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Jodi Bjornson

Tim Whalin

Bridget Hertel

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NORTH DAKOTA LEGISLATIVE RESPONSE TO *MICKELSON*
V. NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE
AND THE FUTURE OF COMPENSATION CLAIMS

JODI BJORNSON,* TIM WHALIN,** BRIDGET HERTEL***

ABSTRACT

During the 2013 North Dakota Legislative Session, the issue of compensability for a pre-existing condition and acceleration of pain symptoms was considered in response to a 2012 North Dakota Supreme Court decision in *Mickelson v. North Dakota Workforce Safety and Insurance*. This Article will primarily provide an overview of the *Mickelson* decision, the legislative response to the decision, and the current state of the law in this specific area.

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* Jodi Bjornson serves as General Counsel for North Dakota Workforce Safety & Insurance Agency.

** Tim Whalin serves as Chief of Injury Services for North Dakota Workforce Safety & Insurance Agency.

*** Bridget Hertel serves as a paralegal for North Dakota Workforce Safety & Insurance Agency.

I. INTRODUCTION

Workforce Safety & Insurance (“WSI”) is North Dakota’s exclusive workers’ compensation insurance provider. It is an executive branch agency that administers benefits to those injured on the job, and collects premiums from employers conducting business in North Dakota to fund this statutory benefit structure. WSI is entirely funded from employer premium dollars and receives no state general funds.

As the only workers’ compensation insurance carrier in North Dakota, employers conducting business in North Dakota are required to obtain workers’ compensation insurance from WSI, with few exceptions. North Dakota has had a monopolistic workers compensation system since 1919 when it was first created by the North Dakota Legislature.¹ North Dakota workers’ compensation law is contained in chapter 65 of the North Dakota Century Code (the “Century Code”).² WSI decisions regarding benefits paid and premiums received are subject to the Administrative Agencies Practices Act found in chapter 28-32 of the Century Code.³

Pursuant to chapter 28-32, a WSI decision can be appealed and heard by an independent administrative law judge, whose decision is subject to review by the North Dakota State District and Supreme Court.⁴ While judicial appeals regarding workers compensation issues are common, some decisions have a wider impact and generate more public attention. One of these decisions, rendered in 2012 by the North Dakota Supreme Court, was at the heart of a debate in the 2013 North Dakota Legislative Assembly.

On August 16, 2012, the North Dakota Supreme Court filed the plurality opinion of *Mickelson v. North Dakota Workforce Safety and Insurance*.⁵ In this case, the Court was faced with interpreting North Dakota workers’ compensation statutes governing compensability of diseases, injuries, or other medical conditions which accompany an employee to his or her workplace and exist prior to a workplace injury (commonly referred to as preexisting conditions). Reactions to the differing opinions in *Mickelson* have been diverse and intense, prompting legislators to introduce legislation in response to *Mickelson*’s plurality opinion.

1. H.B. 56, 16th Leg. Assemb., Reg. Sess. (N.D. 1919).

2. N.D. CENT. CODE ch. 65-01 (2013).

3. See N.D. CENT. CODE §§ 28-32-01, 02 (2013).

4. N.D. CENT. CODE §§ 28-32-42, 49 (2013).

5. 2012 ND 164, 820 N.W.2d 333.

II. WORKERS COMPENSATION LAW REGARDING COMPENSABILITY OF CONDITIONS PRESENT PRIOR TO A WORKPLACE INJURY

In general, only those injuries caused by an employee's work are covered injuries under North Dakota workers' compensation law. This largely distinguishes WSI from other health care insurers as causation is rarely determinative of coverage under general health insurance policies.

Section 65-01-02(10) of the Century Code defines a "compensable injury" as "*an injury by accident arising out of and in the course of hazardous employment* which must be established by medical evidence supported by objective medical findings."⁶ As a result, when a claim for workers' compensation benefits is filed by an injured employee, the threshold inquiry is whether the injury is truly an industrial accident as defined in section 65-01-02(10).

There are times when an industrial accident occurs which may impact an employee's pre-existing, non-work related injury, disease, or condition. For example, an employee for a local home improvement store has had degenerative disc disease of the lumbar spine for years. One day while at work, the employee has an accident while lifting a box. She reports an injury to the same area of her lumbar spine where the disease process has been advancing. The employee files a claim for benefits with WSI and is in need of ongoing medical treatment. Because there was a non-work related disease process already present in the employee's lumbar spine and WSI only covers injuries caused by an employee's work, WSI must further explore the underlying condition in its compensability analysis.

Section 65-01-02(10)(b)(7) of the Century Code provides specific guidance when determining whether an injured employee is entitled to workers' compensation benefits in claims involving preexisting injury, disease, or other conditions. Until 2013, this provision stated the term "compensable injury" did not include, "[i]njuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity."⁷

The 2013 Legislative Assembly added the following clarifying sentence to section 65-01-02(10)(b)(7): "Pain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition,

6. N.D. CENT. CODE § 65-01-02(10) (2013) (emphasis added).

7. N.D. CENT. CODE § 65-01-02(10)(b)(7) (2011).

but pain alone is not a substantial acceleration or a substantial worsening.”⁸ As a result, compensability requires the industrial accident to in some way act upon the underlying preexisting condition and substantially accelerate the progression or substantially worsen the severity of the underlying condition. Under WSI’s interpretation of this statute, a trigger symptom, such as pain, in the underlying condition is not sufficient to render the condition compensable.

