

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>JOSE ALFRED MEDINA GONZALES,</p> <p>Appellant,</p> <p>vs.</p> <p>NORTH DAKOTA WORKFORCE SAFETY INSURANCE FUND,</p> <p>Appellee.</p>	<p>Supreme Court Case No. 20180365</p> <p>Williams County Case No. 53-2018-CV-00482</p> <p>APPELLEE'S BRIEF TO THE SUPREME COURT OF NORTH DAKOTA</p>
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BRIEF OF APPELLEE WORKFORCE SAFETY AND INSURANCE

APPEAL FROM JUDGMENT DATED AUGUST 10, 2018,
AFFIRMING ADMINISTRATIVE LAW JUDGE DECISION
DATED FEBRUARY 28, 2018
WILLIAMS COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE PAUL W. JACOBSON

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STATEMENT OF THE ISSUES

[1] Whether the Administrative Law Judge could have reasonably concluded, based on the hearing record, that Appellant Jose Alfredo Medina Gonzales failed to establish by a preponderance of the evidence that he was entitled to workers' compensation benefits.

STATEMENT OF THE CASE

[2] Appellant Jose Alfredo Medina Gonzales ("Medina") submitted a First Report of Injury to Appellee Workforce Safety and Insurance ("WSI") alleging an injury to his right shoulder that occurred on April 21, 2015, while working for Fuzion Energy Services ("Fuzion"). Medina reported that the injury occurred while he was lifting a roll of welding cables. (C.R. 1-3¹) Fuzion reported to WSI that Medina had voluntarily quit his job and supplied time cards that showed his last day of work was April 19, 2015. (C.R. 10)

[3] On June 11, 2015, WSI issued its Notice of Decision Denying Benefits. The Notice informed Medina that his claim was being denied because of a lack of evidence that the alleged injury occurred while working for Fuzion Energy Services. (C.R. 28) Medina requested reconsideration and provided WSI with copies of text messages, cell phone statements and credit card receipts which he claimed were proof that he was in fact working on April 21, 2015. (C.R. 29-63) WSI denied Medina's request for reconsideration and issued its Order Denying Claim on August 20, 2015. (C.R. 65-71) Medina requested a formal hearing on October 14, 2015. (C.R. 71)

¹ "C.R." refers to the Certificate of Record on Appeal to District Court filed on April 25, 2018, pursuant to N.D.C.C. § 28-32-44.

[4] The administrative hearing in this matter was held on August 22, 2016, before Administrative Law Judge Robert Keogh. (“ALJ Keogh”) (C.R. 160-184) ALJ Keogh issued his Findings of Fact, Conclusions of Law and Final Order (Corrected) on September 12, 2016, in which he affirmed WSI’s Order Denying Claim, dated August 20, 2015. (App. 50-58; C.R. 92-99)

[5] On October 6, 2016, Medina submitted a Petition for Reconsideration and Rehearing (“Petition”). (App. 59-61; C.R. 101-106) He requested that ALJ Keogh reopen the hearing to consider certain documents that he claimed were “irrefutable proof” that he was working on April 21, 2015. (Id.) The documents were applications for “safe work permits” that authorized certain Fuzion Energy employees to perform “hot work,” such as welding, cutting and grinding, on certain dates to include April 19, April 20 and April 21, 2015. (Id.)

[6] WSI opposed the Petition in part on the ground that Medina had not offered these documents into evidence at the administrative hearing and was asking ALJ Keogh to consider “newly discovered evidence” without complying with N.D.A.C. § 98-02-04-07 by showing that he “could not with reasonable diligence have discovered or produced” the documents for the administrative hearing. (C.R. 107-109)

[7] ALJ Keogh issued a Memorandum on Petition for Reconsideration on November 14, 2016. ALJ Keogh decided to reopen the administrative hearing in a limited fashion to accept evidence on whether the safe work permits were “newly discovered evidence.” ALJ Keogh directed Medina to provide legible copies of the safe work permits, a witness who could lay proper foundation for the documents, and a witness that could

testify that Medina was working on the day of the alleged work injury. (App. 62-65; C.R. 110-113)

[8] The “limited” hearing on the safe work permits was held on February 17, 2017. Medina called two witnesses and testified himself. The record was left open for WSI to provide rebuttal evidence but closed on September 1, 2017. (App. 66-90; C.R. 195-219) The parties submitted written closing arguments. (See C.R. 123-127 for Medina’s post-hearing brief; C.R. 128-137 for WSI’s post-hearing response brief and C.R. 139-141 for Medina’s post-hearing reply brief.)

