

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>John Sandberg, Appellee and Cross-Appellant, vs. North Dakota Workforce Safety and Insurance, Appellant and Cross-Appellee, and Park Construction Co., Respondent.</p>	<p>Supreme Court No.: 20220354 Ramsey County District Court Civil No.: 2022-CV-00098 ORAL ARGUMENT REQUESTED</p>
--	---

**BRIEF OF APPELLANT NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

**APPEAL FROM JUDGMENT ENTERED OCTOBER 19, 2022
RAMSEY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE LONNIE W. OLSON**

Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544
janderson@nilleslaw.com
ATTORNEYS FOR APPELLANT
AND CROSS-APPELLEE

TABLE OF CONTENTS

Paragraph No.

STATEMENT OF THE ISSUES.....1

REQUEST FOR ORAL ARGUMENT2

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS11

LAW AND ARGUMENT25

 I. Scope of Review on Appeal.....25

 II. The District Court Erred In Reversing the ALJ’s Affirmance
 of WSI’s Denial of Entitlement to Disability Benefits..... 26

CONCLUSION.....37

TABLE OF AUTHORITIES

CASES

Paragraph No.

Carlson v. Workforce Safety & Ins.,
2012 ND 203, 821 N.W.2d 76010,33

Glass v. Glass,
2018 ND 14, 906 N.W.2d 8133

Parsons v. Workforce Safety and Insurance,
2013 ND 235, 841 N.W.2d 40425

Sloan v. North Dakota Workforce Safety and Insurance,
2011 ND 194, 804 N.W.2d 18425

Workforce Safety and Insurance v. Sandberg,
2019 ND 198, 931 N.W.2d 4884,14

Workforce Safety and Insurance v. Sandberg,
2021 ND 39, 956 N.W.2d 3421,6,7,17,26,28,32,33,36

Ziesch v. Workforce Safety and Insurance,
2006 ND 99, 713 N.W.2d 52529,30,31,34,35,36

Statutes and Rules

N.D.C.C. § 65-01-02(10)4,14

N.D.C.C. § 65-05-08.....24

N.D.C.C. § 65-05-08.3.....3,13

N.D.C.C. § 65-05-15.....2,6,8,11,17,18,20,22,26,31,35,36

N.D.C.C. § 65-05-15(1).....26

North Dakota Rules of Appellate Procedure Rule 28(h).....2

STATEMENT OF THE ISSUES

[1] Whether the District Court erred in reversing the ALJ's affirmance of the July 7, 2021, of Workforce Safety and Insurance ("WSI") because WSI exceeded the scope of this Court's remand in State by & through Workforce Safety & Ins. v. Sandberg, 2021 ND 39, 956 N.W.2d 342, when it also made a decision denying disability benefits on the claim.

REQUEST FOR ORAL ARGUMENT

[2] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure Appellant WSI requests oral argument. This is the third time this claim has been the subject of an appeal. WSI has appealed from the District Court's reversal of its decision on disability benefits. The case is also the subject of a cross-appeal on the issue of whether the claim is subject to N.D.C.C. § 65-05-15 and WSI's denial of disability benefits. It is believed oral argument will assist the Court in understanding WSI's determination in its July 7, 2021, Administrative Order, the scope of the underlying administrative hearing, and how the District Court's reversal of the ALJ's decision is not in accordance with the law.

STATEMENT OF THE CASE

[3] Sandberg filed a claim with WSI on July 6, 2016, claiming an injury to his cervical (neck) as an "All Other Occupational Disease" from unloading and placing rock with an excavator with continuous bouncing . . ." (R9:1) Sandberg wrote 9/28/2015 as his date of injury. Sandberg acknowledged he had prior problems to the body part of the claimed injury. (Id.) On September 22, 2016, WSI issued an Administrative Order denying the claim. (R15) Sandberg requested rehearing. (R16) Following an administrative hearing held in November of 2017, the administrative law judge ("ALJ") issued Findings of Fact, Conclusions of Law and Order dated December 30, 2017. (R17)

The ALJ reversed WSI's Administrative Order. (R17:41) Based on applying N.D.C.C. § 65-05-08.3, ALJ Jordheim made Findings of Fact that: (32) The greater weight of the evidence does not establish that Mr. Sandberg's work caused or substantially accelerated the progression of Mr. Sandberg's degenerative disc disease; (33) A preponderance of the evidence does not establish that Mr. Sandberg's herniated disc is a source of his pain; (34) A preponderance of the evidence does establish that operating the track hoe moving rip rap caused Mr. Sandberg's degenerative disc disease to become more **painful**. Prior to 2015, the pain lessened after rest during seasonal layoff and chiropractic treatment. Following, and as a result of a period of pushing rip rap year round, in 2015 Mr. Sandberg's work induced pain became worse and no longer responded favorably to rest and treatment; (35) A preponderance of the evidence does establish that Mr. Sandberg's jarring work over time has increased the severity of the symptom of pain produced by his pre-existing degenerative disc disease that has caused him to seek considerable medical treatment and ultimately prevented him from performing his lifelong occupation. (R17:39, emphasis supplied.)

