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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bruce Bahmiller Appellee, vs. North Dakota Workforce Safety & Insurance, Appellant, and Matt's Automotive Service Center, Respondent.	**SUPREME COURT NO. 20210033** Civil No. 09-2020-CV-01662 **ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLEE BRUCE BAHMILLER

APPEAL FROM DISTRICT COURT JUDGMENT DATED DECEMBER 18, 2020, AND ORDER REVERSING AND REMANDING CASE DATED DECEMBER 16, 2020
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEPHANIE N. STIEL

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Statement of the Issues

[1] Whether Bahmiller's subjective knowledge of a potential compensable injury diagnosed and treated as *thoracic outlet syndrome and rotator cuff dysfunction* in 2013 commences running of the statute of limitations under N.D.C.C. § 65-05-01 for a *carpal tunnel injury* claim filed in 2019.

[2] Whether Bahmiller may reasonably rely on his doctor's opinion that he did not suffer from carpal tunnel syndrome in 2013 in not filing a claim for the condition at that time.

Statement of the Case

[3] WSI issued an Administrative Order on August 15, 2019, denying Bahmiller's claim for benefits for Carpal Tunnel Syndrome (CTS) as not timely filed within one year a "reasonable person knew or should have known that the employee suffered a work-related injury and has either lost wages because of a resulting disability or received medical treatment." (Appx. 16-20). Bahmiller requested a hearing, after which Administrative Law Judge John Allen affirmed WSI by Order dated May 8, 2020. (Appx. 24-38). Bahmiller appealed to the District Court. (Appx. 39-43). The Honorable Stephannie N. Stiel reversed, correctly noting that Bahmiller's knowledge of a potential compensable injury *diagnosed and treated* as thoracic outlet syndrome and rotator cuff dysfunction in 2013 is not relevant to a determination of the timeliness of filing for carpal tunnel syndrome in 2019. (Appx. 46-56). WSI takes an appeal to this Honorable Court.

Statement of Facts

[4] Bruce Bahmiller's employer, Matt's Automotive Service Center, filed a First Report of Injury for him on April 25, 2019, in connection with right carpal tunnel syndrome.

(Appx. 65). Bahmiller had worked for Matt's Automotive as an automotive technician since January 2011. *Id.* Bahmiller also filed a First Report of Injury on April 29, 2019, writing that he suffered injury to the right wrist (carpal tunnel syndrome), due to "occupational repetitive motion." (Suppl. Appx. 3). The decision of WSI and the ALJ denying Bahmiller's newly diagnosed carpal tunnel syndrome claim filed in 2019 for lack of timeliness conflates prior injuries in 2013 *that had not been diagnosed or treated as CTS* with his current claim. An exhaustive review of his prior medical records fails to reveal any prior diagnosis of CTS.

[5] The WSI claims adjuster, Reena S., talked to Bahmiller, and prepared a Prior Injury & Pre-existing Condition Questionnaire, noting "previous problems or treatment" to the "Rt. Elbow, rt. wrist." (Record at 7). (Hereafter "R."). The claims adjuster asked "what did the medical provider tell you your diagnosis was?," to which Bahmiller replied "tendinitis & elbow epicondylitis." *Id*. As to the difference between the past problem and his current claim, the adjuster wrote: "very severe now. Previously just had tingling in fingers." (R. 8).

[6] By Notice of Decision dated June 13, 2019, WSI denied Mr. Bahmiller's claim as not timely filed, concluding that he had known that his CTS was work-related in 2013. (R. 15). Bahmiller requested reconsideration, noting that Dr. Sollom had told him after a 2013 EMG that he did not have CTS. (Appx. 23). In his decision affirming WSI, ALJ Allen largely parrots WSI's August 15, 2019 Administrative Order, so we begin with close examination of the WSI Order.

[7] Irrespective of the fact that Dr. Sollom had explicitly told Bahmiller that he did not have CTS in 2013, and so did not treat him for CTS, WSI issued its Administrative Order denying his claim as not timely filed within one year a "reasonable person knew or

should have known that the employee suffered a work-related injury and has either lost wages because of a resulting disability or received medical treatment." (Appx. 20, conclusion of law 1). WSI's Order relies on the post-factum opinion of its medical consultant that Bahmiller's current symptoms "are the same as reported in 2013, but with expected progression." (Appx. 19, finding of fact #20).

[8] There are significant problems with the WSI medical consultant's opinion. First, this is Monday morning quarterbacking, using the current knowledge that Bahmiller does have CTS in 2019 retrospectively to show that he was misdiagnosed in 2013 as not suffering from CTS. What WSI's consulting doctor now argues can be shown retrospectively is certainly not what layperson Bahmiller knew or should have known of his injury in 2013. Moreover, the medical consultant wholly ignored that Dr. Sollom's opinion *at the time in 2013* was that the EMG findings were *not sufficient to support a CTS diagnosis*. (*See* Dr. Sollom note of July 16, 2013 at Suppl. Appx. 8, under "IMPRESSION").

