WORKERS' COMPENSATION — INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT: THE NORTH DAKOTA SUPREME COURT REJECTS THE POSITIONAL RISK DOCTRINE IN CASES OF UNEXPLAINED FALLS AT WORK

Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, 815 N.W.2D 539

ABSTRACT

In *Fetzer v. North Dakota Workforce Safety & Insurance*, the North Dakota Supreme Court rejected the positional risk doctrine in cases of unexplained falls at work. The appellant, Fetzer, sustained an injury from a fall at work that was unexplained and not attributable to a risk personal to Fetzer. On appeal, Fetzer argued the Workforce Safety and Insurance order improperly denied her workers' compensation benefits because her injury is compensable under the positional risk doctrine. The North Dakota Supreme Court held a causal connection between an unexplained fall at work and employment is required to satisfy the "arising out of" element of a workers' compensation claim under the North Dakota Workforce Safety and Insurance Act. Because the positional risk doctrine applied only a but-for test to satisfy causality for neutral risks, the North Dakota Supreme Court stated the doctrine is incompatible with the purposes of the Act. In rejecting the positional risk doctrine, the North Dakota Supreme Court has placed a higher causality burden on employees filing workers' compensation claims for injuries resulting from neutral risks at work. Additionally, the *Fetzer* decision raises several unanswered questions for future workers' compensation claimants, including the definition of neutral risks, and whether the causal connection requirement is applicable to all workers' compensation claims resulting from neutral risks.

I. FACTS

Beverly Fetzer fractured her left hip and wrist after falling while walking down a hallway on her employer's premises during work hours.[1] Because Fetzer was injured during work hours, she filed a claim for workers' compensation benefits with Workforce Safety and Insurance ("WSI").[2] WSI denied the claim, determining the injury had "occurred in the course of, but did not arise out of" Fetzer's employment.[3] Additionally, WSI further stated walking at work, without more, is not sufficient to give rise to a claim for benefits.[4]

In response, Fetzer requested a hearing.[5] Before the hearing, the parties stipulated to certain facts, including: (1) the floor where Fetzer fell had no obstructions, slippery spots, frays or tears in the carpet,[6] and (2) "[t]he fall [was] unexplained and not attributable to a risk personal to Fetzer."[7] An Administrative Law Judge ("ALJ") affirmed WSI's order denying Fetzer benefits because Fetzer could not demonstrate the requisite causation required to recover benefits,[8] and North Dakota law requires claimants to prove their injuries arose out of their employment.[9] Fetzer appealed the ALJ's decision to the district court.[10] The district court affirmed the ALJ's conclusions denying coverage to Fetzer.[11]

Fetzer then appealed the district court's decision to the North Dakota Supreme Court, arguing her injury was compensable under the positional

1. Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, ¶ 2, 815 N.W.2d 539, 540.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* ¶ 3. North Dakota Century Code section 65-04-32 states an employee may request a rehearing within thirty days. "Absent a timely and sufficient request for rehearing, the administrative order is final and may not be reheard or appealed." N.D. CENT. CODE § 65-04-32 (2010).
6. *Fetzer*, ¶ 3, 815 N.W.2d at 540.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

risk doctrine.[12] The positional risk doctrine states: "[a]n injury arises out of the employment if it would not have occurred but[-]for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured."[13] Additionally, Fetzer contended the North Dakota Supreme Court had implicitly recognized the positional risk doctrine in *Mitchell v. Sanborn*,[14] and as a result of that previous holding, claimants suffering from unexplained falls at work could be awarded workers' compensation benefits.[15]

II. LEGAL BACKGROUND

The *Fetzer* decision has broad implications on workers' compensation law in North Dakota. In order to more fully understand these implications, it is critical to consider the historical and legal origins of workers' compensation. Designed to strike a bargain between employers and employees, the adoption of workers' compensation laws by states is considered one of the more significant political and legal advancements in our nation's history.[16]

A. THE WORKERS' COMPENSATION BARGAIN

The workers' compensation bargain is the grand compromise between employers and employees, where employees forfeit their right to sue employers in tort in exchange for employers providing medical and disability benefits to employees for injuries occurring at work.[17] Prior to the enactment of workers' compensation laws, the only legal remedy that existed for injured workers was to bring a tort action against their employer.[18] Generally, employers succeeded at trial, in large part as a result of many legal defenses, including assumption of risk and contributory negligence, but this system left employers vulnerable to unpredictable losses.[19] This litigation also heightened friction between employers and

12. *Id.* ¶ 4.

13. *Id.* ¶ 7, 815 N.W.2d at 541 (citing 1 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 3.05 (2011)).

14. 536 N.W.2d 678 (N.D. 1995).

15. *Fetzer*, ¶ 4, 815 N.W.2d at 540.

16. ISHITA SENGUPTA ET AL., NATIONAL ACADEMY OF SOCIAL INSURANCE, WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS 2 (2012).

17. Dean J. Haas, *Falling Down on the Job: Workers' Compensation Shifts from a No-Fault to a Worker-Fault Paradigm*, 79 N.D. L. REV. 203, 204 (2003).

