20220229
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 19, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jesse Keidel, Appellant, vs. North Dakota Workforce Safety & Insurance, Appellee, and Kolling & Kolling Inc., Respondent.	**SUPREME COURT NO. 20220229** Civil No. 45-2022-CV-00068

REPLY BRIEF OF APPELLANT JESSE KEIDEL

APPEAL FROM DISTRICT COURT JUDGMENT DATED JUNE 10, 2022,
STARK COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE WILLIAM HERAUF

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[1] WSI confuses the issue of the seriousness of a physical condition that may change over time (disability or impairment) with a *causal determination* which is subject to finality. Causation determinations are made in a single proceeding and are not constantly revisited simply because the seriousness of a work-related injury changes.

[2] WSI attempts to minimize two brute facts. First, that ALJ Daniel Hovland issued his decision on October 16, 2000, attributing Keidel's entire impairment of the left knee to injury, without apportionment. The evidence at the time of the initial hearing before ALJ Hovland included two surgical reports showing osteoarthritis, and the IME of Dr. Stern. ALJ Hovland affirmed the 15% impairment rating based on Dr. Dilla's "*contention that the medial meniscectomy procedure itself is what led to the degenerative arthritis which led to the arthritis impairment rating, utilizing Table 62, page 83*." (R. 107). Second, Dr. Redington himself admitted that in changing his opinion from non-apportionment to apportioning one-half of the impairment to preexisting knee osteoarthritis he was relying on evidence already of record at the time of the hearing before ALJ Hovland in 2000: "I missed the fact that the surgical narrative described the patellofemoral joint as bone on bone, which would not be from a meniscal injury, but of long-standing osteoarthritis process, greatly preceding the injury of 7 months prior." (R. 140). Dr. Redington thus admits that he apportioned Keidel's impairment based on Dr. Gattey's December 23, 1996, surgical report narrative—*which was available to WSI at the time Keidel's impairment rating for knee arthritis was determined by ALJ Hovland on October 16, 2000.*

[3] The determination that Keidel's knee arthritis is work-related is a causal determination that cannot be relitigated as the issue as to the seriousness of a condition can be. These are two clearly separate concepts. Like determining paternity, this causal

determination can be done but once. On the other hand, child emotional and financial support can change over time—as can the seriousness of an arthritic knee. Keidel's knee now requires knee replacement, which ALJ Hovland recognized would likely increase his impairment rating in the future due to his knee osteoarthritis—and there had not been any causal apportionment to such arthritis. R. 19, finding 6). ALJ Hovland had also found that "The claimant continued to experience problems following the surgical procedure on December 23, 2996… Dr. Gattey concluded that there was bone wearing on bone wearing on the medial side of the knee." (*Id.,* finding 5).

[4] The evidence on which WSI subsequently relied to apportion Keidel's impairment to a preexisting condition—the surgeries on December 23, 1996 (R. 157); and October 20, 1997 (R. 181) both of which show bone on bone arthritis—were available at the time of the 2000 hearing. The issue whether Keidel suffered preexisting left knee arthritis could have been litigated at that time. But in this hearing, ALJ Hovland did not find any knee impairment to be due to a preexisting condition. Again, this is a causal determination that can only be done once. We cannot go back in time to re-litigate causal decisions once made; this obviously opens Pandora's box. Rather, Keidel's PPI claim is a simple determination of impairment due to a change in seriousness of the condition (total knee replacement) under a newer version (6th Edition) of the AMA Guides. Keidel's need for future total knee replacement was predicted from the time of the hearing before ALJ Hovland in 2000, as likely to flow from what was found in the initial surgery (osteoarthritis). ALJ Hovland noted in his October 16, 2000 decision that: "claimant has had two [2] consults with orthopedic surgeons both of whom have recommended either a partial knee replacement or a total knee replacement." (R. 19, finding 6).

[5] *Cridland* noted that the dispositive issue involved the preclusive effect of the ALJ's Order awarding non-apportionable benefits will full knowledge of a fall that could've been used to apportion benefits. *Cridland v. North Dakota Workers Compensation Bureau* 1997 ND 223, 571 N.W.2d 351, ¶ 12. This was a causal decision that could not be relitigated because WSI had had the opportunity to do so in the first hearing before hearing officer Mikkelson. As in *Cridland,* WSI here had full knowledge from operative reports that Keidel had significant osteoarthritis that could lead to total knee replacement surgery—and did not seek apportionment in the 2000 hearing. It could have done so then; it cannot do so now. The PPI rating of Dr. Redington is not "new evidence" as to *the cause of* osteoarthritis. Rather, the PPI rating of Dr. Redington based on total knee replacement surgery was predicted from the time Dr. Gattey had done the first surgeries and is based on change in the seriousness of the condition, not altering what caused it.

