20190056
FILED
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MAY 21, 2019
STATE OF NORTH DAKOTA

THE SUPREME COURT

STATE OF NORTH DAKOTA

BILE SALAT	)	**COUNTY OF BURLEIGH**
	)	
Appellant,	)	**Supreme Court No: 20190056**
	)	**Civil No. 08-2018-CV-01981**
	)	
vs.	)	**APPELLANT'S BRIEF TO THE**
	)	**NORTH DAKOTA SUPREME**
NORTH DAKOTA WORKFORCE SAFETY INSURANCE FUND	)	**COURT**
	)	
Appellee,	)	
	)	
XPO CNW Inc.	)	
	)	
Respondent.	)	

ORDER REVERSING ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER AND ORDER DENYING PETITION FOR RECONSIDERATION AND ORDER FOR JUDGEMENT ENTERED ON DECEMBER 19, 2018, INDEX #30, JUDGMENT ENTERED JANUARY 4, 2019 INDEX #35, WITH NOTICE OF ENTRY OF JUDGMENT SERVED JANUARY 4, 2019, INDEX # 36.

COUNTY OF BURLEIGH
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BRUCE HASKELL

STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58503
(701)222-1761
(littlelaw@littlelawnd.com)

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[1] **I. ISSUE PRESENTED**

[2] Could a reasoning mind find that the decision of the Administrative Law Judge was supported by the greater weight of the evidence?

[3] **II. STATEMENT OF FACTS**

[4] Bile Salat had worked for ten years as a standing forklift operator when he slipped and fell at work, striking his back against the forklift and fracturing his ankle (APP. pg.17). Mr. Salat began treating with Dr. Krissondra Klop, an occupational medicine doctor, and was treated by various medical specialists including a physical therapist, a chiropractor, and a podiatrist for both his right ankle and low back injuries (APP. pg. 14-22, 23-26, 27-29).

[5] **III. STATEMENT OF THE CASE**

[6] WSI awarded Mr. Salat disability benefits as a result of both his low back and right ankle injuries (CR 6). WSI denied Mr. Salat further disability benefits after June 29, 2016, because it contended that he was able to return to work and chose not to do so (APP. pg. 30). WSI then denied further benefits for Mr. Salat's low back condition after November 11, 2016, because it contended that his low back symptoms had resolved (APP. pg. 31-36). Mr. Salat asked for and received an evidentiary hearing. Administrative Law Judge Janet Demarais Seaworth issued Findings of Fact, Conclusions of Law and Order reversing WSI's denials and restoring Mr. Salat's entitlement to continued disability and medical benefits (APP. pg. 37-47). WSI petitioned ALJ Seaworth to reconsider her decision and she, again, ordered Mr. Salat's benefits restored. WSI then appealed to the District Court which, in turn, reversed ALJ Seaworth's factual findings. Mr. Salat has appealed to this Court.

[7] **IV. LAW AND ARGUMENT**

[8] **SCOPE OF REVIEW ON APPEAL**

[9] 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, 3-4.

[10] This Court has long recognized that it must exercise restraint in determining whether WSI'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 at 790. 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 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 that even though the court may have a different view of the evidence, it must only consider whether WSI's decision is supported by the evidence). Quite simply, "[i]t 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).

[11] In both its Petition for Reconsideration and appeal to the District Court, WSI was unhappy with the factual determinations of the Administrative Law Judge, whether denominated as Findings of Fact or Conclusions of Law. For instance, WSI complained that the ALJ found that, "Dr. Hart and Dr. Klop . . . mistakenly concluded that claimant could return to work" (APP. pg. 48-60). WSI also complained that the ALJ found that, "The greater weight of the evidence shows that after November 11, 2016, the claimant continued to experience low back muscle spasms and pain stemming from his altered gait caused by the work injury. His low back muscle spasms and pain is [sic] causally connected to his work injury and he is entitled to benefits for that condition" (APP. pg. 56). WSI also criticized the ALJ's determinations that, "He should not have been released to regular duty and there was no modified work available for him." and that, "The employer then relied on Dr. Klop's erroneous release to regular duty to proceed with claimant's termination" (APP. pg. 57).

