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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, Petitioner and Appellant, vs. Gloria Felan o/b/o Fred Felan, deceased, Respondent and Appellee, and KB & O Partnership, Respondent.	**SUPREME COURT NO. 20200354** Civil No. 41-2020-CV-00023 **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLEE GLORIA FELAN

APPEAL FROM DISTRICT COURT JUDGMENT DATED NOVEMBER 4, 2020,
AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER
OF ADMINISTRATIVE LAW JUDGE JOHN I. ALLEN
DATED FEBRUARY 25, 2020
SARGENT COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE MARK T. BLUMER

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STATEMENT OF THE ISSUES

[1] Whether the unusual stress rule in N.D.C.C. § 65-01-02(10)(a)(3) (2017) applies in this unique circumstance where the precipitating cause of Mr. Felan's death is broken ribs, labored breathing, and ventricular fibrillation suffered in a motor vehicle rollover accident, rather than physical exertion or mental stress.

[2] Whether the Administrative Law Judge's findings of fact that Mr. Felan's rollover accident, rib fractures, and labored breathing is the proximate cause of ventricular fibrillation and death must be upheld on appeal under the reasoning mind standard.

STATEMENT OF THE FACTS

[3] Fred Felan filed a First Report of Injury on September 14, 2017, in connection with an injury suffered in a motor vehicle accident earlier that day. (Record at 1). ("R"). The report of injury reflects that at the time of the rollover accident he was driving a loaded tandem truck in the employ of KBO Farms. *Id.* He consulted P.A. Buchholz at 10:20 a.m., on September 14, 2017, reporting left chest and left rib pain. (R. 67). The pain was described as "sharp and stabbing." *Id*. Review of Symptoms noted left rib pain below the left breast, and tenderness above the left breast. (R. 68). On exam, he had "decreased breath sounds," with left breast pain. *Id.* Left rib x-rays were taken, reportedly without evidence of displaced fracture. (R. 69, 70). P.A. Buchholz applied a rib belt and prescribed hydrocodone. (R. 69). Post-accident drug screening was negative. (R. 71).

[4] His employer took Mr. Felan to a hotel, and purchased his food. According to his daughter's affidavit, they spoke on the phone between 8:00 and 10:00 p.m., the next day, September 15, 2017. (R. 29). He told his daughter that he'd broken his ribs, and was in

"great pain." (R. 30). He was planning to take his prescribed pain medications. *Id.* After his death, WSI issued a September 22, 2017, Notice of Decision Accepting Claim for contusion of the thorax. (R. 8).

[5] Mr. Felan was found deceased in the Oakes hotel room on September 16, 2017, and law enforcement was summoned. (R. 47). The deputy sheriff noted rigor mortis had set in. *Id*. The Oakes ambulance service took him to the hospital. (R. 74). Blood toxicology was positive for the narcotic medication prescribed for his rib fractures. (R. 61-64).

[6] The autopsy report found heart lesions and evidence of placement of a wire stent in the left anterior descending artery. (R. 65). The autopsy found "Congestive cardiomyopathy" and "Coronary arteriosclerosis." *Id*. The contributory causes of death were identified as "blunt abdominal injury; obesity; opioid, tranquilizing and antidepressant drug use." *Id.* The pathologist also found "rib fractures, ages undetermined, consistent with closed chest cardiac compressions." *Id.* However, there is no evidence in the records that chest compression had been performed at the time of his death. In fact, WSI's medical consultant opined that:

> the rib fracture on the autopsy are most likely secondary to the work incident noted on 9/14/17. The area of the fracture was the same area of reported pain by Mr. Felan. There were also no reported chest compressions by the ambulance or sheriff's office which could have caused the fractures. The fractures could have been missed on x-ray due to the injured workers body habitus.

(R. 78).

[7] External findings on autopsy included hemorrhages and blue bruising across the upper abdomen. (R. 66). The death certificate issued by the North Dakota Department of Health—which is not to be used to establish the cause of death under

N.D.C.C. § 65-01-11—agreed with the autopsy as to the cause and contributory cause of death. (R. 16).

[8] As Mrs. Felan believed that this injury contributed to her husband's death, Gloria Felan filed a claim for death benefits roughly a year later. (R. 13-17). WSI's medical consultant concluded that Mr. Felan's work injury was not a substantial contributing factor to his death. (R. 77). WSI issued an Order on December 13, 2018, denying Mrs. Felan's claim for death benefits. (R. 33-37). Mrs. Felan requested a hearing. The specified issue was: "whether Claimant's surviving spouse has proven by preponderance of evidence entitlement to payment of death benefits." (R. 45).

[9] Mrs. Felan hired a board-certified forensic pathologist, Frank Peretti, M.D., to provide an independent medical opinion in this matter. Dr. Peretti issued his report on October 10, 2019, opining that Felan's left ribs fracture was a "significant contributing factor," to his death. (R. 80-81). Dr. Peretti testified that he had reviewed the records, noting that Mr. Felan still had a bruise on the abdomen at the time of autopsy. (Suppl. Appx. 9, lines 13-17). Dr. Peretti testified that the rib fractures Felan suffered in the accident are "one of the most excruciating pains that you can have." (Suppl. Appx. 9, lines 24-25; Suppl. Appx. 10, line 1). A rib belt is supplied because rib fractures cannot be surgically repaired. (Suppl. Appx. 10, lines 6-8).

