

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>Tracey Decker</p> <p>Appellant,</p> <p>vs.</p> <p>North Dakota Workforce Safety and Insurance,</p> <p>Appellee,</p> <p>and</p> <p>Calfrac Well Services Corp.,</p> <p>Respondent.</p>	<p>Supreme Court No.: 20200014 Williams County District Court Civil No.: 53-2019-CV-01267</p>
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BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT JUDGMENT DATED JANUARY 2, 2020,
AND OPINION AND ORDER ENTERED ON DECEMBER 20, 2019,
AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF
ADMINISTRATIVE LAW JUDGE LYNN JORDHEIM, DATED JUNE 21, 2019

WILLIAMS COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON

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STATEMENT OF THE ISSUES

[1] Whether ALJ Jordheim could have reasonably concluded from the hearing evidence as a whole that Decker failed to prove that the April 17, 2015, work incident is a substantial contributing factor to the current condition of his lumbar spine?

STATEMENT OF THE CASE

[2] Claimant Tracey Decker (“Decker”) submitted a First Report of Injury to Workforce Safety and Insurance on May 13, 2015, describing an injury that occurred on April 17, 2015, while working for Calfrac Well Services Corp. Decker reported that he was carrying a “3 inch ‘chick’” on his shoulder when he stepped off a rig mat and “jarred” his low back. (Appx. 32-34; C.R. 1-3¹)

[3] On June 8, 2015, WSI issued its Notice of Decision Accepting Claim and Awarding Specific Benefits for displacement of lumbar intervertebral disc without myelopathy. (Appx. 35; C.R. 4)

[4] On May 15, 2018, WSI issued its Notice of Decision Ending Benefits. WSI notified Decker that his benefits were being terminated after June 5, 2018, because the April 17, 2015, work injury was no longer a substantial contributing factor to the current condition of his lumbar spine. WSI’s decision to terminate further benefits was based on a review of Decker’s medical records by its medical consultant and an Independent Medical Records review performed by Dr. Charles Burton. (Appx. 36; C.R. 6-7)

¹ “C.R.” refers to the Certificate of Record on Appeal to District Court filed on September 27, 2019, pursuant to N.D.C.C. § 28-32-44, followed by reference to the page within the Certificate of Record.

[5] On May 24, 2018, Decker requested reconsideration from WSI's Notice of Decision Ending Benefits. He claimed that his "injury continues to be work related and [he remained] entitled to full benefits." (Appx. 37; C.R. 8) On June 20, 2018, WSI advised Decker by letter that the information submitted for reconsideration was insufficient to change its decision to terminate benefits. (C.R. 22) On July 12, 2018, WSI issued its "Order denying further workers compensation benefits after June 5, 2018, unless and until objective medical evidence demonstrates the work injury is a substantial contributing factor to [Decker's] current condition." (Appx. 49-54; C.R. 25-31)

[6] Decker requested a formal hearing on September 27, 2018. (C.R. 33) On November 15, 2018, Administrative Law Judge Lynn Jordheim ("ALJ") issued a Notice of Hearing, Specification of Issue and Prehearing Order. The Order identified the specified issue as follows:

Does the greater weight of the evidence establish that Tracey Decker's April 17, 2015 work incident is a substantial contributing factor regarding his current lumbar condition?

(C.R. 34-36) The administrative hearing was held on May 28, 2019. (C.R. 381-398)

[7] On June 21, 2019, ALJ Lynn Jordheim issued his Findings of Fact, Conclusions of Law and Order. He concluded that Decker had not met his burden of proving that his compensable injury was a substantial contributing factor to his current low back symptoms, and affirmed WSI's Order denying further benefits. (Appx. 57-68; C.R. 361-372)

[8] On July 18, 2019, Decker petitioned ALJ Jordheim for reconsideration of his decision affirming WSI's denial of further benefits. He argued that "the greater weight of the evidence shows that Mr. Decker's 2013 low back symptoms were

associated with kidney stones.” (C.R. 376-377) ALJ Jordheim issued his Denial of Petition for Reconsideration on August 2, 2019. (Appx. 69; C.R. 379)