[9] On February 26, 2018, ALJ Keogh issued a “Second Memorandum on Petition for Reconsideration,” denying the Petition for Reconsideration. (C.R. 143-147) On February 28, 2018, ALJ Keogh issues his Amended Findings of Fact, Conclusions of Law and Order, again affirming WSI’s Order Denying Claim, dated August 20, 2015. (C.R. 149-158)

[10] Medina filed a Notice of Appeal and Specification of Error with the District Court on March 26, 2018. (App. 10; Doc. ID# 1) On August 8, 2018, the District Court issued its Order affirming ALJ Keogh’s Amended Findings of Fact, Conclusions of Law and Order. (App. 138-139) Order for Judgment was entered on August 9, 2018, and Judgment was entered on August 10, 2018. (App. 140-141) Notice of Entry of Judgment was served on August 14, 2018. (App. 142)

[11] Medina’s Notice of Appeal to the North Dakota Supreme Court was filed on October 1, 2018. (App. 143)

STATEMENT OF FACTS

[12] On April 27, 2015, Medina was seen at the Hutchinson Health Clinic in Hutchinson, Minnesota, claiming an injury to his right shoulder on April 21, 2015. Medina reported to NP Lori Waldera that he was lifting “up a cable, a roll of cable, and he put it on his shoulder and then he was going to push it up into the air onto something and he felt something pop in his right shoulder.” Medina declined an x-ray of his shoulder. NP Waldera restricted him to lifting no more than 5 pounds and to follow up with his regular provider for further evaluation. (C.R. 77-78)

[13] Medina submitted a First Report of Injury to WSI on May 11, 2015, describing an injury to his right shoulder while moving a roll of welding cables from his shoulder to a forklift. His employer was listed as Fuzion Energy in Gillette, Wyoming, but the jobsite where the injury allegedly occurred was in Williston, North Dakota. He indicated that he would miss five or more days of work as a result of the incident. He did not indicate the date he notified his employer and person he notified. He also did not list any witnesses to the injury. (C.R. 1-3)

[14] On May 12, 2015, Russ Barnes, the EHS Manager for Fuzion Services, provided WSI with an investigative report he had prepared upon learning about a possible but unconfirmed work-place injury. He spoke to Joe Quintanilla, who was Medina’s supervisor. Mr. Quintanilla informed Mr. Barnes that Medina had last worked on April 19, 2015. Mr. Quintanilla had talked to Medina by telephone and Medina told him that he had quit because he was unhappy that he had not been made a foreman and he thought the rest of the crew was not respecting him. Medina did not say anything about a work injury. (C.R. 7)

[15] On May 12, 2015, Medina advised WSI that he injured his right shoulder on April 21, 2015, and there were two witnesses, Pablo and Jose Quintanilla. He told his manager, “Fernando,” on April 22 that he had hurt his shoulder and wouldn’t be reporting for work, which Fernando said was okay. Medina told WSI that he had never quit his job and had tried to call his supervisor but never got a hold of him. He also said he spoke to Russ Barnes who said that he was told that Medina had quit. (C.R. 5) WSI asked Medina why he had not worked since the incident, and Medina said by the time he saw a doctor in Minnesota he was not able to contact his employer. Medina said his manager Fernando said he still had a job but Russ Barnes said he no longer worked for Fuzion. (C.R. 5)

[16] Medina was seen at McKenzie Co. Healthcare Urgent Care on May 18, 2015, reporting an on-the-job injury that occurred on April 21, 2015. He stated that he was moving a heavy rope off his shoulder when he felt a pop and some mild pain. He did not seek any medical attention at that time because he did not think the injury was “acute.” Nurse Practitioner Janis Green’s assessment was “rotator cuff injury,” and she recommended an x-ray and MRI of the right shoulder. (C.R. 79-80)

[17] An MRI of Medina’s right shoulder was performed on May 21, 2015. The radiologist questioned whether there was a nondisplaced mid anterior labral tear and recommended an MR arthrography. (C.R. 85-86) An x-ray of the right shoulder was negative. (C.R. 87)

[18] On May 27, 2015, WSI contacted Russ Barnes from Fuzion and requested Medina’s time cards, since he was claiming his last day of work was April 21, 2015, and Fuzion had reported his last day as April 19, 2015. (C.R. 10) On May 28, 2015, Russ

Barnes provided WSI with field tickets for the period of April 12 through April 25, 2015, and Medina's time cards for the same period.

