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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

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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Statement of the Issues

[1] ALJ Hovland's October 16, 2000, Order making a causal determination that Jesse Keidel suffered Permanent Partial Impairment (PPI) to the left knee due to arthritis, without apportionment to a preexisting condition, is res judicata and cannot be relitigated as demonstrated in *Cridland v. North Dakota Workers Compensation Bureau*, 1997 ND 223, 571 N.W.2d 351.

Statement of the Case

[2] Jesse Keidel suffered an injury to his left knee on May 21, 1996, while employed by Kolling & Kolling, Inc., as construction foreman. (R. 1). Keidel suffered a torn medial meniscus but there was a seven month delay in surgery—which was subsequently identified as contributing to the development of knee arthritis. Dr. Gattey performed surgery on December 23, 1996. (R. 157). On October 20, 1997, Dr. Gattey performed a second surgery: high tibial osteotomy *due to medial compartment arthritis*. (R. 181). On June 9, 1999, Dr. Dilla rated Keidel's left knee impairment *due to "posttraumatic degenerative arthritis" of the medial knee compartment*, range of motion deficits, and atrophy of the left thigh, at 15% of the whole body. (R. 95-99). WSI issued an Order on August 20, 1999, finding 15% whole body impairment, which did not meet the 16% whole body threshold then in effect for an impairment award. (R. 7-8). Keidel requested a hearing, which was held on September 27, 2000. (*See* R. 17).

[3] Administrative Law Judge Daniel F. Hovland issued Recommended Findings of Fact, Conclusions of Law, and Order on October 16, 2000, affirming the 15% impairment rating (which resulted in no award to Keidel due to the 16% whole body threshold then in effect). (R. 17). ALJ Hovland's decision is based on Dr. Dilla's June 9,

1999, PPI rating primarily for left knee arthritis, *without apportionment to a preexisting condition*. Dr. Dilla had noted that "if this individual does have a total knee replacement done in the future for progressive degenerative arthritis of the knee, re-evaluation for impairment may in fact have to occur." (R. 97). ALJ Hovland also recognized that the impairment rating would likely increase in the future, finding that Keidel had two consultations with other orthopedic surgeons both of whom have recommended knee replacement. (R. 19, finding 6).

[4] As predicted, Dr. Carpenter performed total knee arthroplasty on January 28, 2019. (R. 276-277). On June 24, Dean Redington, D.C.—who conducts the vast majority of WSI's impairment ratings—evaluated Keidel, and opined that his left knee impairment is Class 4 under "total knee replacement" in Table 16-3 of the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment, at 24% of the whole body. (R. 129).

[5] Under "Apportionment," (R. 131), Dr. Redington then found that "the preponderance of evidence [is] that he probably had some preexisting arthritis, the degree of which cannot be determined, but it was asymptomatic. Unless more information becomes available, I cannot apportion any of the derived impairment to preexisting problems." (R. 132). WSI's PPI auditor, Jolene Rohde, asked Dr. Redington to reconsider lack of apportionment to a preexisting condition, arguing that his right knee had also been replaced. (R. 138).

[6] Ever accommodating, Dr. Redington stated that in "re-reviewing 12/23/1996 surgical [narrative] of Dr. Gattey, in which he performed a near total or total medial meniscectomy[,] 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).

[7] 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.* On August 18, 2020, WSI issued a Notice Denying Permanent Impairment Benefits. (R. 68). Keidel requested reconsideration because almost 20 years earlier, on October 16, 2000, ALJ Hovland had previously determined that his knee arthritis was the basis for left knee impairment entirely attributable to his May 21, 1996 work injury without apportionment. (R. 70).

[8] Dr. Dilla's June 9, 1999, rating included left knee impairment *due to posttraumatic degenerative arthritis* (*see* R. 95-99), and this rating was actually litigated and affirmed by ALJ Hovland on October 16, 2000. (R. 17-23). The determination that Keidel's suffered left knee posttraumatic arthritis that gives rise to impairment *without apportionment* to any preexisting condition in connection with his May 21, 1996 injury became final. WSI cannot relitigate the causation issue of knee arthritis under the doctrine of res judicata.