[9] On August 23, 2019, Decker filed a Notice of Appeal and Specification of Error to Williams County District Court. (Appx. 29-30) On December 20, 2019, District Court Judge Benjamin issued an Opinion and Order affirming the decision of ALJ Jordheim. (Appx. 70-76) Order for Judgment and Judgment were entered on January 2, 2020. (Appx. 11 (Doc #71-72), 84) Notice of Entry of Judgment was served on January 22, 2020. (Appx. 11 (Doc #76))

[10] On January 22, 2010, Decker appealed to this Court. (Appx. 11 (Doc #73))

STATEMENT OF FACTS

[11] Claimant Tracey Decker (“Decker”) submitted a First Report of Injury to Workforce Safety and Insurance on May 13, 2015, describing an injury that occurred on April 17, 2015, while employed by Calfrac Well Services. Decker reported that he was carrying a “3 inch ‘chick’” on his shoulder when he stepped off a rig mat and “jarred” his low back. (C.R. 1-3)

[12] Decker did not seek medical treatment until May 4, 2015, when he saw Nurse Practitioner Stormy Jensen, at the Billings Clinic. Decker reported “concerns over a lift sided sciatic pain.” He reported that the pain has been “present for the last two days,” and that he has experienced similar pain in the past. As for the mechanism of injury, NP Jensen reported: “He states that the pain started after he had to lift a heavy pipe. The patient reports that the pipe was on his right shoulder and he states that he had to twist his lower back in order to adjust it.” Decker further reported that never had any

imaging done of his lower back. NP Jensen's assessment was left-sided sciatica pain and she prescribed prednisone and hydrocodone. (C.R. 55-57)

[13] X-rays of Decker's lower back were performed on May 13, 2015, and interpreted by Dr. Jaszczak Leseck. Dr. Leseck found no evidence of compression deformity or spondylolisthesis. His impression was degenerative disc narrowing at L4-L5 and L5-S1. (C.R. 113)

[14] Decker saw chiropractor Kenneth Stein on May 20, 2015, on a referral from another chiropractor in Bismarck, North Dakota. Decker reported that "he had originally hurt his lower back on April 17 while carrying a 225 pound load and stepped off a platform wrong twisting his lower back." Kenneth Stein's diagnosis was "lumbosacral segment dysfunction" and "degeneration of lumbar or lumbosacral." (C.R. 117-119)

[15] Decker underwent an MRI of his lumbar spine on May 28, 2015. The impression was:

1. Lumbar degenerative disk disease and spondylosis. L5-S1 shows posterior central disk herniation with slight inferior extrusion. There are bilateral anterolateral recess stenoses and bilateral foraminal stenoses at this level.
2. L4-L5 shows a smaller posterior disk protrusion with left anterolateral recess stenosis, left foraminal stenosis and mild to moderate canal stenosis.

(C.R. 130)

[16] On June 8, 2015, WSI issued its Notice of Decision Accepting Claim and Awarding Benefits. The notice informed Decker that WSI had accepted the claim for "[d]isplacement of lumbar intervertebral disc without myelopathy" under ICD-9 code.

(C.R. 4)

[17] On July 6, 2015, Decker saw Dr. Eugen Dolan at the Billings Clinic for a neurosurgery consultation upon referral by chiropractor Kenneth Stein. Decker was complaining of pain in the mid-back, down the left lateral leg and numbness and tingling down the left lateral leg and in the lateral two toes. Decker told Dr. Dolan that he “was lifting a 250-pound piece on his shoulder trying to put it up in the truck, and he felt something pop in his back.” (C.R. 68)

[18] Dr. Dolan noted that the MRI performed on May 28, 2015, showed “L4-5 transitional vertebrae designated S1, L4-5 bulging annulus, posterior disk protrusion producing left lateral recess stenosis impacting on the L5 traversing nerve root and minor left foraminal stenosis. L5-S1 shows a bulging disk with bilateral foraminal stenosis and more protrusion on the right than the left.” Dr. Dolan recommended a Medrol Dosepak for pain and an epidural steroid injection if the Medrol was ineffective. (C.R. 69)

[19] Decker saw Dr. Patricia Grantham on July 14, 2015, as a follow up to his appointment with Dr. Dolan. Dr. Grantham noted that Decker’s complaint was pain in his right hip area radiating down his right leg posteriorly down to the toes. He also noted for past medical history “[k]idney stones.” Dr. Grantham’s assessment was “[c]hronic low back pain with radiculopathy” and she referred Decker to occupational health. (C.R. 71-73)