The more challenging workers compensation claims to adjudicate involve preexisting conditions. In these claims, WSI must conduct a deeper analysis of the underlying condition and determine the impact, if any, of the work incident on the condition. Specifically, WSI must analyze the cause of the complaints associated with a claimed injury to ascertain the diagnosis of the condition that is causing the symptoms. Then WSI must determine whether this condition meets the definition of a compensable injury.

A. HISTORY OF THE INTERACTION BETWEEN THE PREEXISTING INJURY STATUTE AND THE AGGRAVATION STATUTE

The preexisting injury statute has evolved over time. In fact, prior to the 1997 and 2013 amendments, section 65-01-02(10)(b)(7) excluded the following from the definition of “compensable injury”:

Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. It is insufficient, however, to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity.⁹

North Dakota also has what is commonly referred to as an aggravation statute.¹⁰ A version of this statute has been in place since 1931.¹¹ This

8. *Id.* (emphasis added).

9. N.D. CENT. CODE § 65-01-02(10)(b)(7) (1995).

10. N.D. CENT. CODE § 65-05-15 (2013).

11. H.B. 209, 23d Leg. Sess. (N.D. 1931).

statute operates to award benefits on a reduced level when a known preexisting condition created “an interference with physical function” or “has caused previous work restriction.”¹² In other words, when applied, benefits are paid on a partial basis rather than in full. Benefits are paid in full for the acute period, but thereafter, at a percentage equal to the percentage of the cause of the resulting medical condition that can be attributable to the work injury.¹³ Currently there is a presumption that fifty percent of the resulting condition is attributable to the work injury.¹⁴

It is important to understand that neither the preexisting condition statute, nor the aggravation statute operate independently. These two statutes interact, and, as a result, are dependent upon the interpretations of each other. Their applications stack, one upon the other. The resulting complexity in application therefore compounds.

Under the pre-1997 statutes, in order for a claim involving preexisting conditions to be accepted, employment must have substantially aggravated the underlying condition, substantially worsening its severity, or substantially accelerated the progression of an underlying condition.¹⁵ If the preexisting condition was latent, it had to be shown that the underlying condition would likely have progressed similarly in the absence of the employment trigger unless the employment trigger was determined to be a substantial aggravating or accelerating factor.¹⁶ If this test was met, the aggravation statute could then be considered.

At the same time, the version of the aggravation statute in effect prior to its 1997 amendments provided that a “preexisting condition” meant “disability or impairment known in advance of the work injury.”¹⁷ This statute could be invoked if the preexisting condition was “active at the time of the work injury, evidenced by work restriction (active disability) or interference with function (active impairment).”¹⁸ In other words, it was only applicable when the preexisting condition was “active.” It was then only applicable after the injury was accepted under section 65-01-02(10)(b)(7).

This statutory scheme had become, for all practical purposes, unworkable. Each statute spoke to known or unknown preexisting conditions. One required a showing that the condition would have

12. N.D. CENT. CODE § 65-05-15(1) (2013).

13. N.D. CENT. CODE § 65-05-15(3) (2013).

14. *Id.*

15. N.D. CENT. CODE § 65-01-02(10)(b)(6) (1995).

16. *Id.*

17. N.D. CENT. CODE § 65-05-15(1) (1995).

18. N.D. CENT. CODE § 65-05-15(1) (1995).

progressed similarly, but only if it was latent, and the other created application if patent but then only if active. Depending on the reader's view, each statute could easily yield slightly differing permutations.

Following the 1997 amendments to the preexisting injury and aggravation statutes, the language in each of the statutes became parallel, and all references to latent injuries were removed from the preexisting injury statute.¹⁹ Differentiation of “latency” versus “patency” was an analysis conducted under the aggravation statute, and only went to control the size of the award, not whether a claim was compensable.²⁰ References to latent injuries requiring a showing they “would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor” were stripped from the statute. This was the 1997 North Dakota Legislative Assembly’s response to clarify and remedy these unmanageable complexities.

Particularly since the 1997 amendments, it has been WSI's interpretation that a substantial acceleration or substantial worsening must be measured against the underlying condition, and not against the symptoms exhibited. If symptoms, such as pain, can satisfy the “substantially accelerates its progression or substantially worsens its severity” test for preexisting diseases or conditions, taken to its logical conclusion, even minimal increases in symptoms in a preexisting condition could present a potentially compensable event. This is not what the 1997 Legislative Assembly intended. To do so would broaden the compensable injury definition to the point that WSI would essentially become a general medical insurer so long as the symptom arose at work. This would mark a departure to the requirement that an injury is one “arising out of and in the course of hazardous employment.”²¹

B. THE *MICKELSON* OPINION

In *Mickelson*, the plurality’s analysis and conclusions brought into question WSI's historical interpretation of section 65-01-02(10)(b)(7) of the Century Code Code, seemingly reintroducing the “latent” versus “patent” distinction in the compensability analysis and suggesting that pain in and of

19. N.D. CENT. CODE § 65-01-02(10)(b)(7) (1997).

20. N.D. CENT. CODE § 65-05-15(3) (1997).

21. N.D. CENT. CODE § 65-01-02(10) (2013).

itself could be a substantial acceleration or a substantial progression of a preexisting non-work related condition.²²

James Mickelson applied for workers' compensation benefits, asserting he "developed soreness in lower back due to repetitive motion over time using foot pedal and driving over rough terrain."²³ WSI denied his claim for benefits, stating the "January 2010 MRI revealed preexisting degenerative conditions or arthritis and concluding his 'one month employment with Gratech triggered symptoms of [his] pre-existing degeneration but did not cause the condition and [he] did not report an injury to Gratech until'" Decemeber 14, 2009.²⁴

