

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT JUL - 8 2014

ACROSS BIG SKY FLOW TESTING, LLC)
Appellant,)
vs.)
WORKFORCE SAFETY AND)
INSURANCE AND M.F.B., DEPENDENT)
OF DUSTIN BERGSING (DECEASED),)
BY AND THROUGH HER GUARDIAN,)
LACEY BREDDING)
Appellees.)

SUPREME COURT NO.: 2014 0193
DUNN COUNTY CIVIL
NO. 2013-CV-00097

FILED
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JUL - 8 2014

STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

APPEAL FROM THE COURT'S MEMORANDUM OPINION AND ORDER DATED MARCH 18, 2014, AND THE ORDER FOR JUDGMENT AND JUDGMENT DATED APRIL 10, 2014, ENTERED APRIL 14, 2014

DUNN COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE ZANE ANDERSON

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I. ISSUE PRESENTED

[1] Does the greater weight of the evidence and the applicable law support WSI's determination that Dustin Bergsing suffered a work-related death?

II. STATEMENT OF THE CASE

[2] Despite the opinion of its own consultant, Dr. Harvey Hanel, that it was highly improbable that Mr. Bergsing's death had been the result of work-related inhalation of butane, WSI accepted Ms. Breeding's claim for death benefits (Appendix pp. 35, 36-39 (hereafter App.) Mr. Bergsing's employer, Across Big Sky Flow Testing, LLC, challenged WSI's determination and the matter was heard by Administrative Law Judge Rosellen M. Sand on June 18, 2013 (App. 40). On July 17, 2013, ALJ Sand issued Findings of Fact, Conclusions of Law and Order accepting Ms. Breeding's claim for death benefits (App. p. 14-21). Across Big Sky Flow Testing, LLC petitioned ALJ Sand for reconsideration, which was denied by formal order (App. 26-28). Across Big Sky Flow Testing, LLC appealed from both of ALJ Sand's orders (App. pp. 8-9). The Honorable Zane Anderson, District Court Judge, issued a Memorandum Opinion and Order dated March 18, 2014, affirming ALJ Sand's decision (App. pp. 71-86). Across Big Sky Flow Testing, LLC now appeals to this Court (App. 92-94).

III. STATEMENT OF FACTS

[3] Dustin Bergsing was hired by Across Big Sky Flow Testing, LLC to monitor oil tanks located in Dunn County, North Dakota (App. p. 52, Hearing Transcript p. 51, ll. 5-15). On January 9, 2012, Mr. Bergsing died at the location of the tank battery; the certificate of death listed inhalation of petroleum vapors as the cause of death (App. p. 30).

[4] The tank battery at which Mr. Bergsing died was composed of eight oil tanks situated in two rows of four tanks each (App. pp. 52-53; HT pp. l 21 - p. 53, l 5). Between the two rows was an elevated catwalk used by Mr. Bergsing and others to gauge the tanks (App. p. 54; HT p. 57, ll 8-12). Oil and gas were separated by a treater and then sent to oil or water tanks, respectively. All of the tanks were vented together, and when one tank was vented, all of the tanks in the battery would lose whatever gas pressure had built up (App. p. 53; HT p. 54, ll 2-23). Mr. Bergsing's death occurred after he had already gauged both the left and right number two tanks in the battery (thus releasing the pressure in all of the tanks), recorded his results and coiled the line he used in gauging (App. p. 54; HT p. 57, ll 2-25; App. p. 54; HT p. 58 ll 1-7). The oil wells which supplied the tank battery Mr. Bergsing monitored produced oil so slowly that any gas build-up and resulting gas pressure was not even measurable (App. p. 55, HT p. 62, l 21 - p. 63, l 1; App. p. 57, p. 71, ll 14-47; p. 72. ll 5-10). Furthermore the battery's flares and scrubber were functioning as intended, thus further preventing a build-up of hydrocarbon gases (App. p. 55, HT p. 63, ll 12-17). Finally, the tank battery was also gauged by the truck driver who transported the oil from the site several times in the hours before Mr. Bergsing's presumed time of death, including approximately thirty minutes before that event, thus releasing whatever negligible gas pressure existed (App. p. 57, HT p. 70, l 1-p. 72, l 10).