[20] On August 18, 2015, Decker saw Dr. John Petrisko with occupational medicine at the Billings Clinic. Decker’s chief complaint was left leg radicular symptoms. Dr. Petrisko noted that “[p]atient’s mechanism of injury is that while at work he was carrying a heavy pipe, twisting, and placing the pipe down, and adjusting when he had a sharp pain the low back radiating down the left leg.” (C.R. 74)

[21] Dr. Petrisko also noted that Decker had been seen in May of 2013 with complaints of low back and left hip pain. Dr. Petrisko further noted Decker's response that those symptoms "ultimately turned out to be related to renal stones, but I do not see any indication of that." (C.R. 74) Dr. Petrisko's assessment was "[l]umbar spine strain and left lower extremity radicular complaints without evidence of significant nerve root impingement on MRI, only some neural foraminal narrowing at the L4-5 level[.]" He authorized physical therapy and a selective nerve root block. (C.R. 76) The selective nerve block was administered on August 31, 2015. (C.R. 82-84)

[22] Dr. Petrisko saw Decker again on September 8, 2015. Decker reported that he was possibly moving to California and had been let go by his employer because of the slowdown in oilfield activity. Dr. Petrisko's assessment was "[l]umbar spine strain and left lower extremity radicular complaints without significant findings of nerve root impingement on MRI with neural foraminal narrowing at the L4-5 level[.]" (C.R. 85-84)

[23] Decker reported to Dr. Frank Cantrell, a neurologist, on December 10, 2015, for an EMG of his bilateral lower limbs. Dr. Cantrell's impression was "[n]ormal nerve conduction velocity study of the bilateral lower limbs." (C.R. 271-273)

[24] Decker underwent a CT scan of his lumbar spine on December 16, 2015. The neuroradiologist who interpreted the scan reported "[v]ery slight narrowing of the L5-S1 interspace with features of disk protrusions at L3-4, L4-5 and L5-S1[.]" (C.R. 276)

[25] Decker saw Dr. Nathan Deis on December 28, 2015, for a neurosurgery consult. Dr. Deis reviewed the CT, MRI and EMG results. Dr. Deis suspected possible impingement at L5-S1 foramen, but he was hesitant to recommend surgery, not without first seeing "clear evidence of L5 root pathology[.]" (C.R. 277)

[26] Decker returned to Dr. Deis on March 28, 2016. Decker reported no significant relief from conservative treatment, and his symptoms had in fact worsened over the past three months. Dr. Deis made the following assessment:

Degenerative disk disease, L4-5 and L5-S1. There is considerable height loss at the L5-S1 disk space resulting in marked foraminal stenosis. The patient has symptoms following an L5 nerve root distribution. These have been refractory to all conservative measures and significantly impact the patient's quality of life. Surgical treatment is reasonable to restore foraminal height. L4-5 fusion should also be contemplated given there is evidence of degeneration at this level and would be vulnerable to adjacent segment disease.

(C.R. 279-281)

[27] Decker underwent an Independent Medical Evaluation (IME) on June 16, 2016. WSI requested the IME and it was performed by Dr. Michael Bronshvag, a neurologist and internist. Dr. Bronshvag reviewed Decker's medical records and performed a physical examination. He also performed a second EMG. His diagnostic impression was:

1. Lumbar degenerative joint and disc disease—multilevel—with both disc pathology and stenosis, at least some of which must have preceded the event of April 2015.
2. Neurological radicular symptoms noted—electrodiagnostics (myself and Dr. Cantrell) negative.

(C.R. 317)

[28] Dr. Bronshvag noted that Decker's back abnormalities were long standing and could not be explained on the basis of the April 2015 injury. As part of the IME, WSI asked Dr. Bronshvag to answer whether Decker had a pre-existing condition and if the work injury was a substantial contributing factor to his current condition, or did the work

injury trigger symptoms in the pre-existing condition but did not cause substantial worsening. Dr. Bronshvag responded:

As you will note from the history, the claimant had described prior difficulties in 2010 and 2013, but he told me that he had recovered completely and was working without difficulty or limitations in 2014-2015. He described the onset of difficulties with a single specific injury. Accordingly, based on the description provided by the claimant, and as noted in the medical records, he was free of symptomatology in 2014-2015 before the described injury of 17 April 2015. Accordingly, acceleration and substantial worsening severity do not apply. Based on the history and the medical records, the claimant had the onset of his troubling difficulties in April 2015, although there was undoubtedly previously well-tolerated and not-job-limiting symptoms, and a previous history of 2010-2013 difficulties which the claimant described as having made a complete recovery from (and these are commented upon in the medical records as provided as well). Based upon what the claimant told me and my current examination, the work injury brought on or triggered symptoms and substantially worsened the pre-existing condition (from asymptomatic-working and until now—symptoms and difficulties of note which have led to the contemplation of surgical intervention).