[4] The December 30, 2017, Findings of Fact, Conclusions of Law and Final Order of the ALJ was appealed to this Court. In Workforce Safety and Insurance v. Sandberg, 2019 ND 198, 931 N.W.2d 488, this Court reversed the decision and remanded it to the ALJ because it was "unable to reconcile the ALJ's decision with the statutory requirements for medical evidence supported by objective medical findings for a compensable injury in N.D.C.C. § 65-01-02(10)." Id. ¶ 26 (R18:57) This Court explained its rationale for remand as follows:

[¶ 25] The ALJ found persuasive Dr. Peterson's medical opinion that Sandberg's work did not cause or substantially accelerate the progression

of his degenerative disc disease and determined the greater weight of the evidence did not establish Sandberg's work activities caused or substantially accelerated the progression of his preexisting degenerative disc disease. The ALJ also found, however, that Sandberg's work activities caused his degenerative disc disease to be more painful and increased the severity of the symptom of pain from his condition. As the trier-of-fact, the ALJ may rely upon either party's witnesses, and the ALJ has the responsibility to weigh the credibility of medical evidence and adequately explain its reasoning. *See, e.g., Workforce Safety & Ins. v. Auck*, 2020 ND 126, ¶ 14, 785 N.W.2d 186. Here, the ALJ decided Sandberg had established a compensable injury by showing his work activity substantially worsened the severity of his condition. The ALJ's decision states that Sandberg's work activities increased the severity of the symptom of pain from his preexisting degenerative disc disease, but the language of N.D.C.C. § 65-01-02(10)(b)(7) states that "pain alone is not a substantial acceleration or a substantial worsening" of a preexisting injury, disease, or other condition. Pain may be considered in determining whether there is a substantial worsening of a preexisting injury, disease, or other condition but a compensable injury must be established by medical evidence supported by objective medical findings. N.D.C.C. § 65-01-02(10). The ALJ explained Sandberg's work-induced pain no longer responded favorably to rest and treatment and prevented him from performing his lifelong occupation. However, the ALJ did not cite any medical evidence supported by objective medical findings in the record to support a determination that Sandberg's repetitive work activities did not merely trigger symptoms, but rather substantially worsened the severity of his degenerative condition.

(R18:56-57) Sandberg, 2019 ND 198 ¶ 25.

[5] On remand, and following submission of additional briefing, on January 17, 2020, the ALJ issued Revised Findings of Fact, Conclusions of Law and Order on Remand. (R20) In that decision, the ALJ referred to the Order Amending Statement of Issues and confirmed that the issues for hearing on remand were: Has Mr. Sandberg proven by a preponderance of the evidence that his repetitive work activities: (1) are a substantial contributing factor to his cervical and thoracic degenerative conditions, or (2) substantially accelerated or worsened his preexisting cervical spine and thoracic spine

conditions. (R20:61) The ALJ then entered the following Findings of Fact pertinent to the compensability of Sandberg's medical conditions:

27. All three doctors are in essential agreement, and the preponderance of the evidence shows, that Mr. Sandberg showed signs and symptoms of degenerative disc disease as early as 1998, and that his disc degeneration has worsened over time.

28. All three doctors are in essential agreement, and the preponderance of the evidence shows, that Mr. Sandberg has experienced severe pain in his cervical and thoracic back brought on by the effect of the jarring and twisting nature of his work activities.

...

35. The medical opinion of Dr. Peterson as to whether Mr. Sandberg's work caused his disc disease or caused it to substantially accelerate is in conflict with the opinions of Drs. Remmick and Schoneberg. . . .

...

Based upon consideration of all of these factors, Dr. Peterson's opinion is the more persuasive. The greater weight of the evidence does not establish that Mr. Sandberg's work caused or substantially accelerated the progression of Mr. Sandberg's degenerative disc disease.

36. A preponderance of the evidence does establish that the stresses placed upon Mr. Sandberg due to the jarring motion that he assumed and posture that he had to adopt while working substantially contributed to his development of soft tissue injuries that contributed to his debilitating pain.

...

...

38. Mr. Sandberg's soft tissue injuries were not a pre-existing condition.

39. A preponderance of the evidence does not establish that Mr. Sandberg's herniated disc is a source of his pain.

40. A preponderance of the evidence does establish that operating the track hoe moving rip rap was a substantial contributing factor in the development of Mr. Sandberg's debilitating back condition. Prior to 2015, the pain lessened after rest during seasonal layoff and chiropractic treatment. Following, and as a result of a period of pushing rip rap year

round, in 2015 Mr. Sandberg's work induced pain became worse and no longer responded favorably to rest and treatment.

...

42. A preponderance of the evidence establishes that Mr. Sandberg's work did not merely trigger symptoms of a pre-existing condition, but in a real, true, important, and essential way made Mr. Sandberg's back condition more unfavorable, difficult, unpleasant, and painful. Mr. Sandberg provided credible testimony that the jarring and twisting that he endured daily resulted in the pain and loss of function that caused him to seek chiropractic and medical treatment. That treatment provided relief for a time, and he continued to engage in the same work, only stopping when he took what would have been a seasonal layoff anyway when that treatment no longer provided the relief that it once had.

43. A preponderance of the evidence establishes that Mr. Sandberg's employment substantially contributed to the debilitating effects of his cervical and thoracic spine condition, which is a combination of degenerative disc disease and soft tissue injuries caused by his work conditions, and has caused him to seek considerable medical treatment and ultimately prevented him from performing his lifelong occupation.

(R20:68-73, emphasis supplied) The ALJ then concluded as follows:

8. Mr. Sandberg has met his burden of proving by a preponderance of the evidence that he has sustained a compensable injury in that he has proven by a preponderance of the evidence that his repetitive work activities did not merely trigger symptoms in a preexisting condition, but rather substantially contributed to his development of soft tissue injuries in the cervical and thoracic areas of his back.

