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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** **Sargent County District Court** **Civil No.: 41-2020-CV-00023** **ORAL ARGUMENT REQUESTED**

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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STATEMENT OF THE ISSUES

[1] Whether the ALJ misapplied the law by failing to properly apply N.D.C.C. § 65-01-02(10)(a)(3) because the statute permits recovery for injuries due to heart attack or heart related disease "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 . . . ."

[2] Whether the ALJ misapplied the law in concluding Appellee met the burden to prove a compensable injury "by medical evidence supported by objective medical findings" under N.D.C.C. § 65-01-02(10).

[3] Whether the ALJ properly applied the burden of proof to establish entitlement to benefits under N.D.C.C. § 65-01-11.

[4] Whether the ALJ conducted the required "reasoned analysis" of the factors under N.D.C.C. § 65-05-08.3 in concluding that Appellee's death "could" have been caused by a cardiac arrhythmia where there was no objective medical findings to support the analysis.

REQUEST FOR ORAL ARGUMENT

[5] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellant Workforce Safety and Insurance ("WSI") requests oral argument. This appeal involves important issues of statutory construction and application of N.D.C.C. § 65-01-02(10) regarding establishing a compensable injury "by medical evidence supported by objective medical findings" and the requirements to establish a compensable injury due to heart attack or heart-related disease. The appeal also relates to proper application of the burden of proof in workers compensation matters.

STATEMENT OF THE CASE

[6] On September 14, 2017, a First Report of Injury was filed by Respondent KB & O Farms relating to an accident with of its trucks, driven Appellee Fred Felan ("Felan"). (C.R. 1[1]) The claim was filed for left rib injury. (C.R. 1) On September 22, 2017, WSI issued a Notice of Decision in which it accepted the claim for contusion of thorax, unspecified. (C.R. 8)

[7] In September of 2018, a claim was asserted by Felan's spouse for death benefits. (C.R. 13) On September 24, 2018, WSI issued a Notice of Decision Denying the death benefits. (C.R. 18) Felan submitted a request for reconsideration. (C.R. 20-22) On December 13, 2018, WSI issued an Administrative Order denying the claim for death benefits. (Appx. 12-19) Felan requested rehearing. (Appx. 20)

[8] On November 7, 2019, an administrative hearing was held before Administrative Law Judge John Allen ("ALJ"). (C.R. 46a, 187-247) Following post-hearing briefing to the ALJ, on February 25, 2020, the ALJ issued Findings of Fact, Conclusions of Law and Final Order reversing WSI's December 13, 2018, Order. (Appx. 21-35)

[9] WSI appealed the decision of the ALJ to the District Court, Sargent County, North Dakota. (Appx. 36-40) On November 2, 2020, the District Court, the Honorable Mark T. Blumer, issued Findings of Fact, Conclusions of Law and Order affirming the decision of the ALJ. (Appx. 41-47) Order for Judgment and Judgment were entered November 4, 2020. (Appx. 48-49)

[10] WSI has appealed from the District Court Decision and Judgment to this Court. (Appx. 51-54)

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[1] "C.R." refers to the Certificate of Record on Appeal to District Court dated April 15, 2020, filed in this appeal pursuant to N.D.C.C. § 28-32-44.

STATEMENT OF FACTS

[11] On September 14, 2017, Felan was involved in an accident where he was driving a loaded tandem truck, missed a turn and laid the truck down on its side. (C.R. 1) Julie Schulz of KBO Farms went to the scene of the accident. (C.R. 210) Schulz asked Felan if she should call an ambulance and Felan refused. (C.R. 211) Felan did have "a little" chest pain after he was extricated from the vehicle and Schulz again asked him if she could please take him in for an examination, and he agreed. (C.R. 211-212) Schulz took Felan to the Sanford Clinic in Oakes to be checked out. (C.R. 67, 212)

[12] At the Sanford Clinic, it was documented that Felan complained of left chest and left rib pain. (C.R. 67) He had pain with taking a deep breath or coughing, but denied shortness of breath or coughing up any blood. (Id.) From a cardiovascular perspective he had normal rate, rhythm and heart sounds. (C.R. 68) He had decreased breath sounds in the right lower field and left lower field and some left breast tenderness. (Id.) X-rays were taken of his ribs and the PA-C noted he did not see any acute fractures, but would await radiology interpretation. (C.R. 69) Hydrocodone was prescribed for pain as well as a "rib belt" for comfort. (Id.)

[13] At the administrative hearing, Julie Schulz testified that Felan was assisted in obtaining medications after the clinic exam by Schulz's sister, who then took Felan back to the hotel. (C.R. 212-213) Schulz returned to the office and began the process for filing a workers compensation claim. (C.R. 213) Schulz had additional contact with Felan later that same day when she picked him up at his hotel and took him for a meal. (C.R. 213) Felan voiced to Schulz he was sore but did not require any assistance to get from the hotel to the car, or into the diner. (C.R. 214, 216) After the meal, Schulz took

Felan to purchase cigarettes and also gave him some money out of her own pocket so he would have money to eat, and then took him back to the hotel. (C.R. 214)

[14] The next morning, September 15, 2019, Schulz received a call from Felan that he was hungry and again out of money. (C.R. 216) Schulz again picked up Felan from the hotel and took him out to eat. (C.R. 217) Felan required no assistance to get into her vehicle. (C.R. 217) Felan expressed no concerns about how he was feeling. (C.R. 217) During the meal, Schulz testified she noticed Felan was falling asleep and expressed concern that he should go to the Clinic again and get rechecked. (C.R. 217) Felan declined and responded he was fine and had taken "5 hydros." (C.R. 217, 222-223) Schulz told Felan that was too many. (C.R. 217, 223) Felan told her he was a big man and 5 were not going to hurt him and he had taken that many before. (C.R. 217) Felan refused to go to the Clinic again. (C.R. 217) Schulz again purchased cigarettes for Felan and took him back to the hotel. (C.R. 217) Schulz did not observe any problems with Felan entering or exiting her vehicle, or walking to the hotel. (C.R. 218) That same evening, Schulz drove by the hotel and Felan was outside conversing with other employees. (C.R. 219) Felan never told Julie that he was in any type of terrible, excruciating pain, only that he was "sore." (C.R. 214, 220) WSI accepted Felan's claim for the injuries relating to his truck accident for contusion of thorax, unspecified, initial encounter. (C.R. 8)