(C.R. 319)

[29] Dr. Deis ordered a new MRI of Decker's lumbar spine that was obtained on July 11, 2016. The radiologist, Dr. Frank Tamura, compared the result with the MRI and the CT scan taken on December 16, 2015. Dr. Tamura's impression was desiccated discs at L4-5 and L5-S1, with neural foraminal narrowing at L5-S1 and lateral recess stenosis at L4-5. (C.R. 284-285)

[30] Decker followed up with Dr. Deis for his low back pain on August 2, 2016. Dr. Deis noted the most recent MRI was essentially unchanged from previous results and showed height loss at L5-S1 due to moderate foraminal stenosis. The assessment was severe low back pain with radiculopathy, with the pain being localized to the L5 dermatome. Dr. Deis recommended as follows: "Given much of the complaints seem to center around a L5 distribution and the evidence of foraminal stenosis on MRI

scan, surgical treatment could be contemplated. I have suggested decompression and anterior interbody fusion at L4-5 and L5-S1 given the disc disease at these 2 levels.” (C.R. 286-287)

[31] Decker followed-up with Dr. Deis on January 31, 2017, for low back pain and radiculopathy. Dr. Deis’ impression was discogenic low back pain with radicular complaints involving the L5 and S1 regions bilaterally. (C.R. 290-291) He ordered a new MRI that was obtained on July 24, 2017, which he compared to the MRI obtained on May 28, 2015. The impression was:

1. Mild spinal canal stenosis at L4-5 with mild right and moderate left neural foraminal narrowing which has progressed slightly from the previous examination.
2. Moderate to severe bilateral neural foraminal narrowing at L5-S1. Additionally, the traversing S1 nerve roots appear contacted by disc material in the lateral recesses at the L5-S1 level.

(C.R. 132-133)

[32] On November 10, 2017, Decker was seen for an initial evaluation by PA-C Jennifer Kuhr with Ortho Montana. Decker’s chief complaint was low back and bilateral leg pain. Decker gave a history that he was stepping down from a trailer with a heavy piece of equipment on his shoulder and into a hole, jarring his back. PA-C Kuhr noted that Decker’s MRI showed disc degeneration at L4-5 and L5-S1, with bilateral foraminal stenosis at L5-S1. Her impression was lumbar degenerative disc disease at L4-L5 and L5-S1 and foraminal stenosis at L5-S1 bilaterally. She noted that she wanted to review the imaging of Decker’s lumbar spine with one of the surgeons. (C.R. 324-326)

[33] On November 29, 2017, Decker saw Dr. Anthony Roccisano with Ortho Montana. Dr. Roccisano reviewed the imaging and noted “L4-5 and L5-S1 stenosis. He

also has disc degeneration at these levels.” His assessment was L4-5 and L5-S1 stenosis and disc degeneration and he recommended that Decker consider L4-5 and L5-S1 decompression surgery. (C.R. 327-328)

[34] On February 15, 2018, Dr. Roccisano performed bilateral laminoforaminotomy at L4-L5 and L5-S1 on Decker’s lumbar spine. Dr. Roccisano’s preoperative diagnosis was “[s]pinal stenosis at L4-L5 and L5-S1.” In the operative report, he described “severe narrowing especially at the L5-S1 level that caused quite a bit of compression of the S1 nerve roots.” He further noted the absence of any disc bulging or narrowing or free disc material present. (C.R. 354-355)

[35] On February 26, 2018, WSI’s medical consultant, Dr. Carlson, reviewed Decker’s medical records, including Dr. Roccisano’s operative report, and found as follows:

On 02/25/18 (Mr. Decker) underwent a bilateral laminoforaminotomy at the L4-L5 and L5-S1 level performed by Anthony Roccisano, MD. The findings were severe narrowing especially at the L5-S1 level that caused compression of the S1 nerve root with severe stenosis and arthritic narrowing in the lateral recesses at L4-L5 and L5-S1. The op report shows that there was no bulge or narrowing at the L5-S1 level. The L4-L5 level again did not have disc material that was free.