[10] Dr. Peretti opined that the "excruciating pain" from the blunt force trauma and difficulty breathing, "would put *undue stress on his heart* and ultimately cause him to have a cardiac lethal arrhythmia." (Suppl. Appx. 11, lines 4-8). He described the rib fractures as the "proximate cause" of his death. (Suppl. Appx. 11, line 13). Dr. Peretti testified that Felan's injury likely caused his subsequent death, which could not have

been predicted to inevitably occur on a similar time trajectory. (Suppl. Appx. 11, lines 9-25; Suppl. Appx. 12, lines 1-10). Dr. Peretti explained that the heart arrhythmia is an abnormal heartbeat, "which cannot be determined at the time of autopsy because it's electrical." (Suppl. Appx. 12, lines 10-13). Dr. Peretti testified that Mr. Felan's injury is at least 50% of the cause of death as compared to all contributing causes combined. (Suppl. Appx. 12, lines 3-7).

[11] Dr. Peretti testified "it's the stress of the pain, which ultimately puts stress on his heart. And don't forget too, he can't breathe correctly either. You know, he's not breathing normally, because of the pain." (Suppl. Appx. 12, lines 22-25). While Mr. Felan's heart disease *may've eventually* caused his death, Dr. Peretti noted that "people walk around every day with this level of heart disease… you just cannot predict death. No one know when it's going to happen. I mean he could have lived a few more years. You just don't know." (Suppl. Appx. 15, lines 7-18). According to Dr. Peretti, Mr. Felan's death cannot be attributed solely to a natural progression of preexisting heart disease as WSI argued.

[12] On cross-exam, Dr. Peretti agreed that Mr. Felan was not diagnosed with heart arrhythmia at Sanford after the rollover. (Suppl. Appx. 20, lines 1-6). But Dr. Peretti testified that "I'm talking about *ventricular* fibrillation," not the non-lethal atrial fibrillation. (Suppl. Appx. 20, lines 20-25). Dr. Peretti emphasized that an arrythmia cannot be diagnosed at autopsy. (Suppl. Appx. 26, lines 6-10). Dr. Peretti opined that the extreme pain from rib fractures and *lack of oxygen* due to abnormal breathing[1] "ultimately led to the arrhythmia." (Suppl. Appx. 27, lines 10-19). Dr. Peretti testified

[1] Documented on 9/14/2017 by Sanford Health as "decreased breath sounds." (R. 68).

that a myocardial contusion is not required to explain a late cardiac arrythmia after blunt chest trauma. (Suppl. Appx. 28, lines 1-9). Moreover, the pathologist who performed the autopsy had not done a microscopic exam of the heart. (Suppl. Appx. 28, lines 5-9). Dr. Peretti again explained his reasoning: "he sustains these rib fractures which are extremely painful. … these rib fractures would inhibit a lot of his respiration. He wouldn't be getting adequate oxygenation to his blood, which ultimately could lead to the development of his arrhythmia." (Suppl. Appx. 28, lines 19-24). Dr. Peretti reiterated that the injury "more likely than not" triggered the fatal arrhythmia. (Suppl. Appx. 29, lines 10-11).

[13] Based on Dr. Peretti's testimony, ALJ Allen found as follows:

> Peretti opined that Felan's rib fractures were related to the work incident and that rib fractures cause "excruciating pain." Peretti opined that Felan did have preexisting heart disease and the excruciating pain and stress of the pain placed undue stress on [Felan's] heart. This ultimately caused Felan to have a cardiac lethal arrhythmia. Peretti indicated that this type of event was well documented in the literature. Peretti indicated that prior to the work incident Felan was able to perform his daily activities including work activities with his heart disease. Peretti opined that people work every day with heart disease. *Peretti opined that Felan's injury from the work incident was 50% of the cause of his death compared to all contributing causes combined.* Peretti opined that "most people who die of heart disease die of cardiac arrhythmia or an abnormal heartbeat, which cannot be determined at the time of autopsy because it is electrical." Peretti opined that the stress of the pain, puts stress on the heart and his ability to not breath normally, caused the arrhythmia. Peretti opined that the heart muscle does not show damage as a result of arrhythmia and that it is well documented that a blunt chest trauma could lead to late cardiac arrhythmias. Peretti opined that the work incident was the proximate cause of Felan's death.

(Appx. 27-28, finding of fact 29) (Emphasis added).

[14] ALJ Allen also found:

> Peretti agreed that the autopsy report was correct in that the cause of Felan's death was cardiomyopathy and atherosclerotic heart disease.

> Peretti confirmed there was nothing in the autopsy about a cardiac arrythmia but opined that it could not be diagnosed in an autopsy. Peretti confirmed that arrhythmia could also occur without any trauma. Peretti opined that Felan had significant pre-existing heart disease and opined that Felan's extreme pain from the rib fractures would inhibit a lot of his respiration, which would ultimately lead to arrhythmia. Peretti opined that Felan did not die of a myocardial infarction, or a heart attack, because there's no documented damage to the heart muscle. Peretti opined it was more likely than not that Felan developed late cardiac arrhythmia as a result of the work injury.

(Appx. 28, finding of fact 30).