[15] Felan was discovered deceased in his hotel room on September 16, 2017. (C.R. 47) WSI received information on September 20, 2017, that Felan had passed away. (C.R. 3) The information provided WSI by Felan's wife was that she was unsure if the death was due to his injury "because he was doing ok after that accident but they are doing

an autopsy." (C.R. 3) Respondent also reported the death, and that it was not believed to be due to the work injury because Felan had "multiple health concerns including heart and diabetes." (C.R. 3) The autopsy confirmed that Felan died of "congestive cardiomyopathy and arteriosclerotic heart disease." (C.R. 65)

[16] In September of 2018, almost a year later, WSI was contacted regarding filing a claim for death benefits. (C.R. 4, 9) WSI undertook an investigation and gathered information from Felan's spouse and the employer. (C.R. 5, 6, 10-16, 17) WSI denied the claim under N.D.C.C. § 65-01-02(10)(3) which provides that "[i]njuries due to heart attack or other heart-releated disease, stroke, and physical injury caused by mental stimulus, but 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. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work." (C.R. 18) Felan, through counsel, requested reconsideration of that decision. (C.R. 20-25) WSI then issued its Administrative Order on December 13, 2018, denying the claim for death benefits. (Appx. 12-19) Felan requested rehearing. (Appx. 20)

[17] An administrative hearing was held November 7, 2019. (C.R. 46a; 187) The issue for determination by the ALJ was "whether Claimant's surviving spouse has proven by a preponderance of the evidence entitlement to payment of death benefits in connection with claim filed on September 15, 2017." (C.R. 45) Testimony was taken at the hearing of Gloria Felan, Noelia Felan and Julie Schulz. (C.R. 189) Testimony was also taken of Dr. Jessica Carlson, a medical consultant for WSI (C.R. 82-113) and Dr.

Frank Peretti, who was retained by Felan to review the case and offer an opinion. (C.R. 114-142)

[18] Dr. Carlson is a board-certified family medicine physician that also provides medical consulting services to WSI. (C.R. 79, 86) She conducted a review of the medical information at the request of the claims staff to determine whether the injuries sustained in the work incident caused or contributed to Felan's death. (C.R. 88-89) Dr. Carlson responded based on her review that there was no evidence the accident was a cause of the death. (C.R. 89) Dr. Carlson explained that congestive cardiomyopathy is a condition where the muscles of the heart do not work as well so the person does not pump as much blood out of the heart as you should for your body to work properly. (C.R. 90) Dr. Carlson also explained that arteriosclerotic disease is a buildup of plaque or cholesterol of the blood vessels which results in the vessels not expanding or contracting as they should. (C.R. 90) Dr. Carlson testified these conditions result in not enough blood flow to the vital organs to sustain life. (C.R. 90) Dr. Carlson found no objective medical findings in her review of the medical information to support Felan's death was the result of any injury sustained in the accident. (C.R. 93)

[19] Felan retained Dr. Frank Peretti to review materials relating to the claim for death benefits. (C.R. 80-81) Dr. Peretti's report noted that he agreed the cause of death was congestive cardiomyopathy and artherosclerotic heart disease. (C.R. 81) Dr. Peretti opined that the injuries from the accident led to "cardiac arrythmia" that led to Felan's death. (C.R. 81) Peretti based his opinion, in part, on medical article related to cardiac arrhythmia. (C.R. 125-126) Dr. Peretti confirmed, however, that there is nothing in the autopsy report that would confirm Felan developed a cardiac arrhythmia. (C.R. 131) He also confirmed that

there was no indication when Felan was examined at Sanford Health Oakes Clinic on the date of the accident that he had an arrhythmia. (C.R. 132)

[20] Dr. Peretti agreed that not every single person that has a chest trauma develops lethal cardiac arrhythmia. (C.R. 133) He further acknowledged that in the study he cited relied upon a postmortem confirmation of myocardial contusion, which was not present in Felan's case. (C.R. 134-136) Dr. Peretti confirmed that the pathologist that conducted Felan's autopsy confirmed non-lethal injuries, including a small bruise in the abdominal wall and rib fractures. (C.R. 136-137) There was no injury to the aorta. (C.R. 137) Dr. Peretti, therefore, acknowledged that was nothing in the autopsy that could objectively confirm arrhythmia occurred. (C.R. 138)

[21] After post-hearing briefing, the ALJ issued Findings of Fact, Conclusions of Law and Final Order, reversing WSI's Order of December 13, 2018. (Appx. 21-35) The ALJ provided the following discussion regarding his analysis of the issue of whether Felan proved entitlement to death benefits:

> Under North Dakota law, a claimant seeking WSI benefits has the burden of proving by a preponderance of the evidence that the claimant had suffered a compensable injury and is entitled to benefits. N.D.C.C. § 65-01-11; *Bergum v. N.D. Workforce Safety and Insurance*, 2009 ND 52 (citing *Manske v. Workforce Safety & Ins.*, 2008 ND 79). A "compensable injury" is defined in North Dakota Century Code section 65-01-02, Subd. 10 (now Subd. 11) as an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. The statute goes on to state that a compensable injury <u>includes</u> "Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but 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. 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)(emphasis mine). I note that the

Legislature did not place "injuries due to heart attack or other heart-related disease" in the paragraph that defines what is not a compensable injury, for example pre-existing conditions. The Legislature could have, but did not, enact a law that "injuries due to heart attack or other heart-related disease is not compensable unless 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 the cause of the injury or disease as compared with all other contributing causes combined."