A WSI medical consultant conducted a medical records review and concluded that "Mickelson's condition of 'lumbar degenerative disc disease [was] not caused by his reported work injury. Repetitive motion on rough ground while operating a loader may trigger symptoms associated with lumbar degenerative disc disease, but not cause, substantially worsen, or substantially accelerate the condition.'"²⁵ The WSI medical consultant determined Mickelson had "not proven that his work activities substantially accelerated the progression of or substantially worsened the severity of his lumbar spine condition."²⁶

The case was appealed. Following an administrative hearing, the Administrative Law Judge ("ALJ") concluded the record failed to establish Mickelson had "suffered a compensable injury during the course of his employment."²⁷ The ALJ analyzed and weighed the conflicting medical opinions of Dr. Peterson and Mr. Mickelson's medical providers, and ultimately gave more weight to Dr. Peterson's opinion.²⁸ In reaching a final conclusion, the ALJ reasoned that "Mickelson's employment triggered his symptoms of degenerative disc disease, but there was no evidence his employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease."²⁹ The ALJ explained that if Mickelson's argument were accepted and the production of symptoms constitutes a substantial worsening of his degenerative disc disease, the "trigger" language of section 65-01-02(10)(b)(7) would become meaningless.³⁰

22. *Mickelson v. N.D. Workforce Safety & Ins.*, 2012 ND 164, ¶ 21, 820 N.W.2d 333, 342.

23. *Id.* ¶ 2, 820 N.W.2d at 336.

24. *Id.* ¶ 5, 820 N.W.2d at 337.

25. *Id.* ¶ 5, 820 N.W.2d at 337.

26. *Id.* ¶ 5, 820 N.W.2d at 337.

27. *Id.* ¶ 6, 820 N.W.2d at 337.

28. *Id.* ¶ 5, 820 N.W.2d at 337.

29. *Id.* ¶ 6, 820 N.W.2d at 337.

30. *Id.* ¶ 6, 820 N.W.2d at 337.

Justice Kapsner, in authoring the plurality opinion for the court, extensively referenced both *Geck v. North Dakota Workers Compensation Bureau*,³¹ and *Pleinis v. North Dakota Workers Compensation Bureau*,³² as guidance in interpreting the current version of section 65-01-02(10)(b)(7).³³ These cases interpreted the pre-1997 versions of the statute. The plurality also relied upon legislative testimony provided by a WSI representative in 1997 to support their assertion the 1997 amendments to the statute were minimal:

[T]he 1997 amendment ‘did not significantly change the substance’ of the definition of compensable injury; rather, the amendment ‘removes unnecessary and confusing language. It also adopts language that better matches the language of the aggravation statute at 65-05-15. This will create a more workable progression of compensation with no gaps between the various statutes. If the workplace incident is a ‘mere trigger’ of a preexisting condition then there is no coverage. If the work injury significantly aggravates a known preexisting condition then there is a partial coverage. If the work injury is not really affected by the presence of the preexisting condition then it is a ‘new and separate’ injury and is covered at 100% of benefits.”³⁴

In concluding, Justice Kapnsner recognized that an increase in pain alone can support a compensable injury under the current version of the statute:

We recognize . . . that pain can be a symptom, or subjective evidence, of an injury, disease or other condition. Under the ordinary meaning of those terms, however, employment can also substantially worsen the severity, or substantially accelerate the progression of a preexisting injury, disease, or other condition when employment acts as a substantial contributing factor to substantially increase a claimant's pain.³⁵

Moreover, the plurality seems to reinstate the “latent” versus “patent” distinction into section 65-01-02(10)(b)(7):

31. 1998 ND 158, 583 N.W.2d 621.

32. 472 N.W.2d 459 (N.D. 1991).

33. *Mickelson*, 2012 ND 164, ¶¶ 14-21, 820 N.W.2d at 339-42.

34. *Id.* ¶ 17, 820 N.W.2d at 340-41 (quoting *Hearing on H.B. 1269 Before the H. Comm. on Indus., Bus. and Labor*, 55th Leg. Assemb., Reg. Sess. (N.D. 1997) (written testimony of Reagan R. Pufall, WSI Attorney)).

35. *Id.* ¶ 20, 820 N.W.2d at 342.

We decline to construe those terms so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits. Rather, the statute also authorizes compensability if employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition, which we conclude requires consideration of whether the preexisting injury, disease or other condition would have progressed similarly in the absence of employment. Under that language, employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment. That interpretation provides additional clarification and explanation for delineating between noncompensability when employment triggers symptoms in a preexisting *latent* injury, disease, or other condition and compensability when employment substantially accelerates the progression or substantially worsens the severity of the preexisting injury, disease, or other condition.³⁶

Interestingly, Justice Kapsner does not quote all of Attorney Reagan R. Pufall's written testimony on the preexisting condition statute when appearing before the North Dakota Industry, Business and Labor Committee in its deliberation of the 1997 changes to the statute. The paragraph that was not included explains the preexisting injury statute as follows:

This is sometimes referred to as the 'trigger' statute. Under current law, if a worker has a preexisting injury, disease, or other condition, known or unknown, that is 'triggered' by a minor workplace incident, that is not considered a true work-related injury, and is not compensable. A workplace incident that is only 'the straw that broke the camel's back' is not considered a work injury. For example, if a worker has a degenerative condition that is getting progressively worse, and it so happens that the condition takes a turn for the worse at work, that will not be compensable. However, if there was a workplace injury that substantially accelerated the worsening of the condition, so that it got worse much more quickly than it would have otherwise, or if there was a workplace injury that did substantial additional damage on top of