There is no medical evidence of a disc bulge in the lumbar spine. The IW has degenerative and congenital changes to his lumbar spine, which would not have been caused by the 04/17/15 work incident. The work incident would not have substantially worsened and/or accelerated the IW’s pre-existing degenerative and congenital changes of the lumbar spine.

(C.R. 5)

[36] At WSI’s request, Dr. Charles Burton, a neurosurgeon, performed an independent review of Decker’s medical records. (C.R. 342-353) In his report, Dr. Burton agreed with the opinion of Dr. Carlson that Decker had a progressive, multilevel, chronic

lumbar degenerative disc disease that pre-existed the April 17, 2015, work incident. He found no objective evidence of a traumatic injury to Decker's lumbar spine and at most he would have sustained a minor and temporary musculoligamentous sprain/strain. The April 17, 2015, work incident may have triggered symptoms in the pre-existing condition but did not substantially accelerate the progression of the condition or substantially worsen its severity. Furthermore, the minor and temporary musculoligamentous sprain/strain would have resolved no later than June 30, 2015, according to Dr. Burton. (C.R. 352-353)

[37] On May 15, 2018, WSI issued its Notice of Decision Ending Benefits. The Notice informed Decker of WSI's determination that the April 17, 2015, work incident was not a substantial contributing factor to the current condition of his lumbar spine, and he was no longer entitled to benefits after June 5, 2018. The Notice further stated that WSI based its determination on the medical opinions of its medical consultant, Dr. Carlson, and Dr. Charles Burton. (C.R. 6)

[38] Decker requested reconsideration from WSI's decision on May 24, 2018. (C.R. 8) On May 29, 2018, WSI provided Dr. Roccisano with summaries of Dr. Carlson's and Dr. Burton's opinions and asked Dr. Roccisano to answer whether he agreed with Dr. Carlson and Dr. Burton that Decker has pre-existing, chronic lumbar degenerative disc disease unrelated to the April 17, 2015, work incident. Dr. Roccisano answered "Yes." (C.R. 338)

[39] WSI also asked Dr. Roccisano whether he agreed with Dr. Carlson and Dr. Burton that the April 17, 2015, work incident did not substantially accelerate the

progression of the pre-existing condition or substantially worsen its severity. Dr. Roccisano again answered “Yes.” (Id.)

[40] Finally, WSI asked Dr. Roccisano whether he agreed with Dr. Burton’s opinion that the work injury Decker did sustain on April 17, 2015, resolved as of June 30, 2015. Dr. Roccisano again answered “Yes.” (C.R. 339)

[41] On July 12, 2018, WSI issued its Order denying further benefits after June 5, 2018, “unless and until objective medical evidence demonstrates that [Decker’s] work injury is a substantial contributing to his current condition.” (C.R. 25-31)

Prior Medical History

[42] On December 30, 2009, Decker reported to the ER at Holy Rosary Healthcare in Miles City, Montana. He presented complaining of pain in his right hip, right ankle and back pain. He reported the pain started five days earlier after he was trying to push a heavy box across the floor with his right foot. (C.R. 38-39) On that same day, Decker was seen by Dr. Deniz Tek. Decker reported to Dr. Tek that, while pushing a heavy object with his foot, he felt a pop and pain in his low back, right hip and down the right leg. Dr. Tek’s clinical impression was acute pain in lower back (with radiation to the right leg) and herniated disk. (C.R. 40-41)

[43] Decker returned to the ER at Holy Rosary Healthcare on January 2, 2010, where he was diagnosed with right-sided lumbar radiculopathy. (C.R. 42-44)

[44] Decker received chiropractic treatment to his hip and low back from May 21 through May 30, 2015, at the Stanley Chiropractic Office in Miles City, Montana. Decker reported on the intake form that the pain appeared on March 12, 2013. The

treatment records also reflect that the pain at L4-L5 had been present for “2½ months.” (C.R. 48-49)

[45] On the same day he first sought chiropractic treatment, Decker also saw Physician’s Assistant Angela Bundy at Billings Clinic in Miles City, Montana. He described “a two month history of a shooting pain in his low back to his left hip.” He further reported no prior injury or history of injury. (C.R. 50) PA Bundy’s clinical impression was low back pain with radiation to the left. (C.R. 51)

[46] Decker returned to the Billings Clinic on July 5, 2013, where he was evaluated by Nurse Practitioner Stormy Jensen. His chief complaint was low back pain, but he acknowledged that he had not sustained any injury. He described the pain as sharp and worse with turning or twisting movements and prolonged sitting. NP Jensen’s clinical impression was low back pain and Decker was prescribed Flexeril and Norco. (C.R. 52-54)

LAW AND ARGUMENT

A. Scope of Review on Appeal and Burden of Proof:

[47] 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.