This ALJ reads the "heart attack" portion of the statute as one that includes heart attacks and heart disease as being compensable if certain criteria are met as opposed to one that precludes heart attacks and heart disease if those criteria are not met, like the Legislature has done with pre-existing conditions. Therefore, a claimant who claims a heart attack or heart disease injury can still prove a compensable injury if they show "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings."

Therefore, this ALJ found that WSI's argument that because this case involved a heart related question, Felan could only recover if he met the criteria outlined in the statute as too restrictive. This ALJ found that the proper interpretation of the statute allows the Claimant to prove his claim is compensable in another way and it does not mean that Felan can only prove a compensable injury by meeting the statute's requirements.

In order to be a compensable injury, North Dakota law requires the work injury be a substantial contributing factor. The law does not require that the work injury be the sole cause or the primary cause. See, *Brockel v. North Dakota Workforces Safety & Insurance,* 2014 ND 26.

Objective 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. See, *Engebretson v. N.D. Workers Comp. Bureau,* 1999 ND 112, ¶ 24, 595 N.W.2d 312 (Maring J., concurring); *Myhre v. N.D. Workers Comp. Bureau,* 2002 ND 186, ¶ 10; *Swenson v. Workforce Safety & Ins. Fund,* 2007 ND 149, ¶ 25 (emphasis mine). WSI argued that Peretti's opinion does not fall within the realm of what is considered objective medical evidence that Felan incurred any arrhythmia. It is true that Peretti performed a record review only. Peretti also explained why Arrhythmia would not be show up in an autopsy. Peretti's opinion, however, was based upon a review of objective medical findings, including, but not limited to, the Report of Autopsy and medical records. Therefore, this ALJ finds that Peretti's opinions is objective medical evidence.

> The Supreme Court used the words "may include" in the description of objective medical evidence. That language is not limiting objective medical evidence to only those opinions that meet the language in those cases. This ALJ finds that Peretti's opinion falls within the intent of the law and WSI's interpretation of that law is too restrictive. Moreover, this ALJ has entertained many medical opinions upon a review of medical records only. WSI's medical consultant in this case, performed the same analysis of records as did Peretti.

(Appx. 29-30)

[22] WSI filed an appeal of the decision of the ALJ to the District Court, Sargent County, North Dakota. (Appx. 36-40) The District Court issued "Findings of Fact, Conclusions of Law and Order" dated November 2, 2020. (Appx. 41-47) The District Court concluded that the ALJ correctly applied the law and affirmed the decision. (Appx. 46) It is from this decision and the Judgment entered pursuant to this decision that WSI has taken this appeal. (Appx. 49)

LAW AND ARGUMENT

A. SCOPE OF REVIEW ON APPEAL.

[23] The scope of review of an independent administrative law judge decision is set out in N.D.C.C. § 28-32-46. Bishop v. North Dakota Workforce Safety and Ins., 2012 ND 217 ¶ 6, 823 N.W.2d 257. On appeal, this Court reviews the decision of the administrative agency, not the decision of the District Court. Workforce Safety and Insurance v. Avila, 2020 ND 90 ¶ 6, 942 N.W.2d 811. "When an independent ALJ issues final findings of fact, conclusions of law and order under N.D.C.C. § 65-02-22.1, courts apply the same deferential standard of review to the ALJ's factual findings as used for agency decisions." Bishop, 2020 ND 217 at ¶ 5 (citing Sloan v. N.D. Workforce Safety and Ins., 2011 ND 194 ¶ 5, 804 N.W.2d 184; Workforce Safety & Insurance v. Auck,

2010 ND 126 ¶ 9, 785 N.W.2d 186). However, no deference is given to an ALJ's legal conclusions, and questions of law are fully reviewable on appeal. Id. at ¶ 6; Sloan, at ¶ 5; See Auck, at ¶ 9 (noting that deference to ALJ's legal conclusions is "not justified.")

[24] This appeal involves errors of law and fact. On review of such a decision, the Court must "separately inquire whether the order or decision is 'not in accordance with the law'; whether 'the findings of fact made by the [ALJ] are not supported by a preponderance of the evidence'; and, whether the conclusions of the [ALJ] 'are not supported by [the] findings of fact.'" Midwest Property Recovery, Inc. v. Job Service of N.D., 475 N.W.2d 918, 922 (N.D. 1991). The "underlying predicate facts are treated as findings of fact, and the conclusion whether those facts meet the legal standard is a question of law." Matter of BKU Enterprises, Inc., 513 N.W.2d 382, 387 (N.D. 1994). If facts are undisputed the Court reviews the legal question "anew." Gottus v. Job Service North Dakota, 2011 ND 204 ¶ 8, 804 N.W.2d 192 (citing Spectrum Care v. Stevick, 2006 ND 155, 718 N.W.2d 593).

[25] A legal issue on appeal is construction and application of 65-01-02(10)(a)(3)(2017). "Questions of law, including the interpretation of a statute, are fully reviewable." Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. "The primary objective of statutory construction is to ascertain the intent of the legislature." Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶ 11, 602 N.W.2d 704, 708; Ash v. Traynor, 2000 ND 75 ¶ 6, 609 N.W.2d 96, 98. In doing so, courts look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 12, 687 N.W.2d 714 717; Goodleft v. Gullickson, 556 N.W.2d 303, 306 (N.D. 1996).

Statutes are construed "as a whole to harmonize and give meaning to each word and phrase." Baity ¶ 12, 687 N.W.2d at 717; Witcher, ¶ 11, 602 N.W.2d at 78; Ash, ¶ 6, 609 N.W.2d at 99. In addition, "[t]he practical application of a statute by the agency enforcing it is entitled to some weight in construing the statute, especially where the agency interpretation does not contradict clear and unambiguous statutory language." Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992); see also Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989); Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469 (N.D. 1992). See also Houn v. Workforce Safety and Insurance, 2005 ND 115 ¶ 4 (noting administrative construction of statute entitled to some deference).