(R20:75)

[6] The Revised Findings of Fact, Conclusions of Law and Order on Remand was the subject of a second appeal to this Court. Workforce Safety and Insurance v. Sandberg, 2021 ND 39, 956 N.W.2d 342. (R21:78) This Court affirmed the ALJ's revised decision, stating as follows:

[¶26] The ALJ's revised order on remand determined that Sandberg had sustained a compensable injury because his work activities substantially contributed to his development of soft tissue injuries and that the soft tissue injuries were not a pre-existing condition. The ALJ made specific

findings regarding the ALJ's consideration of the evidence presented at the hearing, weighed the doctors' competing opinions, and concluded the medical evidence supported by objective medical findings established a compensable injury. . . .

Sandberg, 2021 ND 39 ¶ 26 (R21:90-91). As to the issue of whether benefits are payable on an aggravation basis under N.D.C.C. § 65-05-15, Sandberg asserted that WSI had waived application of that statute and that the aggravation statute does not apply.

Sandberg, 2021 ND 39 ¶ 30 (R21:92). This Court rejected both arguments stating: "WSI has consistently taken the position that Sandberg was not entitled to benefits for his claimed injuries. WSI has therefore not addressed any calculation of benefits on an aggravation basis under N.D.C.C. § 65-05-15. Moreover, the ALJ's revised order has specifically found that Sandberg's employment substantially contributed to the debilitating effects of his cervical and thoracic spine condition, *which is a combination of degenerative disc disease and soft tissue injuries caused by his work conditions*, and has caused him to seek considerable medical treatment and ultimately prevented him from performing his lifelong occupation." Sandberg, 2021 ND 39 ¶ 32, emphasis supplied. (R21:93). This Court went on to state as follows: "Because the ALJ determined that Sandberg has sustained a compensable injury and Sandberg's compensable injury may "combine[] with a noncompensable injury, disease or other condition," as contemplated under N.D.C.C. § 65-05-15, we remand this case to WSI to determine whether N.D.C.C. § 65-05-15 applies and, if so, the proper calculation for an award of benefits to Sandberg." Sandberg, 2021 ND 39 ¶ 34 (R21:93), emphasis supplied.

[7] The compensability of Sandberg's claim having been determined and consistent with this Court's decision in Sandberg, 2021 ND 39, WSI issued a Notice of Decision reversing its prior decision and accepted Sandberg's claim on an aggravation

basis. (CR:24) In that Notice of Decision, WSI also denied disability benefits. (R24) Sandberg requested reconsideration. (R25) On July 7, 2021, WSI issued an Administrative Order accepting the claim on an aggravation basis and denying disability benefits on the claim. (R:26) Sandberg requested rehearing. (R:27)

[8] An administrative hearing was held December 16-17, 2021, on these issues specified for hearing: (1) Whether Claimants are (sic) entitled to benefits on an aggravation basis pursuant to N.D.C.C. § 65-05-15; (2) If Claimant is entitled to benefits on an aggravation basis, whether the acute phase is between September 28, 2015, and January 5, 2017; and (3) Whether Claimant has established entitlement to disability benefits in connection with his claim. (R28; R35; R36) Following post-hearing briefing (R45; R46; R47), on March 6, 2022, Administrative Law Judge Adele Page (“ALJ Page”) issued Findings of Fact, Conclusions of Law and Final Order dated March 6, 2022, affirming WSI’s July 7, 2021, Order. (R48; R49)

[9] On April 4, 2022, Sandberg submitted a Petition for Reconsideration to ALJ Page. (R50) WSI submitted a Response to that Petition for Reconsideration. (R33) On April 12, 2022, ALJ Page issued an Order Denying Claimant’s Petition for Reconsideration and Rehearing. (R34)

[10] On May 12, 2022, Sandberg filed an appeal to the District Court, Ramsey County, North Dakota. (R1; R2) Following submission of the record and briefing to the Court (R60; R63; R65), on October 17, 2022, the District Court, the Honorable Lonnie W. Olson, issued a Memorandum and Order Reversing, In Part, and Affirming, In Part, the Hearing Officer’s Decision. (R67) In that decision, the District Court as to the issue which is the subject of WSI’s appeal in this matter, stated as follows:

[¶8] Certain legal doctrines outlined in *Sandberg II*, at ¶ 19, come into play in this case:

The law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings, and *[a] party cannot on a second appeal relitigate issues which were resolved by the court in the first appeal or which would have been resolved had they been properly presented in the first appeal.* The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the [appellate court’s] mandate into effect according to its terms.... and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate’s terms.

Carlson v. Workforce Safety & Ins., 2012 ND 203, ¶ 16, 821 N.W.2d 760 (citations and quotation marks omitted)(emphasis added).

[¶9] The *Sandberg II* Court’s description of the overreach of WSI in the Carlson case is now analogous to what has happened post-remand in this case:

We remanded only for further proceedings on calculation of the claimant’s average weekly wage. On remand, however, WSI exercised its continuing jurisdiction and held further proceedings re-adjudicating the claimant’s employment status that “were in effect a ‘do-over’ of the proceedings leading” to the first appeal.

Sandberg II, at ¶ 19 (internal citations omitted).

[¶10] At ¶ 26 of the *Sandberg II* remand, the court specifically affirmed ALJ Jordheim’s determinations that 1) there was a compensable injury and 2) Sandberg is entitled to benefits. The Court remanded to determine “**whether and how**” to calculate benefits per the aggravation statute, N.D.C.C. § 65-05-15. *Id.* at ¶ 29 (emphasis added). This was a very narrow remand.

