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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, **Appellant,** **vs.** **Gloria Felan o/b/o Fred Felan, Deceased,** **Appellee,** **and** **KB & O Partnership,** **Respondent.**	**Supreme Court No.: 20200354** **Sargent County District Court** **Civil No.: 41-2020-CV-00023** **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

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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A. THE ALJ'S FAILURE TO PROPERLY APPLY N.D.C.C. § 65-02-01(10)(a)(3) TO DETERMINE COMPENSABILITY OF A HEART RELATED DEATH REQUIRES THE DECISION BE REVERSED.

[1] In reversing WSI's Order denying death benefits in this case, the ALJ found that Fred Felan's ("Felan") injury from the work incident of September 14, 2017, was 50% of the cause of his death compared to all contributing causes combined. (Finding of Fact #36, Appx. 28) The ALJ made no finding as to the unusual stress requirement, i.e., whether the incident constituted "unusual stress" as defined in N.D.C.C. § 65-01-02(10)(a)(3). The ALJ thus applied part but not all of the statutory requirements of N.D.C.C. § 65-01-02(10)(a)(3). Appellee defends this construction by arguing that the "unusual stress component of the statute does not apply" to Felan's situation. Appellee contends this is correct based upon an author of a workers compensation treatise, that the "unusual stress" requirement does not fit under the facts of the case. In doing so, Appellee is asking the Court to sanction re-writing the law relating to compensable heart attacks or other heart-related conditions, which is not permitted. As this Court has stated:

> It is for the legislature, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the legislature's intent. . . . The function of the courts is to interpret the law, not to legislate, "regardless of how much we might desire to do so or how worthy an argument." CybrCollect [Inc. v. North Dakota Dept's of Fin. Insts., 2005 ND 146 ¶ 23, 703 N.W.2d 285; Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 16, 621 N.W.2d 353. As we have noted, "[i]f the rule is wrong, the legislature has ample power to change it, but the duty of the judiciary is to enforce the law as it exists." CybrCollect, at ¶ 23; see also Doyle, at ¶ 16.

Olson v. Workforce Safety and Insurance, 2008 ND 59 ¶ 23, 747 N.W.2d 71. See also Schoon v. North Dakota Department of Transportation, 2018 ND 210 ¶ 29, 917 N.W.2d

199, J. Crothers, specially concurring (stating "separation of governmental powers requires that the judiciary apply statutes rather than craft them.")

[2] The evolution of this Court's interpretations of the legislative enactments in North Dakota as to what constitutes a compensable heart attack or heart-related condition was outlined in WSI's Brief to this Court. This Court has confirmed that the Legislature has adopted "special rules for recovery" relating to heart attacks and heart conditions. See Schmalz v. North Dakota Workers Compensation Bureau, 449 N.W.2d 817, 824 (N.D. 1989)(noting "a heart attack, which is such a common occurrence, . . . the legislature has adopted special rules for recovery). Currently, the "special rule" provides that "injuries due to heart attack or other heart-released disease . . . ." is compensable "**only** when caused by the employee's employment with reasonable medical certainty, **and 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." N.D.C.C. § 65-01-02(10)(a)(3), emphasis supplied.

[3] Under the definition of "compensable injury" in N.D.C.C. § 65-01-02(10) there are certain conditions that the Legislature has determined require specific criteria to be met to be compensable under North Dakota law. For example, this Court has frequently considered cases on the proper application of special requirements for compensability of a pre-existing condition. See Workforce Safety and Insurance v. Sandberg, 2019 ND 198 ¶ 16, 931 N.W.2d 488 (noting case involved continuing efforts to apply N.D.C.C. § 65-01-02(10)(b)(7) involving "delineation between work activities that merely trigger pain symptoms" and those work activities that "substantially accelerate the progression or substantially worsen the severity" of a pre-existing

condition); Davenport v. Workforce Safety and Insurance, 2013 ND 118 ¶ 17, 833 N.W.2d 500 (discussing requirements of N.D.C.C. § 65-05-01(10)(a)(7) which "authorizes benefits only when at least a 50 percent causal connection exists . . . . and does not permit benefits for an indeterminate relationship between a claimant's work situation and the claimant's mental or psychological condition."); Workforce Safety and Insurance v. Tolman, 2020 ND 223 ¶ 9, 950 N.W.2d 144 (construing N.D.C.C. § 65-01-02(10)(a)(6) (now codified at N.D.C.C. § 65-01-02(11)(a)(6) in determining special requirements for compensability of mental and psychological conditions). What is significant about this Court's opinion in Tolman, was that it discussed proper construction and application of statutory provisions that are specific to certain medical conditions, stating:

> Moreover, "[u]nder N.D.C.C. § 1-02-07, '[s]pecific provisions control over general provisions.'" Rocky Mountain Steel Found., Inc. v. Brockett Co., LLC, 2018 ND 96, ¶ 11, 909 N.W.2d 671 (quoting In re Milbrath, 508 N.W.2d 360, 363 (N.D. 1993)). In this case, N.D.C.C. § 65-01-02(10)(a)(6) provides that for the mental or psychological condition to be compensable, that condition may not "preexist the work injury." This definition of what is "compensable," therefore, controls over the definition of what is "not compensable" under N.D.C.C. § 65-01-02(10)(b)(7). **In other words, N.D.C.C. § 65-01-02(10)(b)(7) does not provide compensability for a "mental or psychological condition" that is not defined as compensable under N.D.C.C. § 65-01-02(10)(a)(6).**

Tolman, 2020 ND 223 ¶ 16 (emphasis supplied). Just as with the definition of what constitutes a compensable psychological condition as construed in Tolman, N.D.C.C. § 65-01-02(10)(a)(3) specifically defines what is required for compensability of "injuries due to heart attack or other heart-related disease . . ." That includes the requirement that "unusual stress" is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined." N.D.C.C. § 65-01-02(10)(a)(3).