[26] A statute is ambiguous when it is "susceptible to differing but rational meanings." Ash ¶ 6, 609 N.W.2d at 96, citing Werlinger v. Champion Healthcare Corp., 1999 ND 173 ¶ 44, 598 N.W.2d 820. "Although courts may resort to extrinsic aids to interpret a statute if it is ambiguous," it must "look first to the statutory language, and if the language is clear and unambiguous, the legislative intent is presumed clear." McDowell v. Gille, 2001 ND 91 ¶ 11, 626 N.W.2d 666, 671. "When the meaning of the statute is clear on its face, there is no room for construction." Baity ¶ 12, 687 N.W.2d at 718. As this Court has reaffirmed on numerous occasions:

> When a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442

N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). See also Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 19, 584 N.W.2d 530, 535 (J. VandeWalle, dissenting). Also, when a statute is clear and unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05; see Bjerke v. North Dakota Workers Compensation Bureau, 1999 ND 180, 599 N.W.2d 329. If the statute is determined to be ambiguous, a court may resort to extrinsic aids such as legislative history to interpret the statute. Shiek v. North Dakota Workers Compensation Bureau, 2002 ND 85 ¶ 12, 643 N.W.2d 721.

B. THE ALJ DID NOT PROPERLY CONSTRUE AND APPLY N.D.C.C. § 65-02-01(10)(a)(3) AND THEREFORE THE ALJ'S DECISION IS NOT IN ACCORDANCE WITH THE LAW AND MUST BE REVERSED.

[27] Under North Dakota law, the definition of a compensable heart related condition is set out in N.D.C.C. § 65-01-02(10)(a)(3) as follows:

> Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, **but 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. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that line of work.**

(Emphasis supplied.) As explained in Auck, 2010 ND 126 ¶ 7, 785 N.W.2d 186, in order to establish a compensable injury for a heart related condition:

> [T]he surviving spouse had the burden of proving by a preponderance of the evidence that: 1) The heart attack that resulted in [claimant's] death was caused by a mental stimulus, here stress, that was caused by his employment with reasonable medical certainty; 2) The stress was "unusual," meaning stress greater than the highest level of stress normally experienced or anticipated in [claimant's] position or line of work; and 3)

> The stress was at least fifty percent of the cause of the heart attack as compared with all other contributing causes combined.

In reversing WSI's Order denying death benefits in this case, the ALJ found that Felan's 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). Rather, the ALJ explained his construction and application of the statute in reversing WSI's Order as follows:

> Under North Dakota law, a claimant seeking WSI benefits has the burden of proving by a preponderance of the evidence that the claimant had suffered a compensable injury and is entitled to benefits. N.D.C.C. § 65-01-11; *Bergum v. N.D. Workforce Safety and Insurance*, 2009 ND 52 (citing *Manske v. Workforce Safety & Ins.*, 2008 ND 79). A "compensable injury is defined in North Dakota Century Code section 65-01-02. Subd. 10 (now Subd. 11) as an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. The statute goes on to state that a compensable injury includes "Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but 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. 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)(emphasis mine.). I note that the Legislature did not place' injuries due to heart attack or other heart-related disease" in the paragraph that defines what is not a compensable injury, for example pre-existing conditions. The Legislature could have, but did not enact a law that "injuries due to heart attack or other heart-related disease is not compensable unless 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."
>
> The ALJ reads the "heart attack" portion of the statute as one that includes heart attacks and heart disease as being compensable if certain criteria are met as opposed to one that precludes heart attacks and heart disease if those criteria are not met, like the Legislature has done with pre-existing conditions. Therefore, a claimant who claims a heart attack or heart disease injury can

> still prove a compensable injury if they show "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings."
>
> Therefore, this ALJ found that WSI's argument that because this case involved a heart related question, Felan could only recover if he met the criteria outlined in the statute as too restrictive. The ALJ found that the proper interpretation of the statute allows the claimant to prove his claim is compensable in another way and it does not mean that Felan can only prove a compensable injury by meeting the statute's requirements.

(Appx. 29-30) The ALJ's construction of N.D.C.C. § 65-01-02(10)(a)(3) is that the criteria outlined in the plain language of the statute need not be met because it is "too restrictive." (Id.) Based on both the plain language of N.D.C.C. § 65-01-02(10)(a)(3) and the case law interpreting this provision, including analysis of the legislative amendments to the statute, it is clear the ALJ erred in the construction and application of this statute. Accordingly, because the ALJ erred as a matter of law, the decision must be reversed. See Avila, 2020 ND 90 ¶ 16 (reversing ALJ decision as not in accordance with the law relating to statutory construction issue).

[28] In Stout v. North Dakota Workmen's Compensation Bureau, 236 N.W.2d 889 (N.D. 1975) this Court held that the "usual exertion" rule was the law of North Dakota when it came to work-connected exertion that precipitated a heart attack. In so holding, the Court rejected the distinction between "unusual" vs. "usual" exertion. Id. at 892. The claimant in Stout, a truck driver, had died unloading freight. The Bureau, at that time, argued that the "unusual exertion" rule was precluded by the statutory definitions for compensable injury, which this Court rejected. Id. at 893-894. At the time the Stout decision was considered, Section 65-01-02 of the Century Code did not have a specific provision relating to heart related conditions. Id. at 893. Instead, the Bureau at that time argued that the condition heart condition that caused death was a disease that was not

traceable to employment. Id. This Court held: "If the myocardial arrest is an accident – and we hold that it is – subdivision 8 a is not applicable." Id. at 894.