[19] The field tickets showed the job-site where the Fuzion crew was working on a particular day. According to the field tickets, the Fuzion crew was working on the "Stockyard Comp Station-Roustabout" for a customer identified as "Flatiron 1804 LTD." Medina was listed by name on the field tickets as a "laborer" through April 19, 2015. (C.R. 14-20) On the field ticket for April 20, 2015, Medina's name is crossed out and someone handwrote "replaced by Lynn Mechun[.]" (C.R. 21) On the field ticket for April 21, 2015, Medina's name has been removed and replaced with Lynn Mechun. (C.R. 22) The same is true for the field tickets from April 22 through April 24, 2015. (C.R. 23-25)

[20] For the week of April 12 through April 18, 2015, the time cards showed that Medina was working at the Stockyard Roustabout project for Flatirons 1804 on Monday (10 hrs.), Tuesday (10 hrs.), Wednesday (11 hrs.), Thursday (9 hrs.), Friday (11.5 hrs.) and Saturday (10 hrs.). (C.R. 13) For the week of April 19 through April 25, 2015, Medina worked April 19 (11 hrs.), but that was the last day. (C.R. 12)

[21] On June 5, 2015, WSI contacted Medina to let him know that Fuzion had provided time cards and job tickets showing April 19, 2015, was his last day of work. Medina responded that Fuzion's documentation was wrong and he was working for a subcontractor called Flatiron on April 21, 2015, and Flatiron should have proof of that. Medina told WSI he would get that information from Flatiron as well as the name of a contact person. (C.R. 26)

[22] Medina was seen by Dr. Robert Barnett at the Twin Cities Orthopedics clinic on June 8, 2015. Dr. Barnett's diagnosis was shoulder strain possible subacromial

tendinopathy without tear, right side, and he administered a cortisone injection. He advised no work pending further evaluation in three weeks; however, Medina reported in the “social history” portion of the note that he was currently unemployed. (C.R. 89-91)

[23] On June 11, 2015, WSI contacted Medina to let him know it had not received from him any additional information that would substantiate he was working for a “subcontractor” on April 21, 2015, so his claim was being denied for lack of evidence that an injury occurred arising out of and in the course of employment. (C.R. 27) WSI issued its Notice of Decision Denying Benefits on June 11, 2015. (C.R. 28)

[24] Medina requested reconsideration and provided WSI copies of text messages from his cell phone, copies of his credit card statement and copies of his cell phone bills claiming they showed that he was working on April 21, 2015. (C.R. 28-63) WSI issued its Order denying claim on August 20, 2015. (C.R. 65-68)

LAW AND ARGUMENT

I. SCOPE OF REVIEW ON APPEAL.

[25] Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Bergum v. North Dakota Workforce Safety & Ins., 2009 ND 52, ¶ 8, 764 N.W.2d 178. The ALJ’s decision must be affirmed unless the "findings of fact are not supported by a preponderance of the evidence, [the] conclusions of law are not supported by [the] findings of fact, [the] decision is not supported by [the] conclusions of law, or [the] decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177, ¶ 8, 569 N.W.2d 1.

[26] This Court must exercise restraint in determining whether the ALJ's decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Bruder v. Workforce Safety and Insurance, 2009 ND 23 ¶ 7, 671 N.W.2d 588; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56 (N.D. 1996). The Court must decide only whether a reasoning mind reasonably could have decided that WSI's findings were proven by the weight of the evidence from the entire record. Industrial Contractors, Inc. v. Workforce Safety and Insurance, 2009 ND 157, ¶ 5, 722 N.W.2d 582. See also Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174, ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI's decision is supported by the evidence).