[¶11] The Court specifically notes Conclusion of Law #8, p. 16, *Odyssey Doc. 20*, Revised Findings of Fact, Conclusions of Law, and Order on Remand by ALJ Jordheim:

Mr. Sandberg has met his burden of proving by a preponderance of the evidence that he has sustained a compensable injury in that he has proven by a preponderance of the evidence that his repetitive work activities did not merely trigger symptoms in a pre-existing condition, but rather substantially contributed to the development of soft tissue injuries in the cervical and thoracic areas of his back.

[¶12] This was affirmed on appeal and is not a Conclusion of Law subject to being “rewritten” by any new issues contrived by WSI and ruled upon by ALJ Page.

[¶13] Despite the clearly delineated remand, WSI created a new issue in addition to the application of the aggravation statute. *See Odyssey Doc. 24*. Specifically, WSI re-adjudicated the issue of Sandberg’s entitlement to disability benefits. This was “in effect a ‘do-over’ of the proceedings” as explained in *Sandberg II* description of the Carlson case. WSI, in direct conflict with ALJ Jordheim’s affirmed determination of entitlement to benefits, re-adjudicated the issue of disability benefits, denying the same and noting “no provider removed you from work but rather outlined work restrictions,” citing N.D.C.C. § 65-05-08(6). *Odyssey Doc. 24*, p. 1. This was made using the same medical records and testimony as was available to WSI prior to *Sandberg II*.

[¶14] There is no section of N.D.C.C. § 65-05-15 requiring, or even allowing, analysis of whether an individual has an earning capacity under N.D.C.C. § 65-05-08(6) when determining whether an individual is entitled to full benefits or benefits on an aggravation basis. This determination simply cannot be done under any interpretation of the limited review in *Sandberg II*.

[¶15] WSI violated the clear remand directive in issuing its June 23, 2021, decision denying disability benefits. ALJ Page likewise exceeded the scope of remand by affirming WSI’s decision to this effect. ALJ Page’s determination delved far beyond the determination of “whether and how” to calculate benefits per the aggravation statute, into a re-analysis and application of several other portions of Chapter 65-05, which are not necessary to the aggravation analysis.

[¶16] Determinations by ALJ Jordheim, which were affirmed in the *Sandberg II* decision and thus binding on ALJ Page, include that:

- a. Sandberg has met his burden of proving by a preponderance of the evidence that he has sustained a compensable injury in that he has proven by a preponderance of the evidence that his

repetitive work activities did not merely trigger symptoms in a preexisting condition, but rather substantially contributed to his development of soft tissue injuries in the cervical and thoracic areas of his back. *Odyssey Doc.* 20, Conclusion # 8, p. 16

- b. A preponderance of the evidence does establish that the stresses placed upon Mr. Sandberg due to the jarring motion that he assumed and posture that he had to adopt while working substantially contributed to his development of soft tissue injuries that contributed to his debilitating pain. *Id.*, Finding # 35, p. 12.
- c. Mr. Sandberg's soft tissue injuries were not a pre-existing condition. A preponderance of the evidence does not establish that Mr. Sandberg's herniated disc is a source of his pain. A preponderance of the evidence does establish that operating the track hoe moving rip rap was a substantial contributing factor in the development of Mr. Sandberg's debilitating back condition. *Id.*, Findings #38-40, p. 13.
- d. A preponderance of the evidence establishes that Mr. Sandberg's work did not merely trigger symptoms of a pre-existing condition, but in a real, true, important, and essential way made Mr. Sandberg's back condition more unfavorable, difficult, unpleasant, and painful. Mr. Sandberg provided credible testimony that the jarring and twisting that he endured daily resulted in the pain and loss of function that caused him to seek chiropractic and medical treatment. *Id.*, Finding #42, p. 14.
- e. A preponderance of the evidence establishes that Mr. Sandberg's employment substantially contributed to the debilitating effects of his cervical and thoracic spine condition, which is a combination of degenerative disc disease and soft tissue injuries caused by the work conditions, **and has caused him to seek considerable medical treatment and ultimately prevented him from performing his lifelong occupation.** *Id.*, Finding # 43, p. 14 (emphasis added).

[¶17] Findings by ALJ Page directly contradicted these determinations by ALJ Jordheim, including her determination 1) Sandberg has failed to bear his burden of establishing entitlement to disability benefits, and 2) that the greater weight of the evidence "establishes that Sandberg voluntarily limited his income." (*Odyssey Doc.* 49, Conclusions #7-8, p. 13)

[¶18] ALJ Page's determination that Sandberg is not entitled to disability benefits went beyond the scope of remand and is REVERSED.

(R67:3:¶8-¶18) Order for Judgment and Judgment were entered in District Court on October 19, 2022. (R71; R72) WSI has filed this appeal from the Judgment entered in this case on October 19, 2022. (R79)

STATEMENT OF FACTS

[11] Sandberg filed his claim for benefits with WSI on July 6, 2016, alleging an injury to his cervical (neck). (R9) Sandberg acknowledged that he had prior problems to that same body part. (Id.) After gathering information on the claim, WSI issued an Administrative Order on September 22, 2016, denying the claim. (R15) That Administrative Order denied benefits for Sandberg’s cervical and thoracic spine, finding that his work activities acted as a trigger to produce symptoms in a pre-existing cervical (neck) and thoracic (middle back) condition. (R15:22) In the September 22, 2016, Administrative Order, WSI concluded in the event it was determined Sandberg sustained a compensable work injury, the claim was subject to the aggravation statute, N.D.C.C. § 65-05-15. (R15:22-23) WSI’s Order made no findings on whether Sandberg may be entitled to disability benefits on his claim; rather, the September 22, 2016, denied liability for the claim because WSI concluded Sandberg had not proven compensable injuries to his cervical or thoracic spine.