[29] In Grace v. North Dakota Workmen's Comp. Bureau, 395 N.W.2d 576 (N.D.1986), the Court noted that the compensability statute had been amended by the legislature in 1977 and that amendment was in response to the Court's holding in Stout. The Court stated that amendment required "that a heart attack or stroke be precipitated by unusual stress in order to be compensable." Id. at 580. The claimant in Grace did masonry work, and had a heart attack after working in very high temperatures for two days. A claim for benefits had been denied because there was no evidence of unusual stress precipitating the heart attack. The Court went confirmed that the "usual exertion" rule of Stout was "no longer a correct statement of law." Id. Henceforth, the statute required "unusual stress." The law at that time of deciding Grace, therefore, was that the heart attack must be precipitated by "unusual stress." Id. The law at that time did "not require that the work causing the heart attack be different in nature from the employee's usual work; however, it [did] require unusual stress." Id. The Court then stated that under the statute as it existed at that time, an examination for unusual stress must be applied "according to the employee's complete work history." Id. at 581. In considering the evidence presented in that case, this Court affirmed the dismissal of the claim for benefits for the heart attack. Id. In doing so, the Court evaluated the testimony and description of the events of the day by the claimant and it supported that the claimant was performing his normal duties at that time, and he had previously worked in very high temperatures. Id. This Court affirmed the denial of the claim.

[30] In Schmalz v. North Dakota Workers Compensation Bureau, 449 N.W.2d 817 (N.D. 1989), this Court again discussed the requirements for establishing a compensable heart condition under the 1977 version of the compensable injury statute. In so doing, the Court reviewed the historical context of claims relating to heart related conditions and the inclusion of the stress requirement. The Court again specifically stated that to establish compensability, the claimant must prove both a causal relationship between the work and unusual stress. On the causation issue, the Court stated as follows:

> In Syverson v. North Dakota Workmen's Comp. Bureau, 406 N.W.2d 688 (N.D. 1987), we discussed the "causally related to employment" requirement. Syverson asserted that his arthritic shoulder condition was brought on or worsened by his employment as a furniture and appliance handler. In rejecting Syverson's claim, the Bureau asserted that "'the evidence does no more than speculate as to a possible causal relationship between any lifting and the arthritic injury.'" In affirming the district court's reversal of the denial of benefits we said:
>
> > "While Dr. Mardirosian may have been unable to medically pinpoint the precise origin of Syverson's arthritic shoulder condition, we believe that his testimony clearly demonstrates that he considered Syverson's employment to be a substantial contributing factor in the development of his arthritis."
>
> Thus, an undisputed medical opinion as to the causal relationship between the alleged course and the injury was not required in Syverson.
>
> Syverson is distinguishable, however, from the case at hand. Schmalz's injury was a **heart attack**, which is such a common occurrence that the legislature has adopted special rules for recovery.

Id. at 824 (emphasis supplied). Thus, this Court confirmed in Schmalz that the requirements to establish compensability of a heart related condition set forth N.D.C.C. § 65-01-02(10)(a)(3) are "special" requirements to establish compensability and an award of benefits under workers compensation law.

[31] What is clear from the history of the statutory amendments, and construction and application of the amendments in subsequent decisions, is that to prove a compensable heart condition, it is not sufficient to simply look at an event that was claimed to cause a heart condition or here death; rather, the facts surrounding that event must also be evaluated to determine if there was unusual stress as defined in the statute. See e.g., Nelson v. North Dakota Workmen's Compensation Bureau, 316 N.W.2d 790, 794 (N.D. 1982)(confirming both causation and unusual stress are requirements for establishing an award of benefits for death related to a heart condition). The ALJ's application of the law to conclude that there need not be an examination of nor proof of the stress requirement as outlined in N.D.C.C. § 65-01-02(10)(a)(3) was legal error.

[32] After the Grace decision, the legislature in 1997 again amended the compensability statute relating to heart related conditions, to its current form. The 1997 legislative history, by way of testimony by WSI attorney Reagan Pufall, points out that under the new definition a high level of stress is not unusual stress but the term unusual stress "is reserved for truly unexpected and extremely stressful experiences that could not be anticipated in that line of work." Testimony of Reagan Pufall on H.B. 1269, House Industry, Business and Labor Committee. The purpose of the 1997 amendments were to "significantly tighten up the requirements for proving that a heart attack, heart disease, stroke, or a physical injury caused by a mental stimulus is a compensable injury." Id. The legislative history further reflects:

> The new law will require medical evidence that unusual workplace stress is at least half the overall cause of the injury. "Unusual stress" is now defined. Under the definition, a high level of stress is not considered unusual if it is the kind of stress that can be anticipated in the particular position. For example, emergency room personnel, plant managers, and hotline workers all experience high levels of mental stress in their jobs

> from time to time. Construction workers and other manual workers experience high levels of physical stress. However, that level of stress would not be considered "unusual" for those positions. "Unusual stress" is reserved for **truly unexpected and extremely stressful experience that could not be anticipated in that line of work.**

Testimony of Reagan Pufall on H.B. 1269, House Industry, Business and Labor Committee (emphasis supplied). Thus, based on a review of Grace and the 1997 legislative history to the amendments to the statute, there is no "usual exertion" rule in North Dakota; rather there is an "unusual stress" rule. The 1997 amendment defined and "significantly tightened up" what constitutes unusual stress under the law. Thus, the law to be applied is much more stringent in terms of allowance of compensation for heart related conditions. However, the analysis remains the same that one must review the claimant's entire work history to evaluate whether the event that is claimed to be the cause of the heart attack constitutes "unusual stress," which was now defined to be stress that is "truly unexpected and extremely stressful" that "could not be anticipated in that line of work."

[33] Based on the plain language of N.D.C.C. § 65-01-02(10)(a)(3), it is not enough, therefore, to simply establish that the employment or an employment related event caused the heart condition with reasonable medical certainty; rather, there is an additional required burden of proof because the statute states "**and** only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury . . . ." (Emphasis supplied.) Because the ALJ made no findings related to the "unusual stress requirement" as a matter of law the ALJ misapplied the statute and the decision be reversed.

