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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Brian Hunter, **Appellant,** **vs.** **North Dakota Workforce Safety & Insurance,** **Appellee.**	**Supreme Court No.: 20210185** **Williams County District Court** **Civil No.: 53-2020-CV-01210**

BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT JUDGMENT DATED MAY 11, 2021
AND ORDER AFFIRMING DECISION OF
ADMINISTRATIVE LAW JUDGE DATED MAY 7, 2021
WILLIAMS COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE KIRSTEN SJUE

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STATEMENT OF THE ISSUES

[1] Whether the ALJ could reasonably determine that Appellant Brian Hunter ("Hunter") failed to establish that his conditions of Barrett's esophagus, GERD and peptic ulcer disease were not compensable medical conditions.

[2] Whether Hunter's arguments regarding burden of proof to be placed on WSI were waived by failing to present arguments to the ALJ and District Court.

STATEMENT OF THE CASE

[3] On April 20, 2011, Hunter sustained an injury while employed by Pioneer Well Service for which he filed a claim for benefits with WSI. (C.R.[1] 1-4) WSI accepted that claim and awarded benefits.

[4] On January 8, 2020, WSI issued an Administrative Order denying liability for Barrett's esophagus, peptic ulcer disease and GERD. (C.R. 22-27) Hunter requested rehearing. (C.R. 28) An administrative hearing was held on June 18, 2020, before ALJ Janet Demarais Seaworth ("ALJ Seaworth"). (C.R. 33-36, 1113-1219)

[5] On July 22, 2020, ALJ Seaworth issued Findings of Fact, Conclusions of Law and Order affirming WSI's January 8, 2020, Order. (Appx.[2] 46-55) Hunter submitted a petition for reconsideration to ALJ Seaworth. (C.R. 1104-1106) WSI submitted its response to that petition for reconsideration. (C.R. 1107-1108) On September 21, 2020, ALJ Seaworth issued an Order Denying Petition for Reconsideration. (C.R. 1109-1112)

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[1] "C.R." refers to Certificate of Record on Appeal to District Court dated November 3, 2020, filed pursuant to N.D.C.C. § 28-32-44.
[2] "Appx." refers to the Appendix filed by Appellant Hunter.

[6] Hunter filed an appeal to the District Court, Williams County. (Appx. 4-6, Docket ID #1) Following submission of the record and briefing, on May 7, 2021, the District Court, the Honorable Kirsten Sjue, issued her Order Affirming Decision of Administrative Law Judge. (Appx. 56-63) Order for Judgment and Judgment were entered on May 11, 2021. (Appx. 5, Docket ID ## 61, 62) Hunter has appealed that decision to this Court.

STATEMENT OF FACTS

[7] Hunter sustained injuries on April 20, 2011, when he was driving truck for Pioneer Well Services, LLC, when he hit a bump in the road, causing him to hit his head on the ceiling of the truck cab. (C.R. 1-4, 54) As a result of injuries sustained in that accident, Hunter has been determined to have permanent compensable injuries of his cervical spine and an irritable bowel syndrome. (C.R. 11-21)

[8] Medical records from prior to the work injury reflected a history of peptic ulcer disease. (Appx. 64-77) Hunter also reported a history of using chewing tobacco. (C.R. 67) Medical notes following the work injury also documented past medical history of the peptic ulcer disease "both esophageal and gastric." (Appx. 79) In pre-op physicals, medical notes documented that Hunter had gastroesophageal reflux disease (GERD). (C.R. 123) He was prescribed omeprazole. (C.R. 125) It was noted that Hunter had "occasional reflux" but "does fairly well as long as he takes his omeprazole." (C.R. 128) Hunter underwent surgery on September 15, 2014, for a left C5-C6 medial facetectomy, foraminotomy, laminotomy and microdiscectomy. (C.R. 181-183)

[9] On October 21, 2014, Hunter was evaluated due to increased pain, with associated symptoms of headache, dizziness, nausea, and vomiting. (C.R. 184) On October

30, 2014, he was seen for similar symptoms and diagnosed with a CSF leak. (C.R. 192-196) By November 3, 2014, he no longer complained of headaches, nausea, or vomiting. (C.R. 206) He was prescribed some Zofran as needed for nausea and vomiting. (C.R. 207) By November 21, 2014, it was noted that the CSF leak issues had resolved, except that he continued to have a headache related to his disc disease in his cervical spine. (C.R. 212)

[10] On March 8, 2015, Hunter complained of pain that resulted in vomiting one time. (Appx. 223) It was noted he was out of pain medications. (Id.) On March 18, 2015, Hunter was diagnosed with viral syndrome, that resulted in vomiting characterized as "clear and dry heaves." (C.R. 238-239) He was offered but spit out Zofran for nausea. (C.R. 240)

[11] On May 18, 2015, Hunter underwent a second surgical procedure on his cervical spine. (C.R. 257-259) His pre-op medications were noted to include omeprazole. (C.R. 266) Post-operatively, discharge medications included omeprazole and Zantac. (C.R. 266) Following the May 18, 2015, surgery, Hunter developed an infection and underwent a further procedure on May 28, 2015. (C.R. 289-290, 296) He was discharged on additional antibiotic medications of Cefazolin and Rifampin of a duration to be determined by the infectious disease physicians. (C.R. 327)