[9] Yet, based on its medical consultant opinion, WSI's August 15, 2019, Order found that Bahmiller's First Report of Injury was not filed within one year of the 2013 EMG finding of some slowing of the median nerve, and that this knowledge must be imputed back to Bahmiller. (App. 19, finding of fact #21). WSI wholly ignores that Dr. Sollom had explicitly told Bahmiller that he did not have CTS, and more significantly still, Dr. Sollom corroborated that he had treated Bahmiller for "musculoskeletal thoracic outlet syndrome," in 2013 not CTS. (Suppl. Appx. 11).

[10] The August 2019 Administrative Order also noted that Bahmiller had filed a prior claim in March 1996, relating to his right wrist and elbow, without noting that *those*

records do not reflect any diagnosis of CTS either. (Appx. 16-17, findings of fact #1-6). Mystified by this denial of benefits, Bahmiller requested a hearing. (Appx. 21).

[11] Bahmiller's 1996 claim is not relevant here because he was not diagnosed with or treated for carpal tunnel syndrome. Dr. Ragland performed an EMG on March 11, 1996, which was normal. (R. 78-79). Bahmiller next saw Dr. Bopp, who noted that he had right shoulder, elbow, and wrist pain in the past, "more in the elbow now than anything else." (R. 80). Dr. Bopp said "I have reviewed Dr. Ragland's EMG report and physical examination. *Dr. Ragland does not think he has carpal tunnel syndrome or ulnar neuropathy at the wrist but rather has [elbow] tendinitis*." *Id*. Dr. Bopp diagnosed him with "chronic lateral epicondylitis and generalized inflammation of the right upper extremity secondary to work related chronic overuse syndrome." (R. 81). Dr. Bopp wanted to "approach this aggressively. I have asked him to go upstairs [for] Physical Therapy for a Nirschl band, a cock-up splint and some phonophoresis and ultrasound. We went ahead today and injected his lateral epicondyle." *Id.*

[12] On September 18, 1996, Dr. Bopp reported he again "thoroughly examine that right upper extremity again. I see nothing for radiculopathy, nothing for radial nerve entrapment." (R. 82). Dr. Bopp injected the elbow again. *Id.* His note of November 29, 1996, states "I have been treating him for a right lateral epicondylitis." (R. 83). *There is no reference to CTS or wrist complaints*. *Id.* The Occupational Therapy notes in August 1996 reflect treatment for "Right lateral epicondylitis." (R. 85).

[13] Bahmiller consulted Dr. Sollom on July 16, 2013, due to discomfort in the upper extremities. (Suppl. Appx. 5-9). Dr. Sollom noted his "symptoms seem to start with his work getting somewhat worse as he keeps working as a mechanic. He can be doing stuff

with bolts and his hand just lock up on him. If he works with his arms overhead his arms go 'dead,' meaning that they get numb, tingly, heavy, fatigued. … He says his symptoms seem to start at the shoulders and go down his arms. He does not really complain of numbness or tingling seeming to bother his hands all that much." (Suppl. Appx. 6).

[14] Dr. Sollom's July 16, 2013 medical note reflects that neurological testing for carpal tunnel was negative: "[t]ests of peripheral nerve entrapment syndrome of the upper extremities – Tinel's … carpal tunnels, cubital tunnels, radial tunnels, Guyon canals, Carpal compression test, Phalen's test, reverse Phalen's test, bowstring test … are bilaterally negative." (Suppl. Appx. 7). Dr. Sollom's interpretation of the nerve conduction studies showed "the right median sensory study is found to be *within normal limits*." (Suppl. Appx. 8). Dr. Sollom noted that peak latencies were prolonged "compared to the other 2 sensory nerves." *Id*. The right median nerve results were mildly prolonged, but "right median motor study has a distal motor latency at the wrist of 4 ms, certainly that is *upper limits of normal*." *Id.*

[15] Dr. Sollom wrote "[t]here is some very mild slowing of the median nerve conduction velocity through the wrist segment and there is some very mild slowing of the ulnar nerve conduction across the elbow segment. *However, he does not have symptoms or findings on examination that would correlate with a carpal tunnel syndrome* or a cubital tunnel syndrome, so clinical correlation is suggested. It is felt his symptoms may be *more likely related to myofascial restrictions and may be a very mild musculoskeletal thoracic outlet syndrome."* (Suppl. Appx. 8). Dr. Sollom referred him for physical therapy at Rehab Authority for treatment of myofascial thoracic outlet syndrome. *Id.*

[16] The physical therapist at Rehab Authority provided treatment for

"*thoracic outlet syndrome* bilaterally." (*See* R. 91—initial P.T. note dated July 17, 2013). As to his "overall condition," the therapist wrote "[w]orsening—his work activities have been coming more and more challenging. Worse When: working, such as with his arms overhead." *Id*. As Dr. Sollom had indicated, Bahmiller's complaints (especially pain with overhead work) is just not indicative of CTS. The therapist's long-term goals for upper extremity were to achieve "minimal functional impairment *from shoulder pain or dysfunction*." (R. 94). The physical therapist thereafter used a diagnosis code 353.0—that is, "*brachial plexus lesions*." (*See* R. 97-131). The therapist continued to refer to right shoulder pain. (*See e.g*. R. 111).