36. *Id.* ¶ 21, 820 N.W.2d at 342 (emphasis added).

the degenerative condition, making the result much more severe than otherwise would have been, then that will be compensable. It will either be accepted for full benefits or partial benefits, depending on all the circumstances.³⁷

Exactly as this testimony supports, the bill was intended to remove the confusing language from the statute. Explicitly removed was the language regarding known and unknown preexisting conditions. That differentiator is now only contained within the “aggravation” statute.³⁸

Justice Kapsner took special attention to reverse on legal grounds stating:

We conclude the ALJ misapplied the law by looking too narrowly at Mickelson’s degenerative disc disease itself without considering whether his injury, disease, or other condition would likely not have progressed similarly in the absence of his employment so as to substantially accelerate the progression or substantially worsen the severity of his injury, disease, or other condition. We therefore reverse the judgment and remand for proper application of N.D.C.C. § 65-01-02(10)(b)(7).³⁹

Justice Kapsner’s opinion was signed by Justice Maring.⁴⁰

Chief Justice VandeWalle wrote a specially concurring opinion. The Chief Justice allowed the remand to occur: “[t]o the extent that is a *factual*, rather than a *legal question*, I am willing to remand the matter to WSI for further consideration under the facts of this case.”⁴¹ The Chief Justice wrote:

While I agree with that conclusion, I am disturbed by the failure of the statutes and our opinions construing those statutes to distinguish those instances in which pain aggravates an underlying condition, i.e., substantially worsens the severity of the condition, from those instances in which, as the majority opinion here recognizes, pain is only a symptom of the condition triggered by employment.⁴²

37. *Hearing on H.B. 1269 Before the H. Comm. on Indus., Bus., and Labor*, 55th Leg. Assemb., Reg. Sess. (N.D. 1997) (written testimony of Reagan R. Pufall, WSI Attorney).

38. N.D. CENT. CODE § 65-05-15 (2013).

39. *Mickelson*, 2012 ND 164, ¶ 23, 820 N.W.2d at 344.

40. *Id.* ¶ 29, 820 N.W.2d at 345.

41. *Id.* ¶ 30, 820 N.W.2d at 345 (VandeWalle, C.J., concurring specially (emphasis added)).

42. *Id.* ¶ 30, 820 N.W.2d at 345.

As a result, the plurality appears in disagreement as to the posture to which the case was returned. Two justices assert it is returned on a legal basis, the other on factual grounds.

Writing separately, concurring and dissenting in part, Justice Crothers directs the Court's attention to the statute as it is currently written.⁴³ Specifically, Justice Crothers summarized Mickelson's argument as being "substantially based on a law review article written by his lawyer and on a general Workers' Compensation treatise."⁴⁴ "The majority does not follow Mickelson down that path, but spends considerable effort parsing the meaning of 'symptom,' 'substantially' and 'trigger' and applying two of this Court's decisions issued before section 65-01-02(10) of the Century Code Code was changed in 1997."⁴⁵

Moreover, in his concurrence, Justice Crothers analyzed Justice Kapsner's opinion as follows:

Rather than affirming the ALJ's straightforward application of the statute, the majority opinion seemingly grinds the meaning of ordinary words to powder and reshapes them to say 'a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition.' After reshaping, the statute is read by the majority to say 'pain can be a substantial aggravation of an underlying latent condition,' and 'employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment.' In simple terms, the majority holding appears to be that pain caused by current employment can be a compensable injury because it made an existing condition more 'unfavorable,' 'difficult' or 'unpleasant.' But clearly, that is not what the legislature said or meant in N.D.C.C. § 65-01-02(10)(b)(7).⁴⁶

His opinion was signed by Justice Sandstrom.⁴⁷

43. *Id.* ¶ 35, 820 N.W.2d at 346 (Crothers, J., concurring in part and dissenting in part).

44. *Id.* ¶ 34, 820 N.W.2d at 345.

45. *Id.* ¶ 34, 820 N.W.2d at 345.

46. *Id.* ¶ 36, 820 N.W.2d at 346 (internal citations omitted).

47. *Id.* ¶ 41, 820 N.W.2d at 348.

Because of the fractured opinions, there was no majority in this instance; rather a plurality of the Court remanded it on two distinctly different bases. Because of the plurality's deviation from WSI's historical application of the preexisting statute, a response from the 2013 Legislative Assembly was generated.

C. LEGISLATIVE RESPONSE TO *MICKELSON*

On January 10, 2013, Representative George Keiser and Senator Jerry Klein introduced House Bill No. 1163 ("HB 1163") to the House of Representatives.⁴⁸ The purpose was to amend section 65-01-02(10)(b)(7) to include the language, "[p]ain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition."⁴⁹ The House referred it to the House Industry, Business, and Labor Committee for consideration.

During the Committee hearing on HB 1163 held on January 21, 2013, the Committee heard from proponents and opponents of the bill. Mr. Tim Wahlin, Chief of Injury Services at WSI, provided WSI's perspective:

WSI, as did the Administrative Law Judge in this case, has read the statute to require a substantial worsening or progression in the preexisting condition, not just symptoms.⁵⁰ To conclude a worsening has occurred because there is pain, or that the pain itself is a new compensable condition, essentially renders the statute moot.⁵¹

Mr. Wahlin further provided that if HB 1163 failed, the financial impact could cause premiums rates to increase from 5.5% to 12.6%.⁵²

Mr. Dean Haas, the attorney who represented Mr. Mickelson, provided the main opposition testimony to HB 1163.⁵³ Mr. Haas categorized HB 1163 as a "dire change,"⁵⁴ stating it "would deny that pain can show a significant worsening of the preexisting condition, and reverse the decisions

48. H.B. 1163, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

49. *Id.* (Introduced version 13.0220.02000), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0220-02000.pdf>.