[12] Hunter continued to be followed in infectious disease. (C.R. 341) It was noted his medications caused him to have diarrhea, abdominal discomfort, nausea, and poor appetite. (C.R. 341) At a June 20, 2015 follow-up, it was noted Hunter was off any IV antibiotics. (C.R. 347) He continued, however, to have significant diarrhea. (C.R. 347) It was recommended that he take yogurt supplements with his meals daily and large amounts of fiber laxative to help with the diarrhea and absorption of any excess liquid in his bowel from the antibiotics. (C.R. 347)

[13] On July 8, 2015, Hunter was seen in the emergency department complaining of loose stools that began in June due to antibiotic treatment. (C.R. 351) The frequency had increased from 4-5 to 14. (C.R. 351) A review of systems documented nausea (accompanied by dry heaves). (C.R. 351) On August 2, 2015, he had another visit to the emergency department due to diarrhea and abdominal cramping. (Appx. 84) Hunter complained of associated abdominal pain and cramping, nausea, and vomiting. (Id.) On August 9, 2015, he was diagnosed with C. diff and was noted to be on a 14-day regimen of metronidazole. (C.R. 379)

[14] On August 30, 2015, it was documented that Hunter had completed his antibiotics for C. diff. (C.R. 396) He presented with abdominal pain. (C.R. 396) He was diagnosed with acute diarrhea. (C.R. 400) The following day he was noted to have neck and arm pain, abdominal pain, nausea, vomiting and diarrhea. (Appx. 85) On September 1, 2015, it was noted he had improved, with only one episode of nausea the prior night, relieved with Zofran. (C.R. 421) His discharge summary reflected his abdominal pain and diarrhea improved. (C.R. 435) Hunter had additional visits to the emergency department in November of 2015 and December 2015. (C.R. 452, 460) A summary of the history of his treatment for the C. diff colitis was documented on December 4, 2015. (C.R. 463-464) A note of January 26, 2016 reflects he was no longer complaining of any nausea or vomiting. (C.R. 497)

[15] Rather than proceed with permanent antibiotic treatment, on February 4, 2016, Hunter underwent a surgical procedure to remove his anterior cervical plate. (C.R. 532-533, 541) His inpatient note relating to that surgery documented his past history of GERD. (C.R. 537) Following that surgery he "has done very well." (C.R. 543)

[16] On March 4, 2016, Hunter was seen at Johns Hopkins for chronic diarrhea. (C.R. 641) That note reflected a history regarding GI symptoms as follows: "he reports abdominal cramping which does improve with bowel movements. He has bloating, which he also seems to have some improvement with the bowel movement. He denies any gastroesophageal reflux disease symptoms, any nausea or vomiting. His appetite is normal." (C.R. 642)

[17] On March 18, 2016, Hunter underwent an EGD with biopsy (upper endoscopy) to evaluate chronic diarrhea. (Appx. 91) The results reflected "there was a single 1cm tongue of possible Barrett's esophagus, biopsied." (Appx. 92) Dr. Joanna Miller Peloquin Melia recommended that Hunter "start PPI such as omeprazole 20 mg daily. He should a repeat upper endoscopy with 4 quadrant biopsies in 1 years' time." (C.R. 689)

[18] In a letter dated December 10, 2018, Dr. Melia stated she last saw Hunter was in May of 2016. (Appx. 95) Dr. Melia noted she was not versed enough in the AMA Guides to offer an opinion regarding permanent impairment. (Appx. 96) Regarding GERD, Dr. Melia responded that "can be exacerbated by narcotic and benzodiazepine use with the mechanism of some decreased gastric emptying in the setting of gastric dysmotility secondary to narcotic use. Additionally, these medications have often been associated with weight gain and weight gain clearly is associated with GERD." (Appx. 96) When asked whether long-term antibiotic use can cause nausea and vomiting, Dr. Melia stated that question was "difficult to answer" and "certainly antibiotics can be associated with acute nausea and vomiting while on them in my practice **I am not aware of any antibiotics that cause long-term effects after they have been stopped."** (Appx. 96, emphasis supplied) Dr. Melia was asked regarding a paraesophageal hernia and clarified that Hunter "had a

small hiatal hernia at the time of upper endoscopy this is distinct from a paraesophageal hernia, hiatal hernias are generally benign. They can be associated with increased GERD. Hiatal hernias can worsen in the setting of of (sic) repeated vomiting so I suppose that vomiting could contribute to that but again this was a small hiatal hernia." (Id.)

[19] Dr. Melia also responded regarding Barrett's esophagus and whether people with GERD are more susceptible to that condition, and she responded: "Yes, definitely. We believe GERD and acid reflux of her (sic) triggers for Barrett's esophagus. As you note he does have other risk factors for Barrett's esophagus specifically that he is an older white male with past history of smoking and he is overweight." (Appx. 96) Dr. Melia then stated as follows:

> To the best of my abilities and with my evaluation as it was in 2016 I can definitely say that I believe that all of these conditions were worsened by the injury and complications of treatment for the work-related injury. I believe the weight gain that he experienced which believe is partially related to decreased activity because of his injury as well as the morbidity after his surgeries certainly can worsen GERD and cause more problems with the Barrett's esophagus. Hiatal hernias are very common and it is difficult to know if we can really attribute all of this to the injury but certainly again I I believe that these conditions were.

(Id.)