[5] After Mr. Bergsing's fiancée, Lacey Breeding, filed a claim for a workers compensation death benefits on behalf of their minor child McKenzie, Workforce Safety and Insurance asked its consultant, Dr. Harvey Hanel, PharmD., to determine whether the levels of petroleum

vapors in Mr. Bergsing's system were concentrated enough to cause his death (App. pp. 31, 32). Dr. Hanel determined that, out of the various petroleum vapors detected in Mr. Bergsing's system, only butane was present in a high enough level to be even considered a potential cause of death, and a concentration of butane in ambient air sufficient to cause death would be higher than that needed to explode in the atmosphere (App. 33-34). Dr. Hanel concluded that it was highly improbable that Mr. Bergsing was exposed to butane in the air in a quantity sufficient to cause his death. He further noted that all of the medical literature documenting deaths through butane inhalation related to "huffing" by illegal substance abusers (Id.). No butane was ever detected at the tank battery Mr. Bergsing was hired to monitor, either before or after his death (App. p. 61, HT p. 85, l 23; App. p. 61, HT p. 86, l 3). Dr. Hanel based his opinion, in part, on his review of the EPA's Acute Exposure Guidelines, available medical literature and the toxicology report of Dr. William Massello, MD (App. pp. 39b-39d).

[6] Dr. Massello, for his part, concluded that Mr. Bergsing's death was caused by hydrocarbon poisoning due to inhaling vapors from petroleum products because he could not account for his death any other way (App. pp. 39f-39j). Dr. Massello was not familiar with the EPA Acute Exposure Guidelines relied on by Dr. Hanel, did not know which hydrocarbon compound might have caused Mr. Bergsing's death, had not read Dr. Hanel's report, was aware of case studies of butane-related deaths caused by recreational huffing and did not know whether Mr. Bergsing's presumed inhalation of butane was due to workplace exposure to that compound (Id.).

IV. LAW AND ARGUMENT

[7] The Appellant, Across Big Sky Flow Testing, LLC, has challenged Finding of Fact 14 and Conclusions of Law 3, 4, and 5 as incorrect, to wit:

FINDING OF FACT 14

14. From observations at the site and review of Mr. Bergsing's notebook, which was found with his body, it appears that he had opened the first tank on the left side, gauged it, retrieved his gauge line, cleaned it, coiled it and had moved on to the next tank where he was found with the hatch unlatched. There was no evidence such as a butane lighter, a paper or plastic bag or other device that would support Big Sky's contention that Mr. Bergsing was doing something other than his job at the time he passed away. (App. p. 16)

CONCLUSIONS OF LAW

3. All of the evidence shows that Mr. Bergsing was on site and was where he was expected to be. The fact that his notebook and gauging tape were found with him, show that he was doing what he was expected to do. While there is speculation and argument that Mr. Bergsing was engaged in non-work activity such as huffing butane, there is no actual evidence that that is the case. There were no butane lighters, and no bags to facilitate the alleged huffing. Here the only evidence is that Mr. Bergsing was doing his work when he succumbed to hydrocarbon inhalation. It is undisputed that these hydrocarbons are present at the well site and thought Dr. Hanel could not reach a conclusion as to the cause of Mr. Bergsing's death, Dr. Massello, based upon his training and experience was able to reach a conclusion as to Mr. Bergsing's death. Dr. Massello considered not only the toxicology reports reviewed by Dr. Hanel, but also personally performed the autopsy. Consequently, Dr. Massello's opinion is more persuasive as to the cause of death than Dr. Hanel's.
4. I conclude that the preponderance of the evidence shows that Mr. Bergsing was at a place he was expected to be to perform his work duties and that he was furthering his employer' business. His death arose out of and in the course of his employment with Big Sky.
5. The greater weight of the evidence in the record showing that Mr. Bergsing's death arose out of and in

the course of his employment with Big Sky, WSI's November 15, 2012, order awarding benefits in the death of Dustin Bergsing must be affirmed.