[15] The ALJ found that "Felan's injury from the work incident was 50% of the cause of his death compared to all contributing causes combined." (Appx. 28, finding of fact 36). After finding the unusual stress rule inapt, the ALJ reversed WSI, thus awarding death benefits. (Appx. 33). WSI appealed to the District Court. The Hon. Mark T. Blumer, Judge of the District Court, affirmed the ALJ, also concluding that the issue is one of "proximate cause" and not unusual stress in this unique circumstance: "the death of Felan was stress from reduced breathing and broken ribs due to the motor vehicle accident." (Appx. 46). Although this court reviews the decision of the administrative agency rather than that of the district court, the district court's analysis is entitled to respect. *Paul v. North Dakota Workers Comp. Bureau*, 2002 ND 96, ¶6, 644 N.W.2d 884. Judge Blumer agreed with ALJ Allen that the unusual stress rule does not apply here.

LAW AND ARGUMENT

A. POTENTIAL APPLICATION OF N.D.C.C. § 65-01-02(10)(a)(3).

[16] North Dakota defines the term compensable injury to *include*:

> Injuries due to heart attack of other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other

> contributing causes combined. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.

N.D.C.C. § 65-01-02(10)(a)(3) (2017).

[17] The ALJ determined that the *inclusion* of heart-related disease within the definition of "compensable injury" does not *exclude* coverage for death due in part to heart-related disease if the death meets the standard definition of injury by accident arising out of and in the course of employment. (Appx. 29-30). This follows from the unique factual circumstances of this case. First, Felan died due to a fatal ventricular arrythmia from the terrible pain and labored breathing due to broken ribs in a rollover accident. This is not a case of alleged mental stress or the like that may be viewed with suspicion. Second, sudden and fatal ventricular arrythmia from the pain and labored breathing from fractured ribs is not "heart disease." ALJ Allen and Judge Blumer correctly concluded that the unusual stress element of N.D.C.C. § 65-01-02(10)(a)(3) does not govern compensability in these unique circumstances of fractured ribs and fatal arrythmia.

[18] In sum, Felan's injury in a rollover accident with fractured ribs, excruciating pain and lack of oxygen leading to fatal ventricular arrythmia is not the common case of myocardial infarction due to overwork from physical exertion or mental stress and worry. The unusual stress rule was intended for injuries due to heart attack or other progressive heart disease, not an accident, pain, breathing difficulties, and death by arrythmia. Applying the unusual stress rule to Felan's injury of rib fractures, labored breathing and death by ventricular arrythmia is inapt; there seem to be no reported cases of this type. As set out below, the statute WSI seeks to apply here contains two parts: unusual stress and medical causation. The unusualness of a serious

rollover motor vehicle accident causing fracture of the ribs is self-evident, and Dr. Peretti's medical opinion that an injury causing ventricular arrythmia is the proximate cause of death satisfies the central causation test.

B. THE UNUSUAL STRESS COMPONENT IS NOT APPLICABLE HERE.

[19] North Dakota is one of a minority of states which requires 'unusual stress' in cases of heart attack, heart disease, and physical injury caused by mental stimulus. Professor Larson estimates that only about 1/3 of the states utilize the standard. Larson, Worker's Compensation Law, § 43.03[1][a]. North Dakota used the majority usual stress standard until legislative amendment in 1977. The Court summarizes this history:

> The 1977 amendment reflects the legislative response to this Court's holding in *Stout v. North Dakota Workmen's Compensation Bureau*, 236 N.W.2d. 889 (N.D. 1975). In *Stout* we held that heart attacks occurring within the course of employment that were precipitated by usual exertion were compensable. …
>
> The legislative history of the amendment indicates that, after *Stout*, claims for heart attacks increased significantly. Legislative Council, Standing Committee Minutes, 1977, S.B. 2158. Mr. Richard J. Gross, former counsel for the Bureau, testified before committee that the number of heart attack claims rose 500 percent after *Stout*. To substantially reduce a projected 17 percent increase in premiums resulting from *Stout*, the legislature enacted Senate Bill 2158 in the 1977 legislative session requiring that a heart attack or stroke be precipitated by unusual stress in order to be compensable. *See* Chapter 579, Sec. 2, 1977, N.D. Sess. Laws.

Grace v. North Dakota Workmen's Comp. Bureau, 395 N.W.2d 576, 580 (N.D.1986).

[20] Professor Larson notes in his renowned treatise on worker's compensation law, that the unusual stress rule was invented for heart attack cases "because their generalized nature makes it difficult factually to attribute the attack to the work." Larson, Worker's Compensation Law, § 46.01, at p. 46-2. ("Larson"). Professor Larson says that "[t]hese heart cases establish the requirement of unusual strain or exertion in heart

disease cases, grounded upon the *judicially declared presumption that death from heart disease is ordinarily the result of natural physiological causes rather than trauma or particular effort." Id*. (Emphasis added). He adds that, "unfortunately, the unusual exertion requirement is a clumsy and ill-fitting device with which to ensure causal connection." Larson, § 46.01, at p. 46-3. He notes that the components are "so commingled that it is impossible to segregate them." Larson, § 46.02, at p. 46-3. Larson notes that the basic problem is causation, and he suggests breaking down the causation question into its two parts: "the legal and the medical." Larson, § 46.03[1], at p. 46-5.

[21] In a worker's compensation case of death by cerebral aneurysm that may just as well have occurred off work, the Supreme Court of Kansas echoed Professor Larson's justification for the unusual stress rule as being grounded in the natural progression of disease:

> The goal of the heart amendment ... is legitimate. It is not to deny compensation to claimants who suffer injury on the job, but rather to avoid requiring the employer to act as an absolute insurer of claimants whose death or disability was merely the result of the *natural progress of disease* and which coincidentally occurred at the workplace.

Mudd v. Neosho Memorial Regional Med. Center, 275 Kan. 187, 199-200, 62 P.3d 236 (2003) (emphasis added).

