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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** **Cass County District Court** **Civil No.: 09-2020-CV-01662** **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

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 STEPHANNIE N. STIEL

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LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED IN REVERSING THE ALJ'S DECISION BECAUSE THE ALJ PROPERLY APPLIED THE LAW TO THE FACTS OF THIS CLAIM.

[1] Workforce Safety and Insurance ("WSI") is compelled to draw the Court's attention to inaccuracies in the factual background set forth in Appellee's Brief as it pertains to the actions of the claims adjuster, Reena S. During the processing of the claim for benefits filed in April of 2019, Reena S. testified that when she contacted Bahmiller to gather information for the three-point contact, she completed the C96 form while she was speaking with Bahmiller. (C.R. 263; see C.R. 5-6) Bahmiller told Reena the claim was for repetitive motion to his right wrist. (C.R. 5-6; 264) When Reena asked Bahmiller when he first treated for his injury, he told her it was 2013. (C.R. 6, 265)

[2] Reena testified that when Bahmiller indicated treatment began in 2013 she immediately questioned whether the injury was filed timely. (C.R. 265) Reena then completed the prior injury and preexisting claims questionnaire over the phone with Bahmiller. (C.R. 267) As to Bahmiller's reference to the prior diagnosis of tendinitis and elbow epicondylitis referenced on that form, Reena confirmed in her testimony and the form itself reflects, this was in reference to a 1996 claim filed by Bahmiller. (C.R. 268; Appx. 70) Bahmiller's citation to that reference as support for past problems and how they were different from the current claim is misleading. Reena's testimony and her contemporaneous documentation clearly reflects that Bahmiller told her the difference between his condition in 2013 and current symptoms was that it was more severe. (Appx. 67, 69, 71, 73) He did not reference that the 2013 condition was tendinitis and elbow epicondylitis.

[3] Reena testified that when Bahmiller told her he first treated for his condition in 2013, she immediately questioned why there was not a claim filed in 2013. (C.R. 265) Bahmiller confirmed to Reena that he was aware in 2013 that his condition was related to work. (C.R. 265) As to the testimony of Bahmiller as to what he treated for in 2013 and what he was told, ALJ Allen found: "Bahmiller's testimony and recollection of his treatments in 2013 were inconsistent with the medical records. For that reason, Bahmiller's testimony regarding treatments and symptoms in 2013 are suspect. The 2013 medical records are more credible than Bahmiller's recollection of what took place in 2013." (Finding of Fact # 31; Appx. 32) This Court may not make independent findings of fact and must give deference to the ALJ's assessment of the credibility of witnesses. Muldoon v. Workforce Safety and Insurance, 2012 ND 244 ¶ 10, 823 N.W.2d 761.

[4] Under N.D.C.C. § 65-05-01 "[a]ll 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 or within two years after the death." The date of injury for purposes of filing a claim for benefits "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, emphasis supplied. Neither the plain language of the statute, nor any of the case law cited by Bahmiller in his Brief requires that a physician specifically advise of a specific diagnosis by a medical provider for the injured worker to know or should know of an injury related to employment. "To have a compensable injury, a claimant must know or have reason to know the significance, or seriousness, of [the] condition and that the injury is work-

related." Anderson v. North Dakota Workers Comp. Bureau, 553 N.W.2d 496, 499 (N.D. 1996). The law does not require that Bahmiller know the specific diagnosis associated with his condition as he is not to be judged as an individual learned in medicine. As this Court stated in Klein v. North Dakota Workers Compensation Bureau, 2001 ND 170 ¶ 16, 634 N.W.2d 530:

> Although the 1997 amendment **does not require knowledge of a "compensable" injury**, we have stated the term work-related injury as used in our previous statute must be read with reference to a compensable injury. . . .
>
> The Legislature has removed the requirement that the employee be informed by his treating health care provider that his work is a substantial contributing cause of his condition, and we do not mean to suggest that a doctor must specifically inform the claimant that his work activities caused the claimant's injury in every case. 1997 N.D. Sess. Laws ch. 539, § 1.