50. While there were others who testified in both support and opposition of H.B. 1163, this article contains selected testimony that is intended to capture the essence of the arguments presented on both sides.

51. *Hearing on H.B. 1163 Before the H. Comm. on Indus., Bus., and Labor*, 63rd Leg. Assemb., Reg. Sess. 51 (N.D. 2013) [hereinafter *House Hearing on H.B. 1163*] (statement of Tim Wahlin, Chief of Injury Services, WSI).

52. *Id.* at 4.

53. *Id.* at 7. (statement of Attorney Dean Haas).

54. *Id.*

of the North Dakota Supreme Court.”⁵⁵ He indicated the bill was “a severely retrograde step” and should be studied by the legislature prior to its enactment.⁵⁶ Mr. Haas asserted the *Geck* case, which noted pain could be an aggravation of an underlying condition of arthritis under previous law, was still controlling law, and *Mickelson* reaffirmed this.⁵⁷ This position was refuted by WSI’s testimony regarding WSI’s historical application.⁵⁸

On January 23, 2013, the Industry, Business, and Labor Committee met and reviewed a fiscal note provided by WSI.⁵⁹ In addition, as suggested by Mr. Haas, Representative Marvin Nelson moved a “hog house amendment”⁶⁰ to require the 2013-14 Interim Workers' Compensation Review Committee to study coverage of the worsening of conditions.⁶¹ This motion failed four to eleven. Representative Gary Sukut moved to pass HB 1163 in its original form, which passed eleven to four.⁶²

HB 1163 returned to the floor of the House of Representatives for a second reading on January 29, 2013, where it passed sixty-one to twenty-eight.⁶³ On January 30, 2013, the Senate received the bill from the House of Representatives. It was not formally introduced into the Senate until February 12, 2013, and once again referred to the Industry, Business and Labor Committee.⁶⁴

The Senate Industry, Business and Labor Committee met on March 19, 2013.⁶⁵ During this hearing, robust and diverse testimony on HB 1163 took place. Initially, Representative George Keiser introduced HB 1163 to the Committee, referencing the *Mickelson* decision and the need for the bill.⁶⁶

55. *Id.* at 70 (statement of Attorney Dean Haas).

56. *Id.* at 71.

57. *Id.* at 72; *see also* *Geck v. N.D. Workers Comp. Bureau*, 1998 ND 158, ¶¶ 10-15, 583 N.W.2d 621, 624 (noting that a compensable aggravation of a pre-existing arthritis could include a worsening of symptoms and remanded to the case to determine whether there was a substantial aggravation of the arthritis in plaintiff’s left knee).

58. *House Hearing on H.B. 1163*, *supra* note 52, at 51 (statement of Tim Wahlin, Chief of Injury Services, WSI).

59. WSI provided a summary of Actuarial Information to the Legislative Council stating no fiscal impact was anticipated with the proposed bill because there would not be a change to WSI’s application of the statute. *Hearing on H.B. 1163 Before the S. Comm. on Indus., Bus., and Labor*, 63rd Leg. Assemb., Reg. Sess. 78 (N.D. 2013) [hereinafter *Senate Hearing on H.B. 1163*].

60. A “Hog House” amendment can typically be described as a removal of the entirety of a bill’s legislative text and replacement via amendment. *See, e.g.*, SOUTH DAKOTA LEGISLATURE’S STUDENT GUIDE: GLOSSARY OF LEGISLATIVE TERMS, 4, available at <http://legis.sd.gov/docs/studentpage/studentguide/Glossary.pdf>.

61. *House Hearing on H.B. 1163*, *supra* note 52, at 12 (statement of Representative Nelson).

62. *Id.* at 13 (statement of Representative Sukut).

63. H. JOURNAL, 63d Leg. Assemb., Reg. Sess. 261, 262-63 (N.D. 2013).

64. S. JOURNAL, 63d Leg. Assemb., Reg. Sess. 323, 346 (N.D. 2013).

65. *Senate Hearing on H.B. 1163*, *supra* note 60.

66. *See id.* at 21 (statement of Representative George Keiser).

He stated that “in the interim, the court intervened and made a ruling in contradiction to what the practice had been at [WSI].”⁶⁷

At this time, Tim Wahlin again testified on behalf of WSI.⁶⁸ He initially addressed the misinformation circulating about HB 1163:

We have met with various constituents to explain why this bill was submitted and what is intended by the language. There are various interpretations regarding the bills effects and intentions in circulation and we acknowledge that fact. I have attached a one page information sheet to provide clarification. Many of the issues within this bill illustrate profound ideological differences within the workers’ compensation industry. Hopefully this testimony will help to explain the reasons behind the bill’s creation and facilitate a discussion regarding a reasonable balancing of the potential increased scope of coverage and the costs this may generate.⁶⁹

He explained WSI’s practice of focusing on the compensability of the underlying condition in order to determine compensability.⁷⁰ He further stated that HB 1163 maintained the historical application of the law and noted the bill does not eliminate pain as a consideration when reviewing a claim for compensability.⁷¹ He added that “[n]o portion of this bill renders pain irrelevant or unimportant” and “[n]o portion of this bill denied medical coverage for treatment of pain in compensable conditions.”⁷²

Greg Peterson, M.D., a Physical Medicine and Rehabilitation physician and a Board Certified Pain Medicine Specialist, testified in support of the bill. Dr. Peterson serves as a medical consultant for WSI and provided a medical opinion in Mr. Mickelson’s claim.⁷³ Dr. Peterson testified that “no physician can reliably measure pain” and that pain can be different for everyone.⁷⁴ He explained:

[I]f the *Mickelson* case progresses to where a person’s report of increased pain in a preexisting condition establishes a compensable injury, unreliability will become prevalent in the system. Without addressing the question of what is causing the pain and inquiry about whether work progressed or worsened the

67. *Id.*

68. *Id.* at 75 (statement of Tim Wahlin, Chief of Injury Services, WSI).