[27] "It is within [the ALJ's] province to weigh the credibility of the evidence presented." Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). The Court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995).

II. ALJ Keogh Could Reasonably Determine that Medina Did Not Prove By a Preponderance of the Evidence that He Suffered a Compensable Injury.

A. Medina Failed to Prove That He Was Working on the Date That He Claimed He Injured His Right Shoulder.

[28] Medina's arguments to this Court as outlined in his brief are merely a recitation of the same arguments he presented to ALJ Keogh. Medina is in effect claiming that ALJ Keogh reached the wrong result, and he is asking this Court to reconsider and

reweigh the evidence presented at the administrative hearing. However, this Court is not in a position to review the evidence so as to reconsider or reweigh it; this Court is limited to considering whether ALJ Keogh's decision is supported by the evidence. See Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174,

¶ 40, 599 N.W.2d 280.

[29] WSI denied Medina's claim for benefits based on a lack of evidence that the injury to his right shoulder occurred while he was on-the-job for Fuzion. WSI stated in its Notice:

WSI is denying your claim due to the lack of evidence to support this injury happened while you were at work. WSI spoke to you on a few different occasions asking for evidence to show this incident happened at work on 4/21/2015 while working for Fuzion Energy Services. Later you indicated to WSI that this incident happened while you were reporting to a subcontracting company for Fuzion Energy Services. WSI requested contact information for the subcontracting company and names of people that you reported to. To this date, WSI has not received any additional information regarding this subcontracting company that shows you were working for them at the time of the accident.

You employer Fuzion Energy Services indicated to WSI that your last day was on 4/19/2015 and that you informed your manager that you quit and will not be returning to work. Fuzion Energy tried contacting you on several occasions after 04/19/2015 and were [sic] informed on 04/20/2015 by you that you will no longer be working for them. Fuzion Energy Services has also provided WSI with witness statements and time sheets showing your last day with them was 04/19/2015.

(C.R. 28)

[30] Fuzion provided WSI with field tickets that showed Fuzion employees were working on a project for another company called Flatiron LTD. Medina was listed as a member of the Fuzion crew working on the Flatiron project through April 19, 2015. On April 20, 2015, Medina's name was crossed off the field ticket and replaced with the name

“Lynn Mechun.” Also, Fuzion provided WSI with Medina’s time cards, which are consistent with the field tickets and show that his last day worked was April 19, 2015.

[31] The field tickets and time card are consistent with information gathered by Russ Barnes from Fuzion that Medina quit his job after his shift on April 19, 2015, because he was unhappy that he was not made a foreman and the other crew members did not respect him. (C.R. 7)

[32] Medina’s response was to claim that Fuzion is wrong and the company altered its documentation to avoid reporting a work injury:

Q. (Mr. Gigler) Okay. What’s your explanation as to why your name doesn’t appear as someone who’s worked out at the Flatiron project on either April 20 or April 21?

A. (Mr. Medina) To me it’s the way they have so they won’t have to pay for the accident. The accident occurred on the 20th, so they said that I—that I am—I haven’t worked there after the 19th and I am out.

Q. So you’re—you think that your employer changed these field tickets, basically pages 21, 22, they altered them to remove your name?

A. Yes, that is what I think. If I were not there, how would I know what was done that day, which people was there—were there?

Q. Now, you’ve—you’ve told us what you think happened. Do you have any—do you have an evidence to support what you think?

A. Okay. Well, no, not at the moment, but if need be, there was—there was a way. There are—there’s not just one sheet to be signed. Flatiron has one signed sheet. Fuzion has another signed sheet, and the—and the project has another one. So there are three signed sheets, and Fuzion has one but not the other two.