[12] WSI’s September 22, 2016, Administrative Order was the subject of an administrative hearing held November 21, 2017. (R17) The issues specified for hearing at that time were: “Has Mr. Sandberg proven by a preponderance of the evidence that his repetitive work activities: (1) are a substantial contributing factor to his cervical and thoracic degenerative conditions, or (2) substantially accelerated or worsened his

preexisting cervical spine and thoracic spine conditions?” (R17:30) There was no issue specified regarding entitlement to disability benefits.

[13] The ALJ issued Findings of Fact, Conclusions of Law and Order on December 30, 2017. (R17) The ALJ reversed WSI’s Administrative Order. (R17:41) Based on applying N.D.C.C. § 65-05-08.3, the ALJ made Findings of Fact that: (32) The greater weight of the evidence does not establish that Mr. Sandberg’s work caused or substantially accelerated the progression of Mr. Sandberg’s degenerative disc disease; (33) A preponderance of the evidence does not establish that Mr. Sandberg’s herniated disc is a source of his pain; (34) A preponderance of the evidence does establish that operating the track hoe moving rip rap caused Mr. Sandberg’s degenerative disc disease to become more painful. Prior to 2015, the pain lessened after rest during seasonal layoff and chiropractic treatment. Following, and as a result of a period of pushing rip rap year round, in 2015 Mr. Sandberg’s work induced pain became worse and no longer responded favorably to rest and treatment; (35) A preponderance of the evidence does establish that Mr. Sandberg’s jarring work over time has increased the severity of the symptom of pain produced by his pre-existing degenerative disc disease that has caused him to seek considerable medical treatment and ultimately prevented him from performing his lifelong occupation. (R17:38-39) No Findings or Conclusions were made by the ALJ regarding entitlement to disability benefits.

[14] The December 30, 2017, Findings of Fact, Conclusions of Law and Final Order was appealed to this Court. In Workforce Safety and Insurance v. Sandberg, 2019 ND 198, 931 N.W.2d 488, this Court reversed the December 30, 2017, decision of the ALJ and remanded it because this Court was “unable to reconcile the ALJ’s decision with

the statutory requirements for medical evidence supported by objective medical findings for a compensable injury in N.D.C.C. § 65-01-02(10).” Id., ¶ 26 (R18:57)

[15] On remand, no additional evidence was submitted into the record; rather, there were submissions of additional briefs and proposed findings of fact. (R20:62) On January 17, 2020, the ALJ issued Revised Findings of Fact, Conclusions of Law and Order on Remand. (R20) Once again, the issues that were the subject of that remand proceeding were the same as the initial proceeding, specifically: Has Mr. Sandberg proven by a preponderance of the evidence that his repetitive work activities: (1) are a substantial contributing factor to his cervical and thoracic degenerative conditions, or (2) substantially accelerated or worsened his preexisting cervical spine and thoracic spine conditions. (R20:61) Again there was no specified issue as to entitlement to disability benefits.

[16] The ALJ’s January 17, 2020 Revised Findings of Fact, Conclusions of Law and Order again reversed WSI’s January 22, 2016, Order that had denied liability for Sandberg’s cervical and thoracic spine conditions. (R20:75) There were no Findings or Conclusions in the Revised Findings of Fact, Conclusions of Law and Order on Remand dated January 17, 2020, regarding an award of disability benefits to Sandberg.

[17] The Revised Findings of Fact, Conclusions of Law and Order on Remand was the subject of a second appeal to this Court. Workforce Safety and Insurance v. Sandberg, 2021 ND 39, 956 N.W.2d 342. (R21) This Court affirmed the ALJ’s decision January 17, 2020 revised decision, that Sandberg had established he sustained compensable injuries to his cervical and thoracic spine. (R21:93) However, this Court went on to state as follows: “Because the ALJ determined that Sandberg has sustained a

compensable injury and Sandberg’s compensable injury may “combine[] with a noncompensable injury, disease or other condition,” as contemplated under N.D.C.C. § 65-05-15, we remand this case to WSI to determine whether N.D.C.C. § 65-05-15 applies, and if so, **the proper calculation for an award of benefits to Sandberg.**” Sandberg, 2021 ND 99 ¶ 34. (R21:93) (Emphasis supplied.)

[18] Following the second remand, WSI issued a Notice Reversing Prior Decision and Notice of Decision Accepting Claim and Awarding Specific Benefits. (R24) Consistent with this Court’s decision in Sandberg, 2021 ND 99, that Sandberg had proven compensable cervical and thoracic spine injuries, WSI accepted Sandberg’s claim stating: “(WSI) is accepting your claim and awarding benefits on a 50% basis effective 01/06/2017.” (R24) WSI determined that the “acute phase of treatment from 09/28/2015 to 01/05/2017, will be paid based on a non-aggravation basis.” The 50% aggravation is not applied during the acute phase of treatment,” citing N.D.C.C. § 65-05-15. (R24)

[19] WSI also made a decision regarding entitlement to disability benefits. (R24) Regarding denial of disability benefits, WSI’s Notice of Decision stated as follows:

Disability benefits are denied. You previously indicated that no medical provider took you off of work in September of 2015. Instead, you requested early layoff. Medical records also indicate no provider removed you from work but rather outlined work restrictions. N.D.C.C. § 65-05-08(6) states “It is the burden of the employee to show that the inability to obtain employment or to earn as much as the employee earned at the time of injury is due to physical limitation related to the injury, and that any wage loss claims is the result of the compensable injury.”