[34] Furthermore, Felan did not present evidence sufficient to meet the burden that Felan's situation was "truly unexpected and extremely stressful" and "could not be anticipated in that line of work." While pain associated with rib fractures can occur, there was nothing presented as far as evidence that the pain experienced by Felan was "extraordinary" or "could not be anticipated." Furthermore, there was absolutely no evidence related to how stressful Felan's job was driving truck, or how "unusual" a truck accident may be. An analysis of how "unusual stress" is interpreted and applied is instructive.

[35] In Stokes v. First Nat. Bank, 377 S.E.2d 922 (S.C. Ct. App. 1988), aff'd, 410 S.E.2d 248 (S.C. 1991) a vice president of a bank in South Carolina suffered a heart attack that was attributed to his work. In Stokes, the decedent was forced to take on increased duties, an increased workload, and increased hours as a result of the resignation of a manager and an upcoming merger. The evidence in Stokes showed that the workload increased drastically to 16-18 hours per day, seven days a week and he became dysfunctional in the month leading up to the merger. That court determined that the increase of workload assigned constituted an "unusual and extraordinary condition of employment." Id. at 925. No such evidence exists here. See also Richards Dept. Store v. Donin, 365 So. 2d 385 (Fla. 1978)(reversing award of benefits for heart attack where there was no evidence of unusual stress from an unexpected or unusual event happening suddenly).

[36] In Courtney by Higdem v. City of Orono, 424 N.W.2d 295 (Minn. 1988), that court confirmed there is an element of legal causation required to support a claim of unusual stress, and stated that the employee "must produce evidence that the stress was

extreme or beyond the ordinary-day-to-day stress to which all employees are exposed." Id. at 297. That court required a remand for failure to analyze this issue correctly. Subsequently, the case made its way back to the Minnesota Supreme Court. In Courtney by Higdem v. City of Orono, 463 N.W.2d 514 (Minn. 1990), the reviewing court discussed the evidence regarding this legal causation issue, which the compensation found was insufficient from an objective basis to justify a finding that whatever stress the claimant experienced was "beyond the ordinary day-to-day stress to which all employees are exposed." Id.

[37] There was no evidence presented to support that Felan was under any "unusual stress" under the legal analysis applicable to the current statutory definition. Felan was taken off work to rest after his truck accident. Felan was functional and able to converse and go out to eat after the accident. The observations of the one witness that actually interacted with Felan documented that he did not appear to be in any acute, severe or unusual pain. In evaluating the evidence, the law of North Dakota is no longer "usual exertion" it is "unusual stress," which is now specifically and stringently defined. See arguments, supra. Thus, one must look at the event that is claimed and evaluate whether that is truly something that was "unexpected."

[38] The situation here is also very different from Auck, 2010 ND 126, 785 N.W.2d 186, the one case where this Court has affirmed an unusual stress claim. In Auck, there was evidence and testimony relating to chronic pain, chronic stress and depression and that was unusual because it was not something normally experienced or anticipated in the line of work. Here, while Felan relied on the opinion of Dr. Peretti about the pain associated with rib fractures, there is nothing to support that the pain Felan experienced

was unusual or out of the ordinary or unexpected in his line of work or with the type of rib injury he sustained. While Dr. Peretti may be able to provide medical causation opinions, he cannot state a legal causation opinion. Peretti confirmed in his testimony he did not talk to any witnesses or anyone who had seen or interacted with Felan after the accident. (C.R. 130) Peretti did only a paper review. (C.R. 130) Peretti's testimony cannot, as a matter of law, be determinative as to the issue of whether there was unusual stress. See Nelson, 316 N.W.2d at 796 (noting physician had no direct knowledge of stress and thus testimony of physician was not evidence that stress did exist).

[39] In applying N.D.C.C. § 65-01-02(10)(a)(3) to the facts of this case, while keeping in mind the clear legislative intent of the statute, the ALJ failed to make findings relative to unusual stress and more importantly, as a matter of law the evidence does not support unusual stress as a cause of Felan's demise. The ALJ analysis that under N.D.C.C. § 65-01-02(10)(a)(3) all that is required is to establish causation as to the employment event without the need to establish the "unusual stress" requirement is plain error requiring reversal of the decision. As this Court has so aptly stated:

> [T]his court cannot legislate; we cannot change statutory law by judicial decision. If there are changes to be made in the statute, that is a matter to be left to the legislature, and it is for the legislature to determine policy, not the courts.

Lembke v. Unke, 171 N.W.2d 837, 853 (N.D. 1969). See Fetzer v. Minot Park Dist., 138 N.W.2d 601, 604 (N.D. 1965) (stating "courts cannot legislate, regardless of how much we might desire to do so."); Olson v. Workforce Safety and Ins., 2008 ND 59 ¶ 23, 747 N.W.2d 71 (stating "[t]he function of the courts is to interpret the law, not to legislate, regardless of how much we might desire to do so.") Accordingly, because the ALJ improperly misapplied N.D.C.C. § 65-01-02(10)(a)(3), and as a matter of law there is no evidence to support

"unusual stress" as required by the statute, this Court must reverse the decision of the ALJ and affirm WSI's denial of death benefits in this claim See Huwe v. Workforce Safety and Insurance, 2008 ND 47 ¶27, 746 N.W.2d158 (reversing ALJ decision where findings of fact do not address evidence presented).

C. THE ALJ MISAPPLIED THE LAW RELATING TO THE BURDEN TO ESTABLISH ENTITLEMENT TO BENEFITS BY OBJECTIVE MEDICAL EVIDENCE SUPPORTED BY OBJECTIVE MEDICAL FINDINGS UNDER N.D.C.C. § 65-01-02(10).