[9] On November 19, 2020, WSI issued an Order denying an impairment award for his left knee, apportioning 50% of the impairment to preexisting arthritis—in effect trying to relitigate a causal determination made by ALJ Hovland in his Order dated October 16, 2000. (R. 80-83). Keidel requested a hearing, pointing out that Dr. Dilla's 15% PPI rating done in June 1999, and Dr. Dilla's "contention that the medial meniscectomy procedure itself is what led to the degenerative arthritis" without apportionment had become final. (R. 86). Keidel argued that his knee arthritis had already been found to be work-related without apportionment, and WSI could not relitigate the causal apportionment issue when

the arthritis eventually also led to total knee replacement.

Statement of the Facts

[10] Keidel's injury to his left knee on May 21, 1996, resulted in permanent impairment of the left knee, and necessitated three surgical procedures. WSI paid the cost of each surgical procedure in full, without apportionment to a preexisting condition. Prior to the PPI evaluation done by Dr. Dilla in June 1999, Keidel was primarily treating with Dr. Gattey. On July 5, 1996, Dr. Gattey noted a probable sprain and injured medial meniscus. (R. 151). On September 5, 1996, Dr. Gattey diagnosed a large and disorganized tear of the medial meniscus which he correctly predicted would trouble Keidel long into the future. (R. 153). Dr. Gattey also referred him for several stints of physical therapy. (*See* R. 195-206). Dr. Gattey performed medial meniscectomy on December 23, 1996. (R. 157). In his operative note, Dr. Gattey reported that the ACL looks like one in an arthritic knee, and that Keidel has grade 3 degenerative changes in the patellofemoral joint. *Id.* Dr. Gattey also noted that because Keidel had no prior left knee symptoms, the left knee arthritis was a surprise. (R. 158).

[11] Keidel continued to have swelling, stiffness and pain, and was thought likely to require another surgery, high tibial osteotomy. (*See* R. 167-- April 3, 1997; R. 168-- June 11, 1997). On June 18, Dr. Gattey wrote to WSI that there was a causal relationship between the development of arthritis and injury; he said "[p]erhaps he had osteoarthritis preceding his injury but there is no history of that. His story does not lead one to suspect this. It certainly triggered the sequence of events that brought him to me." (R. 167-a). The issue as to whether Keidel had preexisting knee arthritis was apparent at the time of PPI hearing over which ALJ Hovland presided on September 27, 2000. Dr. Redington admitted that in

deciding to apportion impairment to a preexisting condition left knee arthritis *he was 're-reviewing' Dr. Gattey's December 23, 1996 surgical note.* (R. 140).

[12] Dr. Gattey performed high tibial osteotomy on October 20, 1997. (R. 181). *The post operative diagnosis was medial compartment osteoarthritis left knee*. *Id*. On December 4, 1997, Dr. Gattey noted Keidel had limited range of motion. (R. 184). Keidel also treated periodically with Dr. Kovacs from February 1997 to July 2010. (R. 207-234). Dr. Kovacs generally diagnosed post traumatic degenerative joint disease of the left knee throughout 1998. (*See e.g*., R. 209; R. 211; R. 212; R. 213; R. 214). WSI had long been aware that Keidel had knee arthritis, yet the initial PPI rating incorporating knee arthritis as the basis for the rating was not apportioned to a preexisting condition in the litigation before ALJ Hovland in the fall of 2000. (R. 17-23).

[13] Dr. Stern conducted an IME on behalf of WSI and its outside counsel on May 19, 1998, stating that Keidel suffered from preexisting degenerative joint disease in the knee which had not manifested itself yet before the work injury. (*See* R. 237, discussion, number 2). Dr. Stern opined that the work injury "acted as a trigger to produce symptoms in his left knee. This 'work trigger' substantially aggravated and accelerated the degenerative condition of his left knee. The reason for this opinion has to do with the delay to surgery. … However, the surgery was not performed until seven months after his initial injury, and, in my opinion, working construction with a large complex tear of his entire medial meniscus would have accelerated and permanently aggravated his left knee condition." (R. 238). In his June 29, 1998, letter to WSI counsel, Dr. Stern opined that Keidel's "left knee condition was accelerated and permanently aggravated. It is my opinion, as a board certified orthopedic surgeon, *this acceleration and permanent aggravation ultimately led to his need*

for high tibial osteotomy for medial compartment degenerative joint disease." (R. 239). (Emphasis added). Thus, WSI and its counsel was certainly aware of the issue of preexisting arthritis at the time of the hearing before ALJ Hovland the following September 2000, but did not raise the issue at that hearing.