(R24) Sandberg requested reconsideration. (R25) In that petition for reconsideration, Sandberg stated as follows:

As to disability, Sandberg did not ‘retire’ as alleged by WSI.¹ He was unable to return to heavy work operating equipment. As noted by the ALJ in his findings, “[b]ecause he could no longer do his job due to pain, Mr. Sandberg requested and received an early seasonal layoff from Park Construction, and his last day of work was September 28, 2015.” (ALJ OP. 1/17/20, Finding 10). The ALJ also found that “[a] preponderance of evidence establishes that Mr. Sandberg’s employment substantially contributed to the debilitating effects of his cervical and thoracic spine condition ... and has caused him to seek considerable medical treatment and ultimately prevented him from performing his lifelong occupation.” (ALJ OP. 1/17/20, Finding 43).

(R25)

[20] WSI then issued an Administrative Order on July 7, 2021. (R26) In that Order, WSI reaffirmed that Sandberg had sustained a compensable injury, determined that the aggravation statute applied, N.D.C.C. § 65-05-15, determined the period of acute care under N.D.C.C. § 65-05-15, and denied disability benefits. (Id.) Sandberg requested rehearing from WSI’s July 7, 2021, Order. (R27). The issues specified by the ALJ for the hearing on the July 7, 2021, Order were: 1) Whether Claimants (sic) are entitled to benefits on an aggravation basis pursuant to N.D.C.C. § 65-05-15; 2) If Claimant is entitled to benefits on an aggravation basis, whether the acute phase is between September 28, 2015, and January 5, 2017; and 3) Whether Claimant has established entitlement to disability benefits in connection with his claim. (R28)

[21] Although Sandberg in his Petition for Rehearing stated that “WSI’s current order is outside the scope of the remand authorized by [this Court],” (R27) no arguments were made by Sandberg in post-hearing briefing on that issue. (R45; R47)

¹ WSI’s Notice of Decision dated June 23, 2021, did not assert Sandberg “retired.” The full text of the Notice of Decision regarding the decision on denial of disability benefits is quoted above.

Rather, arguments to the ALJ focused on the merits of whether Sandberg had established entitlement to disability benefits. (Id.)

[22] The ALJ affirmed WSI's July 7, 2021, Order on both the issue of application of N.D.C.C. § 65-05-15 and WSI's denial of disability benefits. (R49; R50) Consistent with the fact that Sandberg did not argue in post-hearing briefing that WSI's determination of disability benefits exceeded the scope of remand, the ALJ made no findings or conclusions on that issue. (R50) On the issue of disability benefits, the ALJ found that Sandberg failed to prove by a preponderance of the evidence that he is disabled. (Finding of Fact # 32, R49:800) The ALJ also concluded, based on N.D.C.C. § 65-05-08, that Sandberg failed to bear his burden of establishing entitlement to disability benefits as he brought forth no evidence of attempts to obtain employment within his restrictions. (Conclusions of Law ## 6-7, R49:801)

[23] Sandberg then submitted a Petition for Reconsideration. (R50) Sandberg asserted the same arguments made in post-hearing briefing, disagreeing with the ALJ's analysis of the application of the aggravation statute and finding that Sandberg was not entitled to disability benefits. (R50:804-807) In her Order Denying Claimant's Petition for Reconsideration and Rehearing, the ALJ responded as follows regarding issues pertaining to her decision to affirm WSI's denial of disability benefits:

In his Petition Sandberg states this ALJ "failed to make factual findings to support a determination that Sandberg is not disabled." Petition ¶ 4. Sandberg claims that this ALJ concluded that Sandberg failed on his burden of proof solely because he failed to do a job search. Sandberg also asserts that WSI was required to establish earnings capacity. Id. ¶ 5. Finally, Sandberg asserts that the employer should have the burden to show that some kind of work is regularly and continuously available to Sandberg (odd lot doctrine). Id. ¶ 8.

However, this ALJ made specific factual findings supporting that “Sandberg has failed to prove by a preponderance of the evidence that he is disabled. The greater weight of the evidence established that Sandberg was capable of employment with restrictions for light or sedentary employment and he voluntarily limited his earnings.” Finding ¶ 32; See Findings ¶¶ 12, 13, 14, 15, 16, 17, 22 (Dr. Johnson opined Sandberg was capable of sedentary or light duty), ¶ 23 (Dr. Johnson supports the expertise on the workability assessment of occupational therapists and opined Sandberg was not disabled in his personal life), ¶ 28. Further, Sandberg has the burden of establishing entitlement to disability benefits. Conclusion ¶ 6. Finally, the North Dakota Supreme Court has not adopted the odd lot doctrine.

Thus, this ALJ reaffirms her decision that Sandberg failed on his burden of proof to establish he is disabled. Finding ¶ 32, Conclusion ¶ 7.

(R34:812-814)

[24] Sandberg then appealed to the District Court from the ALJ’s Findings of Fact, Conclusions of Law and Final Order of March 6, 2022, and the Order Denying Petition for Reconsideration dated April 12, 2022. (R1; R2) Sandberg asserted that WSI’s denial of disability benefits and the ALJ’s decision on the issue of disability violated the “law of the case” doctrine. (R2:2:¶3) In neither the Appellant’s Brief to the District Court, nor the Reply Brief, did Sandberg make arguments relating to the “law of the case” doctrine or that WSI’s determination of disability was outside of the scope of the remand. (R60; R65) As outlined above, the District Court reversed WSI’s decision on denial of disability benefits because the ALJ’s “determination that Sandberg is not entitled to disability benefits went beyond the scope of remand” (R67:5:¶18)

LAW AND ARGUMENT

I. SCOPE OF REVIEW ON APPEAL.

[25] This Court reviews the decision of the administrative agency in the same manner as the District Court. Parsons v. Workforce Safety and Insurance, 2013 ND 235 ¶

12, 841 N.W.2d 404. WSI's appeal raises a question of law. Questions of law are fully reviewable on appeal. Sloan v. North Dakota Workforce Safety and Insurance, 2011 ND 194 ¶ 5, 804 N.W.2d 184.