[40] In order to establish a compensable injury, N.D.C.C. § 65-01-02(10) requires that an injury "be established by medical evidence supported by objective medical findings." As to this requirement, the ALJ found that "Peretti's review of the medical records and opinions is objective medical evidence." (Finding of Fact # 34, Appx. 28) In so finding, the ALJ explained his analysis as follows:

> In order to be a compensable injury, North Dakota law requires the work injury be a substantial contributing factor. The law does not require that the work injury be the sole cause or the primary cause. See, *Brockel v. North Dakota Workforce Safety & Insurance*, 2014 ND 26.
>
> Objective 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. See, Engebretson v. N.D. Workers Comp. Bureau, 1999 ND 112, ¶ 24, 595 N.W.2d 312 (Maring, J., concurring); Myhre v. N. D. Workers Comp. Bureau, 2002 ND 186, ¶ 10; Swenson v. Workforce Safety & Ins. Fund, 2007 ND 149, ¶ 25 (emphasis mine). WSI argued that Peretti's opinion does not fall within the realm of what is considered objective medical evidence. WSI's arguments included that Peretti did not physically examine Felan and also there was no objective evidence that Felan incurred any arrhythmia. It is true that Peretti performed a record review only. Peretti also explained why arrhythmia would not show up in an autopsy. Peretti's opinion, however, was based upon a review of objective medical findings, including, but not limited to, the Report of Autopsy and medical records. Therefore, this ALJ finds that Peretti's opinions is objective medical evidence.
>
> The Supreme Court used the words "may include" in the description of objective medical evidence. The language is not limiting objective medical

> evidence to only those opinions that meet the language in those cases. The ALJ finds that Peretti's opinion falls within the intent of the law and WSI's interpretation of that law is too restrictive. Moreover, this ALJ has entertained many medical opinions based upon a review of medical records only. WSI's medical consultant in this case, performed the same analysis of records as did Peretti.

(C.R. 181) This analysis is an error of law based on the established case law interpreting the requirement of what constitutes medical evidence supported by objective medical findings.

[41] Dr. Peretti was retained by Felan to conduct a review of information in the case. Peretti did not speak with any of Felan's surviving relatives. (C.R. 130) He did not talk to anyone that had contact with Felan following the motor vehicle accident. (C.R. 120) Peretti hypothesized that chest trauma and abdominal injuries caused a cardiac arrhythmia. (C.R. 131) Peretti confirmed that there was nothing in the autopsy report to confirm Felan actually suffered a cardiac arrhythmia. (C.R. 131) He confirmed that when Felan was evaluated at Sanford Oakes Clinic, there was no indication after the motor vehicle accident Felan had an arrhythmia. (C.R. 132) Dr. Peretti also agreed that not every single person that has a chest trauma develops a lethal cardiac arrhythmia. (C.R. 133) When asked if any objective medical documentation exists that Felan developed an arrhythmia, Dr. Peretti confirmed that did not exist. (C.R. 134, 137-138) The ALJ acknowledged that Dr. Carlson, who reviewed the information for WSI, also confirmed as well that there was no objective evidence to support any cardiac arrhythmia was caused by Felan's pain or chest trauma. (C.R. 183)

[42] The ALJ reasoned accepting Dr. Peretti's opinion as objective medical evidence because he has accepted medical opinions of WSI medical consultants in the past. (C.R. 181) However, it is not WSI's burden to establish a compensable injury to

sustain benefits. Indeed, in Wherry v. North Dakota State Hospital, 498 N.W.2d 136, 139 (1993) this Court stated:

> To participate in the workers' compensation fund, N.D.C.C. § 65-01-11 requires a claimant prove a compensable injury by a preponderance of the evidence. Moses v. North Dakota Workers Compensation Bureau, 429 N.W.2d 436 (N.D. 1988). The claimant must prove a causal connection between employment and an injury. Id. **The Bureau does not have the burden of proving that the claimant is not entitled to benefits, or that the claimant's injury is unrelated to employment**. Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730 (N.D. 1988), *cert. denied*, 489 U.S. 1014, 109 S.Ct. 1126, 103 L.Ed.2d 189 (1989); Gramling v. North Dakota Workmen's Compensation Bureau, 303 N.W.2d 323 (N.D. 1981).

(Emphasis supplied.) The medical evidence supported by objective medical findings requirement applies specifically to the burden placed on the injured worker to prove a compensable injury. N.D.C.C. § 65-01-11; N.D.C.C. § 65-01-02(1). As this Court has repeatedly confirmed, it is the claimant that is responsible for supporting their claim. Davenport v. Workforce Safety & Ins. Fund, 2013 ND 118 ¶ 18, 833 N.W.2d 500.

[43] Dr. Peretti's opinion was based, in part, on a medical study. However, on cross-examination relating to the medical study Peretti acknowledged that the two things that were present and relied upon in that study to support that chest trauma that can cause fatal cardiac arrhythmia were not present in this case: (1) a cardiac contusion; and (2) histological findings of severe interstitial oedema, hemorrhages, and infiltration of lymphocytest and neutrophils, fresh myocardiac necrosis and fatty degeneration. (C.R. 134-136) Peretti confirmed that the pathologist that conducted the autopsy on Felan indicated only "non-lethal injuries." (C.R. 136) He also confirmed the pathologist did not do the microscopic evaluation to identify if the other conditions were present. Id. He also agreed that cardiac arrhythmia can occur in the absence of trauma. (C.R. 138)

[44] In Across Big Sky Flow Testing, LLC v. Workforce Safety and Insurance, 2014 ND 236 ¶ 8, 857 N.W.2d 380, this Court reaffirmed that objective 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." The ALJ did not and cannot cite any case law from North Dakota that supports that a physician's medical opinion that is not based on an examination and not based on the patient's medical history meets the objective medical evidence requirement. Indeed, what this Court has confirmed is that if there are factors equally possible, an award of benefits may not be based on "surmise or conjecture or mere guess." Kurtz v. North Dakota Workmen's Compensation Bureau, 139 N.W.2d 525, 528 (N.D. 1966); Across Big Sky Flow Testing, 2014 ND 236 ¶ 9, 857 N.W.2d 380.