[17] The physical therapist treated Bahmiller relating to complaints emanating from the nerves in the brachial plexus region, not CTS. And when Dr. Sollom referred to thoracic outlet syndrome in his July 16, 2013, medical record (Suppl. Appx. 8), he is referring to the nerves in the brachial plexus region, not CTS. The medical definition of the diagnosis for Bahmiller's 2013 injury is: "thoracic outlet syndrome (TOS) is caused by compression of the brachial plexus and/or subclavian vessels as they pass through the cervicothoracobrachial region, exiting the chest." The physical therapist referred to brachial plexus lesion, and Dr. Sollom to TOS. Neither one diagnosed Bahmiller with CTS in 2013. Most crucially, there is not a single medical record from 2013 that shows medical treatment given to Bahmiller for CTS.

[18] Dr. Sollom's July 16, 2013, contemporaneous record that Bahmiller did not have CTS is determinative. Moreover, Dr. Sollom's subsequent notes also reflect that Bahmiller had been attending physical therapy for shoulder pain (and thoracic outlet syndrome often causes shoulder pain). For example, in his next medical note dated

August 27, 2013, Dr. Sollom reported that *"[m]ost of the discomfort he has is in the shoulder joints now, right shoulder much more than left*. Right shoulder pain really made worse by working with arms overhead." (R. 41b). Dr. Sollom's diagnosis was "Right rotator cuff dysfunction … Left knee pain … Myofascial pain syndrome of upper quarters." (R. 41e). *Dr. Sollom injected Bahmiller's shoulder*. *Id*.

[19] In his subsequent note of September 26, 2013, Dr. Sollom again noted that the EMG showed "very minimal slowing through the carpal tunnel and minimal slowing of the ulnar nerve across the elbow. *Nothing was really felt to be diagnostic."* (R. 41i). Dr. Sollom again diagnosed "Right rotator cuff dysfunction" and "Myofascial pain syndrome of upper and lower quarters," not CTS. (R. 41m). The treatment for TOS and rotator cuff dysfunction in 2013 included shoulder injection and physical therapy to regain function in the right shoulder. Bahmiller was discharged from physical therapy on November 26, 2013. (R. 130). He did not seek additional treatment relating to his shoulder after September 26, 2013.

[20] Bahmiller first sought treatment for his CTS on March 22, 2019, when he consulted Dr. Kenninger, reporting right arm numbness, tingling and pain. (R. 51). An EMG was performed showing his right carpal tunnel syndrome. *Id*. Dr. Norberg's note of April 12, 2019, indicated he had severe right carpal tunnel syndrome and mild left carpal tunnel syndrome. (R. 53). Dr. Norberg recommended surgery. (R. 54). Bahmiller notified his employer of this injury on April 16, 2019. (Appx. 66). The employer filed the claim on April 25, 2019. (Appx. 66). Bahmiller also filed his own First Report of Injury on April 29, 2019, for an injury to the right wrist, due to "occupational repetitive motion." (Suppl. Appx. 3-4).

[21] It is readily apparent that though WSI is now claiming that Mr. Bahmiller should have known he had suffered a compensable repetitive work injury (carpal tunnel syndrome) based on the EMG in July 2013, WSI would have denied the claim if he had filed it in 2013 for *lack of any clinical correlation as all neurological testing for CTS was negative*. (Suppl. Appx. 7). Dr. Sollom, in fact, expressly stated that he could not clinically document CTS, and he did not treat Bahmiller for CTS. (Suppl. Appx. 11). In reply to counsel's letter asking "[g]iven your July 16, 2013, medical note, and the complex insidious nature of a CTS diagnosis, was Mr. Bahmiller reasonably on notice in 2013, that he suffered a work-related right carpal tunnel syndrome?," Dr. Sollom wrote:

> It is my medical opinion, with a reasonable degree of medical certainty, that no, he would not be "reasonably on notice" on that date that he had a work-related right carpal tunnel syndrome. First of all, he did not describe symptoms that are consistent with carpal tunnel syndrome. He described "discomfort" through upper quarters and upper extremities. He did state that working with his arms overhead that his arms would go "dead," meaning they would feel numb, tingly, heavy, or fatigued. Those symptoms can be seen in a number of things, such as cervical spondylosis or radiculopathy, thoracic outlet syndrome, myofascial pain syndrome of the upper quarters.

(Suppl. Appx. 10).

[22] Dr. Sollom further noted that Bahmiller's symptoms did not correlate with a CTS diagnosis in 2013, explaining that:

> He felt that his pain and/or paresthesia would seem to start more so in the shoulders and go down the arms. Usually with carpal tunnel syndrome, symptoms are noted mainly in the hands but at times can radiate up the forearms or up to the shoulders. He did not really complain of numbness and tingling seeming to bother his hands very much at all. He was more concerned with discomfort that was aching and stabbing going through the upper quarters.

(Suppl. Appx. 10-11).