[20] In March of 2019, Hunter was evaluated at the inflammatory bowel disease clinic at the University of Utah. (C.R. 749) The doctor again prescribed a PPI (omeprazole) which was noted should improve his reflux and be helpful in the setting of Barrett's esophagus. (Appx. 98) Although Hunter reported he quit smoking about 9 years prior, he did use smokeless tobacco. (C.R. 752) A pharmacy note documented he stopped his PPI and takes 2 Tums twice a day. (C.R. 757) It was noted he should consider resuming PPI if willing. (Id.)

[21] On July 12, 2019, Hunter underwent a follow-up upper endoscopy. (C.R. 783) The report reflected that the "biopsies obtained from your stomach and small intestine during your upper endoscopy were normal, showing no evidence of cancer, Heliobacter pylori infection or celiac sprue." (C.R. 783) Regarding the esophagus, it was reported to show "Barrett's esophagus" which was described as [p]recancerous changes known as low grade dysplasia." (C.R. 783) He was referred for strategies to manage the condition. (Id.)

[22] WSI responded to a request for treatment related to Barrett's esophagus on September 24, 2019, denying the same. (C.R. 5) Hunter responded with an email stating he appealed the decision. (C.R. 5) Hunter asserted that the Barrett's esophagus was caused by "all the antibiotics and vomiting over a 4-year period." (C.R. 6)

[23] WSI referred the claim for a comprehensive review by its medical director. (C.R. 10, 1074-1075) Dr. Mandi Johnson prepared a lengthy summary of her review of all the medical records on Hunter's claim. (Appx. 106-114) Dr. Johnson documented her medical opinion as follows:

> To review, Mr. Hunter suffered a work injury on 4/20/2011. His past medical history prior to the work injury included peptic ulcer disease, GERD, and heart disease. Mr. Hunter's social history was significant for length use of tobacco products, as well as caffeine, alcohol, and amphetamine use. Due to his heart disease Mr. Hunter takes aspirin and Plavix on a daily basis. An EGC showed a small hiatal hernia. The treatment of his work injury did not include any significant use of steroids by mouth or NSAIDs.
>
> It is my medical opinion gastroesophageal reflux disorder (GERD) is a separate condition from irritable bowel syndrome.
>
> - Irritable bowel syndrome is a disorder of the large intestine. The exact cause is not known. Common symptoms include abdominal pain, cramping, constipation, and/or diarrhea triggered by certain foods or stress.
> - GERD is a condition where acid from your stomach enters the esophagus. If this happens intermittently or for short periods of time, the primary problem is discomfort. However, if this happens

chronically, over the course of many years, the reflux can cause change the lining of the esophagus leading to a condition called Barrett's esophagus. The lining of the esophagus is different than the lining of the stomach and is not meant to handle acid. The chronic stress of acid in the esophagus causes the lining of the esophagus to change in response to this stress, which is Barrett's esophagus. If this is not managed, these changes of the esophagus can result in cancer.

It is my medical opinion Mr. Hunter's gastroesophageal reflux disease was not caused by the work injury or the treatment of the work injury.

- Mr. Hunter's history is significant for GERD and peptic ulcer disease prior to the work injury.
- The pathophysiology of GERD is described above.
- When a medical provider evaluates a patient for GERD a history is obtained for caffeine, tobacco, NSAD, and alcohol use. This is because these are the most common causes of GERD. Mr. Hunter's history clearly documents caffeine, tobacco, and alcohol use. In addition, he reported amphetamine use which can also cause GERD.
- His EGC showed a hiatal hernia, which is also a risk factor for GERD.
- There is an increased risk of GERD in patients with obesity. Review of Mr. Hunter's medical record does not consistently show a BMI greater than 30. Review of the medical record shows Mr. Hunter's weigh increases over time. In 2017, his BMI is approximately 30. However, the diagnosis of GERD is well established before 2017. The pathophysiology of weight gain and obesity is complex. Opiates & benzodiazepines are generally not considered high risk medications for weight gain.
- Mr. Hunter's treatment for his work injury included occasional NSAID and steroid use. However, this was only for limited periods of time. It is my medical opinion this was not a significant contributing factor for Mr. Hunter's GERD.
- It is true that opiates may cause intestinal dysmotility issues. This is the pathophysiology for narcotic-induced constipation. It is my medical opinion this is not a significant contributing factor to Mr. Hunter's GERD.

It is my medical opinion Mr. Hunter's Barrett's esophagus was not caused by his work injury or the treatment of the work injury.

- Barrett's esophagus is caused by GERD. As previously stated, Mr. Hunter's history is significant for GERD and ulcer disease prior to the work injury.
- The significant contributing factors for Mr. Hunter's GERD include caffeine, nicotine, alcohol, and amphetamine use.

Mr. Hunter's diagnosis is Barrett's esophagus. Mr. Hunter does not have esophageal cancer.

- Barrett's esophagus is a condition of dysplasia or pre-cancerous cells, in the esophagus.
- Barrett's esophagus is a known risk factor for esophageal cancer.