[45] In this case, the ALJ found objective medical evidence *solely* based on Dr. Peretti's opinion, even though he was not a treating physician, did not review any of Felan's prior medical history, did not talk to any individual or physician that interacted with Felan following the motor vehicle accident, and could point to no objective findings in the autopsy to confirm his hypothesis on the cause of Felan's death. Without medical evidence supported by objective medical findings, Felan's claim fails as a matter of law. As noted in Workforce Safety and Insurance v. Sandberg, 2019 ND 198 ¶ 25, 931 N.W.2d 488, when "the ALJ [does] not cite any medical evidence supported by objective medical findings in the record" to support the opinion on compensability, the decision should be reversed. As a matter of law, therefore, Dr. Peretti's opinion alone cannot constitute "objective medical evidence" because not only did he not cite to any objective medical findings, none exist in the record. Accordingly, because as a matter of law Felan did not

establish a compensable injury by medical evidence supported by objective medical findings, the ALJ's decision must be reversed. Id.

D. THE ALJ COULD NOT REASONABLY CONCLUDE, BASED ON THE EVIDENCE, THAT FELAN HAD ESTABLISHED A COMPENSABLE HEART CONDITION CAUSED HIS DEATH.

[46] The cause of death listed on Felan's death certificate was congestive cardiomyopathy and arteriosclerotic heart disease. (C.R. 16) The report of autopsy identified the cause of death as congestive cardiomyopathy and arteriosclerotic heart disease. (C.R. 65) Both Dr. Peretti (C.R. 131) and Dr. Carlson agreed that was the cause of his death. (C.R. 107) The ALJ went on to consider N.D.C.C. § 65-05-08.3 in weighing the medical opinions of these doctors. Based on a review of the ALJ's decision, it is clear that he misapplied N.D.C.C. § 65-05-08.3. In Albright v. North Dakota Workforce Safety and Insurance, 2013 ND 97, 833 N.W.2d 1, this Court held that the intent of 65-05-08.3 was to "codify caselaw stating that if WSI disregards medical evidence favorable to a claimant WSI must consider the entire record, clarify inconsistencies, and adequately explain the reason for disregarding medical evidence favorable to the claimant." However, the Court also confirmed that this analysis must be done in a "reasoned manner." See, e.g., Huwe, 2008 ND 47 ¶ 10, 746 N.W.2d 158. To meet this standard, the ALJ must sufficiently address the reason for rejecting favorable evidence with a reason that is supported by the record that complies with the prevailing law. Swenson v. Workforce Safety and Insurance, 2007 ND 149 ¶ 28, 738 N.W.2d 892.

[47] As fully outlined above, the medical evidence necessary to establish a compensable injury must be supported by objective medical findings. N.D.C.C. § 65-01-02(10). As to the factors under N.D.C.C. § 65-05-08.3, the ALJ concluded that the

following factors were "neutral" or entitled to "no weight": (a) length of treatment relationship and frequency of examinations; (b) nature and extent of treatment relationship; (e) appearance of bias; (g) other relevant factors. (Appx. 31-32) As to the relevant evidence supporting the opinions, the ALJ found "both opinions were plausible." (Appx. 32) The ALJ, however, found the evidence "slightly" more favored Dr. Peretti's opinion. In doing so, the ALJ pointed to Peretti's opinion that "blunt chest trauma" "could" lead to late cardiac arrhythmias." (Appx. 32) However, Peretti confirmed in his testimony that there was nothing in the autopsy to confirm that hypothesis. (C.R. 131) In addition, the facts based on a cited medical study that would support chest trauma as a cause of death by arrhythmia were not present in Felan's case. (C.R. 136) As this Court stated in Swenson, neither the workers compensation statutes nor case law impose a requirement on those offering medical opinions in workers compensation cases to have support of a scientific authority such as treatise or published report of a study. Id. ¶ 29. Without supporting objective medical findings, and nothing in the autopsy report to confirm the hypothesis of Dr. Peretti, the ALJ giving "slightly greater weight" is not a "reasoned" analysis of the medical evidence. Under the appropriate standard for evaluating medical opinions, "it is insufficient for the ALJ to merely provide any reason for disregarding competent medical testimony about causation. The ALJ must sufficiently address the reason for doing so which is supported by the record and complies with the prevailing law." Id. ¶ 28. The ALJ's analysis in this case does not meet this standard and therefore reversal is required. See Swenson, id. at ¶ 30 (reversing and remanding because ALJ applied inappropriate standard when evaluating medical opinions); Parsons v. Workforce Safety and Insurance, 2013 ND 235 ¶21, 841 N.W.2d 404 (reversing ALJ

decision where based on entire record a reasoning mind could not conclude as the ALJ did); Huwe, 2008 ND 47 ¶27, 746 N.W.2d158 (reversing ALJ decision where findings of fact do not sufficiently address evidence presented).

CONCLUSION

[48] For the foregoing reasons, 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 29th day of January, 2021.

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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 Brief, hereby certifies, in compliance with Rule 32(a)(7) 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 Brief totals 34.

DATED this 28th day of January, 2021.

/s/ Jacqueline S. Anderson

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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 Feland, deceased,** **Appellee** **and** **KB & O Partnership,** **Respondent.**	**Supreme Court No. 20200354** **Sargent Co. District Court** **Civil No.: 41-2020-CV-00023** **AFFIDAVIT OF ELECTRONIC SERVICE**

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:

BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

APPENDIX OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

on the following persons:

Dean J. Haas	**dhaas@bismarcklaw.com**
Michelle M. Donarski	**mdonarski@andersonbottrell.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.

Melany J. Strendin

SUBSCRIBED AND SWORN to before me on January 28, 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