Id. ¶ 17.

This Court reaffirmed that the "correct legal standard . . . is whether a reasonable person, not learned in medicine, of claimant's age and intelligence . . . knew or should have known . . . his [medical condition] was a compensable work-related injury." Id. ¶ 20. Under the law, whether Dr. Sollom specifically told Bahmiller about a diagnosis of carpal tunnel syndrome in 2013 is irrelevant. See Lechner v. Workforce Safety and Insurance, 2018 ND 270 ¶ 12, 920 N.W.2d 288, noting "[t]he statute does not require that a doctor specifically inform the claimant that his work activities caused his injury." As the ALJ found, Bahmiller, knew and understood the relationship of his condition and symptoms to the work activities based both and the totality of the evidence. See Appx. 33.

[5] The ALJ made Findings relating to Bahmiller's background, work history and the more credible notations in the medical records which supported that Bahmiller

knew or should have known he had an injury related to employment in 2013. (Appx. 33-34) The ALJ summarized those Findings to include references to statements in the record attributing the complaints to work activities as a mechanic and that the condition is getting worse due to his work; that Bahmiller did feel his condition was related to work activities; that the physical therapist documented Bahmiller linked his complaints to activities of being a mechanic; that Bahmiller relayed the information to Dr. Sollom; that Dr. Sollom acknowledged although the EMG was not completely diagnostic of carpal tunnel syndrome at that time, when Bahmiller overuses his right hand at work his hand goes number; Bahmiller complained to his employer of the problems since he began employment; and that when Bahmiller treated again in 2019 Bahmiller reported that this condition had slowly progressed over the last 6 years. (Appx. 34) These facts, coupled with the admissions of Bahmiller to Reena that his treatment for the condition for which he was filing a claim began in 2013 support Bahmiller knew of the relationship of his medical condition, however characterized, to his employment. Under the law, Bahmiller did not have to be specifically told his condition was CTS in 2013, as the law does not require the complexity of compensable injury determination. Claimant's arguments require a higher level of knowledge and a specific statement from a physician of a compensable condition, than is required of the law.

[6] The ALJ applied the correct legal standard to the facts of the case. Because the District Court incorrectly applied the law and required specific knowledge and medical determination of compensability, it erred in reversing the ALJ's decision. (Appx. 52-53) Accordingly, this Court must *reverse* the decision of the District Court and reinstate the

ALJ's decision. See Workforce Safety and Insurance v. Salat, 2019 ND 294, 936 N.W.2d 91 (reversing District Court judgment and reinstating ALJ's decision).

CONCLUSION

[7] For the foregoing reasons and as more fully outlined in WSI's initial Brief to this Court, WSI respectfully requests that this Court *reverse* the decision of the District Court and enter is decision to affirm the ALJ's Findings of Fact, Conclusions of Law and Final Order of May 8, 2020.

DATED this 12th day of May, 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 Reply Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals 8.

DATED this 12th day of May, 2021.

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

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

REPLY BRIEF OF APPELLANT NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

on the following persons:

Dean J. Haas **dhaas@bismarcklaw.com**

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

And on the following persons:

Matt's Automotive Service Center
1150 43 ½ St S
Fargo, ND 58103

by depositing in the United States Post Office at Fargo, North Dakota, on May 12, 2021, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address.

cc.: Al Schmidt, ND WSI
Claim No..: 2019 024,780
Nilles File No.: 19-300.029

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

Laurie A. Grimm

SUBSCRIBED AND SWORN to before me on May 12, 2021.

RACHEL D. HENRY
Notary Public
State of North Dakota
My Commission Expires Oct. 4, 2021

Notary Public

cc.: Al Schmidt, ND WSI
Claim No..: 2019 024,780
Nilles File No.: 19-300.029