II. THE DISTRICT COURT ERRED IN REVERSING THE ALJ'S AFFIRMANCE OF WSI'S DENIAL OF ENTITLEMENT TO DISABILITY BENEFITS.

[26] The procedural history of this claim, as outlined above, reflects this claim consisted of two appeals to this Court before a final determination that Sandberg had established compensable injuries to his cervical and thoracic spine. In Sandberg, 2021 ND 39 ¶ 34, this Court remanded the case to WSI "to determine whether N.D.C.C. § 65-05-15 applies and, if so, the proper calculation for an award of benefits to Sandberg." WSI then issued its Notice Reversing Prior Decision and Notice of Decision Accepting Claim and Awarding Specific Benefits. (R24) In that Notice of Decision, WSI identified the accepted diagnoses on the claim (R24:98) as it pertains to the cervical and thoracic spine. WSI also determined that the claim was subject to the aggravation statute, N.D.C.C. § 65-05-15. (R24) WSI outlined the "acute phase" under N.D.C.C. § 65-05-15(1), and the date following which benefits would be paid on an aggravation basis. There is no argument that WSI was entitled to make these determinations under N.D.C.C. § 65-05-15 based on the remand in Sandberg, 2021 ND 39.

[27] Because the issue of compensability of Sandberg's condition having been determined in the prior proceedings and affirmed by this Court, WSI also made a determination on entitlement to disability benefits after the case was remanded. The issue of entitlement to disability benefits was not addressed in WSI's September 22, 2016, Order, that was the subject of the two prior appeals because that Order denied Sandberg's

claim. (R15) The procedural history set forth above, also confirms that the issue of entitlement to disability benefits was not a specified issue in the initial administrative hearing, nor on remand. (R17; R20)

[28] WSI agrees that the issue of entitlement to disability benefits was not an issue that was remanded from this Court following Sandberg, 2021 ND 39. However, this Court has previously held that once a determination of compensability of a claim is finally determined, after a hearing, WSI may then proceed to review the claim for determination on entitlement to benefits, including disability benefits.

[29] In Ziesch v. Workforce Safety and Insurance, 2006 ND 99, 713 N.W.2d 525, WSI had denied a claim filed in 1999 for benefits. Id. ¶ 4. That denial was the subject of an administrative hearing held on January 12, 2001. Id. The ALJ that heard that appeal reversed WSI's Order, and WSI adopted that decision. Id. After the administrative decision became final that determined Ziesch's claim was compensable, WSI reviewed the medical records and determined Ziesch was entitled to disability benefits from November 10, 1999, to December 15, 1999. Id. ¶ 5. WSI issued a Notice of Intention to Discontinue/Reduce Benefits advising of the award of disability benefits and the end date of the same. Id. WSI then issued an Administrative Order regarding the entitlement to disability benefits between the dates awarded and denying further disability benefits. Id. Ziesch requested rehearing from WSI's Administrative Order. Id. ¶ 6. The ALJ and the District Court affirmed WSI's Order. Id. ¶ 7.

[30] When this Court reviewed the Ziesch case on appeal, the Court characterized the issue as "when a claimant requests a hearing on WSI's initial informal denial of a claim, WSI must conduct a full investigation and make a determination of all

aspects of the benefits the claimant would be entitled to if the claim is ultimately determined to be compensable.” Id. ¶ 18. This Court then rejected that WSI must conduct a full investigation of factual and medical issues as to amount of medical benefits allowed and duration of any disability. Id. This Court’s rationale was stated as follows:

By providing a hearing addressing compensability of the claim and the claimant’s entitlement to benefits, and reserving determination of specific amounts of benefits, if necessary, for a later date, WSI has employed a procedure which seeks to ensure a quick determination of a claimant’s entitlement to benefits while avoiding unnecessary waste of administrative time, resources, and expenses. If WSI is required to immediately investigate, raise, and decide issues relating to the specific amounts of benefits a claimant may be entitled to if WSI’s initial determination of noncompensability is reversed, the ultimate result in many cases will be a great waste of WSI’s time and resources, delay of a determination on the fundamental issue of compensability of the claim, and unnecessary complication of proceedings. . . . WSI has logically attempted to draw a distinction between a claimant’s entitlement to benefits and the determination of the amount and duration of benefits if, in fact, any benefits are due.

Id. ¶ 19.

[31] Based on this Court’s decision in Ziesch, WSI’s September 22, 2016, Order denying Sandberg’s claim (R15) is proper and in accordance with the law. In that Order, WSI made no determination of the amount or duration of entitlement to benefits. Rather, the Order simply denied Sandberg’s claim. After Sandberg’s claim was determined compensable, WSI then made a decision on entitlement to disability benefits and made that decision part of the Notice of Decision issued June 23, 2021, where WSI determined that N.D.C.C. § 65-05-15 applied. (R24)

[32] As the procedural and factual history outlined above demonstrates, the issue of disability benefits was not a part of the initial hearing on WSI’s September 22, 2016, Order, and the issue of disability benefits was not specified as an issue. After the

initial appeal to this Court, the same issues were the subject of the remand proceeding, which again were simply compensability of Sandberg’s cervical and thoracic spine conditions. The District Court relied upon a discussion in Sandberg, 2021 ND 39 ¶ 19, regarding the “law-of-the-case” doctrine relating to a second appeal (R67:3:¶8) in holding that WSI violated the remand directive issuing its June 23, 2021, Notice of Decision on disability benefits and ALJ Page exceeded the scope of the remand by affirming WSI’s determination of denial of disability benefits. (R67:4:¶15, ¶18) This is an erroneous application of the law.