(Appx. 111-113)

[24] On January 8, 2020, WSI issued an Administrative Order denying liability for Barrett's esophagus, GERD, and peptic ulcer disease. (C.R. 22-27) Hunter requested rehearing. (C.R. 28) In the request for rehearing, Hunter stated that "Dr. Melia's December 10, 2018, opinion is not accurate relating to Mr. Hunter's diagnosis of GERD, Barrett's esophagus and peptic ulcer disease." (C.R. 28)

[25] An administrative hearing was held on June 18, 2020. (C.R. 1113-1205) At that administrative hearing, Hunter presented testimony on his own behalf. (C.R. 1115) WSI called Dr. Mandi Johnson to testify at the hearing regarding her medical review and opinions. (C.R. 1115) Hunter called no medical witnesses and instead, despite the request for hearing stating Dr. Melia's opinion was not accurate, argued that Dr. Melia's opinion was objective medical evidence to support his claim. (C.R. 1191-1192)

[26] Dr. Johnson is Board Certified in Family Medicine and currently acts as WSI's Medical Director. (C.R. 1086, 1137) When Dr. Johnson is asked to review a claim and determine the relationship of certain conditions to a work injury, she reviews and reads every medical record in the claim. (C.R. 1139-1140) As a practicing clinician, Dr. Johnson documents things in the medical records she is reviewing that impact the question posed to her, in this case the three conditions that were the subject of the hearing. (C.R. 1141)

[27] Regarding peptic ulcer disease, Dr. Johnson testified it is a sore or ulcer typically in the stomach that is caused from a direct irritation to the stomach or an acid

problem over time. (C.R. 1142) Dr. Johnson's review of the records reflected Hunter had peptic ulcer disease and GERD before the work injury. (C.R. 1142, 1146) To explain the connection between these two conditions, Dr. Johnson testified as follows:

> [T]hey're all kind of connected. I mean ulcer disease is caused, is caused by an, GERD. You know, gastric reflux or gastric reflux is caused by a couple of different problems, either a direct irritant to the stomach lining, so like alcohol, nicotine, certain medications like aspirin, Plavix, stimulants, and then ulcer disease can also be caused by, or GERD, can also be caused by reflux where the stomach and the sphincter relax because of medications or things that we intake like caffeine, so ulcer disease, I mean, to summarize, ulcer disease can be caused, the primary cause of ulcers is really GERD or reflux issues, and reflux is caused by either direct irritants to the stomach or esophagus or by things that cause a relaxation of the sphincter so that acid doesn't always stay in the body, body part it's supposed to stay in.

(C.R. 1143) Dr. Johnson testified you can have GERD without having peptic ulcer disease, but you really do not get ulcers without having some component of GERD. (C.R. 1146) Dr. Johnson testified that GERD, peptic ulcer disease and Barrett's esophagus, the three things at issue in the hearing, are connected because they all "describe a similar pathophysiology process." (C.R. 1145)

[28] Dr. Johnson's medical review also focused on medications because certain medications such as NSAIDs, aspirin, Plavix and stimulants pose a higher risk of causing GERD or ulcers. (C.R. 1143-1144) Hunter was taking aspirin and Plavix to reduce the risk of another heart attack. (C.R. 1144) Even though these medications are irritating to the esophagus, the risk of dying from heart attack is greater so providers felt that aspirin and Plavix were worth the risk of continuing to be on. (C.R. 11145)

[29] Dr. Johnson described the pathophysiology of development of Barrett's esophagus by describing the types of cells in the stomach vs. in the esophagus. (C.R. 1152) The cells in the stomach are more suited to deal with acid than those in the esophagus.

(C.R. 1152) If there is an acid problem in the stomach and it starts creeping up into the esophagus, the cells in the esophagus change, and that's called Barrett's esophagus. (C.R. 1152) This is not cancer, but it is an objective finding that the cells in the esophagus are changing. (C.R. 1153) If the GERD or acid problem is not brought under control, it can develop into esophageal cancer. (C.R. 1153) This process occurs over the course of many years. (C.R. 1153-1154)

[30] In her testimony, Dr. Johnson discussed the claims made by Hunter as to the relationship between his peptic ulcer disease, GERD and Barrett's esophagus and his work injury. Antibiotics, as alleged by Hunter, are not known as a medication that causes a direct irritation to the esophagus or stomach. (C.R. 1155) Antibiotics also do not cause relaxation of the muscles or sphincter between the stomach and esophagus. (C.R. 1155) Thus, antibiotic use is not associated with causing acid reflux problems. (C.R. 1155-1156)

[31] Dr. Johnson also addressed Hunter's claim that vomiting was the cause of the GERD, peptic ulcer disease and Barrett's esophagus. Dr. Johnson explained that although vomiting does take things from the stomach and push it up through the esophagus, she did not see a persistent enough pattern of vomiting that caused her concern that it was a significant factor in the GERD or Barrett's esophagus. (C.R. 1157)

[32] Dr. Johnson evaluated the endoscopy results from 2016 and compared those to 2019. (C.R. 1158-1160) In doing so she did not find a significant progression of the Barrett's esophagus. (C.R. 1160) She also did not find, a "four-year history of vomiting and/or taking antibiotics" as claimed by Hunter. (C.R. 1160)

[33] Concerning Dr. Melia's opinion, Dr. Johnson testified she did not agree with the opinion that the GERD and Barrett's esophagus were worsened by the work injury and

complications from treatment of the work injury. (C.R. 1164) Dr. Johnson explained that looking at things like caffeine, alcohol, nicotine, aspirin, and Plavix, those are chronic daily things that affect the esophageal lining and how the stomach and esophagus work. (C.R. 1165) Comparing those things to the short-term NSAID and antibiotics for the work injury, those weren't significant factors in the development of GERD or Barrett's esophagus. (C.R. 1165) She also testified that given Hunter's pre-existing GERD and peptic ulcer disease, those conditions would have progressed the same to Barrett's esophagus even absent the work injury. (C.R. 1166)