[14] On November 4, 1998, Dr. Kovacs opined it "reasonably possible" that Keidel would reach the 16% PPI threshold then in effect. (R. 216). Dr. Gary Dilla thus performed an impairment rating on June 9, 1999. (R. 95-103). Dr. Dilla's impression was *posttraumatic degenerative arthritis, left knee, and post status meniscectomy and tibial osteotomy "secondary to degenerative arthritis, left knee*." (R. 96). Dr. Dilla then rated Keidel's impairment under the 4th Edition of the AMA Guides, using loss of knee range of motion in Table 41; mild thigh circumference abnormality under Table 37; and, results of radiographic studies under Table 62). (R. 98, number 5-a to 5-c). The ROM loss was 4% impairment. (R. 98, number 6). Left thigh atrophy yielded a rating of 1%). (R. 98, number 7). Dr. Dilla rated the degenerative changes in the knee (as objectively shown by radiographs) as yielding 10% impairment. (R. 99, number 11). Dr. Dilla noted that "no impairment would apply for the patellofemoral joint." *Id.*

[15] Dr. Dilla rated Keidel's work related left knee impairment from the May 21, 1996, work injury as "10% impairment of the whole person *due to medial knee compartment arthritis*." (R. 99, number 12). Dr. Dilla's PPI rating for knee arthritis was clearly attributed directly to Keidel's May 21, 1996 work injury, *without apportionment*. *Id.* Asked to comment on Mr. Keidel's concerns about the PPI rating, Dr. Dilla wrote that "*it is my 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).

(Emphasis added). Dr. Dilla clearly attributed the arthritis in the medial joint to his long untreated left meniscus tear, which was surgically operated on only seven months post injury. He did not apportion the arthritis to a preexisting condition.

[16] Dr. Dilla used the 4th Edition of the AMA Guides to rate Keidel's impairment as 15% of the whole body, entirely attributable to the work injury. He also noted that "*[i]f this individual does have a total knee replacement done in the future for progressive degenerative arthritis of the knee, re-evaluation for impairment may in fact have to occur*." (R. 97). 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). ALJ Hovland found that Dr. Dilla provided a 15% PPI rating *for Keidel's work related injury to the left knee.* (*See* R. 19, finding 7). ALJ Hovland noted that "*Dr. Dilla was deposed and he adequately explained the basis for his impairment rating*. *See* Exhibit B16." (R. 22, conclusion of law 5).

[17] Dr. Dilla opined that Keidel's medial compartment osteoarthritis of the left knee is caused by the May 21, 1996, work injury without apportionment to a preexisting condition. WSI had ample opportunity to contest the PPI determination that Keidel suffered from work related left knee osteoarthritis at the hearing before ALJ Hovland on September 27, 2000. WSI Claim Operations Manager, Nick Jolliffe affirmed the recommended decision of ALJ Hovland on November 20, 2000. (R. 16). In sum, the work relatedness of Keidel's osteoarthritis of the left knee was stated by two doctors; accepted by WSI in its Order finding a 15% PPI based on knee arthritis; and affirmed by ALJ Hovland after hearing. WSI and its counsel had also obtained the IME opinion of Dr. Stern, who also

addressed the issue of knee arthritis. (R. 239). The causal determination whether Keidel suffered a nonwork component of preexisting left knee arthritis was clearly an issue of which WSI was aware, and could have been litigated at the September 27, 2000 hearing before ALJ Hovland.

[18] Dr. Redington initially said: "I cannot apportion any of the derived impairment to preexisting problems." (R. 132). WSI's PPI auditor, Jolene Rohde, asked him to reconsider, stating: "the right knee cannot be utilized as normal for comparison as it is [also] status post total knee arthroplasty. However, Mr. Keidel has not sustained a work related injury to the right knee and yet, a rating of the right knee would result in the same impairment as the left knee … Given this information, would apportionment not be appropriate, since Mr. Keidel's uninjured right knee actually has a worse impairment than that of his injured left knee, even if the arthritic changes of the left knee were accelerated by the 7 month timeframe between injury and the meniscectomy procedure?" (R. 138).

[19] Ever accommodating, Dr. Redington stated that in "re-reviewing 12/23/1996 surgical [narrative] of Dr. Gattey, in which he performed a near total or total medial meniscectomy[,] 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). Of course, this surgical report was available at the time of Dr. Dilla's PPI rating, and at the time of the hearing before ALJ Hovland.