[12] Clearly, WSI's complaints relate to factual determinations and not matters of law. [13]WSI's criticism of the ALJ's decision included three complaints: 1) That Mr. Salat's pain after November 11, 2016 was thoracic rather than lumbar; 2) That the ALJ should have accepted Dr. Klop's work release; and 3) That the ALJ impermissibly questioned Dr. Cooper. ALJ Seaworth responded to each of WSI's criticisms:

> [14] First, WSI argues that there is no evidence that claimant had lumbar problems after November 11, 2016; rather, he had mid-back (thoracic) problems after November 11, 2016. WSI parses the record too neatly. Claimant consistently complained of low back symptoms that upon examination were variously described as mid-low, mid-back, thoracolumbar, and low back pain and were attributed to the lumbar region or the thoracic region, or both. WSI points out that the May 19, 2017 medical record states that claimant's back spasm was in the thoracic region. Yet, as WSI notes, the record shows that claimant had "[p]ain at the bilateral paraspinal musculature at

T10-T12." T12 is immediately adjacent to L1 and while Dr. Klop noted on that occasion that there was "[n]o lower back pain with palpation" that does not mean that claimant's low back pain no longer existed because Dr. Klop referred to T10-12 rather than L1. What is clear from the record is that claimant had low back muscular pain resulting from his antalgic gait caused by the work injury, whether it is attributed to L1 or T12. WSI's attempt to parse liability for low back pain based on whether the pain can be attributed to the L1 or T12 region is unpersuasive given the record showing claimant's consistent complaints of low back pain attributable to his antalgic gait caused by the work injury. Finally, it is worth noting that Dr. Klop found claimant had tenderness at L1-L5 on October 6, 2016, and on November 22, 2016, Dr. Cooper referred to claimant's "continued low back pain" and "current low back condition" even· while finding that claimant had tenderness at T7 through T10. In fact, his report refers to the "Thoracolumbar spine." (APP. pg. 61-63)So, while Dr. Cooper did not believe that claimant's low back condition was due to the work injury, he acknowledged that claimant had a low back condition, even after November 11, 2016.

[15] Second, WSI argues that claimant has not shown that he is entitled to disability benefits after June 29, 2016 because he was released to work by his treating doctor and he failed to provide any verification of disability thereafter. Dr. Klop's release cannot be blindly accepted when the evidence shows that it was not well founded. WSI' s own expert witness did not agree with that work release. As discussed, the greater weight of the evidence shows that claimant was still disabled after June 29, 2016 and he should not have been released to regular duty work.

[16] Finally, WSI Counsel argues that this ALJ abused her authority to question witnesses when the ALJ asked WSI's expert witness if he would have released claimant to work. That expert witness had offered an opinion before the hearing that claimant's ankle injury had not resolved and indicating that the nature of his ankle injury had not been fully appreciated by his medical providers. Obviously, the credibility of the work release was an issue, since WSI relied upon that work release to deny further disability benefits. WSI counsel's suggestion that this ALJ's questioning of WSI's expert witness was inappropriate is mistaken. As the Attorney General has advised:

> [17] The North Dakota Worker's Compensation Bureau is an administrative agency subject to the requirements of the North Dakota Administrative Agencies Practice Act, N.D.C.C. Ch. 28-32. Foss v. North Dakota Workmen's Compensation Bureau, 214 N.W.2d 519, 521 (N.D. 1974). Litigation attorneys of the Bureau represent the Bureau's interests in administrative proceedings. In doing so, the attorneys represent the Bureau in the traditional role of an attorney, introducing evidence and cross-examining witnesses. However, the Bureau, and thus its attorney must not place itself in a position fully adversary to the claimant. Frohlich v. North Dakota Workers Compensation Bureau, 556 N.W.2d 297, 301 (N.D. 1996). "The adversarial concept has only limited application in a worker's compensation claim. "McDaniel v. North Dakota Workers Compensation Bureau, 567 N.W.2d 833, 838 (N.D. 1997). See also S&S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80 (N.D.1995). This is because the Bureau acts as both a fact finder and an advocate in considering a worker's claim. Fuhrman v. North Dakota Workers Compensation Bureau, 569 N.W.2d 269, 272 (N.D. 1997); Blanchard v. North Dakota Workers Compensation Bureau, 565 N.W.2d 485, 489 (N.D. 1997). Accordingly, the primary goal of attorneys representing the Bureau in administrative proceedings should be to attempt to obtain relevant information, so the Bureau can make an informed decision, not to take an adversarial position to the claimant.