[22] As the ALJ and District Court Judge Blumer noted, this theory of a natural progression of preexisting disease is not applicable here. Felan's rib fractures, labored breathing and lack of oxygen induced death by ventricular fibrillation. This is indeed a very unusual scenario, but does not fit the normal case of usual versus unusual *physical exertion or mental stress*. The Kansas Supreme Court said that "in the run-of-the-mill 'heart case' it must be shown that at the time of his injury the workman was engaged in 'unusual' exertion." *Dial v. C.V. Dome Co*., 213 Kan. 262, 266, 515 P.2d 1046, 1050

(1973). According to the Court, the key feature common to 'run-of-the-mill' heart cases is that the *exertion of the work*—whether usual or unusual—was the producing cause of the injury. *Id*. The heart amendment does not "deal with a situation where the precipitating cause is an external force, wholly independent of the workman's exertion." *Id.,* ¶6. The court provides examples where the unusual stress component ought not apply, somewhat akin to the case at bar:

> had a falling beam struck the claimant on the head, causing the same cerebral hemorrhage he actually suffered, we would suppose that the resulting disability would likewise be clearly compensable. The intervention of a 'cerebrovascular injury' would not bring the heart amendment into play, because the agency which 'precipitated' the disability was not the exertion of his work but the external force of the blow.
> ***
> We thus agree with the director's conclusion; it was not the legislative intent that the amendment apply to this sort of case. Where the disability is the product of some external force or agency, and *not of the exertion of the claimant's work, the heart amendment has no applicability*. In such a case, *where exertion is not the agency 'necessary to precipitate the disability,'* the usual vs. unusual exertion test applied in our previous heart amendment cases is irrelevant. Instead, the customary standards are to be applied in determining whether the injury was accidental, and whether it arose out of and in the course of the workman's employment.

Dial, 515 P.2d at 1051 (emphasis added).

[23] The question of unusualness is not a medical issue for a doctor. There are cases on both sides of almost any conceivable fact pattern, finding unusualness in one Rorschach test and no unusualness in another constellation of a less lucky star alignment. Perhaps nothing illustrates this more starkly than a comparison of the North Dakota cases of *Grace v. North Dakota Workmen's Comp. Bureau*, 395 N.W.2d 576, 580 (N.D.1986), and *North Dakota Workforce Safety & Ins. Fund v. Auck,* 2010 ND 126, 785 N.W.2d 186.

[24] In the latter case, the ALJ had found that Mr. Auck died as the result of a

heart attack caused by unusual stress:

> At the hearing, Auck's primary care physician testified he had begun treating him in roughly 1994 and saw him extremely frequently. He testified Auck had suffered from chronic pain, chronic stress, and depression related to his work. He testified stress was at least fifty percent of the cause of Auck's heart attack as compared to all other contributing factors. He testified that if Auck had not been working at Bobcat, he would not have had a heart attack when he did.
>
> A cardiology specialist retained by WSI testified Auck had other risk factors, such as hypertension, high cholesterol, obesity, smoking, and a family history of coronary disease. He also testified that the link between long-term stress and heart disease is controversial. A family medicine specialist retained by Bobcat agreed that Auck had other risk factors and testified that he was not aware of any study linking long-term stress and heart attacks.

WSI v. Auck, 2010 ND 126, at ¶3.

[25] The Court set out the following unremarkable facts:

> The ALJ relied on the testimony of Dr. Jeffrey Smith, Auck's primary care physician, who testified that the long-term chronic pain Auck suffered during his employment with Bobcat caused him to experience extraordinary stress. Dr. Smith testified:
>
> > Well, he felt depressed primarily because of his pain and how that affected his life. You know, it was pervasive; it wasn't only at work, it overlapped into the rest of his life.
> >
> > And he felt rather hopeless because of that. And he felt that he was stuck doing his job without any hope of improvement. The stress he felt was from knowing that he's going to be in pain a lot, despite pain medication, you can't have zero pain with pain medicine, and just the sense of dread that he had at work.

WSI v. Auck, 2010 ND 126, ¶12, 785 N.W.2d 186.

[26] Mr. Auck's treating doctor simply testified that cumulative long-term stress and chronic pain from numerous injuries are risk factors for heart attacks, while the employer's doctor and the IME doctor both testified that the causal link of depression and stress to heart disease is 'controversial' or nonproven. *WSI v. Auck*, 2010 ND 126, ¶13.

Like the claimant's treating doctor had done during testimony, the ALJ conflated unusual stress and medical causation. So did the Court on appeal. As the Court noted, an ALJ is empowered to reject the expert medical opinions on offer from the employer and WSI and accept the rather conclusory opinion of Dr. Smith.

[27] Having allowed conflation of the medical and the legal components, the Court then refocused on the question of unusual stress, noting that "Bobcat and WSI argue Auck's stress was not unusual stress. WSI argues his work was no different than the work performed by other Bobcat assemblers, and that his stress was personal in nature. Bobcat argues Auck did not experience an immediate, precipitating cause for his cardiac arrest, but instead was performing his usual work when the cardiac arrest occurred." *WSI v. Auck*, 2010 ND 126, ¶16. But Dr. Smith had supported his patient, *blending unusual stress and medical causation.* The court noted: "At the hearing, Dr. Smith testified that Auck's stress was extraordinary and that if he had not been working at Bobcat, he would not have had a heart attack at that point in his life. Dr. Smith testified that Auck's work or work conditions were the primary cause of his pain and depression." *Id*.