69. *Id.*

70. *Id.*

71. *Id.* at 76.

72. *Id.* at 78.

73. *Id.* (written testimony of Greg Peterson, M.D.).

74. *Id.* at 98.

condition, liability will be established without the requisite tie to employment.⁷⁵

Dr. Peterson concluded by explaining that HB 1163 was “not an issue of medical practice,” nor did it “limit diagnosis or treatment of patients.”⁷⁶ He noted that “[t]he importance of a treating physician’s opinion is unchanged by this bill. The treating physician’s opinion remains the paramount point of inquiry. This bill simply allowed continued fair determination of who should pay for patient care.”⁷⁷

Patti Peterson, RN/FNP and Nora Allen, RN, both with Sanford Health, testified in support of the bill. They supported clarifying that pain is a symptom rather than a cause of a pre-existing condition.⁷⁸

Other medical providers provided testimony in opposition to HB 1163. The heart of their concern was the perceived elimination of pain from the compensability equation and WSI’s alleged misunderstanding of pain. Michael Moore, MD, a WSI’s Board of Directors member, spoke in opposition to the bill. He contended that the bill as written could “be interpreted as entirely dismissive of a patient’s complaints of pain.”⁷⁹ Dr. Moore explained “many diagnoses are made purely on the basis of a patient’s history, their complaints (which frequently concern pain), a physical examination, and the judgment of the physician.”⁸⁰ He posed concern because not every diagnosis can be determined by some scan, blood test, or imaging study.⁸¹

Dr. Moore provided suggested language to the Committee that he purported “accomplished the goal of clarifying what constitutes a compensable injury, but did not remove a patient’s complaint of pain from consideration.”⁸² This language read: “Pain that can be reasonably attributed to the natural consequences of aging or the natural history of a pre-existing injury, disease, or other condition is not in and of itself provide proof of a compensable injury.”⁸³

Michael Gonzalez, M.D., also testified in opposition to the bill. He opined that the “proposed legislation is based on a profound misunderstanding of what pain is” because “[i]t mixes the idea of acute pain

75. *Id.* at 98-99.

76. *Id.* at 99.

77. *Id.*

78. *Id.* at 101 (statement of Patti Peterson, RN and statement of Nora Allen, NP).

79. *Id.* at 102 (statement of Michael Moore, M.D., Member, WSI Board of Directors).

80. *Id.*

81. *Id.*

82. *Id.* (testimony of Michael Moore, M.D.) (on hand with the authors).

83. *Id.* at 121 (Proposed Amendment 13.0220.02002).

with chronic pain, and does not reflect at all what we know about pain from the contemporary scientific study.”⁸⁴ He referenced a video completed by Dr. Elliot Krane, a professor of pediatric anesthesiology and pain medicine at Stanford University Medical School, to support his perspective.⁸⁵ In addition, Shelley Killen, M.D., spoke in opposition to HB 1163. Her concerns were that the bill does not consider diseases such as Complex Regional Pain Syndrome, which is a syndrome solely based on pain.⁸⁶ Finally, John Mickelson, D.O., provided written testimony indicating HB 1163 could increase the cost of treating injured workers by causing the doctors to perform “unnecessary and expensive” tests to determine the cause of the injury.⁸⁷ He indicated “numerous diseases have no obvious medical findings that you can perform a test on.”⁸⁸

Attorney Dean Haas testified once again in opposition to HB 1163. Mr. Haas argued that “a significant increase in pain—even chronic pain—would no longer qualify as a compensable injury.”⁸⁹ One of the main points of his testimony was that the bill reversed the workers’ compensation principle that employees must be taken “as is” despite age, natural aging, or genetic susceptibility.⁹⁰ He also argued that, based on the physicians who testified earlier, pain is a significant factor in determining a person’s medical condition and it would be unethical for a physician to ignore a person’s pain complaints.⁹¹ He agreed that pain is subjective, but noted pain has also been studied scientifically.⁹² Mr. Haas contended that even without the passage of HB 1163, North Dakota was still one of the most conservative states when taking into consideration pre-existing conditions.⁹³

The Senate Industry, Business, and Labor Committee reconvened on March 26, 2013. Senator Philip Murphy moved to adopt the amendments proposed by Dr. Moore.⁹⁴ The motion failed two to five.⁹⁵ However, a similar amendment proposed by Senator Klein that intended to address some of Dr. Moore’s concerns was also introduced.⁹⁶ It provided that

84. *Id.* at 106 (statement of Michael Gonzalez, M.D.).

85. Dr. Elliot Krane, *The Mystery of Chronic Pain*, TED (Mar. 2011), http://www.ted.com/talks/elliott_krane_the_mystery_of_chronic_pain.html.

86. *Senate Hearing on H.B. 1163*, *supra* note 60, at 107 (statement of Shelly Killen, M.D.).

87. *Id.* at 120 (statement of John Mickelson, D.O.).