Q. Well, did you contact Flatiron to get a copy of that sheet?

A. No. No, I can’t find them. I—I can’t find them on the Internet and nobody is working there anymore.

Q. Okay. That’s something that WSI told you to do back in May of 2015, right, to get proof that you were on the job?

A. Yes.

Q. And did you—did you call and talk to anybody at Flatiron?

A. No. I tried to find them on the Internet and I couldn't find it.

(Transcript from 8/22/2016 Hearing at 42-43)

[33] At the administrative hearing, Russ Barnes from Fuzion Energy testified concerning the field tickets, the time cards and the investigation he performed into whether Medina was actually working on April 21, 2015. Mr. Barnes was asked whether it was possible that Fuzion made a mistake and Medina was in fact working on April 20-21, 2015. Mr. Barnes testified Fuzion did not make that mistake. He was also asked whether the field tickets or time cards had been “doctored” to remove Medina’s name from them after April 19, 2015, which he denied. (Transcript from 8/22/2016 Hearing at 63-64)

[34] Russ Barnes also testified that Fuzion employees get a check stub showing their hours worked, and this would be true even for those employees such as Medina who utilized direct deposit of their paychecks. (Transcript from 8/22/2016 Hearing at 63) Assuming for the sake of argument that Fuzion documents were somehow altered, Medina should still have in possession evidence that would in fact have proved he was working on the day he claimed to have been injured—his own check stub.

[35] During his hearing testimony, Medina was asked whether he was paid for working on April 20 and April 21. His answer was evasive and seemed to anticipate the direction any follow up questions might take:

Q. (Mr. Gigler) Okay. Did you get paid for working on April 20 and 21?

A. (Mr. Medina) I—I don't know which days they paid me. I received my deposit, but I didn't get my—my report. Fernando kept that report.

Q. Okay. When you say Fernando kept the report, what report are you talking about?

A. Okay. The report where it says how many hours were worked and the overtime and all the hours worked.

Q. Okay. So—so normally, if I understand you right, you would receive attached to your check or some notice of the hours that you would work every day, right?

A. Yes. Here's how it went. I had direct deposit, but from Wyoming they would send to Fernando a report that said all the hours worked, the deductions and everything, but that came to Fernando, and then he would—he would give it to us and that came in a different envelope.

Q. Okay. Well, and did you receive that, which would have included April 20 and April 21?

A. No. I never saw it. Fernando kept it.

Q. Okay. So did you ever request—go back to Fuzion and request a copy of that statement showing your hours, your pay for that period?

A. Nope, I never did it.

Q. Okay. Did you ever ask Fernando why he never gave you that information?

A. No. No. Actually, Fernando never answers my call. He never answered my call after a certain time period.

(Transcript from August 22, 2016, Hearing at 33-34) The check stub could have confirmed that Medina was in fact working on April 21, 2015, or it could have confirmed Fuzion's documentation that he was **not** working on that day. Medina's testimony that Fernando's usual practice was to give the employees their check stubs separately, but did not give Medina the one check stub that would show whether he worked on April 20 and 21, 2015, and that Medina failed to follow up with either Fernando or Fuzion, is simply not credible.

[36] In his Findings of Fact, Conclusions of Law and Order (Corrected), issued on September 12, 2016, ALJ Keogh concluded as follows:

Claimant claimed that he was injured on 4/21/2015. There is some evidence that he worked on that day, if weight can be given to the text messages and gas receipts that, when considered along with Claimant's testimony, would lead to some inference that he did work that day. However, despite the somewhat contradictory statements of the Employer made in the course of Mr. Barnes' investigation and relative to the dates of the various events or communications, the Field Tickets and payroll records that show Claimant did not work on either 4/20/15 or 4/21/2015 are unrefuted, unassailable, and are conclusive.

(App. 50-581; C.R. 92-99 at Conclusion of Law #3) That conclusion of law indicates that ALJ Keogh weighed the evidence by Fuzion that Medina was not working on April 21, 2015, and Medina's evidence that he was working. Based on that evidence, ALJ Keogh could have reasonably concluded as he did that Medina had failed to prove that he was working on the date that he claimed he injured his right shoulder.

B. ALJ Keogh's Denial of Medina's Petition for Reconsideration Following a Limited Hearing was Appropriate under N.D.A.C. § 98-02-04-07.