[33] Quoting from Carlson v. Workforce Safety & Ins., 2012 ND 203, 821 N.W.2d 760, this Court discussed the “law of the case” principle. Sandberg, 2021 ND 39 ¶ 19. Specifically, this Court stated that “[t]he mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the [appellate court’s] mandate into effect according to its terms” Id. As this Court further stated in Sandberg, the “law of the case” doctrine is grounded on the theory of res judicata and grounded on judicial economy. Sandberg, 2021 ND 39 ¶ 19, quoting Glass v. Glass, 2018 ND 14 ¶ 5, 906 N.W.2d 81.

[34] The distinction in this case is that in Ziesch, this Court specifically rejected the argument that administrative res judicata precluded WSI from making the subsequent determination of entitlement to disability benefits after a denial of a claim is reversed. In Ziesch, this Court stated:

Administrative res judicata must be applied in accordance with its purpose-to conserve scarce administrative resources and avoid wasteful expense and delay. . .

The result urged by Ziesch would lead to absurd results and would not serve the purpose of the doctrine of administrative res judicata to conserve administrative resources and avoid unnecessary expense and delay. We conclude WSI was not barred by the doctrine of administrative res judicata from determining Ziesch was entitled to disability benefits only for the period between November 10 and December 15, 1999.

2006 ND 99 ¶¶ 19-20.

[35] The District Court incorrectly focused on this Court's remand language regarding application of N.D.C.C. § 65-05-15 to the claim. The District Court is correct that entitlement to disability benefits is an entirely new issue that WSI included in its Notice of Decision of June 23, 2021, in which WSI documented the compensability of Sandberg's claim and determined N.D.C.C. § 65-05-15 applied. However, because the issue of disability was not an issue that WSI addressed in its September 22, 2015, Order which only denied compensability of the claim, under the rationale explained by this Court in Ziesch, it was entirely proper for WSI to render a decision on entitlement to disability benefits after compensability of Sandberg's claim was decided.

[36] The District Court erred in holding that WSI's determination on entitlement to disability benefits, and the ALJ affirming WSI's decision on that issue, exceeded the scope of the remand from this Court in Sandberg, 2021 ND 39. This Court did not decide a legal issue relating to entitlement to disability benefits in the prior appeals. Rather, those appeals were exclusively related to a determination of compensability of Sandberg's claim. Based on the rationale outlined by this Court in Ziesch, WSI was entitled to make a decision on entitlement to disability benefits after compensability of Sandberg's claim was final. There was no error in including that decision in its June 23, 2021, Notice of Decision accepting Sandberg's claim and determining N.D.C.C. § 65-05-15 applied. Thus, the District Court erred in concluding

that determining eligibility to disability benefits in the June 23, 2021, Notice of Decision violated the “law of the case” and exceeded the scope of this Court’s remand in Sandberg, 2021 ND 39.

CONCLUSION

[37] For the foregoing reasons, WSI respectfully requests this Court **reverse** the District Court’s decision as it pertains to WSI’s denial of disability benefits and the ALJ’s affirmance of that denial.

DATED this 12th day of January, 2023.

/s/ Jacqueline S. Anderson
Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General for
Workforce Safety and Insurance
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
T/N: 701-237-5544
janderson@nilleslaw.com

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)(8)(A) 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 27.

DATED this 12th day of January, 2023.

/s/ Jacqueline S. Anderson _____
Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General for
Workforce Safety and Insurance
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
T/N: 701-237-5544
janderson@nilleslaw.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

John Sandberg,

Appellee and Cross-Appellant,

vs.

North Dakota Workforce Safety and
Insurance,

Appellant and Cross-Appellee,

and

Park Construction Co.,

Respondent.

Supreme Court No.: 20220354
Ramsey County District Court
Civil No.: 2022-CV-00098

AFFIDAVIT OF SERVICE

[1] I, Laurie A. Grimm, 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:

Brief of Appellant North Dakota Workforce Safety and Insurance

[2] On January 12, 2023, by sending a true and correct copy thereof by electronic means only to the following email address, to wit:

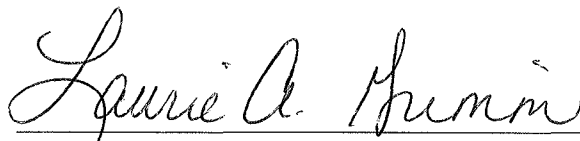
Dean Haas

dhaas@bismarcklaw.com

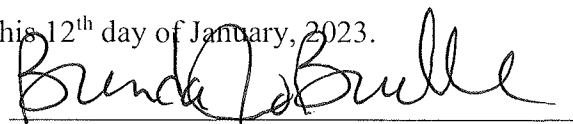
[3] To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be served. The above document was emailed in accordance with the provision of the Rules of Civil Procedure.

[4] I further certify that a copy of the foregoing document will be mailed first class mail, postage paid, to the following:

Park Construction Company
1481 81st Ave. NE
Minneapolis, MN 55432


Laurie A. Grimm

Subscribed and sworn to before me this 12th day of January, 2023.


Brenda Jo Brunelle

Notary Public

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