[34] Dr. Johnson also explained why the fact that Hunter had irritable bowel syndrome is not significant in terms of Barrett's esophagus and GERD. (C.R. 1180) As Dr. Johnson explained, irritable bowel syndrome is an intestinal issue, while GERD and peptic ulcer disease and Barrett's esophagus is an esophagus, stomach issue. (C.R. 1180) The pathophysiology is different between an upper GI and lower GI tract conditions. (C.R. 1180)

[35] ALJ Seaworth, after considering the documentary evidence and listening to the testimony of the witnesses at hearing, issued Findings of Fact, Conclusions of Law and Order on July 22, 2020, affirming WSI's January 8, 2020, Order. (Appx. 46-55) The ALJ's analysis included consideration of the factors outlined in N.D.C.C. § 65-05-08.3. (Appx. 54-55) ALJ Seaworth also rejected the Petition for Reconsideration filed by Hunter. (C.R. 1104-1105, 1109-1110) In rejecting Hunter's claim that Dr. Melia's opinion should be controlling, ALJ Seaworth stated:

> Mr. Hunter argues that Findings of Fact 20 and Conclusions of Law 2 and 3 are incorrect. First he argues that Dr. Melia's opinion should be controlling because she was claimant's treating gastroenterologist and Dr. Johnson is a family practice physician who merely reviewed claimant's records. This

ALJ has discussed the opinions offered by Dr. Melia and Dr. Johnson in detail. That Dr. Melia offered an opinion some two years after she last saw claimant does not necessitate that this ALJ accept it as controlling. As the North Dakota Supreme Court has advised, a fact finder need not accept an expert opinion just because it is offered. Gardebring v. Rizzo, 269 N.W.2d 104 (1978)(while expert opinions are helpful, the courts are not required to accept such opinions as conclusive). As WSI noted, "[a]s fact-finder, the ALJ has the responsibility to weigh the credibility of medical evidence." Workforce Safety and Ins. v. Auck, 2010 ND 126 (the ALJ must consider the entire record). The opinions were evaluated in consideration of the factors enumerated in N.D.C.C. § 65-05-08.3 and, for the reasons discussed, Dr. Johnson's opinion was found most persuasive. Claimant argues that the relationship between GERD and his obesity and smoking was unexplained and that evidence of his preexisting GERD and "personal habits" including smoking should be dismissed as irrelevant, but Dr. Melia and Dr. Johnson agree that claimant's obesity and past history of smoking are risk factors for Barrett's esophagus, which is triggered by GERD and acid reflux. Accordingly, medical records that show claimant had GERD prior to the work injury are relevant, regardless of whether those symptoms were discussed in association with a 2011 evaluation for appendicitis. Likewise, evidence of claimant's obesity and smoking is relevant, since obesity and smoking are risk factors for the development of GERD and Barrett's esophagus. While claimant argues that his "personal habits" are irrelevant because Dr. Melia opined a causal connection between his injury and the development of Barrett's esophagus the fact that Dr. Melia provided an opinion does not foreclose an examination of the basis of that opinion. Here, there are other known explanations for claimant's condition. Dr. Melia failed to discuss those other factors and their causal connection to claimant's conditions. This failure to explain the basis of her opinion, in the face of other explanations for claimant's condition, impugns the credibility of her opinion. Dodds v. North Dakota State Highway Commissioner, 354 N.W.2d 165 (N.D. 1984) (the weakness or non-existence of a basis for an expert's opinion goes to the expert's credibility). In sum, claimant presented an opinion supporting his position and urges this ALJ to just accept it. The ALJ must however, weigh the credibility of that evidence and consider the entire record. There were two medical opinions presented here and upon consideration of those medical opinions, Dr. Melia's opinion did not carry the day.

(C.R. 1109-1100).

[36] Hunter appealed from the ALJ's decision to affirm WSI's Order to the District Court, Williams County. (Appx. 4; Docket ID #1) The District Court affirmed the ALJ's decision, stating as follows:

After very careful consideration of the record in this matter, including a close examination of the opinions of Dr. Melia and Dr. Johnson and the corresponding medical records, the Court concludes that a reasoning mind reasonably could have determined that Dr. Johnson's opinion was more credible and persuasive and therefore entitled to more weight than Dr. Melia's opinion. The ALJ extensively analyzed the evidentiary record and made ten pages of factual findings and conclusions addressing the medical evidence offered by both parties, including the opinions of Dr. Melia and Dr. Johnson. The ALJ thoroughly explained the reasons why she found the opinion of Dr. Johnson to be more compelling and persuasive, in light of the factors under N.D.C.C. § 65-05-08.3 and the facts and circumstances of this case.

The Court will address a few of the particular arguments raised by Hunter with regard to the ALJ's assessment of the medical evidence and opinions in this matter. Contrary to Hunter's assertions, there is in fact medical documentation in the record showing that he had the conditions of peptic ulcer disease and GERD prior to the April 2011 work injury, including two medical forms in which he self-reported a history of each of those conditions on January 17, 2011, and January 25, 2011. See Cert. of Record at 40, 44-45, 50. [Appx. 64, 68-69, 74] Shortly after his work injury, on May 2, 2011, he again reported a prior history of heartburn and ulcers, which would have been well before the post-surgery course of antibiotics in 2015 that Hunter now claims caused his GERD, peptic ulcer disease, and ultimately Barrett's esophagus. See Cert. of Record at 59.