[37] As noted above, on October 6, 2016, Medina submitted his Petition for Reconsideration from the ALJ's Findings of Fact, Conclusions of Law and Order. In his petition, Medina complained about "inconsistencies" in the Field Tickets and argued that Fuzion Energy failed to explain the "obvious discrepancy" in its Field Tickets. Medina further claimed that he had "irrefutable proof" that he was working for Fuzion on April 21, 2015. He attached illegible copies of "safe work permits" for April 19, 21 and 22, 2015, which he claimed showed that he performed the work described in those documents. (C.R. 101-109)

[38] The safe work permits attached to Medina's petition for reconsideration were not admitted into evidence and therefore not part of the August 22, 2016, hearing record. The specific grounds for reopening an administrative hearing are set forth in N.D.A.C. § 98-02-04-07:

- a. Any irregularities of procedure by the hearing officer of any party, any order of the hearing officer, or any abuse of discretion of the hearing officer by which any party was prevented from having a fair hearing.
- b. Accident or surprise which ordinary prudence could not have guarded against.
- c. Newly discovered evidence material to the party submitting the petition which the party could not, with reasonable diligence, have discovered or produced at the hearing.

Medina did not argue the hearing should be reopened because ALJ Keogh prevented him from having a fair hearing, nor did he allege "accident or surprise." Instead, he offered the Flatiron safe work permits without any explanation why they should be considered. WSI countered that the safe work permits are "newly discovered evidence" under subsection (c) since they were not offered into evidence at the time of the hearing, but Medina had made no showing why he "could not with reasonable diligence have discovered or produced" them for the administrative hearing. (C.R. 107-09)

[39] Over WSI's objection, ALJ Keogh reopened the hearing on a limited basis to consider whether the Flatiron safe work permits were "newly discovered evidence," provided they met the specified grounds pursuant to N.D.A.C. § 98-02-04-07. At the "limited" hearing, Medina called John Hippe, who testified that he was the operations manager at Flatiron Midstream, LLC. Mr. Hippe testified that was "familiar" with the Flatiron safe work permits Medina was proposing as hearing exhibits only because one of

his “operators” received a call from Medina requesting them. Hippe told this “operator” to go back in the files to see if they were there. Hippe testified: “He [Medina] was wanting us to send them to him. And that’s how I became familiar with them. I didn’t know what they were for, why you wanted them.” (Transcript from 2/17/2017 Hearing at 11) He also testified that he did not know the date of the phone call from Medina to “the operator” requesting the safe work permits.” (Id. at 12)

[40] Hippe was able to identify the general purpose of the Flatiron safe work permit. He testified that, “[t]he purpose of that is the foreman will take a copy of this work permit with them to the designated area that they are working, and that foreman is meant to be in that area to be notified who is allowed to work in that area on that crew.” (Transcript from 2/17/2017 Hearing at 13) He further testified that the safe work permits are filled out prior to the work being performed, and the persons from Fuzion listed are those permitted to be on the jobsite. However, the safe work permit does not confirm that a worker listed on the permit was actually on site on the day the work was to be performed:

Q. (Mr. Gigler) So this, the permit has to be in place before any work is actually done, correct?

A. (Mr. Hippe) Yes. That is correct. An operator has to go out and verify that everything is okay to work around.

Q. But the names that we see on the permit, they are actually filled in before the work is done, true?

A. Yeah. Everything is filled out before the work starts.

Q. And, so, whoever from Flat Iron would not have any idea which of the employees listed would actually be out performing the work; would that be true?

A. I guess, yeah, like, I mean, when the contractor comes in and fills it out, sometimes each guy will sign the name, sometimes the foreman puts down who he brought with him. But we don't verify with an ID check, nothing like that.

Q. Does Flat Iron use the safe work permit in any way to reconcile which employees actually did the work?

A. No. I mean, like, if we receive a bill do we use it to verify, no. It's a form to make sure it's safe work basically.

(Transcript from 2/17/2017 Hearing at 16-17)

[41] Furthermore, Hippe admitted on cross-examination that he had no any personal knowledge of the activities that were supposedly documented by the safe work permits:

Q. (Mr. Gigler) Okay. Let me ask you this: Does your operator verify that they permit the employees listed were authorized to do the work were actually present at the time?

A. (Mr. Hippe) No. They don't actually speak to each person and get an ID or nothing like that.

Q. So it's likely that your operator maybe saw one person from Fusion?

A. I guess it's possible. I don't know. I don't know.

Q. So as operations manager. I think you said you were?

A. Yes.

Q. You're familiar with the documents, right, the safe work permits themselves?

A. Yes.

Q. But you're not familiar or you don't have any direct knowledge of the activities that were supposedly indicated on these particular permits, right.