[48] 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 at 790; S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). This Court has recognized that "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).

[49] 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).

[50] A claimant bears the burden of establishing the right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129, ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. When seeking benefits for a medical condition, the claimant must prove by a preponderance of the evidence that the medical condition for which benefits are sought is causally related to the work injury. Bergum, supra, 2009 ND 52, ¶ 11

[51] At the administrative hearing level, ALJ Jordheim framed the issue to be resolved as follows: "Does the greater weight of the evidence establish that Tracey

Decker's April 17, 2015 work incident is a substantial contributing factor regarding his current lumbar back condition?" (C.R. 362) After considering all the evidence, the ALJ found that "the greater weight of the evidence" did not establish that Decker's April 17, 2015 work incident was a substantial contributing factor to the condition of his lumbar spine, or that the work incident "substantially worsened and/or accelerated his pre-existing congenital and degenerative lumbar spine condition." (C.R. 370)

[52] In his brief to this Court, Decker stated the issue as: "Does the greater weight of the evidence establish that Tracey Decker's April 17, 2015 work incident is a substantial contributing factor to his current lumbar condition?" (Appellant's Brief at ¶ 2) What followed in the body of the brief is a clear invitation to this Court to reweigh the evidence in the record, make independent findings of fact and substitute its judgment for that of the ALJ, in open defiance of its well-settled limited function, which is to determine "whether or not a reasoning mind could have reasonably determined that the factual conclusions were supported by the evidence." Kopp v. Workers Compensation Bureau, 462 N.W.2d 132, 135-36 (N.D. 1990).

B. ALJ Jordheim's Decision that Decker Failed to Prove that the April 17, 2015, Work Injury was a Substantial Contributing Factor to the Current Condition of His Lumbar Spine is Supported by a Preponderance of the Evidence.

[53] ALJ Jordheim concluded that Decker had not met his burden of providing by a preponderance of the medical evidence that the work incident of April 17, 2015, was a significant contributing factor to the current condition of his lumbar spine. That conclusion was supported by the ALJ's findings of fact, which in turn were supported by the greater weight of the evidence in the hearing record.

[54] ALJ Jordheim found that Decker suffers from a pre-existing degenerative condition to his lumbar spine, and it is this condition that is the source of his current symptoms, i.e., the low back pain and radiculopathy. He also found this pre-existing degenerative condition had become symptomatic before the April 17, 2018, work injury, and it became symptomatic again after the work injury. Furthermore, although the work injury triggered symptoms in the pre-existing condition, the ALJ found the work injury did not substantially accelerated its progress or substantially worsened its severity.

[55] ALJ Jordheim's decision finds substantial support in the hearing record. He had available to him Decker's medical records from 2009, 2010 and 2013, which documented his prior complaints about low back pain and radiating pain. (C.R. 40-41, 42-44, 48-49, 51, 52-54). The record also contains Dr. Charles Burton's report from his independent records review and his hearing testimony, where he explained and defended his medical opinion. Dr. Burton concluded that Decker had a chronic, pre-existing lumbar degenerative disc, and, while the April 17, 2015, work incident might have triggered symptoms in the pre-existing condition, it did not substantially accelerate its progression or substantially worsen its severity. Dr. Burton further determined that at most Decker might have sustained a minor and musculoligamentous sprain/strain that would have resolved no later than June 30, 2015. (C.R. 342-353)

[56] The hearing record also contains an MRI of Decker's lumbar spine from May 28, 2015, obtained a little more than one month after the April 17, 2015, work incident. The radiologist's impression was lumbar degenerative disk disease and spondylosis at L4-L5 and L5-S1. The interpreting radiologist also read the results to

include a central disk herniation and slight extrusion at L5-S1 and a disk protrusion at L4-L5. (C.R. 130)