[4] The ALJ clearly misapplied N.D.C.C. § 65-01-02(10)(a)(3), in failing require proof of all the elements of the statute, including the "unusual stress requirement." Therefore, the ALJ's decision must be reversed. See Workforce Safety and Insurance v. Avila, 2020 ND 90 ¶ 16, 942 N.W.2d 811 (reversing ALJ decision as not in accordance with the law relating to statutory construction issue); Tolman, 2020 ND 223 ¶ 17 (reversing decision because ALJ misconstrued statute).

B. THE OBJECTIVE MEDICAL EVIDENCE REQUIREMENT FOR ESTABLISHING A COMPENSABLE INJURY IS NOT MET IN THIS CASE.

[5] First, it is necessary to correct statements made by Appellee in its Brief to this Court regarding the position taken by Workforce Safety and Insurance ("WSI") in this proceeding. Appellee contends WSI argued that the death of Felan was the natural progression of his preexisting heart disease. WSI took no such position. WSI's arguments focused on the requirements of N.D.C.C. § 65-01-02(10)(a)(3) to establish a compensable condition. In doing so, WSI had the claim reviewed by a medical doctor, Dr. Jessica Carlson, who testified via deposition and that testimony was submitted for consideration by the ALJ. (C.R. 82-107) Dr. Carlson testified that based on her review of the medical information related to the injuries sustained by Felan in the motor vehicle accident and the analysis of the autopsy results, it was her opinion the motor vehicle accident did not cause his death. (C.R. 88-98) Dr. Carlson opined there was no objective evidence to support Felan's death occurred because of a cardiac arrythmia. (C.R. 93-94)

[6] Rather than focus on requirement under N.D.C.C. § 65-01-02(10) that a compensable injury "must be established by medical evidence supported by objective medical findings," Appellee argues the "substantial contributing cause" standard, citing

Brockel v. North Dakota Workforce Safety and Insurance, 2014 ND 26, 843 N.W.2d 15. In Brockel, the issue under review was whether Brockel had established his wage loss was the result of his compensable injury. Id. ¶ 18. The ALJ concluded that a noncompensable vertebral artery occlusion at C5-6 was the disabling medical condition, rather than his compensable left shoulder injury. This Court referenced that as to disability benefits, the claimant need not prove the work injury is the sole cause of the disability, only that it is a substantial contributing factor to the disability. Id. ¶ 21. That is not the issue or standard applicable to this case. As set forth above, there is a specific statute and "special requirements" to establish a compensable heart-related condition.

[7] On the issue of objective medical findings, Appellee argues that "injuries are not susceptible to definitive proof as in a radiograph, chemical or electrical test." WSI made no such argument that there is some type of "definitive proof" required for determination of compensability. However, N.D.C.C. § 65-01-02(10) clearly and unequivocally requires "medical evidence supported by objective medical findings" to prove a compensable injury. Although the Court has judicially recognized that objective medical evidence *may* include a physician's medical opinion based on an examination, 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, in this case, Dr. Peretti was not a treating physician and did not examine Felan. Further, Dr. Peretti acknowledged that there was nothing in the autopsy that could objectively confirm arrhythmia occurred. (C.R. 138) Dr. Peretti further acknowledged that the study he relied upon to support his hypothesis of cause of death was not present in Felan's case. (C.R. 134-136) WSI submits this testimony, therefore, does not meet the requirement of proving a

compensable injury by medical evidence supported by objective medical findings as required under N.D.C.C. § 65-01-02(10). Aga v. Workforce Safety & Ins. Fund, 2006 ND 254 ¶ 17, 726 N.W.2d 204.

[8] This Court recently confirmed that if an ALJ fails to cite to objective medical findings to support compensability, the decision must be reversed. Workforce Safety and Insurance v. Sandberg, 2019 ND 198 ¶ 25, 931 N.W.2d 488. As a matter of law Dr. Peretti's opinion alone cannot constitute "objective medical evidence" because not only did he not cite to any objective medical findings, but none also exist in the record. The ALJ's decision must therefore be reversed. Id.

CONCLUSION

[9] For the foregoing reasons and as more fully outlined in Appellant's initial Brief to this Court, WSI respectfully requests this Court ***reverse*** the decision of the District Court which affirmed the February 25, 2020, decision of the ALJ, and enter its Order affirming WSI's Order of December 13, 2018, denying Felan's claim for death benefits.

DATED this 10th day of March, 2021.

/s/ Jacqueline S. Anderson

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Reply Brief, hereby certifies, in compliance with Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Reply Brief totals 9.

DATED this 10th day of March, 2021

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STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Melany J. Strendin, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that she served the attached:

REPLY BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

on the following persons:

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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.

Melany J. Strendin

SUBSCRIBED AND SWORN to before me on March 10, 2021.

BRENDA JO BRUNELLE
Notary Public
State of North Dakota
My Commission Expires June 18, 2023

Notary Public

cc.: Al Schmidt, ND WSI
Claim No.: 2017 992,512
Nilles File No.: 17-300.140