Hunter objects to the ALJ's findings regarding the fact that Dr. Melia rendered her medical opinion about his conditions in December 2018, more than two years after she had last seen him for treatment in May 2016. However, the Court views that as a legitimate consideration which the ALJ reasonably could have taken into account when weighing Dr. Melia's opinion. Dr. Melia treated Hunter three times from March 2016 to May 2016, which provides the basis for her opinion as a treating doctor but also reflects a relatively limited point in time in Hunter's complex medical history. From the Court's review of the medical documentation in the file, it appears that Dr. Melia would have been aware of a summary of Hunter's medical history at the time she treated him in 2016, but she never conducted a full review of his medical records dating back to the year of the work injury in 2011. Furthermore, there is no indication in the record that Dr. Melia would have been aware of any of Hunter's medical history or records after May 2016, when she was no longer seeing him as a patient. It was reasonable for the ALJ to evaluate these facts and circumstances regarding the basis for Dr. Melia's opinion, and to compare that with the comprehensive review of all of Hunter's medical records conducted by Dr. Johnson in 2019.

> Hunter also contends that Dr. Melia was never asked to explain in her letter opinion how certain risk factors, such as long-term use of aspirin and Plavix for a heart condition, a long history of smoking and using smokeless tobacco, and a history of using alcohol and being overweight or obese, would affect her medical opinion about causation of his GERD, peptic ulcer disease, and Barrett's esophagus. The implication seems to be that it was somehow unfair to Dr. Johnson to be critical of Dr. Melia's letter opinion for not adequately addressing these issues, when Dr. Melia was never given the opportunity to directly answer those questions.
>
> However, ultimately "[t]he claimant is responsible for making a record to support his claim." Across Big Sky Flow Testing, LLC, 2014 ND 236, ¶ 9, 857 N.W.2d 380 (internal quotation omitted). In this case, Hunter decided to rely upon a written letter opinion from Dr. Melia dated December 10, 2018, rather than calling her as a witness to provide testimony under oath and subject to cross-examination, either by deposition or at the administrative hearing itself. By relying on a written opinion rather than live testimony, the claimant takes the risk that the medical opinion cannot be further explored or developed through questioning, and any possible issues or concerns the ALJ may have regarding that opinion may go unaddressed.
>
> Here the ALJ thoroughly weighted and analyzed all the medical evidence in the record and the medical opinions of Dr. Melia and Dr. Johnson. The ALJ's analysis comports with the factors to be considered when resolving conflicting medical opinions under N.D.C.C. § 65-05-08.3. The ALJ sufficiently explained her reasons, based upon the objective medical evidence and the record as a whole, for finding the opinion expressed by Dr. Melia to be less persuasive than the opinion of Dr. Johnson.
>
> After careful consideration, the Court concludes that a reasoning mind reasonably could have determined the ALJ's factual findings were proven by the weight of the evidence from the entire record. Specifically, a reasoning mind reasonably could have determined that Hunter's work injury and subsequent treatment for the work injury were not a substantial contributing factor to his Barrett's esophagus, GERD, and peptic ulcer disease, nor did they substantially accelerate the progression or substantially worsen the severity of those conditions. The ALJ's findings of fact are supported by a preponderance of the evidence and sufficiently address the evidence presented, and the ALJ's conclusions of law and order are supported by the findings of fact and are in accordance with the applicable law. . . .

(Appx. 60-63) This appeal followed.

LAW AND ARGUMENT

A. BURDEN OF PROOF AND SCOPE OF REVIEW ON APPEAL.

[37] 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, 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. However, the District Court's decision is entitled to "due respect." Bergum v. North Dakota Workforce Safety and Ins., 2009 ND 52 ¶8, 764 N.W.2d 178.

[38] "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 decision." Id. at ¶ 5 (citing Sloan v. N.D. Workforce Safety and Ins., 2011 ND 194 ¶ 5, 804 N.W.2d 184; Workforce Safety and Ins. v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186). "[F]act findings are within the province of the ALJ who hears the witnesses, sees their demeanor, evaluates their credibility and is in a better position to ascertain the facts than an appellate court relying on a cold record." Workforce Safety and Insurance v. Larry's On Site Welding, 2014 ND 81 ¶ 20, 845 N.W.2d 310, 315, citing Muldoon v. Workforce Safety and Insurance, 2012 ND 244 ¶ 8, 823 N.W.2d 761. 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.")

[39] The ALJ's decision must be affirmed unless the "findings of fact are not supported by a preponderance of the evidence, [the] conclusions of law are not supported by

[the] findings of fact, [the] decision is not supported by [the] conclusions of law, or [the] decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. The Court must exercise restraint in determining whether the ALJ's decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Bruder v. Workforce Safety and Insurance, 2009 ND 23 ¶ 7, 671 N.W.2d at 790. Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436 (N.D. 1988); Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court must decide only whether a reasoning mind reasonably could have decided that WSI's findings were proven by the weight of the evidence from the entire record. Industrial Contractors, Inc. v. Workforce Safety and Insurance, 2009 ND 157 ¶ 5, 722 N.W.2d 582. See also Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI's decision is supported by the evidence). Quite simply, "[i]t is within [the ALJ's] province to weigh the credibility of the evidence presented." Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). The District Court cannot substitute its judgment for that of the [ALJ]. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995).

B. THE ALJ COULD REASONABLY CONCLUDE THAT HUNTER FAILED TO ESTABLISH THAT PEPTIC ULCER DISEASE, GERD AND BARRETT'S ESOPHAGUS ARE COMPENSABLE MEDICAL CONDITIONS.