88. *Id.*

89. *Id.* at 108 (statement of Attorney Dean Haas).

90. *Id.*

91. *Id.* at 109.

92. *Id.*

93. *Id.*

94. *Id.* at 25 (statement of Sen. Philip Murphy).

95. *Id.* at 31.

96. *Id.* at 26 (statement of Sen. Jerry Klein).

“[p]ain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening.”⁹⁷ Mr. Wahlin explained this amendment helped clarify for everyone that pain is a factor when considering compensability of an injury, but pain alone will not be considered a substantial worsening, but a symptom.⁹⁸ The amendment passed the committee seven to zero.⁹⁹ Ultimately the amended bill passed the Committee by a vote of five to two.¹⁰⁰

On March 29, 2013, the Senate passed HB 1163 with Senate Amendments, twenty-seven in favor and nineteen in opposition.¹⁰¹ Because of the Senate’s amendment to the bill, it was returned to the House of Representatives to consider the engrossed version of the bill. On April 4, 2013, the House of Representatives refused to concur with the Senate’s amendments and referred it back to the House Industry, Business, and Labor Committee.¹⁰²

On April 10, 2013, a conference committee on HB 1163 was held with appointed members from the Senate and House Industry, Business, and Labor Committees in attendance. House members posed concern with the Senate amendments being redundant, contradictory, and providing additional language for courts to interpret.¹⁰³ Senator John Andrist explained that the Senate amendment was crafted to assist in the passage of the bill given the contention during the Senate hearings.¹⁰⁴ Tim Wahlin stated it was WSI’s intention from the beginning that pain be considered, and pointed to the fact that the Senate amendment acknowledges that pain is a symptom to be considered, but WSI will still look at what is the basis or condition that is substantially worsened.¹⁰⁵ The conference committee ultimately agreed to accede to the Senate amendments.¹⁰⁶ On April 16, 2013, the House of Representatives passed House Bill 1163 with Senate Amendments—sixty-five to twenty-eight.¹⁰⁷ On April 29, 2013, Governor

97. *Id.* at 123.

98. *Id.* at 26 (statement of Tim Wahlin, Chief of Injury Services, WSI).

99. *Id.* at 32.

100. *Id.* at 33.

101. S. JOURNAL, 63d Leg. Assemb., Reg. Sess. 931, 932 (N.D. 2013).

102. H. JOURNAL, 63d Leg. Assemb., Reg. Sess. 1141, 1148 (N.D. 2013).

103. *Hearing on H.B. 1163 Before the Conf. Comm. on Indus., Bus., and Labor*, 63rd Leg., Assemb., Reg. Sess. 36 (N.D. 2013) (statements of Representatives George Keiser and Dan Ruby).

104. *Id.* at 38 (statement of Senator John Andrist).

105. *Id.* (statement of Tim Wahlin, Chief of Injury Services, WSI).

106. *Id.* at 39.

107. H. JOURNAL, 63d Leg. Assemb., Reg. Sess. 1529, 1535 (N.D. 2013).

Dalrymple signed House Bill 1163. It applied to all claims regardless of the date of injury and would become effective August 1, 2013.¹⁰⁸

D. CASE LAW FOLLOWING *MICKELSON* AND THE INTERPRETATION OF THE 2013 LEGISLATIVE CLARIFICATIONS

On July 18, 2013, the Supreme Court issued a unanimous decision in *Davenport v. Workforce Safety and Insurance Fund*.¹⁰⁹ This is the first case following *Mickelson* in which the Court provided additional insight regarding its decision in *Mickelson*. The main issue in this case was whether Mr. Davenport incurred compensable injuries under section 65-01-02(10) of the Century Code Code.¹¹⁰ Davenport asserted that, although he had known preexisting degenerative spine and lower back conditions, his work injuries substantially aggravated or worsened his conditions to where he had to seek medical treatment and was unable to perform his regular work duties.¹¹¹ He asserted “his ongoing chronic pain condition was substantially caused by his work injuries.”¹¹² Relying on *Mickelson*, Davenport advocated for reversal of the order denying compensability for these conditions.¹¹³

WSI responded that the ALJ correctly decided Davenport’s preexisting cervical spine, left shoulder, and lower back conditions were not compensable. WSI asserted the *Mickelson* case involved significantly different facts and did not require reversal of the ALJ’s decision because it involved a latent preexisting condition while Davenport had known preexisting symptoms in his cervical spine and back.¹¹⁴ WSI maintained the ALJ correctly applied the law and the ALJ’s findings were supported by the weight of the evidence because Davenport’s preexisting condition in his lower back and cervical spine was hastened by years of smoking, and he offered no medical evidence supported by objective medical findings to show compensability for a work injury.¹¹⁵

In its analysis, the Supreme Court provided further clarification regarding *Mickelson*’s meaning:

108. North Dakota Legislative Council, *Effective Dates of 2013 Legislation*, available at <http://www.legis.nd.gov/files/resource/63-2013/effective-dates-legislation/2013-effective-dates-legislation.pdf?20140417101022>.

109. *Davenport v. Workforce Safety & Ins. Fund*, 2013 ND 118, 833 N.W.2d 500.

110. *Id.* ¶ 1, 833 N.W.2d at 503.

111. *Id.* ¶ 20, 833 N.W.2d at 509.

112. *Id.* ¶ 20, 833 N.W.2d at 509.

113. *Id.* ¶ 20, 833 N.W.2d at 509.

114. *Id.* ¶ 21, 833 N.W.2d at 509.

115. *Id.* ¶ 21, 833 N.W.2d at 509.

