C.C. [Section] 6.5-05-08 (1). This statute is unchanged from Claimant's original work injury date through the present time. The three part test is as follows:
>
> a. The employee has sustained a significant change in compensable medical condition;
> b. The employee has sustained an actual wage loss caused by the significant change in the compensable medical condition; and
> c. The employee has not retired or voluntarily withdrawn from the job market as defined in section 65-05-09.3.
>
> The factual application of subsections (a) and (c) above indicates Claimant worked for Williston RV & Marine under restrictions for approximately 10 years before he quit. Today, Claimant's medical providers and the Social Security Administration declare Claimant to be disabled. A significant change in Claimant's medical condition is apparent. Most recently Claimant did not quit but was fired from Ray meeting the requirements of subsection (c). (Ex. 47). However, the factual application of subsection (b) is not met. Although Claimant has worked over 12 hours during the course of a few weeks for Ray, there is not an actual wage loss caused by the significant change in Claimant's medical condition as defined by law. Instead, the evidence does not show Claimant's change in his compensable medical condition to be contemporaneous with and tied to his loss of wages while working for Ray.

(App. 17-21).

12. The factual application of prevailing law prevents Claimant from receiving benefits.

(App. 21).

CONCLUSIONS OF LAW

3. Application of North Dakota law established by the North Dakota Supreme Court in Aga v. WSI, 725 N.W. 2d 204 (ND 2006) requires that, 'Claimant's change in compensable medical condition must be contemporaneous with and tied to an alleged actual loss of wages.' Citing, Beckler v. WSI, 692 N.W. 2d 483 (ND 2005). Bachmeier V. N.D. Worker's Comp. Bureau, 650 N.W. 2d 217 (ND 2003. Gronfur v. N.D. Worker's Comp. Fund, 658 N.W. 2d 337 (ND 2003).

4. The application of prevailing law prevents Claimant from receiving benefits.

5. Claimant argues that he falls through the cracks of WSI's policy because he has been disabled all along while still employed at Williston RV & Marine. Claimant asserts that he previously went above and beyond the call of duty, worked very hard despite the pain, discomforts and the heavy medications when he was employed at Williston RV & Marine. Nevertheless, application of North Dakota Supreme Court cases noted above apply as the legal standard for the re-application of disability benefits.

(App. 22).

6. In 2010, Claimant quit his job with Williston RV & Marine. Claimant's re-application for WSI disability benefits was denied on April 15, 2010, and as a matter of law that was a final Order. N.D.C.C. [Section] 65-01-16(7) mandates an appeal to be filed within 30 days from the date of service of the Administrative Order. An appeal was not filed. Since the April 15, 2010, Order, Claimant has not sustained an actual wage loss caused by the significant change in his compensable medical condition as a matter of law.

(App. 22-23).

[6] N.D.C.C. Section 65-05-08(1) contains three requirements in order for an injured worker to receive disability benefits on reapplication: a significant change in his compensable medical condition, actual wage loss caused by that significant change, and an involuntary

separation from employment. The statutory requirements have been the subject of judicial interpretation a number of times, most notably: Gronfur v. N.D. Worker's Comp. Fund, 2003 N.D. 42, 658 N.W. 2d 337; Beckler v. Workforce Safety & Insurance., 2005 N.D. 33, 692 N.W. 2d 483; Bachmeier v. N.D. Worker's Comp. Bureau, 2003 N.D. 63, 660 N.W. 2d 217; and Aga v. Workforce Safety & Insurance, 2006 N.D. 254, 725 N.W. 2d 204. In the instant case, the ALJ relied principally on a single sentence in this Court's opinion in Aga, supra, para. 16: "Claimant's change in compensable medical condition must be contemporaneous with and tied to an alleged actual loss of wages."

[7] Disability is established by the greater weight of objective medical evidence. See: N.D.C.C. Section 65-05-08.1. In other words, a claimant, such as Mikkel Hering, is not disabled unless and until he can prove it. While the ALJ agreed that Mr. Hering had suffered a significant change in his compensable medical condition, had sustained an actual wage loss, and had not voluntarily separated himself from his employment with Ray Company, Inc. (App. 20-21 - Finding of Fact 11)), the ALJ nevertheless concluded that Mr. Hering's change in condition and actual wage loss were not contemporaneous. Thus, under the ALJ's reasoning, Mr. Hering is not entitled to reinstatement of disability benefits despite having demonstrated his disability and actual wage loss. (App. 21 (XLI - Finding of Fact 11)).