A. No. I typically don't interact with the contractor when they are getting their permits done. No. That's what operators do.

(Hrg. Tr. at 27-28)

[42] Medina also called Jesus Contero² to testify over WSI's objection that Contero's testimony was not "newly discovered evidence" because Medina had made no showing that he could not, with reasonable diligence, have discovered or produced Contero at the administrative hearing. (Transcript from 2/17/2017 Hearing at 28-31) Contero testified that he and Medina were both working for Fuzion on April 21, 2015. When asked how he knew Medina was working that day, Contero testified: "Because I remember that that time we worked 13, 14, 15, 16, 17, 18, 19, 20, all the way to the 21st. I continued working, but he worked only until the 21st." (Id. at 33)

[43] Contero admitted on cross-examination that Medina was his friend, and the two of them had talked on the telephone approximately a week or two prior to the hearing, and at that time Medina asked Contero if he could help him by testifying at the "limited" hearing. (Transcript from 2/17/2017 Hearing at 34) Medina was allowed to testify again at the "limited" hearing about when he first contacted Flatiron to request copies of the safe work permits. (Id. at 47-51) Medina did not provide any testimony regarding why he could not have had his friend Jesus Contero testify at the August 22, 2016, administrative hearing.

[44] Following the testimony of John Hippe, Jesus Contero and Medina, ALJ Keogh closed the record and issued his Second Memorandum on Petition for Reconsideration, which denied Medina's Petition for Reconsideration. (C.R. 143-147) ALJ Keogh found that the Flatiron Safe Work Permits did qualify as "newly discovered

² Jesus Contero is also identified as "Jesus Quintero" on Fuzion documents such as the Field Tickets. (See C.R. 14-25)

evidence” pursuant to N.D.A.C § 98-02-04-07, but they were evidence only that Medina’s name was on the permits. They were not evidence that Medina was in fact working for Fuzion on April 21, 2015. (Id. at Finding of Fact #7)

[45] Furthermore, ALJ Keogh found that the testimony of Jesus Contero was not newly discovered evidence sufficient to justify reopening the administrative hearing: “Again, Claimant was duly warned that WSI would make an issue out of whether or not Claimant was really working on 4/21/2015. Claimant and Mr. Contero (“Quentero”) are friends and were co-workers. Claimant knew how to contact Mr. Contero but supposedly did so only shortly before the second hearing. If Claimant believed Mr. Contero would provide corroborating testimony about working on 4/21/2015, he had ample time and opportunity to secure that testimony at the first hearing.” (C.R. 146 at Finding of Fact #8)

[46] On February 28, 2018, ALJ Keogh issues his Amended Findings of Fact, Conclusions of Law, and Order, wherein he concluded that Medina had failed to prove by a preponderance of the evidence that he is entitled to benefits under North Dakota Workmen’s Compensation Act. The “amendments” were the incorporation of findings of fact 23, 24 and 25, wherein ALJ Keogh summarized the evidence presented at the “limited” hearing on Medina’s Petition for Reconsideration, which he denied.

[47] ALJ Keogh found, as he did originally in his decision following the August 22, 2016, hearing, that Medina had failed to prove by a preponderance of the evidence that he was working for Fusion Energy on April 21, 2015, which was the date he claimed he injured his right shoulder. Based on that finding, ALJ Keogh concluded that Medina had not proved that he was entitled to benefits. ALJ Keogh could have reasonably concluded

as he did, based on the evidentiary record as a whole, and therefore his decision must be affirmed. Victor v. Workforce Safety & Ins., 2006 ND 68, ¶ 13, 711 N.W.2d 188.

CONCLUSION

[48] For the reasons outlined herein, Appellee, State of North Dakota, by and through Workforce Safety and Insurance, hereby requests that this Court AFFIRM the District Court's Order of August 8, 2018, affirming the Amended Findings of Fact, Conclusions of Law and Order of Administrative Law Judge Robert Keogh, dated February 28, 2018.

DATED this 7th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, Workforce Safety and Insurance, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table

of authorities, signature block, certificate of service and certificate of compliance totals
5465 words.

Dated this 7th day of December, 2018

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