[23] Dr. Sollom further detailed the medical complexity of EMG testing, crucially explaining that *the EMG was not diagnostic of CTS*:

> I did do a nerve conduction velocity/EMG study and I did state that there was some very mild slowing of the nerve conduction velocity for the median nerve through the wrist area and for the ulnar nerve through the elbow area on the right side; however, these findings certainly were not diagnostic of carpal tunnel syndrome, especially when he had no findings on physical examination that would be consistent with a median nerve entrapment at the wrist.
>
> The distal motor latency for the right median nerve at the wrist was 4.0 msec, which in my situation at this clinic that is in the upper limits of normal, not abnormal. Also, the orthodromic median sensory study had latencies that were within normal limits. It was just on the 2 paired sensory nerve stimulation studies that it appeared that the median sensory nerve could be conducting a little bit more slowly than the radial or ulnar sensory nerves. The difference in the peak latencies of the paired nerves, however, was only 0.70 msec, and that I am not even sure reaches a statistically significant difference, especially when everything else was normal including amplitudes and durations, and his EMG needle examination was completely normal.

(Suppl. Appx. 11).

[24] Dr. Sollom further explained that if he had thought that Bahmiller had CTS in 2013, ***the treatment course would have been different***:

> *If I had thought that he had a significant issue with nerve entrapment at the wrist or elbow, I would have sent him to occupational therapy* for some work on range of motion, stretching, strengthening, tendon glide, wrist mobilization, etc. *What I did instead* was send him to physical therapy to work on more of the neck, upper back, upper quarter myofascial restrictions and discomfort.

(Suppl. Appx. 11).

[25] Contrary to WSI's medical consultant's sheer speculation that Bahmiller was *treating for* CTS in 2013, *Dr. Sollom explicitly stated that he had ordered physical therapy to treat Bahmiller's myofascial upper quarter shoulder/brachial plexus/thoracic outlet complaints*. (Suppl. Appx. 11). Dr. Sollom clearly noted that he had primarily treated Bahmiller for his rotator cuff problems, and did not treat any complaints relating to CTS:

> When I saw him in recheck at the end of August 2013, he was more

> concerned regarding discomfort in the right shoulder and left knee, really was not having any significant complaints or remarks about pain, numbness or tingling in the hands or wrists. He was felt to have a right rotator cuff dysfunction, had an injection in the right shoulder joint, also given a left knee injection, and he was to continue with physical therapy. When I saw him in recheck the end of September 2013, he was overall 75% improved with the knee pain and with the upper quarter, shoulder, upper back discomfort. It was felt that he was doing well enough at that time that he should consider joining a community health club facility to continue with strengthening and conditioning activities there, did not feel that he needed a referral to orthopedics or rheumatology at that point but did give him some Mobic to see if that would help with any residual mild discomfort in the upper back/upper quarter areas. *So I did not specifically tell him that he had carpal tunnel syndrome, and I also specifically did not tell him that this was on the basis of work-related repetitive injuries.*

(Suppl. Appx. 11) (Emphasis added).

[26] Bahmiller was expressly advised by Dr. Sollom in 2013 that he did not have CTS, and thus did not file a claim for CTS at that time. And Bahmiller did not receive any medical treatment for CTS in 2013. Moreover, Dr. Sollom did not tell Bahmiller that he had suffered *any* compensable injury, including thoracic outlet syndrome. (Suppl. Appx. 11). It is readily apparent that if Bahmiller had actually filed a claim *for CTS* based on his own *subjective opinion* that he had suffered a work-related CTS at that time that was contradicted by Dr. Sollom, his claim would have been denied for lack of "objective medical findings" under N.D.C.C. § 65-01-02(11) (defining compensable injury).

[27] The Court has repeatedly held that "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). WSI does not, and indeed may not, accept a claim on the mere opinion of an injured worker that the injury is work-related, nor on the word that the doctor had told him so. WSI will review the medical records themselves. Here, Dr. Sollom did not believe that Bahmiller had CTS in 2013, and he did not treat him for it. No reasonable person would have been on notice that he or she

had suffered a compensable carpal tunnel syndrome injury in 2013.

Law and Argument

I. Standard of Review

[28] Generally, a deferential standard applies when reviewing the factual findings of an agency decision. *Zimmerman v. North Dakota Workforce Safety & Ins. Fund*, 2010 ND 42, ¶4, 779 N.W.2d 372. Similar deference to the ALJ's *legal conclusions*, however, is not justified. *Workforce Safety & Ins. Fund v. Auck,* 2010 ND 126, ¶9, 785 N.W.2d 186. Whether Bahmiller as a layperson reasonably knew the work relationship between his job and his CTS before ever being diagnosed with or treated for it, is primarily a question of law. No construction of the facts is capable of evading the central pure question of law: is Bahmiller entitled to rely on his doctor's explicit opinion that he did not have CTS in 2013 as grounds for not filing for this condition until first treated for it in 2019? And because he was entirely justified in not filing a claim for CTS in 2013 based on his doctor's opinion that he did not have CTS, Bahmiller has filed a timely claim under N.D.C.C. § 65-05-01 as a matter of law.