> [18] 98-F-12 Op. N.D. Att'y Gen. 1-2 (1998). To that end, and in order to facilitate full disclosure of the facts, the administrative rules allow a hearing officer to examine witnesses, direct witnesses to testify, issue subpoenas and discovery orders, and request late-filed exhibits. N.D. Admin. R. 98-02-03-02, 98-02-03-03. The testimony elicited by the questioning to which WSI objects is relevant and material, it is allowed under applicable rules, and it is fully in keeping with the nature of these administrative proceedings "to obtain relevant information, so the Bureau can make an informed decision ... " 98-F-12 Op. N.D. Att'y Gen. 2 (1998).

[19] WSI objected to the ALJ's consideration of relevant evidence to make an informed decision. That was the gist of WSI's argument on reconsideration and before the District Court. The District Court substituted its view of the evidence for that of the ALJ. As discussed, the reviewing court cannot substitute its judgment or its view of the facts for that of the administrative agency or, in this case, the ALJ. The District Court determined that, "After careful review of the record on appeal, a reasoning mind could not reasonably conclude that Dr. Cooper and Dr. Klop had conflicting medical opinions"(APP. pg.15). The ALJ explained in some detail that she relied on Dr. Robert Cooper, WSI's expert, for her finding that Mr. Salat had a low back condition after November 11, 2016. She explained that she thought that she was obligated to consider all of the medical evidence, regardless of which party produced it. The ALJ's analysis was hardly "manufactured" or unreasoned as suggested by the District Court.

[20] The WSI Order at issue before the ALJ was based on findings of fact that: On April 6, 2016, Dr. Klop opined that Mr. Salat's low back pain had resolved; and on November 22, 2016, Dr. Cooper opined that Mr. Salat had reached pre-injury status within three to six weeks after his February 22, 2016 work injury (APP. pg. 43). When Dr. Cooper testified at the hearing, he opined that he would not have released Mr. Salat to return to work when Dr. Klop had because returning to work would likely have prevented or delayed healing and, instead, he would have referred Mr. Salat to a specialized center to treat his work injury (APP. pg. 64). The ALJ recognized that Dr. Cooper's opinion at hearing regarding Mr. Salat's ability to return to work and recommendation for specialized care was at odds with Dr. Klop's work release and treatment

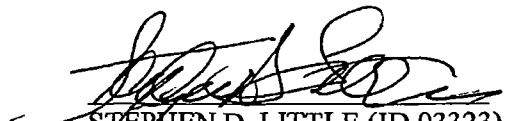
records. As the ALJ noted, it was apparent from Dr. Cooper's testimony that he thought that Dr. Klop had not fully appreciated the nature and seriousness of Mr. Salat's ankle injury (APP. pg. 65-68). The ALJ determined that the greater weight of the evidence supported Dr. Cooper's opinion that Dr. Klop's work release had been in error. There was nothing manufactured about Dr. Cooper's opinion regarding Dr. Klop's failure to appreciate the true nature of Mr. Salat's injury. Since her work release had been based on a misunderstanding of Mr. Salat's actual condition, it could hardly be said to be based on objective medical evidence. The ALJ determined that WSI's Order denying further disability benefits after June 29, 2016, which was based on Dr. Klop's misunderstanding of Mr. Salat's condition, must be reversed. The ALJ also determined that the greater weight of the medical evidence showed that Mr. Salat's low back pain had not resolved and, consequently, WSI's Order denying further medical treatment for Mr. Salat's thoracolumbar spine after November 11, 2016, must be reversed.

[21] **V. CONCLUSION**

[22] The issues before the ALJ were whether Mr. Salat was entitled to disability benefits after June 29, 2016 and whether he was entitled to any benefits in connection with his low back condition after November 11, 2016. The ALJ, relying on both parties' evidence, determined that the greater weight of that evidence showed that he remained entitled to benefits. There is no basis to reverse that determination.