[57] It should be noted that the disc abnormalities at L5-S1 and L4-L5, as shown on the MRI, were never corroborated. Dr. Roccisano performed surgery on Decker's lumbar spine on February 15, 2018. His preoperative indication was "congenital, as well as arthritic narrowing of the lateral recesses of L4-L5 and L5-S1." In describing the operative procedure, Dr. Roccisano noted the absence of free disc materials at either the L4-L5 or the L5-S1 disc spaces. His postoperative diagnosis was limited to the degenerative processes of spinal stenosis at L4-L5 and L5-S1. (C.R. 354-355)

[58] Furthermore, the hearing record shows that Dr. Roccisano reviewed the opinions of WSI's medical consultant, Dr. Carlson and the IMR physician, Dr. Burton, and agreed with both that Decker had a pre-existing degenerative condition in his lumbar spine, and that the April 17, 2015, work incident triggered symptoms in the condition but did not substantially accelerate the progression of the condition or substantially worsen its severity. Dr. Roccisano also agreed that the work injury Decker did sustain on April 17, 2015, would have resolved as of June 30, 2015. (C.R. 338-339) Decker's brief does not mention Dr. Roccisano's agreement with the opinions of Dr. Carlson and Dr. Burton.

[59] ALJ Jordheim noted that Dr. Bronshvag presented the one inconsistent opinion that the April 17, 2015, work injury substantially worsened the pre-existing condition because it went from asymptomatic before the incident to symptomatic after the incident and there was "contemplation of surgical intervention." The ALJ did not find Dr. Bronshvag's opinion persuasive, and he explained why: "Dr. Bronshvag cited no

objective medical evidence that Mr. Decker had sustained a traumatic injury to his back greater than a sprain or strain. Dr. Bronshvag also opined that Mr. Decker had completely recovered from his back problems in 2010 and 2013, a notion that is inconsistent with the opinion, which shared, that Mr. Decker suffered from a progressive degenerative condition of the back. Dr. Bronshvag appears to be confusing cessation of symptoms with recovery from the condition causing the symptoms.” (C.R. 370) It should be noted that Dr. Roccisano’s opinion would be consistent with ALJ Jordheim’s view of Dr. Bronshvag’s opinion.

[60] Dr. Carlson, Dr. Burton, Dr. Roccisano and even Dr. Bronshvag, agreed that Decker had a chronic, lumbar degenerative disc disease that pre-existed the April 17, 2015, work incident. Decker’s response was to rely on his own testimony that the low back pain he had experienced prior to April 17, 2015, was not caused by the degenerative disc disease, but instead by kidney stones. Decker points to medical records from treating physicians that mention kidney stones, but none of them actually attribute the low back pain to kidney stones. In fact, Dr. John Petrisko noted seeing Decker in May of 2013 for low back and hip pain that Decker related to kidney stones. Petrisko, however, reported that he saw no indication of that in the records. (C.R. 74)

[61] In his brief, Decker argues his case again to this Court with the hope it will reweigh the evidence and reach a result favorable to him. As an example, Decker accuses the ALJ of “minimizing” his injury by describing it as a “misstep” while carrying a heavy piece of equipment. Decker claims that the ALJ “trivialized” the mechanism of injury, and the evidence actually showed that, while being “punished” by his employer, he had fallen to the ground carrying the weight and had to be helped up by his co-

workers. Decker testified to this version of the mechanism of injury at the administrative hearing.

[62] Decker's version of the mechanism of injury, however, is not corroborated by any other evidence, medical or otherwise. In the First Report of Injury to WSI, Decker reported that he was injured while carrying a "3 inch 'chick'" on his shoulder when he stepped off a rig mat and "jarred" his low back. (C.R. 1-3) When Decker saw NP Stormy Jensen on May 5, 2015, he reported the pain started when he twisted his low back to adjust a heavy pipe he was carrying. (C.R. 55-57) There is no mention that Decker fell while carrying a heavy pipe and the need for assistance to get back to his feet.

[63] Decker reported to chiropractor Kenneth Stein that "he originally hurt his lower back on April 17 while carrying a 225 pound load and stepped off a platform wrong twisting his lower back." (C.R. 117-119) Decker reported to Dr. Dolan that he "was lifting a 250-pound piece on his shoulder trying to put it in the truck, and he felt something pop in his back." (C.R. 68) None of the descriptions he gave to his treating physicians included the fact that he fell to the ground with the heavy piece of equipment on his shoulder and required assistance from his co-workers to get to his feet.