[29] ALJ Allen's affirmance of WSI constitutes legal error for a number of reasons. First, ALJ Allen considers Bahmiller's own *subjective opinion* of work relation as actually over-riding that of his doctor. Second, as Dr. Sollom noted, Bahmiller was treating for a brachial plexus/TOS and rotator cuff injury, not CTS. Bahmiller's knowledge of a potential work injury treated as thoracic outlet syndrome and rotator cuff dysfunction in 2013 is not relevant to timelines of filing a carpal tunnel syndrome claim in 2019. ALJ Allen transforms Bahmiller's *subjective opinion* that the symptoms in his upper right extremity were work related in 2013 to *objective medical evidence* that he had CTS in 2013, requiring

him to file the CTS claim at that time. Time barring a claim for a thoracic outlet syndrome and rotator cuff injury after treatment for it in 2013 is one thing; also time barring a CTS claim is another. WSI had confused the ALJ with its medical expert, and caused the ALJ to commit a clear legal error, which must be reversed, as the Honorable District Court Judge Stiel recognized: "Dr. Carlson, WSI's medical consultant, testified that the 2013 and 2019 symptoms are the same with expected progression [of] CTS. Ex. 75, at 00238:6-25. However, Dr. Car[l]son also testified that the treatments for thoracic outlet syndrome and CTS are different and confirmed that Bahmiller had never treated for CTS. *Id*. … The conclusion that Bahmiller received treatment for his "condition"… is not supported by any findings based on objective medical evidence. In fact, the objective medical evidence contradicts that there was treatment for his wrist and hand condition in 2013." (Appx. 55, at ¶26).

II. A reasonably knowledgeable layperson would not have known the work relationship until so advised by a doctor.

[30] The statute governing the filing requirements, N.D.C.C. § 65-05-01, provides that:

> All original claims for benefits must be filed by the injured employee, or someone on the injured employee's behalf, within one year after the injury . . . . The date of injury for purposes of this section is the first date that a reasonable person knew or should have known that the employee suffered a work-related injury and has either lost wages because of a resulting disability or received medical treatment.

N.D.C.C. § 65-05-01.

[31] N.D.C.C. § 65-05-01, uses a "reasonable person" standard to determine the date of injury. The North Dakota Supreme Court has said that "the Legislature had in mind the *ordinary reasonable lay person* and *not a person learned in medicine* when it used that term in our statute. Nor do we believe that the Legislature in using the term

'knew or should have known' intended to impose a standard or a degree of wisdom comparable to that expected of a doctor or a person learned in medicine." *See Teegarden v. N.D. Workmen's Comp. Bureau*, 313 N.W.2d 716, 718 (N.D. 1981). In *Teegarden*, the Court noted that *while the doctor suspected* the person's respiratory problems were caused by his exposure to grain dust working at a grain elevator *the doctor did not so advise his patient*. *Under that circumstance—the same as we have here—the employee did not reasonably know of the work relationship until explicitly so advised by the doctor. The court explained:*

> The letters of Dr. R. W. McLean clearly disclose that the Doctor had formed some very definite opinions or conclusions that Teegarden's injury (disease) was work-related and that smoking affected his health. However, the letters do not disclose if the doctor ever informed Teegarden that the injury (disease) was caused by his working conditions. Nor do the letters disclose if Teegarden was ever told to quit working at the elevator.
>
> The Doctor also advised the claimant to quit smoking. Does this compel a conclusion that the injury (disease) was caused by smoking and that the claimant knew or should have known that smoking caused his injury (disease)? No one has suggested such a conclusion. The parallel between this and the dust is obvious.

Teegarden, 313 N.W.2d at 719.

[32] In *Evjen v. N.D. Workers Comp. Bureau,* 429 N.W.2d 418, 419 (N.D. 1988), the Court considered a claim for headaches *which his doctor had expressly stated were caused by his employment*. The court noted that the treating doctor had not only formed an expert medical opinion as to work relationship, but had also provided a letter to Evjen that his headaches work work-related:

> The record in this case shows that Evjen knew he was having headaches that were causally related to his employment by August 1, 1984, and that his physician recommended that he stop working the afternoon shift because of his headaches. In an August 13, 1984, letter that Evjen kept and a copy of which he provided to his employer, *Evjen's physician* referred to Evjen's headaches as a "significant health problem ... *caused by significant*

> *stress on the job*" and stated that he "would like to see him transferred to a different Unit at the State Hospital and also recommend that he not work afternoon shift."
>
> Unlike the claimant in *Teegarden*, Evjen *received specific medical advice that his injury was related to his employment and also that it was a significant health problem.* Without that advice, this would be a different case because headaches are fairly common afflictions often suffered by many from job stress. A reasonable lay person would not immediately file a claim for compensation upon learning that occasional headaches were work-related.

Evjen, 429 N.W.2d at 420.

[33] *White v. N.D. Workers Comp. Bureau,* 441 N.W.2d 908 (1989) is also illustrative of the principle that a doctor's opinion of work-relation expressed to the injured worker is critical. In that case, the Bureau made the following findings of fact in denying the claim:

> Claimant testified at the hearing that he was aware that he had fallen at work, and was aware that he had injured himself. However, claimant further testifies that Dr. Reiswig had told him that he has arthritis. Claimant further testifies that he was unaware that he could then file a claim for workers compensation benefits because he had an arthritic condition.
> * * * * * *
> Claimant knew or should have known that his fall at work was a compensable injury within the meaning of the North Dakota Workers Compensation Act. In fact, claimant did testify that he knew he had injured himself at work.
>
> That claimant misapprehended the seriousness of his injury is not a legal justification for failing to file within one year of injury.
> * * * * * *
> The evidence indicates that claimant reasonably knew that he had injured himself at work on the day he fell, April 27, 1984.

White, 441 N.W.2d at 909.