[28] The ALJ had clearly conflated unusual stress and medical causation. The Court summarized: "[t]he ALJ concluded the greater weight of the evidence showed with reasonable medical certainty that the heart attack that resulted in Auck's death was caused by mental stimulus, namely unusual stress, resulting from his work with long-term chronic pain as an assembler at Bobcat." *WSI v. Auck*, at ¶4. This conflation is precisely what Professor Larson warned against: "unfortunately, the unusual exertion requirement is a clumsy and ill-fitting device with which to ensure causal connection." Larson, § 46.01, at p. 46-3. He notes that the legal and medical

components are "so commingled that it is impossible to segregate them." Larson, § 46.02, at p. 46-3. The central issue, rather, is one of essential medical causation—what is precisely what ALJ Allen found exists in this case.

[29] The *Auck* Court upheld the ALJ under the deferential standard of review: "[c]onfronted with a classic 'battle of the experts,' the ALJ, as fact-finder, may rely upon either party's witness." *Auck*, 2010 ND 126, ¶14. Similarly, ALJ Allen is legally justified in relying upon the opinion of Dr. Peretti, who testified that Mr. Felan died as a result of the significant pain from rib fractures, labored breathing and lack of oxygen, and fatal ventricular arrythmia, which were the "predominant," and "proximate cause," of death. (Suppl. Appx. at p. 12, lines 9-25; Suppl. Appx. at p. 13, lines 1-18). Unquestionably, the rollover accident itself with rib fractures and excruciating pain constitutes unusual stress—an accident, pain and difficulty drawing a breath cannot be a routine activity of work as heavy lifting can be for some workers.

[30] *Grace v. North Dakota Workmen's Comp. Bureau*, 395 N.W.2d 576 (N.D.1986), presents the opposite. Unlike the vigorously contested issues in *Auck*, the facts of medical causation in *Grace* were no longer in dispute, the court noting that "[t]he Bureau has not contested the district court's determination that James' heart attack was causally related to his employment, with reasonable medical certainty." *Id*., at 580. Mr. Grace argued that the "coalescence of a number of stressful conditions occurring at the work site established by a preponderance of the evidence that his heart attack had been precipitated by unusual stress. James points to the high temperatures, unusual work duties as masonry foreman, emotional anxiety related to being behind schedule, and fear attributable to the movement of the crane overhead as creating unusual stress." *Id*.

[31] The *Grace* Court affirmed the Bureau under the deferential standard of review of all findings of fact. The Court noted that:

> The Bureau contends that in accordance with James' work history he was not under unusual stress. The Bureau points to James' 38 years as a brick layer and his work occasionally as a foreman. It relies upon James' testimony that he had been a foreman 'off and on, my whole career of laying bricks.' The Bureau notes that exposure to the elements is inherent in masonry work and that scheduling concerns are an integral part of being a foreman. The Bureau refers to the statement that James made to its investigator that being behind schedule was not anything to worry about.

Grace, 395 N.W.2d at 581.

[32] The Court examined the record as to all three stressful components: lifting of the masonry; work in very high temperatures; and, emotional stress of supervising. As to each, the Court found a factual root on which the Bureau could have relied. First, the *Grace* Court noted:

> the difficulty that courts in various jurisdictions have had in determining 'unusual stress,' particularly as applied to unusual emotional stress. … Larson, in his treatise on Workmen's Compensation Law … notes that close questions involving *emotional stress* are inevitable when, *instead of colorful triggering events*, the employment contribution takes the form of a *more protracted burden of worry, overwork*, frustration, guilt, tension, or apprehension over losing one's job.

Grace, at 581 (emphasis added).

[33] But, the *Grace* Court noted, in the instant case, "the *emotional stress* is attributed to worry and anxiety and the physical stress attributed to the extreme heat." *Id.* Mr. Grace presented a much stronger case of unusual stress than the sketchy version of stress accepted in *Auck.* Yet, in *Grace*, the Court affirmed the factual determination of the ALJ based on "*James' description of the day as a normal day*." *Id*., at 581 (Emphasis added). As to heat, the Court observed: "masons must work in a variety of temperatures. … James testified in the administrative hearing that he had previously worked in very high temperatures. He said, 'I've worked on boilers, and I've worked in temperatures exceeding

150 degrees.'" *Grace*, at 581. Finally, the Court noted that lifting heavy bricks is also a central element of brick-laying; which he did every day. *Id*. In contrast, Felan fractured his ribs and suffered debilitating pain to just draw breath in a once in a lifetime rollover accident. These unique set of events are not measurable through the lens of 'unusual stress.' In the event, the distinctively rare events here constitute unusual stress as a matter of law.

[34] WSI argues that "there was absolutely no evidence related to how stressful Felan's job was driving truck, or how "unusual" a truck accident may be." (WSI Brief at 25). WSI cites to cases it finds "instructive." But *Stokes v. First National Bank*, 377 S.E.2d 922 (S.C. Ct. Appx. 1988), aff'd, 410 S.E.2d 248 (S.C. 1991), involved run-of-the-mill mental stress to the bank Vice President concerning increased workload assignments during a merger. It seems wholly expected that work hours and perceived stress will increase for any upper level manager during merger and layoff of other managers. This emotional trigger is not very colorful or instructive after all.