[20] Dr. Redington's belated apportionment founders on the brute fact that the issue of the work relation of his knee arthritis was the subject of prior litigation before ALJ Hovland on September 27, 2000. Thus, WSI cannot relitigate the issue of the causal

relationship between left knee osteoarthritis and the May 21, 1996 work injury these many years later. The *issue of causation* is subject to a final determination, and relitigating the issue is precluded by the doctrine of res judicata.

[21] Dr. Redington altered his rating on the premise that "*the uninjured right knee* had essentially the same outcome without a known injury, thus an argument could be made that the total *left knee replacement would have eventually been necessary in the absence of the work injury*, but the work injury likely accelerated the need for the same." (R. 141). Not only has Dr. Redington rejiggered the facts to suit his purpose, he committed *legal error by using a potential PPI rating for an uninjured right knee* as grounds to deny PPI for the injured left knee.

Law and Argument

I. Standard of Review

[22] Keidel's appeal of the ALJ's decision is brought under the North Dakota Administrative Agencies Practice Act, chapter 28-32. 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. The issue of the res judicata effect of Administrative Law Judge Daniel F. Hovland Findings of Fact, Conclusions of Law, and Order on October 16, 2000, affirming the 15% impairment rating without apportionment to a preexisting condition is a question of law for the Court.

II. WSI is barred by the doctrine of res judicata from litigating the causal apportionment issue of which it was aware and could have been raised in the 2000 PPI hearing.

[23] Dr. Dilla rated Keidel's work related left knee impairment from the May 21, 1996, work injury as "10% impairment of the whole person *due to medial knee compartment arthritis*." (R. 99, number 12). (Emphasis added). Dr. Dilla's PPI rating was in connection with work related knee arthritis, without apportionment. Dr. Dilla stated it is his "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). (Emphasis added).

[24] Dr. Dilla's opinion that the work injury caused the knee arthritis is wholly consistent with Dr. Stern's opinion. Dr. Stern's May 19, 1998, IME done at the behest of WSI outside counsel states that Keidel suffered from *preexisting degenerative joint disease in the knee* which had not manifested itself yet before the work injury. (R. 237, discussion, number 2). He opined that the work injury "acted as a trigger to produce symptoms in his left knee. This 'work trigger' substantially aggravated and accelerated the degenerative condition of his left knee. The reason for this opinion has to do with the delay to surgery. … However, the surgery was not performed until seven months after his initial injury, and, in my opinion, working construction with a large complex tear of his entire medial meniscus would have accelerated and permanently aggravated his left knee condition." (R. 238).

[25] WSI had questions of Dr. Stern, as evidenced by his June 29, 1998, letter to WSI counsel. (R. 239). Dr. Stern opined that Keidel's "left knee condition was accelerated and permanently aggravated. It is my opinion, as a board certified orthopedic surgeon, this *acceleration and permanent aggravation* ultimately led to his need for high tibial osteotomy *for medial compartment degenerative joint disease*." (R. 239). A high tibial osteotomy is a surgical procedure that realigns the knee joint. For some patients who have knee arthritis,

this surgery can delay or prevent the need for a partial or total knee replacement by preserving damaged joint tissue. The opinions of Dr. Gattey and Dr. Stern that the work injury caused and permanently accelerated arthritis is the reason Keidel had high tibial osteotomy surgery. None of the doctors, including Dr. Dilla in his impairment rating, apportioned Keidel's arthritis to a preexisting condition. *The issue as to aggravation and apportionment to preexisting arthritis was clearly an issue of which WSI's legal counsel was aware at the time of the hearing before ALJ Hovland in 2000.*

[26] Dr. Dilla used the 4th Edition of the AMA Guides to rate Keidel's impairment at 15% of the whole body, entirely attributable to the work injury, without apportionment. Dr. Dilla also noted that "[i]f this individual does have a total knee replacement done in the future for progressive degenerative arthritis of the knee, re-evaluation for impairment may in fact have to occur." (R. 97). ALJ Hovland also noted that two orthopedic surgeons had advised Keidel that it was likely he'd also need a knee replacement in the future. (R. 19, finding 6). ALJ Hovland found that Dr. Dilla provided a 15% PPI rating *for Keidel's work related injury to the left knee.* (R. 19, finding 7.) ALJ Hovland stated that "Dr. Dilla was deposed and he adequately explained the basis for his impairment rating. *See* Exhibit B16." (R. 22, conclusion of law 5).