[34] The Court rejected the argument that the claimant's knowledge that he had suffered a fall (and had also actually sought medical care for this fall at work) is necessarily determinative:

> The Bureau's argument would be more persuasive if the statute provided that the period for filing a claim began on the date of an accident. *See* 3 Larson, Workmen's Compensation Law, § 78.41(b) (1989). Instead, NDCC 65–05–01 requires knowledge of a compensable injury to begin the period for filing a claim. *Teegarden v. North Dakota* Workmen's Compensation *Bureau,* 313 N.W.2d 716 (N.D.1981). The Bureau has ignored that an apparently minor injury may develop into a compensable injury *and that a doctor may not immediately diagnose an in injury as work-related or compensable*. See 3 Larson, Workmen's Compensation Law § 78 (1989). In those instances, the Bureau's interpretation would impel employees to " 'rush in with claims for every minor ache, pain, or symptom' in order to make sure that any future claim for compensation will not be deemed untimely." *Evjen, supra,* 429 N.W.2d at 421.
>
> We do not believe that the Legislature intended to go that far. We believe that the Legislature intended that any doubt about whether a claimant can determine the actual date of a compensable injury with certainty must be resolved by testing the claimant's knowledge under the *reasonable person standard*.

White, 441 N.W.2d at 910 (Emphasis added).

[35] Just as Mr. White was entitled to rely on his doctor's opinion for not filing his claim, Mr. Bahmiller is justified in not filing a claim in 2013 based on the opinion of his physician, Dr. Sollom. The *White* court concluded:

> Under the circumstances of this case, we do not believe that a reasonable basis existed for the Bureau to conclude that, given his education and intelligence, White knew or should have known that he suffered a compensable injury on April 27, 1984. Rather, we believe that the evidence leads to one reasonable conclusion: the time for White to file a claim began in November 1986 *when Dr. Kennedy informed him that he had a herniated disc and linked that injury to his fall.* White's claim was filed within one year of that date and was therefore timely.

White, 441 N.W.2d at 910. (Emphasis added).

[36] In addition to providing a safeguard in the form of utilizing a reasonable person standard as to knowledge of a work relationship, the statute requires that the employee have objectively suffered a "compensable injury," to commence running of the limitations period. That is, the employee must have suffered actual damages: "either lost

wages because of a resulting disability or received medical treatment." N.D.C.C. § 65-05-01. Bahmiller was not disabled due to CTS in 2013, and did not receive medical care for CTS in 2013.

[37] *Klein v. N.D. Workers Comp. Bureau*, 2001 ND 170, 634 N.W.2d 530, is illustrative of the knowledge requirement. In *Klein*, the injured employee had filed a claim for benefits on May 10, 1999, stating in his application that he experienced injuries to his left and right knees while working as a nursery technician. He did not specify the date of the injuries, but rather he indicated his injuries gradually developed in "1996-1998-99." *Klein,* 2001 ND at ¶4. Mr. Klein *subjectively believed* that he had suffered injuries to both knees as a result of job responsibilities which required "long periods of time performing duties on concrete, bending, lifting, kneeling, climbing, etc. and working in extreme weather conditions." *Id.* The court reversed and remanded because "there was no acknowledgment of arthritis as an insidious disease or that a worker comparable to Klein should have known his arthritis was caused by his work." *Klein,* 2001 ND at ¶20. The court held that Mr. Klein's subjective belief of work relationship is not akin to objective medical evidence of work relationship as provided by his doctor—even though he had suffered damages. Klein's suspicion of work relationship years before filing his claim did not impute medical knowledge to him.

[38] The *Klein* Court held that the term "injury" as used in the statute means layperson knowledge that he or she had suffered a compensable injury. *Klein*, at ¶17. There are two components. The Court has repeatedly held that the date of injury for purposes of N.D.C.C. § 65-05-01 is the earliest date a reasonable lay person, not learned in medicine, knew or should have known that she suffered a compensable work-related

injury and either lost wages or received medical treatment. *Klein*, at ¶¶ 16-17. In this case, Bahmiller was not diagnosed with CTS in 2013, and he was not treated for CTS. No reasonable person can be expected to have filed this CTS claim in 2013, given the complete lack of: (1) a diagnosis and an expert medical opinion as to the work-related mechanism of injury; and, (2) lost wages or receipt of medical treatment.

[39] The *Klein* Court further noted that in obvious cases of injury to the body in a sudden accident, the statute does not require that a doctor specifically inform the claimant that he suffered a work injury. The Court explained:

> Certainly, some injuries are obviously caused by the claimant's work and do not require a doctor to inform the claimant his injuries are work related. In these situations, the limitations period begins to run in the absence of any medical advice. *Other complex, insidious injuries, however, require knowledge in medical matters because their causes and effects are not immediately apparent to the reasonable lay person, not learned in medicine.* These causes and effects can be complex and controversial even for physicians. A specific diagnosis of a claimant's condition, therefore, may not be sufficient to commence the limitations
> period when the diagnosis does not indicate that the condition is work related and when the condition is a common affliction suffered by many individuals.

Klein, 2001 ND 170, ¶19 (emphasis added).