[6] The *Cridland* Court noted that ALJ Mikkelson had held a "formal 'trial-type' hearing," which included references to Cridland's bathroom fall. ¶ 20. The Court noted that "[ALJ] Mikkelson decided Cridland's claim for disability and medical benefits after a trial-type procedure and *without apportioning benefits* between the work injury and the bathroom fall. That's precisely what ALJ Hovland did here. *Given the Bureau's knowledge of the bathroom fall and the medical records indicating a herniated disc, the underlying rationale for res judicata is not served by permitting multiple adjudicative proceedings first to decide a claimant's continued entitlement to benefits and then to decide apportionment of those benefits*." ¶ 21. Similarly, the Bureau had knowledge from two surgical reports that Keidel already had severe knee osteoarthritis and would likely have total knee replacement. The underlying rationale

for the doctrine of res judicata is eviscerated if the Bureau can litigate a causal apportionment issue of which it was aware at the time of ALJ Hovland's opinion determining knee impairment based on arthritis without apportionment.

[7] Similarly, the *Cridland* Court noted that "[t]he aggravation and apportionment issues decided in the later proceeding were issues that *could have been resolved* in the previous formal adjudicative proceeding before hearing officer Mikkelson." ¶ 22. "Permitting litigation of the aggravation and apportionment issues after a formal adjudicative hearing deciding compensability does not promote finality or the 'sure and certain relief' envisioned by the workers compensation act. … Under administrative res judicata, the Bureau's July 27, 1995 order would ordinarily preclude the Bureau from apportioning Cridland's benefits between the two occurrences because the aggravation and apportionment issues should have been decided in the formal adjudicative proceeding before hearing officer Mikkelson."

[8] In sum, Dr. Dilla's PPI rating explicitly noted that he expected that Keidel would qualify for an additional PPI rating after knee replacement, and ALJ Hovland noted it very likely—according to two orthopedic surgeons. And even Dr. Redington admitted that the operative report that predated the initial non-apportioned PPI award is what convinced him to apportion to a preexisting osteoarthritis in his second apportionment determination in June 2020. (R. 141). The issue of apportionment based on preexisting knee arthritis was clearly identifiable at the time of Dr. Dilla's rating and ALJ Hovland's decision, because the bureau had the *surgical reports of the meniscectomy and high tibial osteotomy at the time—which are basis now for Dr. Redington's attempt to override the lack of apportionment in the prior proceedings.*

[9] WSI argues that *Cridland* does not prevent apportionment now, because the first PPI rating was done under the 4th Edition of the AMA Guides, while Redington's was done under the 6th Edition—without being able to explain away the central causal determination that can only be made one time. WSI glibly portrays Redington's apportionment as simply being based on the "significant change in his compensable left knee medical condition which resulted in the need for a total knee arthroplasty." (WSI Brief at ¶ 46).

[10] WSI argues that "[i]f res judicata applied, would not Keidel's impairment for his arthritic condition have to be what was determined in 1999-2000 regardless of any change in condition?" (WSI Brief at ¶ 47). No, because WSI is not just reopening to evaluate a change in seriousness of the knee condition; it is attempting to relitigate causation and now apportioning part of the condition to a preexisting condition—as issue of which it was on notice of through two operative reports of Dr. Gattey and the IME of Dr. Stern. It was overwhelmingly obvious by the time of the hearing before ALJ Hovland that Keidel had significant knee osteoarthritis.

[11] WSI's characterization of Keidel's PPI claim as reopening due to change in condition (total knee replacement) is just wrong. WSI's denial of PPI benefits is not due to the impairment rating itself as Class 4, Grade A (seriousness). Rather, the denial of PPI benefits is actually based on evidence relating to a new 50% *causal apportionment* done by Dr. Redington wherein WSI seeks "*to reopen a claim for the consideration of new or additional evidence of medical condition existing at the time of an earlier denial." Again, the evidence as to causal apportionment was clearly available at the time of the Hearing over which ALJ Hovland presided in 2000. This issue could have*

been raised in that hearing. This is precisely the doctrine of administrative res judicata.