[8] While this Court did, indeed, state in Aga, supra that a change in compensable medical condition and actual wage loss must be contemporaneous, it did not state that they must be simultaneous. Mr. Hering first consulted with Dr. Carol Krause on January 25, 2012 (App. 70-73). He worked unsuccessfully for Ray Company, Inc. from February

27, 2012, until March 8, 2012, leaving work early and missing entire days of work during that period (App. 84). Mr. Hering saw Dr. Krause again on February 8, 2012, March 8, 2012, April 5, 2012, May 3, 2012, June 18, 2012, June 27, 2012, July 16, 2012, and July 18, 2012 (App. 70-84). It was not until Mr. Hering's July 18, 2012 visit that Dr. Krause ventured an opinion of his disability status (App. 84). That opinion was based, in part, on Mr. Hering's experience at Ray Company, Inc. when Mr. Hering last worked full time, five days per week at Williston RV, he was able to lift RV batteries and LP tanks. When he worked for Ray Company, Inc., he could not work full days, could not work full weeks and could not lift more than a few ounces (App. 106-110; [HT p. 22 L 18 - p. 26 L 25]). Under N.D.C.C. Section 65-05-08.1(2)(d), a treating doctor is allowed to certify a claimant's disability up to sixty days before the doctor's initial examination, and that is exactly what Dr. Krause did. Thus, Dr. Krause determined that Mr. Hering was disabled on and after November 27, 2011, but he did not know that until nearly eight months later, on July 18, 2012. (App. 84). In the meantime, of course, Mr. Hering tried, unsuccessfully, to return to work.

[9] Under the ALJ's rationale, Mr. Hering would have had to be fired the precise moment a treating doctor said his compensable medical condition substantially worsened. Of course, seldom are both the treating doctor and the employer on hand precisely when a claimant's condition (determination of disability) changes. Fortunately, neither the statutory law nor the case law requires such precision. Rather, this Court has merely held that the change in compensable condition and actual wage loss must be contemporaneous, i.e., during the same period of time. Certainly, under any reasonable interpretation, Mikkel Hering's

documented change in his compensable condition occurred during the same period of time and was the cause of his actual wage loss.

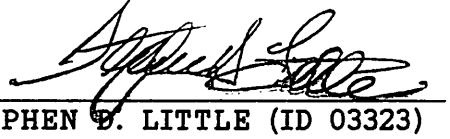
[10] This Court's various pronouncements on N.D.C.C. Section 65-05-08 have made it more difficult for claimants such as Mikkel Hering to get disability benefits reinstated than it is for them to get an initial award of those very same benefits. Simply put, it is a tough standard. In the instant case, the ALJ's requirement that a change in compensable condition and actual wage loss be simultaneous increases a claimant's burden from difficult to impossible. Neither the Legislature nor this Court require the impossible.

V. CONCLUSION

[11] Mr. Hering has proven his entitlement to reinstatement of disability benefits under the terms of N.D.C.C. Section 65-05-08. He respectfully asks this Court to reverse the decision of the Administrative Law Judge and order reinstatement of disability benefits.

Respectfully submitted this 5th day of March, 2014.

LITTLE LAW OFFICE



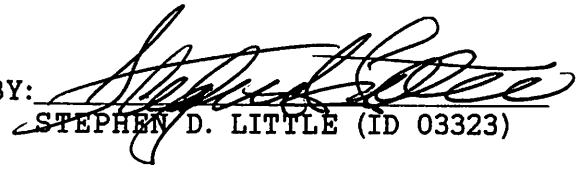
STEPHEN D. LITTLE (ID 03323)

ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501
(701) 222-1761
littlelaw@btinet.net

CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 5th day of March, 2014, a true and correct copy of the Appellant's Brief with an attached Certificate of Service and an Appendix were mailed to the following:

Mitchell D. Armstrong
Special Assistant Attorney General
Smith Bakke Porsborg Schweigert & Armstrong
P. O. Box 460
Bismarck, ND 58501 - marmstrong@smithbakke.com

BY: 
STEPHEN D. LITTLE (ID 03323)

ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
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littlelaw@btinet.net