(App. 20-21).

[8] As ALJ Sand noted, it was Ms. Breeding's burden to prove a work-related death (App. pp. 19-20 (Conclusions of Law 1)). It is not enough that Dustin Bergsing's death occurred during the course of his employment. In order to be compensable, his death must have been caused by his employment activities, as shown by the greater weight of the evidence. See: Fetzer v. Workforce Safety and Insurance, 2012 ND 73, 815 N.W.2d 539. Furthermore, WSI's determination cannot be based on mere conjecture or surmise. See: Steele v. North Dakota Workmen's Compensation Bureau, 273 N.W.2d 692 (N.D. 1978). In the instant case, there is no evidence and no expert opinion that Mr. Bergsing's death was caused by the inhalation of hydrocarbon vapors emanating from the tank battery he was hired to monitor. Furthermore, there is no evidence that the tank battery Mr. Bergsing worked at has ever produced butane gas in any measurable quantity. Finally, of course, there is the unrefuted evidence that the tank battery had no measurable build-up of pressurized gases, because of the low rate of oil production and frequent venting of tanks, and the unrefuted expert opinion of WSI's own consultant Dr. Hanel that a concentration of butane sufficient to cause death could not have existed in the ambient air Mr. Bergsing breathed.

[9] Across Big Sky Flow Testing, LLC did not contend that Mr. Bergsing's death was caused by recreational drug use. It has never been the Appellant's burden to prove any such thing. Rather, the Appellant contends that the greater weight of the evidence establishes

that Mr. Bergsing's death was not caused by exposure to butane or any other hydrocarbon compounds vented from any tank he was assigned to gauge. The fact that no drug paraphenalia was found is irrelevant, particularly without evidence of a thorough search. In sum, there was no evidence that the tank battery where Mr. Bergsing worked produced any toxic hydrocarbon gases in sufficient quantity to cause his death.

[10] Certainly, Mr. Bergsing's untimely death was a tragedy for his family, his fiancée and young McKenzie. Presumably, we shall never know what caused his death or the level of butane found in his system. While we may never know the source of the petrochemicals which presumably caused Mr. Bergsing's death, we can be certain that his death was not caused by a lethal level of butane emanating from the tank battery because there is no evidence of such a build-up of toxic gases and because WSI's own expert considered such a mechanism of injury and subsequent death highly improbable.

[11] In her Order Denying Petition for Reconsideration (App. pp. 26-28), the ALJ surmised that, because the levels of hydrocarbons Mr. Bergsing inhaled were presumably higher than the levels detected post-mortem (because of the volatility of the chemicals), inhalation of those chemicals might have been lethal. As previously noted, WSI (including the ALJ acting for WSI) cannot base its decision on surmise or conjecture. The ALJ went on to note that Mr. Bergsing was exposed to hydrocarbon gases other than butane which might have resulted in his death. Again, Dr. Massello could not state which hydrocarbon gas or gases led to Mr. Bergsing's death or whether the hydrocarbon gases in his system were produced by the tank battery.

[12] Dr. Hanel's opinion that only butane could have conceivably caused that death goes unrefuted. Consequently, Across Big Sky Flow Testing, LLC does not dispute that Mr. Bergsing's death, more than likely, was the result of inhalation of butane. The mere fact that Mr. Bergsing inhaled butane while at work does not necessarily mean that such inhalation was work related. In fact, the greater weight of the evidence shows that Mr. Bergsing could not have inhaled a lethal quantity of butane from the ambient air of the depressurized tank battery. Finally, while the ALJ is certainly allowed to make a reasoned choice of expert opinions, she, acting for WSI, cannot disavow the opinion of the expert retained by WSI to provide an opinion within his area of expertise simply because he is not a toxicologist. WSI, even acting through the ALJ, is not free to pick and choose in an attempt to find the opinion it wishes to find, and, by soliciting Dr. Hanel's opinion, WSI tacitly acknowledged his expertise.