[27] The causation issue as to the *work relation of Keidel's left knee osteoarthritis* was an issue that could have been addressed in the hearing before ALJ Hovland. WSI had ample opportunity to contest Dr. Dilla's determination that Keidel suffered from work related osteoarthritis without apportionment. WSI did not alter ALJ Hovland's finding that the May 21, 1996 work injury caused left knee arthritis that led to the 15% whole body PPI rating. This issue as to the cause of Keidel's osteoarthritis was litigated or could have been

litigated in the proceeding over which ALJ Hovland presided in October 2000.

[28] This case is similar to *Cridland v. North Dakota Workers Compensation Bureau*, 1997 ND 223, 571 N.W.2d 351, where the Court refused to allow the Bureau to apportion benefits and relitigate a prior determination under circumstances in which WSI's prior order awarding full benefits was "entered with knowledge of the noncompensable injury and after a formal adjudicative hearing."

[29] Cridland had suffered a work injury to the lumbar spine on September 3, 1993. ¶ 2. She slipped at home on September 26, 1993, suffering a fracture to the right hand and "reinjuring her back." ¶ 3-4. A WSI claims adjuster then began to investigate *the causal relationship* between the Cridland's lumbar spine condition and the work and non-work injuries. ¶ 6. But in the meantime her benefits were suspended for failing to provide medical records and the Bureau terminated her wage loss benefits. ¶ 7. She requested a hearing, and in an Order dated July 27, 1995, ALJ Mikkelson reversed, citing medical records and concluding that "Cridland remained disabled as a result of her work injury and was entitled to reasonable medical expenses and disability benefits." ¶ 8.

[30] Neither side appealed from ALJ Mikkelson's decision, but WSI obtained an IME opinion from Dr. Ray which "attributed 25 percent of Cridland's back difficulties to her work injury and 75 percent to her bathroom fall. The Bureau issued an order accepting Dr. Ray's opinion, awarding Cridland benefits on a 25 percent aggravation basis, and requiring her to repay about $24,000 in medical and disability benefits previously paid by the Bureau. Cridland requested a rehearing." *Id.*

[31] At the subsequent hearing, ALJ Wahl recommended affirming the

Bureau's aggravation and apportionment order, "concluding (1) the Bureau had continuing jurisdiction under N.D.C.C. § 65-05-04 to review the award to Cridland, (2) the apportionment issue was not considered by administrative law judge Mikkelson and therefore the doctrine of administrative res judicata did not preclude the Bureau from deciding that issue, and (3) the only evidence about the effect of Cridland's bathroom fall on her lower back condition was Dr. Ray's opinion." ¶ 10. The Court noted that "the dispositive issue involves the preclusive effect of the Bureau's July 27, 1995 order [issued by ALJ Mikkelson]." ¶ 12.

[32] The *Cridland* Court noted that "[t]he preclusive effect of a prior proceeding on a subsequent action has traditionally been governed by the doctrines of res judicata and collateral estoppel." *Cridland*, ¶ 13, citing *Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383* (N.D.1992). The *Cridland* Court also noted that had previously "explained the rationale for precluding reconsideration of claims or issues under the doctrines of res judicata and collateral estoppel" in *K & K Implement v. First Nat. Bank,* 501 N.W.2d 734, 738 (N.D.1993):

> The doctrines promote efficiency for the judiciary and the litigants by requiring that disputes be finally resolved and ended.... "Courts apply the doctrine of *res judicata* to promote the finality of judgments, which in turn increases certainty, discourages multiple litigation and conserves judicial resources."... A party who brings some claims into one court without seeking complete relief and brings some related claims in another court, or who presents some issues in one court proceeding and reserves others to raise them in another court, invites wasteful expense and delay. Application of the law of res judicata conserves scarce judicial resources and avoids wasteful expense and delay.

[33] The *Cridland* court next quoted *Hofsommer,* 488 N.W.2d at 383, where that Court had described the difference between res judicata and collateral estoppel:

> Although collateral estoppel is a branch of the broader law of res

> judicata, the doctrines are not the same. Res judicata, or claim preclusion, is the more sweeping doctrine that prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction.... On the other hand, collateral estoppel, or issue preclusion, generally forecloses the relitigation, in a second action based on a different claim, of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit.