[40] In the Statement of Issues filed with the Notice of Appeal, Hunter raised the issue of whether the preponderance of the evidence supported the ALJ's conclusions. In

arguments in the briefing to this Court, Hunter essentially reargues the evidence that was presented to the ALJ for consideration. On appeal, the question is not whether this Court would have weighed the evidence differently or reached a different conclusion than that which was reached by the ALJ. In Re Claim of Vail, 522 N.W.2d 480, 482 (N.D. 1994). Rather, the issue on appeal is whether a reasoning mind could find that the weight of the evidence supports the [ALJ's] findings. Id. That standard is clearly met in this case, and the ALJ's decision should be affirmed. See id.

[41] 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."** (Emphasis supplied.) A claimant "is responsible for making a record to support his claim." Aga v. Workforce Safety and Ins., 2006 ND 254, ¶ 17, 725 N.W.2d 204.

[42] As outlined above, the ALJ had to consider two medical opinions in rendering her decision on the issue of whether Hunter met his burden to prove entitlement to benefits for GERD, peptic ulcer disease and Barrett's esophagus. In such a situation, it is the ALJ's duty to weigh evidence and resolve conflicting medical opinions in making its findings. Thompson v. Workforce Safety and Ins., 2006 ND 69, ¶ 11, 712 N.W.2d 309. As is required, ALJ Seaworth considered the factors set out in section 65-05-08.3, N.D.C.C., which provides in relevant part:

> 1. A presumption may not be established in favor of any doctor's opinion. The organization shall resolve conflicting medical opinions and in doing so the organization shall consider the following factors:
>
> a. The length of the treatment relationship and the frequency of examinations;
> b. The nature and extent of the treatment relationship;
> c. The amount of relevant evidence in support of the opinion;

d. How consistent the opinion is with the record as a whole;
e. The appearance of bias;
f. Whether the doctor specializes in the medical issues related to the opinion; and
g. Other relevant factors.

As interpreted in Albright v. Workforce Safety and Insurance, 2013 ND 97 ¶ 27, 833 N.W.2d 1, this statute "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, applying the two tests and the factors identified in N.D.C.C. § 65-05-08.3."

[43] In weighing the evidence initially and on reconsideration, the ALJ did exactly what she was required to do in the case of conflicting medical opinions, that being acknowledge their existence and set forth her reasons, supported by the record, for rejecting any opinions favorable to the claimant. Hein v. North Dakota Workers Compensation Bureau, 1999 ND 200 ¶¶ 14-15, 601 N.W.2d 576, 578-79. This Court has noted that "[t]he explanation for rejection of medical evidence favorable to the claimant may consist of the [ALJ's] analysis of why [he] accepted contrary evidence." Hein, 1999 ND 200 ¶ 15, 601 N.W.2d at 578, citing Hibl v. North Dakota Workers Compensation Bureau, 1998 ND 198 ¶ 10, 586 N.W.2d 167.

[44] Hunter wants the Court to assume that Dr. Melia's written opinion is entitled to more weight because she is a gastroenterologist. ALJ Seaworth acknowledged that fact. (Appx. 54) However, the ALJ clearly believed Dr. Johnson's opinion was entitled to more weight given the depth of her analysis, thoroughness in reviewing the record and the consistency of her opinion through her testimony at the hearing. (Appx. 54) In Aga, 2006

ND 254, 725 N.W.2d 204, this Court considered the issue of whether relying solely on written reports in supporting a claim and the evaluation of that evidence by the ALJ. This Court stated as follows:

> Although Aga asserts claimants typically use doctor's letters to support their claim, WSI is responsible for weighing the credibility of medical evidence. Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶ 13, 671 N.W.2d 784. In the absence of a proper objection, an administrative agency may receive documentary evidence in some instances. See N.D.C.C. § 28-32-24. Aga was entitled to subpoena his doctors or to present telephonic testimony from his doctors. See N.D.C.C. §§ 28-32-33 and 28-32-35. Aga nevertheless relied on written opinions from his doctors without any further elaboration and did not present testimony from his doctors or other employees at Miracle Mart to support his claim. It is well-established that in a reapplication for disability benefits, a claimant has the ultimate burden of proof to establish a significant change in his compensable medical condition and is responsible for making a record to support his claim. . . . On this record and under our deferential standard of review, we conclude a reasoning mind could reasonably conclude that Aga failed to establish he sustained a significant change in his compensable medical condition when he reapplied for disability benefits. We therefore conclude WSI's denial of Aga's reapplication for benefits is supported by a preponderance of the evidence.

Aga, 2006 ND 254 ¶ 17, 725 N.W.2d 204. ALJ Seaworth was clearly swayed by the testimony and written opinion of Dr. Johnson. Under Aga, this Court confirmed she is entitled to give such opinion more weight. This is not, therefore, a basis for reversing the ALJ's decision.

[45] Hunter perpetuates his erroneous claim that Dr. Johnson's opinion was that Hunter's GERD, PUC and Barrett's esophagus were the result of caffeine intake and other personal habits. In fact, Dr. Johnson's opinion was that the GERD was not caused by the work injury or treatment of the work injury. (C.R. 1083) She fully explained her analysis at the hearing in her testimony. Her rationale included his history and other risk factors. (C.R. 1083) However, it also was based on the pathophysiology of GERD vs. irritable bowel

syndrome. Hunter also had a hiatal hernia, and Hunter's treatment regimen did not include medications that would significantly contribute to the development or aggravation of ulcer disease or GERD.