Under *Mickelson*, depending on the specific facts and circumstances and the medical evidence supported by objective medical findings, pain can be a substantial worsening of the severity or a substantial acceleration of the progression of a preexisting condition and pain also can be a symptom of the condition triggered by employment. Under *Mickelson*, however, pain alone does not establish a substantial acceleration or a substantial worsening of a preexisting condition for purposes of a compensable injury. Rather, *Mickelson* does not eliminate the requirement that there must be medical evidence supported by objective medical findings for a compensable injury.¹¹⁶

Thus, in the *Davenport* case, there was sufficient medical evidence to support the conclusion that Davenport's pain was not caused by the work injury, and likely would have progressed the same, absent the work injury. The Court emphasized that just because pain became worse after the injury, the requisite objective medical evidence still needed to be present to support a causal connection between the pain in the underlying condition and the work incident. The mere existence of increased pain is not enough to deem the pain compensable.

Most recently, the Court issued a split decision in *Warren Parsons v. Workforce Safety and Insurance Fund*.¹¹⁷ In this case, the ALJ denied Parson's claim for benefits on the basis that the work injury triggered symptoms in his preexisting cervical spine condition, but did not substantially accelerate the progression or substantially worsen the severity of his preexisting condition as required by section 65-01-10(b)(7) of the Century Code Code.¹¹⁸ Writing for the majority, Justice Maring determined the preexisting injury statute was not applicable to this claim and that ALJ erred as a matter of law in applying it.¹¹⁹

In addition, according to the majority, the medical evidence supported that Parson's condition, for which he was seeking treatment, did not stem from his preexisting condition, but from separate unrelated tears in his cervical spine discs caused by the work injury.¹²⁰ As a result, the majority reversed the denial of Parson's claim concluding, "a reasoning mind could not reasonably determine the ALJ's findings that Parson's injuries are attributable to his preexisting condition and that his employment triggered

116. *Id.* ¶ 25, 833 N.W.2d at 510 (citations omitted).

117. 2013 ND 235, 841 N.W.2d 404.

118. *Id.* ¶ 16, 841 N.W.2d at 409.

119. *Id.* ¶ 19, 841 N.W.2d at 410.

120. *Id.* ¶ 21, 841 N.W.2d at 411.

symptoms of his preexisting condition were proven by a the weight of the evidence,” and remanded the case to WSI to adjudicate benefits.¹²¹

Justice Crothers dissented. He determined the ALJ correctly applied the law, and the ALJ’s factual determinations should have been sustained.¹²² The dissent was critical of the majority overstepping its bounds: “[t]he majority notes, but I believe does not abide by, our very limited review of an executive branch agency’s factual determinations.”¹²³ The dissent explained the ALJ considered and weighed the evidence, and the ALJ’s findings were supported by competent evidence.¹²⁴ “On that basis, I would affirm the ALJ’s decisions under our limited legal authority to review factual findings.”¹²⁵ Ultimately, *Parsons* does not modify the plurality’s decision in *Mickelson*. The *Parsons*’ majority simply determined under the evidence presented in *Parsons*’ claim that the preexisting injury statute was not applicable and the factual determinations were not supported.

There are likely other cases currently in the appeal process that will shed light on the boundaries of the *Mickelson* decision. However, like *Davenport* and *Parsons*, these cases will interpret the pre-2013 preexisting injury statute. Until the court addresses the 2013 version of this statute, it will not be known whether the court and the Legislature will interpret this provision consistently. In the meantime, WSI will continue to apply the 2013 version of the preexisting injury statute to compensability determinations made after August 1, 2013.

III. CONCLUSION

At the core of this debate is the time worn conflict that exists between the judiciary and the legislative branches of government in the area of workers’ compensation. The conflict makes this area of law difficult to project for regulators. Historically, the great compromise that removed an employee’s right to sue in return for the sure and certain relief of no-fault medical and wage replacement benefits has always been ripe for judicial interpretations consistent with an overlay of interpretive justice. Legislatively, especially in North Dakota, political forces are fiercely invested in controlling this arena by statute.

121. *Id.* ¶¶ 21-22, 841 N.W.2d at 411-12.

122. *Id.* ¶ 32, 841 N.W.2d at 413 (Crothers, J. dissenting).

123. *Id.* ¶ 34, 841 N.W.2d at 415.

124. *Id.* ¶¶ 36-37, 841 N.W.2d at 415-16.

125. *Id.* ¶ 37, 841 N.W.2d at 416.

In North Dakota, a schism has begun to appear within our Supreme Court between a faction tending towards a progressive activism within the workers' compensation laws and a very disciplined, literalistic reading of the statutory scheme. This interplay has appeared in the *Mickelson* case, and was recently affirmed in the *Parsons* case. Both the plurality and later majority opinions were authored by Justice Maring, the dissents by Justice Crothers. In his dissents, Justice Crothers is critical of the court's ease of avoiding, or aggressive interpretation of statutory law.

As the state agency whose charge it is to enforce the law, little variance is allowed other than applying the statutes as written. The position is essential because WSI is required to act as an insurer and "reserve" appropriate funds for the payment of claims currently in the system. Based upon those anticipated expenditures, rates are developed to charge employers appropriate premiums to cover the anticipated costs. If interpretations of the statutes vary, costs will as well. Having already charged premiums developed by an interpretation gleaned from participation in the legislative process, it leaves WSI in the unenviable position of charging current employers for those changes, even when those employers are outside of the risk years insured.

This debate is far from over. Recent changes in the make up of the court may also alter the outcomes of workers' compensation cases in the years to come. We will wait and see.