[34] *Cridland* noted that the Court's "recent decisions have distinguished collateral estoppel, or issue preclusion, and res judicata, or claim preclusion, in part on the basis of whether an issue *was actually litigated in a prior proceeding*, or whether the issue was raised *or could have been raised in the prior proceeding*." *Cridland*, ¶ 15, citing *Americana Healthcare Ctr. v. North Dakota Dep't of Human Servs., 513 N.W.2d 889,* 891, n. 2 (N.D.1994); … *Circle K v. Industrial Com'n,* 179 Ariz. 422, 880 P.2d 642, 645-46 (1993) (holding that "collateral estoppel requires actual litigation of issue in prior proceeding while res judicata does not.") *Cridland,* ¶ 15.

[35] The Court next noted that "the aggravation and apportionment issues for Cridland's work injury and bathroom fall *were not actually decided* by the Bureau's July 27, 1995 order. Collateral estoppel, which applies to issues actually litigated in prior proceedings, therefore does not apply to these issues." *Cridland*, ¶ 16.

[36] The Court explained that "res judicata, however, is broader than collateral estoppel and prohibits relitigation of claims that were raised or *could have been raised* in a prior proceeding between the same parties or their privies, and which were resolved by a final judgment in a court of competent jurisdiction." *Cridland*, ¶ 17

(citations omitted). "The applicability of the doctrine of res judicata is a question of law." *Cridland*, ¶ 17 citing *Hofsommer,* 488 N.W.2d at 383.

[37] The *Cridland* Court continued: "[a]dministrative res judicata is the judicial doctrine of res judicata applied to an administrative proceeding." *Cridland*, ¶ 18. The Court has said "we apply administrative res judicata more circumspectly than judicial res judicata, taking into account (1) the subject matter decided by the administrative agency, (2) the purpose of the administrative action, and (3) the reasons for the later proceeding." *Cridland*, ¶ 18 (citations omitted).

[38] According to the Court, "that circumspection is due in part to the wide range of executive, judicial, and legislative functions performed by administrative agencies." *Cridland*, ¶ 19 (citations omitted). "Respected authorities have recognized administrative res judicata more readily applies when an administrative agency decides issues after according the parties the benefit of a trial-type procedure. II Davis and Pierce, Administrative Law Treatise, § 13.3, p. 250 (3rd ed.1994)." (Other citations omitted). The *Cridland* Court quoted the explanation offered by the United States Supreme Court in *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 107 (1991):

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an *adequate opportunity to litigate*, the courts have not hesitated to apply res judicata to enforce repose. *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394 (1966). Such repose is justified on the sound and obvious principle of judicial policy that *a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise*. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.... The principle holds true when a court has resolved an issue, *and should*

> *do so equally when the issue has been decided by an administrative agency ... which acts in a judicial capacity*.

Cridland ¶ 19. (Emphasis added).

[39] The Court noted that ALJ Mikkelson had held a "formal 'trial-type' hearing," which "lead to the Bureau's July 27, 1995 order deciding Cridland's continued entitlement to medical and disability benefits for her work injury." *Cridland* ¶ 20. The Court noted that the record considered by the ALJ 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. Under N.D.C.C. § 65-05-03, the Bureau has authority to decide "all questions within its jurisdiction" and its decisions are final and entitled to the same full faith and credit as a judgment of a court of record. *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.

[40] Here, Dr. Dilla rated Keidel's work related left knee impairment from the May 21, 1996, work injury as "10% impairment of the whole person *due to medial knee compartment arthritis*." (R. 99, number 12). Dr. Dilla's *PPI rating for knee arthritis* was clearly attributed directly to the work injury, without apportionment. *Id.* Asked to comment on Mr. Keidel's concerns about the PPI rating, Dr. Dilla wrote that "*it is my 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). (Emphasis added).

[41] Dr. Dilla clearly attributed the arthritis in the medial joint to his long untreated left meniscus tear, which was surgically operated on only seven months post injury. The Bureau was certainly aware that Dr. Dilla had found the arthritis to be work related, and ALJ Hovland had ordered this to be the final rating, after hearing. That rating was for work-related knee arthritis, without apportionment to a preexisting condition. WSI also had the evidence from Dr. Stern that the injury had permanently worsened the knee arthritis. The Bureau clearly could have challenged the PPI rating that found Keidel's impairment was due to the May 21, 1996 injury and was not preexisting, but chose not to.