[46] Hunter is also critical of Dr. Johnson's opinions on consideration of other risk factors for these conditions. In the District Court, Hunter's counsel argued "personal habits" were irrelevant, citing Manske v. Workforce Safety and Insurance, 2008 ND 79, 798 N.W.2d 397. In fact, the reason this Court reversed the ALJ's decision in Manske was that the ALJ did not consider whether the work injury was a substantial contributing factor to development of a medical condition, instead looking to whether it was the sole cause of the condition. The reference to personal habits in the Court's discussion in Manske actually states that because an individual has personal habits that make him more prone to an injury is not a sufficient reason for denying a claim. Manske ¶ 12. Here, ALJ Seaworth did not apply the wrong standard in analyzing the evidence, and thus Manske does not support a reversal of her decision.

[47] The most persuasive, reasonable, and consistent medical opinion is that of Dr. Mandi Johnson who conducted a comprehensive review of the medical records, submitted a written report, and was available for testimony and cross-examination. Dr. Melia's letter opinion pales in comparison to Dr. Johnson's analysis. As ALJ Seaworth noted, although Dr. Melia opined that the GERD and Barrett's esophagus were "worsened by the injury" and treatment, she does not explain how those conditions were worsened. (Appx. 54) Not only does Dr. Melia fail to articulate the objective medical findings that support her opinion, but she also fails to explain what "treatment" and for what condition caused the GERD and Barrett's esophagus to worsen.

[48] Lastly, as it pertains to the claim of bias of a medical opinion offered by Dr. Johnson in Spangler v. North Dakota Workers Compensation Bureau, 519 N.W.2d 576 (N.D. 1994) this Court held that "the suggestion that a physician's opinion could be purchased is an affront to the medical profession and cannot by itself be an adequate reason to disregard [the] opinion . . . ." Dr. Johnson confirmed that whether her opinion is favorable or unfavorable to WSI, she receives the same compensation. (C.R. 1140) Furthermore, this Court has recognized that the opinion of WSI's medical consultant when it is the only medical professional that reviewed all the pertinent medical records and evaluated the medical evidence, and who testifies to explain those medical opinions, can support a determination to deny benefits on a claim. See Thompson, 2006 ND 69, 712 N.W.2d 309.

[49] ALJ Seaworth not only explained her analysis in her Findings of Fact, Conclusions of Law and Order of July 22, 2020, she responded on a request for reconsideration to Hunter's claims that Finding #20 and Conclusions of Law #2 and #3 were in error. As fact-finder, the ALJ has the responsibility to weigh the credibility of medical evidence." Auck, 2010 ND 126, ¶ 14, 785 N.W.2d 186 (citing Barnes v. Workforce Safety & Ins., 2003 ND 141, ¶¶ 20-21, 668 N.W.2d 290.) As this Court held in Aga, under the deferential standard of review of such a decision, and reviewing the evidence ALJ Seaworth could reasonably conclude as she did. Therefore, that decision must be affirmed. Victor v. Workforce Safety & Ins., 2006 ND 68, ¶ 13, 711 N.W.2d 188.

C. HUNTER WAIVED ARGUMENTS RELATING TO REQUIRING WSI PROVE AN INJURY IS NOT COMPENSABLE AND THE ARGUMENT HAS NO BASIS IN LAW.

[50] Hunter spends considerable time arguing to the Court that WSI must prove an injury or illness is not compensable by objective medical evidence supported by objective medical findings. This argument was not raised with the ALJ nor in the District Court. In such a situation, this Court has stated as follows:

> "It is well-settled that issues not raised in the district court may not be raised for the first time on appeal." Paulson v. Paulson, 2011 ND 159, ¶ 9, 801 N.W.2d 746; see also Unser v. N.D. Workers Comp. Bureau, 1999 ND 129, ¶ 14, 598 N.W.2d 89 ("An issue not properly raised before the trial court cannot be brought for the first time on appeal.").

Muldoon, 2012 ND 244 ¶ 15, 823 N.W.2d 761.

[51] There is no basis in law for any argument that WSI has the burden to establish a claimant is not entitled to benefits sought. N.D.C.C. § 65-01-11 clearly and unequivocally provides that "[a]ny claimant against the fund . . . has the burden of proving by a preponderance of the evidence that the claimant is entitled to benefits." 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.) Accordingly, the arguments made by Hunter on this issue should be summarily rejected.

CONCLUSION

[52] For the foregoing reasons, WSI respectfully requests that this Court the *affirm* decision of the District Court which had affirmed the ALJ's Findings of Fact, Conclusions of Law and Final Order dated July 22, 2020.

DATED this 14th day of September, 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 28.

DATED this 14th day of September, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Brian Hunter, Appellant, vs. North Dakota Workforce Safety & Insurance, Appellee.	Supreme Court No. 20210185 Williams Co. District Court Civil No.: 53-2020-CV-01210 AFFIDAVIT OF ELECTRONIC SERVICE

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:

BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

on the following person by email and by depositing in the United States Post Office at Fargo, North Dakota, on September 14, 2021, a true and correct copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person named:

Brian Hunter
PO Box 762
Roosevelt, UT 84066

anytimeservicesbh@yahoo.com

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 September 14, 2021.

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

Notary Public

cc.: Jennifer Fender, ND WSI
Claim No.: 2011 840.482
Nilles File No.: 19-300.061