[23] Dated this 21st day of May, 2019.

[24] LITTLE LAW OFFICE



STEPHEN D. LITTLE (ID 03323)
Little Law Office
Gateway Office Building

2718 Gateway Ave., Ste. 302
Bismarck, ND 58503-0585
T/N: 701-222-1761
littlelaw@littlelawnd.com
ATTORNEY FOR APPELLANT

[25] **CERTIFICATE OF COMPLIANCE**

[26] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(a)(7)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance totals 2940 words.

[27] Dated this 21st day of May, 2019.

[28]

LITTLE LAW OFFICE

STEPHEN D. LITTLE (ID 03323)
Little Law Office
Gateway Office Building
2718 Gateway Ave., Ste. 302
Bismarck, ND 58503-0585
T/N: 701-222-1761
littlelaw@littlelawnd.com
ATTORNEY FOR APPELLANT

[29] **CERTIFICATE OF SERVICE**

[30] I, Stephen D. Little, hereby certify that on this 21st day of May, 2019, a true and correct copy of the Appellant's Brief Certificate of Service and were served via email to the following:

SUPREME COURT OF NORTH DAKOTA
OFFICE OF THE CLERK
supclerkofcourt@ndcourts.gov

Mr. Mitchell Armstrong
MArmstrong@smithporsborg.com

[31] Dated this 21st day of May, 2019.

[32]

LITTLE LAW OFFICE

STEPHEN D. LITTLE (ID 03323)
Little Law Office
Gateway Office Building
2718 Gateway Ave., Ste. 302
Bismarck, ND 58503-0585
T/N: 701-222-1761
littlelaw@littlelawnd.com
ATTORNEY FOR APPELLANT

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	)	**Civil No. 08-2018-CV-01981**
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
NORTH DAKOTA WORKFORCE SAFETY INSURANCE FUND	)	
	)	
Appellee,	)	
	)	
XPO CNW Inc.	)	
	)	
Respondent.	)	

1] I, Stephen D. Little, hereby certify that on this 21st day of May, 2019, a true and correct copy of the Appellant's Appendix and Certificate of Service and were served via email to the following:

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OFFICE OF THE CLERK
supclerkofcourt@ndcourts.gov

Mr. Mitchell Armstrong
MArmstrong@smithporsborg.com

Dated this 21st day of May, 2019.

LITTLE LAW OFFICE

STEPHEN D. LITTLE (ID 03323)
ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58503
(701) 222-1761
littlelaw@littlelawnd.com

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	)	
vs.	)	**CERTIFICATE OF SERVICE**
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	)	
Appellee,	)	
	)	
XPO CNW Inc.	)	
	)	
Respondent.	)	

1] I, Stephen D. Little, hereby certify that on this 21st day of May, 2019, a true and correct copy of the Appellant's Motion For Extension of Time To File Brief, Appellant's Brief and Appendix was mailed through US Mail with prepaid postage to the following:

XPO CNW Inc.
Attn: HR Dept.
Box 4150
Portland OR 97208-4150

A copy of the Appellant's Motion For Extension of Time To File Brief, Appellant's Brief and Appendix was also served via email on May 21, 2019 to the following:

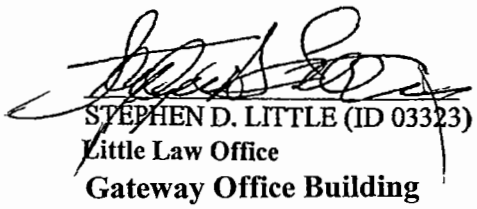
SUPREME COURT OF NORTH DAKOTA
OFFICE OF THE CLERK
supclerkofcourt@ndcourts.gov

Mr. Mitchell Armstrong
MArmstrong@smithporsborg.com

2] Dated this 23rd day of May, 2019.

3] **LITTLE LAW OFFICE**

4]



STEPHEN D. LITTLE (ID 03323)
Little Law Office
Gateway Office Building
2718 Gateway Ave., Ste. 302
Bismarck, ND 58503-0585
T/N: 701-222-1761
littlelaw@littlelawnd.com
ATTORNEY FOR APPELLANT