[42] Crucially, *the December 23, 1996, operative report on which Dr. Redington* ***now relies*** *to apportion part of Keidlel's left knee arthritis to a preexisting condition was clearly available at the time of the 2000 hearing.* In reply to WSI counsel's question what led him to change his mind and apportion part of Keidel's impairment to preexisting knee arthritis, Dr. Redington testified that: "the main thing is what's described in the surgical report, the surgical narrative of 12/23/96." (R. 623; Hearing Transcript at page 134, lines 6-9). The surgical report was available at the time of the September 27, 2000 PPI hearing; WSI could have raised the causation issue as to preexisting knee osteoarthritis at that hearing, and did not. The determination of ALJ Hovland on October 16, 2000, that Keidel had 100% work related permanent impairment to the left knee due to osteoarthritis cannot be relitigated.

[43] 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."

[44] The Court has consistently emphasized that "res judicata, or claim preclusion, prevents relitigation of claims that were raised, *or could have been raised*, in prior actions between the same parties or their privies." *Kulczyk v. Tioga Ready Mix Co.*, 2017 ND 218, ¶ 10, 902 N.W.2d 485 (quoting *Missouri Breaks, LLC v. Burns*, 2010 ND 221, ¶ 10, 791 N.W.2d 33). Res judicata means a valid, final judgment is conclusive with regard to claims raised, *or claims that could have been raised*, as to the parties and their privies in future actions. *Kulczyk*, at ¶ 10. Whether res judicata applies is a question of law, fully reviewable on appeal. *Id.* Res judicata applies even though the subsequent claims may be based on a different legal theory. *Littlefield v. Union State Bank, Hazen, N.D.*, 500 N.W.2d 881, 884 (N.D. 1993). If the subsequent claims are based upon the identical factual situation as the claims in the earlier action, then they should have been raised in the earlier action. *Id.* It does not matter that the substantive issues were not directly decided in the earlier action, the key is that they were *capable of being, and should have been, raised* as part of the earlier action. *Id.* (citing *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 385 (N.D. 1992)).

[45] Dr. Dilla had documented that he expected that Keidel would qualify for an additional PPI rating after knee replacement, and ALJ Hovland noted it very likely.

The issue of apportionment based on preexisting knee arthritis was clearly identifiable at the point of Dr. Dilla's rating, because the rating doctor and *WSI had access to 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.* Dr. Redington's acknowledgment that the preexisting nature of Keidel's left knee arthritis was apparent at the time of the December 23, 1996 surgery further shows that this issue as to apportionment was ripe for decision at the time of the hearing before ALJ Hovland on September 27, 2000. This issue of apportionment due to preexisting arthritis is a claim that could have been raised in the hearing before ALJ Hovland. The issue as to the cause of something is a matter to be decided at a certain time; at hearing, or trial, or inquest. Causation is the quintessential issue that cannot be subject to multiple "visions and revisions." WSI does not have continuing jurisdiction that overcomes the doctrine of finality that is res judicata.

[46] 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).

[47] 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 ALJ 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. At the time of the September 27, 2000 hearing, the ALJ recognized that the change in severity of Keidel's condition to total knee replacement may well require a second PPI rating based on change in severity. That's indeed required, but in addition to this, WSI is also trying to relitigate causation—which it cannot do. This brings us to the essential case *Lass v. North Dakota Workmen's Comp. Bur.,* 415 N.W.2d 796, 800 (N.D.1987) which WSI misrepresents.

[48] *Lass* came about because the Bureau had long been operating under a profound misunderstanding of the effect of a simple discontinuation of disability benefits, believing that any work release and termination of disability benefits was final, and could not be reopened. For example, an employee might be released to heavy work, and benefits discontinued. Later, the employee might have a significant change in medical condition (which involves measuring the severity of disability, not relitigating causation of disability) and be given a light work release only. If the employee had skills only to do

heavy work, he or she might now be unable to work. Yet, WSI was claiming that disability could not be reopened. WSI claimed that reopening was purely discretionary, and that *its earlier determination of disability was res judicata*.