[35] *Courtney by Higdem v. City of Orono*, 424 N.W.2d 295 (Minn. 1988), is equally unrevealing of the principle, for no facts at all were presented as to the nature of unusual stress; hence the remand. On appeal after remand, the Court upheld the ALJ decision denying the death claim of the police officer's widow noting significant problems with both medical and legal causation:

> The 48-year-old employee was 6 feet 2 inches tall and weighed 232 pounds. The autopsy report revealed that the employee had severe atherosclerotic coronary disease and diverticulitis of the colon. The employee had smoked three packs of cigarettes per day and one doctor characterized him as obese.
> ***
> Relevant evidence included the testimony of Orono police officers who described their work activities as more administrative in nature and community service oriented than law enforcement oriented.

> The testimony about the employee varied more than considerably. There was testimony that he was fearful, that he regarded his work as stressful and that his habits and demeanor changed in a way suggestive of stress. On the other hand, there was testimony that he did not appear fearful, that he seemed to like firing guns and driving fast and that he was "laid back" and nonchalant about his work.
>
> There was testimony from a consulting psychologist and cardiologist that the employee's work was stressful and substantially contributed to the development of his heart disease and death. There was expert testimony that his work was not a substantial contributing factor in the development of his heart disease and there was testimony that smoking and obesity promote heart disease.

Courtney by Higdem v. City of Orono, 463 N.W.2d 514, 515 (Minn. 1990).

[36] This sparse additional information is not illuminating either. And there are many thousands of reported heart injury claims. Yet none are akin to Felan's rollover accident with broken ribs, excruciating pain, labored breathing and fatal ventricular arrythmia. Felan's early death is not simply attributable to heart attack or the normal progression of heart disease. Thus, the unusual stress component of the statute does not apply. Second, even if applicable, this wholly unique constellation of events constitutes unusual stress as a matter of law. I have found no cases discussing unusual stress in the context of death by fatal ventricular arrythmia due to savage and searing pain and inability to gasp a breath. This, suffered in a rollover accident, not from emotional angst amidst a bank merger, is unique.

[37] The unusual stress cases do not capture such unique events. As above stated, Professor Larson argues that *the unusual stress rule was invented due to problems with causation* — "because their generalized nature makes it difficult factually to attribute the attack to the work." Larson, § 46.01. As Professor Larson notes (and *Auck* illustrates), "death from heart disease is *ordinarily the result of natural physiological causes rather than trauma or particular effort.*" *Id*. The basic causation problem then can be broken

down the into its two parts—*medical causation and legal causation.* Larson, § 46.03[1]. Here, ALJ found the requisite medical causation in the accident, fractured ribs, lack of oxygenation, and subsequent death by ventricular fibrillation, based squarely on Dr. Peretti's opinion. (Appx. 27, finding 29). The ALJ thus found that Felan's work injury is at least 50% of the cause of death compared to all other conditions combined. (Appx. 28, finding 36). The ALJ determined that in this distinctive circumstance the unusual stress component does not apply. And it makes sense that it does not apply here—Mr. Felan died of ventricular arrythmia due to piercing pain and inability to breathe, not heart disease or heart attack. And this unique circumstance in any event constitutes unusual stress as a matter of law.

[38] As the *Grace* court noted, it is indeed interesting that Professor Larson discusses a large number of *emotional/mental stress cases* with "*colorful triggering events* [such as] worry, overwork, frustration, guilt, tension," which are less likely to result in a finding of unusual stress. *Grace* at 581; *see* Larson, § 44.05[2], at p. 44-41. Larson writes: [p]erhaps because of the somewhat more elusive nature of emotional causation, the proportion of denials seems to be somewhat greater than in the physical-exertion cases." *Id*. Yet, the ALJ in *Auck* found sufficient facts to award benefits due to worry and overwork. Felan's is not a worry/mental stress case. And it is more than a simple physical exertion case. Mr. Felan suffered painful rib fractures, had trouble breathing and was deprived of oxygen. His fatal ventricular arrythmia due to pain, belabored breathing and deficient oxygenation is the clear sole proximate cause of his death, and should be compensated given the ALJ's fact finding of medical causation. The unusual stress rule adds nothing to the equation here.

[39] An unusual stress analysis is a poor measuring rod in a case like Felan's—where a rollover accident leads to an arrythmia opined to be the predominant cause of death. Unusual stress is designed to measure physical exertion (lifting, working in heat, etc.), and mental stress (working long hours, worry, etc.). How will an ALJ even apply the unusual stress rule to a rollover accident that contributes to death? The number of accidents in which the employee was involved? The speed of the crash? The physical injuries suffered in the crash? This last measuring stick for stress is exactly the medical causation test that Felan has already met according to ALJ Allen.

[40] The ALJ is in accord with Professor Larson that "the unusual exertion requirement is a clumsy and ill-fitting device with which to ensure causal connection." Larson, § 46.01, at p. 46-3. The components are "so commingled that it is impossible to segregate them." Larson, § 46.02, at p. 46-3.

C. THE MEDICAL CAUSATION COMPONENT.

[41] WSI argues that heart disease is one of the contributing causes of Fred Felan's death. But this is irrelevant; rather, the focus must be on the whether the *work injury* is a substantial contributing cause to his early death (i.e. the proximate cause). In *Brockel v. North Dakota Workforce Safety & Insurance*, 2014 ND 26, ¶21, 843 N.W.2d 15, the Court said:

> However, in this case the ALJ … made this nonwork-related condition the focus of its analysis without regard to Brockel's compensable left shoulder injury. We have long recognized that a claimant need not prove that the work-related injury is the sole cause of her disability or even that it is a primary cause of that disability. To the contrary, the work injury need only be a 'substantial contributing factor' to the disability. *Holtz v. North Dakota Workers Comp. Bureau*, 479 N.W.2d 469, 471 (N.D. 1992) (quoting *Satrom v. North Dakota Workmen's Comp. Bureau,* 328 N.W.2d 824, 831 (N.D. 1982)). Clearly, it is work-related injury that is at the center of the legislature's attention, *Bjerke v. North Dakota Workers*

> *Comp. Bureau,* 1999 ND 180, ¶ 21, 599 N.W.2d 329 (quoting *Holtz*, at 471), rather than nonwork-related medical conditions.