[40] The *Klein* Court noted that in most cases of insidious onset and multiple risk factors of which employment is only one, a specific diagnosis of the claimant's condition and sufficiency of the 'mechanism of injury' at work is likely required. *Even a specific diagnosis*, however, "may not be sufficient to commence the limitations period when the diagnosis does not indicate that the condition is work related and when the condition is a common affliction suffered by many individuals." *Klein*, at ¶19. Thus, even a diagnosis of CTS (which was not made in 2013) would not have commenced the limitations period unless the worker was informed of a work-relationship by a qualified medical provider, and

treatment had been provided. That's because *CTS has many causes and is not generally considered to be an occupational disease or condition.*

[41] And in this case, Bahmiller was actually told by Dr. Sollom that he did not suffer from CTS. (Suppl. Appx. 11). And he was not informed that he had sustained any work injury at all, including thoracic outlet syndrome or rotator cuff injury. *Id*. Bahmiller's own subjective opinion on work relationship would not have been sufficient basis to award him benefits on *any claim* made in 2013—*much less CTS which he was told he did not have*. WSI's disingenuous arguments to the ALJ below completely failed to address the crucial fact that if Mr. Bahmiller had filed a claim for benefits due to CTS in 2013, the claim would have been denied for lack of "objective medical evidence." N.D.C.C. § 65-01-02(10) defines a "compensable injury" 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*."

[42] Under North Dakota law, the injured worker bears the burden of proof by the preponderance of evidence. *See* N.D.C.C. § 65-01-11. The Court has repeatedly held that the "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). Bahmiller had no such medical opinion in 2013. The argument of Bahmiller's employer that Bahmiller had wrist problems for years is irrelevant as a legal matter in this context: Bahmiller reasonably relied on Dr. Sollom, who told him that although there were EMG findings of mild median nerve slowing consistent with CTS, based on exam and the precise nature of the EMG findings, he did not have CTS, and he did not treat for CTS.

[43] WSI argues that *Ringsaker v. Workforce Safety & Insurance Fund*, 2005 ND 44, 693 N.W.2d 14, supports a denial. (WSI Brief at ¶33-34). But *Ringsaker* is clearly and easily distinguished *on the facts*. In that case, the Court said:

> [¶ 13] Ringsaker argues he did not know his shoulder injury was work related until he was diagnosed with a torn rotator cuff at the Mayo Clinic in January 2000. He therefore claims his February 3, 2000, claim was timely.
>
> [¶ 14] Ringsaker's argument is premised entirely upon his assertion that his doctors did not, in 1997, advise him that his shoulder pain was caused by rotator cuff problems. Rather, he claims he was told that his shoulder problems were caused by arthritis. He contends that he did not file a claim at that time because he believed arthritis was a general condition that was not work related and that he would not be eligible for benefits.
>
> [¶ 15] WSI rejected Ringsaker's argument, effectively concluding that his testimony that his doctors had told him his problems were caused solely by arthritis was not credible. WSI specifically noted the "substantial medical evidence of record, that is contrary to his position." Notwithstanding Ringsaker's testimony that his doctors in 1997 told him his shoulder pain was caused by arthritis, *all of the contemporaneous medical records indicate that the doctors consistently concluded Ringsaker's shoulder pain was caused by a rotator cuff problem.* Ringsaker did not call the doctors to testify nor provide depositions or affidavits to corroborate his assertion that the doctors never told him he had a rotator cuff problem, but only arthritis. The only mention of arthritis in the 1997 records is in Dr. Varberg's March 14, 1997, notes, which indicated there was "a very minimal amount of degenerative arthritic change" in the AC joint. Dr. Varberg, however, concluded in his notes that he still believed Ringsaker's main problem was the rotator cuff, not the AC joint.
>
> [¶ 17] [Ringaker's case] is clearly distinguishable from *Klein* and *Anderson.* In those cases, [like Bahmiller here] *the claimants had medical ailments which commonly occurred without a specific triggering injury, arthritis and carpal tunnel syndrome, respectively, and argued that their injuries were gradual progressions without a specific original date of injury*. The Court in each case concluded that, without medical advice linking their conditions with their employment, the claimants would not know or have reason to know their injuries were work related. The Court explained in *Klein,* at ¶19, that, when the claimant has a "complex, insidious" injury or condition, the causes and effects may not be evident to a layperson and the one-year period in N.D.C.C. § 65–05–01 may not be triggered until the claimant is advised that his injury or condition is work related.

Ringsaker, 2005 ND 44 (Emphasis added).

[44] The *Ringsaker* Court noted that the claimant "saw his doctors on at least five occasions in the months following his injury," and that "[t]his medical history, the 1997 medical records, and Ringsaker's contemporaneous acknowledgment that his shoulder problems were caused by his 1996 work incident indicate that this was not minor pain or symptoms from which a layperson would be unaware that the injury was work related." *Ringsaker*, 2005 ND 44, at ¶19. Unlike Mr. Ringsaker, the medical records do not show that Bahmiller's doctors had made a work-related diagnosis. Quite the opposite; Dr. Sollom did not diagnose CTS, and told Bahmiller that he did not have CTS.