[13] It appears likely that Mr. Bergsing's death was caused by the inhalation of butane. While other hydrocarbon gases were also in his bloodstream, Dr. Hanel opined that only butane was present at a level to represent even a possible cause of death (App. pp. 33-34). Dr. Massello did not venture an opinion as to which of the hydrocarbon compounds present in Mr. Bergsing's bloodstream, either alone or in combination, was responsible for his death. While Dr. Hanel opined that only butane, out of the various compounds present in Mr. Bergsing's bloodstream, was present at a level to be even a potential cause of death, he thought it highly unlikely that butane in the ambient air surrounding Mr. Bergsing (i.e., vented from the oil storage tanks Mr. Bergsing was responsible to gauge) could have been concentrated enough to be the

actual cause of death (Id.). Once again, Dr. Massello had no opinion of the concentration of butane in ambient air necessary to cause death. In short, while there were a number of hydrocarbon compounds present in Mr. Bergsing's system, only butane was posited as even a potential cause of death, and the likelihood of Mr. Bergsing being exposed to a toxic level of butane from the ambient air surrounding him was thought to be highly unlikely. There is no opinion to the contrary.

[14] On top of the expert medical opinion of the unlikelihood of Mr. Bergsing's death being the result of inhalation of hydrocarbon vapors in the surrounding air, the lay testimony showed that: because the tanks are connected and venting one tank vents them all, because the tanks had already been vented both by Mr. Bergsing and others, because the rate of oil production and transfer into the tank battery would have resulted in negligible production of hydrocarbon gases, and because the flaring equipment was functioning to incinerate whatever negligible amount of hydrocarbon gases might be produced, it is unlikely that the tanks Mr. Bergsing was gauging when he died produced a lethal amount of hydrocarbon gas (App. p. HT p. 54, 11. 2-23; App. p. 55, HT p. 62, 1. 21-p. 63, 1. 1; HT p. 63, 11. 12-17).

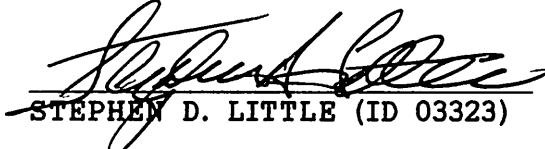
V. CONCLUSION

[15] Not only is it highly unlikely that Mr. Bergsing's death could have been caused by butane in the ambient air, not only is there no factual evidence or expert opinion that any other hydrocarbon compound present in Mr. Bergsing's bloodstream could have been concentrated enough in the ambient air to be lethal, and not only is it unlikely that there was ever such a concentration of toxic hydrocarbon gases at the tank battery where Mr. Bergsing worked, there is simply

no evidence, whether through expert medical opinion or otherwise, that Mr. Bergsing's death was actually caused by his exposure to hydrocarbon gases in the course of his work. As noted previously, it is not enough that an injury occur at work, it must be caused by the work activities. In the instant case, neither Dr. Massello nor Dr. Hanel opined that the hydrocarbon compounds in Mr. Bergsing's bloodstream were vented from the storage tanks he was hired to gauge. Mr. Bergsing has not sustained his burden of proof. The ALJ's decision is not supported by the greater weight of the evidence, expert and otherwise, and her award of death benefits must be reversed.

Respectfully submitted this 8th day of July, 2014.

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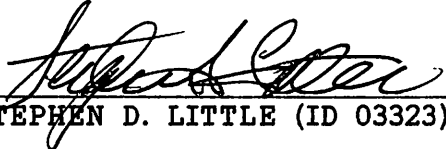
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I, Stephen D. Little, certify that on the 8th day of July, 4, 2014, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

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