Brockel, 2014 ND at ¶21 (internal punctuation omitted).

[42] The facts of this case as found by ALJ Allen establish the requisite causal connection to a work injury. Dr. Peretti agreed with the autopsy report that congestive cardiomyopathy and coronary arteriosclerosis contributed to Felan's death. (R. 80-81). But he also testified about the significant work-connection: Felan had suffered broken ribs in the accident (Suppl. Appx. at p. 9, lines 13-17); pain from rib fracture is "excruciating" (Suppl. Appx. at p. 9-10); pain from the blunt force trauma and *lack of oxygenation* "would put *undue stress on his heart* and ultimately cause him to have a cardiac lethal arrhythmia" (Suppl. App at p. 11, lines 4-8); arrhythmia is an abnormal heartbeat, "which cannot be determined at the time of autopsy because it's electrical." (Suppl. Appx. at p. 10, lines 10-13).

[43] Dr. Peretti noted the obvious, that while Felan's heart disease may've eventually caused his death, "people walk around every day with this level of heart disease… you just cannot predict death. No one know when it's going to happen. I mean he could have lived a few more years. You just don't know." (Suppl. Appx. at p. 15, lines 7-18). According to Dr. Peretti, Mr. Felan's death cannot be attributed solely to a natural progression of preexisting heart disease as WSI argued. Dr. Peretti opined that his rib fractures were the "proximate cause" of Felan's death at that time. (Suppl. Appx. at p. 11, lines 9-25; Suppl. Appx. at p. 12, lines 1-10). As the *Brockel* Court held, the finding that a non-work factor is contributory (here of heart disease) does not negate the significance of the work-related causal contribution to death. *See Brockel, id*., 2014 ND at ¶21. While Mr. Felan's congestive cardiomyopathy and coronary arteriosclerosis made him more

susceptible to developing a fatal ventricular arrythmia, the evidence is that but for the rib fractures and breathing difficulties, he would not have died from the effects of the accident.

[44] The susceptibility to suffering fatal arrythmia from an accident because of his preexisting coronary disease is not a complete defense to compensability, as the employer takes the employee as he finds him. *Bruns v. North Dakota Worker's Compensation Bureau*, 1999 ND 116, ¶16 n.2, 595 N.W.2d 298. "The fact that an employee may have physical conditions or personal habits which make him or her more prone to such an injury does not constitute a sufficient reason for denying a claim. … To the contrary, the work injury need only be a 'substantial contributing factor.'" *Manske v. North Dakota Workforce Safety & Ins.,* 2008 ND 79 ¶12, 748 N.W.2d 394, citing *Satrom* v. *North Dakota Workmen's Compensation Bureau,* 328 N.W.2d 824, 831 (N.D. 1982).

[45] Simply put, the medical/legal question is whether the accident resulting in rib fractures, pain, and inadequate oxygen supply due to his labored breathing meets the medical causation test. This is largely a battle of medical experts. Under N.D.C.C. § 65-05-08.3, WSI "shall resolve conflicting medical opinions, and in doing so the organization shall consider," the following factors:

> a. The length of the treatment relationship and the frequency of examinations;
> b. The nature and extent of the treatment relationship;
> c. The amount of relevant evidence in support of the opinion;
> d. How consistent the opinion is with the record as a whole;
> e. Appearance of bias;
> f. Whether the health care provider specializes in the medical issues related to the opinion; and
> g. Other relevant factors.

N.D.C.C. § 65-05-08.3.

[46] The primary distinguishing factor in this case is simply the expertise differential: a longtime board-certified forensic pathologist, versus a family practitioner with

about 8 years of experience. (*See* Appx. 32, ALJ analysis of factor (f) -- relating to medical specialty). According to Dr. Peretti, the extreme pain of his left rib fractures with labored breathing and lack of adequate oxygenation to the heart is the predominant and proximate cause of Felan's early death. As fact-finder, ALJ was within his purview in finding Dr. Peretti's opinion more credible and fact-based than that of WSI's paid medical consultant.

[47] This is a much stronger medical causation case than Mr. Auck's was. The ALJ in *Auck* analyzed the issue of medical causation, finding that "if he had not been working at Bobcat, he would not have had a heart attack at that point in his life." *WSI v. Auck*, ¶¶16-17. This is medical causation. According to the Court, "[t]he ALJ concluded the greater weight of the evidence showed *with reasonable medical certainty* that the heart attack that resulted in Auck's death was caused by *mental stimulus, namely unusual stress*, resulting from his work with long-term chronic pain as an assembler at Bobcat." *WSI v. Auck*, at ¶4. The ALJ had conflated unusual stress and medical causation, and this determination was upheld on appeal. Based on the testimony of Dr. Perretti, ALJ Allen had even stronger ground than existed in *Auck* to conclude that the work accident was at least 50% of the cause of death as compared to all other factors combined. (Appx. 28, finding of fact 36).