[45] *Anderson v. North Dakota Workers Comp. Bureau*, 553 N.W.2d 496 (N.D. 1996), is another timely filing case in which the worker was diagnosed with CTS, and denied by WSI on the theory the claimant must have known of the work relationship:

> The Bureau based its conclusion that Anderson's claim was untimely on her medical and chiropractic records. On November 7, 1984, Dr. Hennenfent noted in his medical record from his examination of her:
>
> > She has a history of numbness in both hands which occur while working with her hands. She is a beautician and does a lot of hand motion. During the day her hands may feel somewhat numb and [have] decreased strength.... Positive Tanil's [sic] sign of both wrists. There was evidence of pons weakness of both hands....
> > Impression: ... 2. Carpal tunnel syndrome....
> > Plan: ... Also cockup splints bilat. for h.s. for the next few wks....
>
> Anderson began receiving chiropractic treatment from Dr. William Swanson in 1985 after being in a car accident. In Anderson's chiropractic records, dated January 9, 1985, carpal tunnel syndrome is listed as one of several complaints. Dr. Swanson noted Anderson was experiencing hand numbness. The fact Anderson sought medical attention in 1984 does not establish she then knew or should have known she had a compensable work injury. … The records prepared by Dr. Hennenfent and Dr. Swanson do not report they advised Anderson about the significance of her

> condition. Anderson testified she never even saw the records. A claimant is not charged with knowledge of opinions and conclusions in medical records she has not reviewed. … *Neither Dr. Hennenfent nor Dr. Swanson were deposed to determine what they advised Anderson about her condition, its eventual course, or the causal connection between Anderson's employment and her condition.*

Anderson, 553 N.W2d at 499 (Internal citations omitted).

[46] WSI attempts to distinguish Bahmiller from *Anderson*: "Anderson testified that she did not know her work was the cause of her injury, even though she felt symptoms at work." (WSI Brief at ¶26). WSI argues that in contrast "Bahmiller knew and understood that the symptoms he was having were caused by his employment activities." (WSI Brief at ¶ 27). WSI intentionally conflates Bahmiller's subjective belief that he *may have* had a work-related right upper extremity condition with knowledge based on medical advice that he had a work-related CTS in 2013. *But knowing of a different right upper extremity injury diagnosed and treated as rotator cuff dysfunction and thoracic outlet syndrome does not require him to file a claim for that injury or be barred as untimely for a different injury (CTS) that he later develops.* And while Ms. Anderson's *contemporaneous medical records* reflected a work-related CTS diagnosis, Dr. Sollom's contemporaneous medical record dated July 16, 2013, does not reflect a work relation to any injury, and denies that he suffers from CTS. (Suppl. Appx. 7-8). Dr. Sollom subsequently confirmed that he had never told Bahmiller that he suffered from any work injury, including any repetitive work injury. (Suppl. Appx. 11).

[47] Mr. Bahmiller has a stronger case than Ms. Anderson did because her doctors had actually diagnosed her with CTS. Moreover, Ms. Anderson complained specifically of numbness in both hands working as a beautician, while Bahmiller "does not really complain of numbness or tingling seeming to bother his hands all that much."

(Supp. Appx. 6). Anderson was simply held not to know what was in her medical records, despite her own subjective knowledge that her hand numbness occurred working as a beautician. Here, the medical records of Dr. Sollom state that Bahmiller did not have CTS. Even if Bahmiller had filed a claim for CTS based solely on the single EMG finding of "very mild slowing" (a finding that Dr. Sollom had also characterized as being within normal limits and a finding he did not think could establish CTS *nor convince him to treat his patient for CTS*), WSI would not have accepted the claim as compensable for lack of "objective medical evidence" of compensable injury. The lack of clinical correlation makes all the difference.

[48] ALJ Allen made clear mistakes of law: elevating Bahmiller's subjective opinion of potential work relationship over Dr. Sollom's doctor's opinion that he did not have CTS in 2013; and, conflating Bahmiller's subjective opinion that his rotator cuff dysfunction and *thoracic outlet syndrome* was work related in 2013, with knowledge that he had also suffered a compensable CTS injury in 2013.

Request for Oral Argument

[49] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Bahmiller requests oral argument. WSI's appeal involves an issue of statutory construction of N.D.C.C. § 65-05-01, which requires claim filing within one year a reasonably prudent claimant knew of a compensable work injury.

Conclusion

[50] For the reasons above stated, the Court should affirm the Honorable Stephannie N. Stiel reversal of ALJ Allen's denial of Bahmiller's claim under N.D.C.C. § 65-05-01.

Respectfully submitted this 29th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

[51] The undersigned, as attorney for the Appellee 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 27 pages, inclusive.

Dated this 29th of April, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bruce Bahmiller Appellee, vs. North Dakota Workforce Safety & Insurance, Appellant, and Matt's Automotive Service Center, Respondent.	**SUPREME COURT NO. 20210033** Civil No. 09-2020-CV-01662

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 Bruce Bahmiller;**
2. **Appendix to the Brief of Appellee Bruce Bahmiller; and**
3. **Affidavit of Service.**

[2] On April 29, 2021, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

Jacqueline Anderson	**Clerk of the Supreme Court**
janderson@nilleslaw.com	**supclerkofcourt@ndcourts.gov**

[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:

Matt's Automotive Service Center
1150 43½ St S
Fargo ND 58103

[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 29th day of April, 2021.

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

Notary Public