[12] WSI argues that res judicata is not applicable because Dr. Redington's rating in 2020 is based on new evidence (yet the prior operative reports were in existence at the time of the 2000 hearing); a new operative procedure (total knee replacement that was predicted); and a new evaluation of impairment under a later version of the AMA Guides. (WSI Brief at ¶ 47-48). WSI emphasizes that there are two different versions of the AMA Guides used to rate the impairment—as if this gets rid of its res judicata problem. (WSI Brief at ¶ 48). Again, this is remarkable conflation of two issues. One can make a final causal apportionment determination (whether any impairment is due to preexisting osteoarthritis) in the first proceeding under the 4th Edition and in the second proceeding determine the new rating for impairment due to the total knee replacement surgery under the 6th Edition of the AMA Guides. (Change in seriousness of said arthritic knee). There is *nothing new in the evidence as to the existence of osteoarthritis in his left knee* that did not exist in 2000; we have the change in seriousness that was reasonably expected in 2000 to the point of total knee replacement surgery.

[13] The *Cridland* Court rejected the Bureau's argument that it could simply render a new decision by invoking its continuing jurisdiction under N.D.C.C. § 65-05-04. The Court said:

> Here, the Bureau's July 27, 1995 order was made with knowledge of Cridland's bathroom fall and after a formal adjudicative hearing. Although the Bureau subsequently ordered an independent medical examination by Dr. Ray, *her opinion was not new evidence in the sense that it involved a change in Cridland's medical condition or evidence discoverable only after the July 27, 1995 order. Compare Lass v. North Dakota Workmen's Comp. Bur.,* 415 N.W.2d 796, 800 (N.D.1987) (Workers Compensation Act did not authorize Bureau to deny future claims based upon change in claimant's medical condition). *Rather, Dr.*

> *Ray's opinion was based upon records available to the Bureau before the July 27, 1995 order.*

Cridland ¶ 28. (Emphasis added).

[14] While Dr. Ray's IME was new in the sense that it was conducted after the hearing, *it was not new in that it addressed causation issues that had been previously identified* by hearing officer Mikkelson. According to the Court, the IME "was *not new evidence* in the sense that it involved a change in Cridland's medical condition or evidence discoverable only after the July 27, 1995 order." *Cridland* ¶ 28. Similar to the new IME in *Cridland*, the evidence on which Dr. Redington now relies to apportion Keidel's osteoarthritis—Dr. Gattey's December 23, 1996, surgical note (R. 157)—was available to WSI at the time Keidel's PPI claim was first heard by ALJ Hovland in September 2000. This was a causal determination, capable of final determination, not simply a change in medical condition. The causal determination as to a preexisting condition can be made only once, in contrast to evaluations of the severity of the disability or impairment that may change over time. Causation decisions do not change over time. WSI's entire argument boils down to the fact that the first rating was done under the 4th Edition of the AMA Guides, while the second under the 6th Edition, without being able to explain how that justifies litigating a non-apportionment decision already made in the initial hearing.

[15] WSI cites *State ex rel B.O.C. Group v. Industrial Com'n of Ohio*, 569 N.E.2d 496 (1991) for the unremarkable proposition that res judicata does not apply if the issue is the "physical condition or degree of disability at two entirely different times." (WSI Brief at ¶ 49). This is simply the *Lass* rule: *change in the seriousness of a condition can change over time*; a causal decision does not. WSI is comparing apples and oranges

here. Again, the Court in *Lass v. North Dakota Workmen's Compensation Bureau*, 415 N.W.2d 796, 800 (N.D. 1987), observed that disability determinations (similar to PPI ratings) must be reconsidered based on a significant change in the seriousness of a condition (as is the case for his total knee replacement). This, the Court said, "is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether." *Id.,* at 800, citing 3 Larson's Workmen's Compensation Law § 81.10, p. 15-528 (1983). This does not mean that a work-related *diagnosis* can be changed because it worsens. It means that the *rating* can be adjusted upward for the knee replacement—which was predicted to be likely.

[16] WSI also cites *Ziesch v. Workforce Safety & Insurance*, 2006 ND 99, 713 N.W.2d 525, as supportive of its position here. But that case is about seriousness of a condition—not a causal determination as an apportionment decision is. Re-examining causal determinations opens Pandora's Box to an unrecognizable world.

Dated this 19th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

[17] The undersigned, as attorney for the Appellant in the above matter, hereby certifies, in compliance with North Dakota Rule of Appellate Procedure 32, that the above brief was prepared with proportionally spaced, 12 point font typeface, and the total number of pages of the above Reply Brief totals 11 pages, inclusive.

Dated this 19th of October, 2022.

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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. **Reply Brief of Appellant Jesse Keidel; and**
2. **Affidavit of Service.**

[2] On October 19, 2022, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

Jacqueline Anderson
janderson@nilleslaw.com

[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:

Kolling & Kolling, Inc.
PO Box 1225
Dickinson ND 58602

[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 19th day of October, 2022.

MICHELE A NICHOLS
Notary Public
State of North Dakota
My Commission Expires August 14, 2025

Notary Public