[48] WSI complains that ALJ Allen awarded Mrs. Felan death benefits in the absence of objective medical evidence. But this Court has said that "[o]bjective medical evidence may include a physician's medical opinion based on an examination, a patient's medical history, and the physician's education and experience." *Myhre v. North Dakota Workers Compensation Bureau,* 2002 ND 186, ¶ 15, 653 N.W.2d 705. WSI's contention the ALJ could not have found "objective medical evidence" of death by atrial fibrillation

after having suffered fractured ribs and difficulty breathing is belied by the opinion of Dr. Peretti, who set out the *physiological mechanism* by which this can occur. ALJ Allen thus found objective medical evidence that Felan's rollover accident and its sequela lead to his death. Judge Blumer concurred.

[49] As the ALJ correctly noted, most cases require evaluation of competing expert medical opinions. And as this Court has observed, "testimony of a medical expert is always desirable and in most cases indispensable to prove causation." *Satrom* v. *North Dakota Workmen's Compensation Bureau,* 328 N.W.2d 824, 831 (N.D. 1982). Probably most injuries are not susceptible to definitive proof as in a radiograph, chemical or electrical test. In *Parsons v. North Dakota Workforce Safety & Insurance*, 2013 ND 235, ¶ 17, 841 N.W.2d 404, the Court held that cervical strain and a microscopic tear to the cervical discs—which are not visualized on an MRI—is sufficient to prove a compensable injury. In *Parsons*, it was sufficient to afford compensation even in the absence of an 'objective medical test' showing injury, where the medical expert had provided a diagnosis and opinion evidence as to the sufficiency of the mechanism of injury to show causation (bouncing on a truck seat and contact with a seat belt). Medical causation is clearer here than it was in *Auck*—but similar to the kind of expert medical opinion on evidence on offer in *Parsons,* where a physiological mechanism of injury was provided.

[50] The ALJ in *Auck* found that routine work duties, but compounded by mental stress and pain constituted unusual stress, and similarly relied on *conclusory opinion evidence as to medical causation*. For the ALJ this was enough to overcome Mr. Auck's medical history of hypertension, smoking, obesity, elevated cholesterol, strong

family history of heart disease, and even having "known coronary artery disease." *Auck v. WSI*, ¶ 16. Clearly, an ALJ's determination as to medical causation must not be disturbed on appeal.

[51] For the reasons above stated, the District Court decision affirming the ALJ should be affirmed.

REQUEST FOR ORAL ARGUMENT

[52] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Felan requests oral argument. WSI's appeal presents a unique circumstance regarding proper application of the medical causation and unusual stress elements in N.D.C.C. § 65-01-02(10)(a)(3) (2017) to a death claim stemming from a motor vehicle rollover accident rather than physical exertion or mental stress.

Respectfully submitted this 25th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

[53] The undersigned, as attorney for the Petitioner/Appellant in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportionally spaced, 12 point font typeface, and the total number of pages of the above Brief totals 28 pages, inclusive.

Dated this 25th of February, 2021

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/s/ Dean J. Haas
By: Dean J. Haas (ID #04032)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, Petitioner and Appellant, vs. Gloria Felan o/b/o Fred Felan, deceased, Respondent and Appellee, and KB & O Partnership, Respondent.	**SUPREME COURT NO. 20200354** Civil No. 41-2020-CV-00023 **AFFIDAVIT OF SERVICE**

[1] I, Sarah Broker, being duly sworn, deposes and says that I am of legal age and not a party to this action, and that I served the following document(s):

1. **Brief of Appellee Gloria Felan**
2. **Appendix to the Brief of Appellee Gloria Felan; and**
3. **Affidavit of Service.**

[2] On February 25, 2020 by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

Jacqueline S. Anderson
janderson@nilleslaw.com

Michelle Donarski
mdonarski@andersonbottrell.com

[3] To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be served. The above documents were emailed in accordance with the provision of the Rules of Civil Procedure.

[4] I further certify that copy of the foregoing documents will be mailed first class mail, postage paid, to the following non E-filing participants:

None.

[5] The addresses of each party served are the last reasonably ascertainable post office address of such party.

Sarah Broker

Subscribed and sworn to before me this 25th day of February, 2021.

ROSANNE OGDEN
Notary Public
State of North Dakota
My Commission Expires December 23, 2021

Notary Public

20200354

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 1, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, by and through Workforce Safety and Insurance, Petitioner and Appellant, vs. Gloria Felan o/b/o Fred Felan, deceased, Respondent and Appellee, and KB & O Partnership, Respondent.	**SUPREME COURT NO. 20200354** Civil No. 41-2020-CV-00023 **AFFIDAVIT OF SERVICE**

[1] I, Sarah Broker, being duly sworn, deposes and says that I am of legal age and not a party to this action, and that I served the following document(s):

1. **Brief of Appellee Gloria Felan; and**
3. **Affidavit of Service.**

[2] On March 1, 2021 by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

Jacqueline S. Anderson
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Michelle Donarski
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[3] To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be served. The above documents were emailed in accordance with the provision of the Rules of Civil Procedure.

[4] I further certify that copy of the foregoing documents will be mailed first class mail, postage paid, to the following non E-filing participants:

None.

[5] The addresses of each party served are the last reasonably ascertainable post office address of such party.

Sarah Broker

Subscribed and sworn to before me this 1st day of March, 2021.

MICHELE A. NICHOLS
Notary Public
State of North Dakota
My Commission Expires August 14, 2021

Notary Public