[64] It appears to be Decker's position that it was error for ALJ Jordheim to not accept his version of the mechanism of injury, despite its glaring inconsistency with other evidence in the hearing record, including his own medical records. As previously noted, the weight given to the credibility of the evidence presented is for the ALJ to decide, not Decker. Based on the hearing record, it would not be unreasonable for ALJ Jordheim to reject Decker's testimony regarding the mechanism of injury in favor of more reliable evidence contained in his medical records.

[65] Decker also faults ALJ Jordheim and Dr. Burton (and WSI) for not offering an explanation for his “ability to perform heavy labor before his work injury compared to his consistently documented functional limitations after that work injury.” Such an explanation would necessarily require causation, something Dr. Burton, WSI and the ALJ are not prepared to admit.” (Appellant’s Brief at ¶ 13.) While freely offering this criticism, Decker himself fails to point to any objective medical findings establishing that the work incident substantially accelerated the progress of the pre-existing degenerative disc disease or substantially worsened its severity, which is causation and Decker’s burden to prove, not WSI’s. See N.D.C.C. §§ 65-01-02(10)(b)(7) and 65-01-11.

CONCLUSION

[66] This Court’s function is to “exercise restraint in deciding whether an agency’s findings of fact are supported by a preponderance of the evidence,” and not “make independent findings or substitute our judgment for that of the agency.” Thomas v. Workforce Safety and Insurance, 2005 ND 52, ¶ 5, 692 N.W.2d 901. What this Court is required to do under that standard of review is to “decide only whether a reasoning mind reasonably could have decided the findings were proven by the weight of the evidence from the entire record.” Id. (quoting Barnes v. Workforce Safety & Ins., 2003 ND 141, ¶ 9, 668 N.W.2d 290).

[67] This Court should decline Decker’s invitation to reweigh the hearing evidence. A reasoning mind could reasonably conclude that Decker failed to prove by the greater weight of the evidence that the April 17, 2015, work incident was a significant contributing factor to the current condition of his lumbar spine. WSI respectfully

requests this Court affirm the Findings of Fact, Conclusions of Law and Order issued by ALJ Jordheim on June 21, 2019.

DATED this 20th day of March, 2020.

/s/ Douglas W. Gigler

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of pages in the above Brief totals twenty-four (24).

DATED this 20th day of March, 2020.

/s/ Douglas W. Gigler

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

<p>Tracey Decker</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">vs.</p> <p>North Dakota Workforce Safety and Insurance,</p> <p style="text-align: center;">Appellee,</p> <p style="text-align: center;">and</p> <p>Calfrac Well Services Corp.,</p> <p style="text-align: center;">Respondent.</p>	<p>Supreme Court No.: 20200014 Williams County District Court Civil No.: 53-2019-CV-01267</p> <p style="text-align: center;">AFFIDAVIT OF SERVICE</p>
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STATE OF NORTH DAKOTA)
)ss.
 COUNTY OF CASS)

[1] Brenda Jo Brunelle, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Fargo, ND, not a party to nor interested in the action, and that she served the attached:

**BRIEF OF APPELLEE NORTH DAKOTA
 WORKFORCE SAFETY AND INSURANCE**

On the following:

Calfrac Well Services Corp.
717 17th St.
Denver, CO 80202

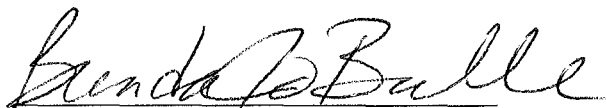
by depositing in the United States Post Office at Fargo, North Dakota, on March 20, 2020, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address; and

FURTHERMORE, UPON:

Stephen D. Little
littlelaw@littlelawnd.com

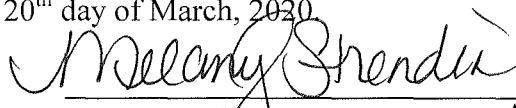
VIA E-MAIL to each person above named at the above e-mail address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.



Brenda Jo Brunelle

Subscribed and sworn to before me this 20th day of March, 2020



Notary Public

My Commission Expires: 1/21/23