[49] Prior to *Lass*, the Bureau relied on *Jones v. North Dakota Workmen's Compensation Bureau*, 334 N.W.2d 188, 191 (N.D. 1983), for the proposition that once it discontinued benefits the *disability determination became final*. But that case is inapposite, because *Jones* did not involve disability, which can change over time, but had to do with the ***causal relationship*** *between the injury and the condition*. *A decision on causation or apportionment between injuries is something that can be—and should be—finally decided and not continually reopened and relitigated.*

[50] The doctrine of res judicata does not apply with equal force to disability determinations because the ability to work can change over time; once work relation is established, the disability that it occasions is not itself a causal determination. Rather, disability is proven with medical verification of disability. *See* N.D.C.C. § 65-05-08.3. A WSI decision is res judicata as to the worker's *disability status* as it then exists. The Court in *Lass v. North Dakota Workmen's Compensation Bureau*, 415 N.W.2d 796, 800 (N.D. 1987), observed that disability determinations must be reconsidered based on a significant change in condition. Thus, 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). Similarly, a PPI rating can be revised based on the change in the severity of the underlying injury:

from medical meniscus repair and high tibial osteotomy to the total knee replacement; *but the causal determination whether there was a preexisting knee arthritis cannot be relitigated.*

[51] The *Cridland* Court thus rejected the argument that the Bureau could simply exercise its continuing jurisdiction and apportion Cridland's claim between the work injury and the nonwork fall at home. "The plain language of N.D.C.C. § 65-05-04, authorizes the Bureau to review an award 'at any time' and 'in accordance with the facts found on such review' to 'end, diminish, or increase the compensation previously awarded.' That language, however, does not preclude application of the doctrine of administrative res judicata to Bureau decisions entered after a formal adjudicative hearing. *Although the Bureau has some discretionary authority to review previous awards under N.D.C.C. § 65-05-04, that statutory authority does not mean the Bureau can relitigate issues that were or should have been decided in a prior formal adjudicative proceeding.* We are not persuaded the Legislature intended to give the Bureau unlimited authority to relitigate issues that should have been raised in a prior formal adjudicative hearing." *Cridland*, ¶ 29.

[52] The Court also distinguished *Johnson v. North Dakota Workers' Comp. Bureau*, 484 N.W.2d 292 (N.D.1992), which upheld the Bureau's right to demand repayment due to an erroneous adjudication. In that case, "the Bureau's initial decision was made by a claims analyst in the context of an 'informal hearing.' Although the claims analyst's initial decision constituted a Bureau adjudication under N.D.C.C. § 65-05-29(3)(b), and was final under N.D.C.C. § 65-05-03, that decision was not made after a formal adjudicative hearing." In contrast, Keidel was found to have a work

related knee osteoarthritis after having participated in a formal trial type hearing before ALJ Hovland. The issue is one of causation and capable of final determination. The *Cridland* Court held that the principles of res judicata should bar relitigation, explaining that:

> Rather, *Johnson* and N.D.C.C. §§ 65-05-04 … must be considered in light of the doctrine of administrative res judicata, the importance of finality of agency decisions, and the purpose of the workers compensation law to provide injured workers with "sure and certain relief" *to preclude the Bureau, in the absence of new evidence or a change in medical condition, from relitigating claims which were, or should have been decided, in a prior formal adjudicative hearing*.

Cridland ¶ 29. (Emphasis added).

[53] Dr. Gattey's December 23, 1996 operative note on which Dr. Redington based his apportionment determination was available at the time of the September 27, 2000 hearing. WSI cannot relitigate this causal determination that Keidel suffered a non-apportionable work-related knee osteoarthritis. Dr. Dilla and ALJ Hovland did not apportion the rating to a preexisting arthritis. ALJ Hovland was also cognizant that Keidel would likely be rated again in the future, should the severity of his condition change so as to require knee replacement as contemplated by Dr. Dilla and the two consulting orthopedic surgeons. (ALJ Hovland Opinion, Finding 6, at R. 19).

Conclusion

[54] The Court should reverse the causal apportionment of impairment to a preexisting left knee arthritis under the doctrine of res judicata.

Dated this ____ day of September, 2022.

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CERTIFICATE OF COMPLIANCE

[55] 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 Brief totals 28 pages, inclusive.

Dated this 13th day of September, 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

[2] On September 12, 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 12th day of September, 2022.

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

Notary Public