18. SENGUPTA ET AL., *supra* note 16, at 2.

19. *Id.*

employees.[20] As a result, employers and employees generally favored the adoption of workers' compensation laws.[21]

Historically, Germany and Great Britain were among the first of the developed nations to enact workers' compensation laws in 1884 and 1897, respectively.[22] In the United States, workers' compensation laws were adopted by most states between 1910 and 1920,[23] and although federal workers' compensation laws have been enacted,[24] workers' compensation remains primarily a state issue in the United States.[25] North Dakota followed the national trend and adopted the North Dakota Workforce Safety and Insurance Act in 1919.[26]

B. THE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE ACT

In 1919, the North Dakota Legislature passed the North Dakota Workforce Safety and Insurance Act and created the Workmen's Compensation Bureau, which would operate a state fund to insure and administer workers' compensation benefits.[27] Its stated purpose is to provide "sure and certain relief . . . regardless of questions of fault" to workers injured while performing work.[28] Unlike the majority of states, however, the North Dakota Legislative Assembly chose to create a government agency to exclusively control workers' compensation benefits.[29]

1. *A State Controlled Approach to Workers' Compensation*

North Dakota, Ohio, Washington, West Virginia, and Wyoming[30] rejected the prototypical approach to workers' compensation, which allows private insurers to write workers' compensation coverage.[31] Instead, North Dakota and these four other states elected to rely on an entirely state

20. *Id*.
21. *Id*.
22. *Id*. at 1.
23. *Id*.
24. *Id*. at 2.
25. *Id*.
26. Workforce Safety & Insurance Act, 1919 N.D. Laws 162, § 1.
27. *Id*.
28. N.D. CENT. CODE § 65-01-01 (2010).
29. Haas, *supra* note 17, at 209.
30. N.D. CENT. CODE § 65-01-01; OHIO REV. CODE ANN. § 4123.05 (West 2012); WASH. REV. CODE § 51.04.010 (2012); W. VA. CODE § 23-1-1 (2012); WYO. STAT. ANN. § 27-14-101 (2012).
31. Haas, *supra* note 17, at 209.

program for workers' compensation.[32] Scholars and lawmakers debate whether the state controlled approach is more meritorious than the privatization approach,[33] but the state controlled aspect of the North Dakota Workforce Safety and Insurance aspect is critical for understanding how claims for benefits are reviewed in North Dakota.

The Workforce Safety and Insurance agency reviews all claims for benefits by injured employees.[34] WSI then decides whether the injured employee is entitled to benefits under North Dakota Century Code section 65-01-01.[35] In making a decision regarding benefits, claimants have the burden of proving by a preponderance of the evidence the claimant suffered a compensable injury.[36]

2. *Compensable Injury Requirement*

The compensable injury requirement is often the source of litigation in North Dakota workers' compensation claims,[37] because the statutory

32. *Id*. In North Dakota and many other states, social engineering was at its peak in 1919. "The same Legislative Assembly that created the Workers' Compensation Act also adopted legislation creating a state bank, a state mill, and a state elevator. Not surprisingly, the original bill exhibited a socialist bent." Susan J. Anderson & Gerald Deloss, *Are Employees Obtaining "Sure and Certain Relief" Under the 1995 Legislative Enactments of the North Dakota Workers' Compensation Act?*, 72 N.D. L. REV. 349, 352 (1996); *see also* Price v. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 327 (1998) (explaining the Progressive Era's impact on workers' compensation laws in the early 1900s).

33. *See* Haas, *supra* note 17, at 209-11; Emily A. Spieler, *Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia*, 95 W. VA. L. REV. 333, 357 (1993); Fishback & Kantor, *supra* note 32, at 310; Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 YALE L. & POL'Y REV. 123, 142 (1996).

34. N.D. CENT. CODE § 65-01-01.

35. *Id*.

36. Swenson v. Workforce Safety & Ins., 2007 ND 149, ¶ 24, 738 N.W.2d 892, 901.

37. Mickelson v. N.D. Workforce Safety & Ins., 2012 ND 164, ¶ 12, 820 N.W.2d 333, 339 (arguing degenerative disc condition made worse by employment is a compensable injury); Johnson v. N.D. Workforce Safety & Ins., 2012 ND 87, ¶ 8, 816 N.W.2d 74, 77 (disputing whether a pre-existing shoulder injury, substantially accelerated by employment, is a compensable injury); Landrum v. N.D. Workforce Safety & Ins., 2011 ND 108, ¶ 11, 798 N.W.2d 669, 671 (considering whether a denial of benefits for headaches and vision problems was appropriate); Curran v. N.D. Workforce Safety & Ins., 2010 ND 227, ¶ 20, 791 N.W.2d 622, 625-26 (considering whether an injury to a lumbar spine while picking up a band-aid at work is a compensable injury); N.D. Workforce Safety & Ins. v. Auck, 2010 ND 126, ¶ 7, 785 N.W.2d 186, 189 (considering whether a heart attack caused by work-related stress is a compensable injury); Schoch v. N.D. Workforce Safety & Ins., 2010 ND 25, ¶ 11, 778 N.W.2d 542, 547 (considering whether a disc herniation was a compensable injury); Swenson v. N.D. Workforce Safety & Ins., 2009 ND 197, ¶ 8, 775 N.W.2d 700, 703 (considering whether there was enough evidence to support that plaintiff's injury was work-related); Bergum v. N.D. Workforce Safety & Ins., 2009 ND 52, ¶ 10, 764 N.W.2d 178, 181 (considering whether a lower back injury was a compensable injury); Huwe v. N.D. Workforce Safety & Ins., 2008 ND 47, ¶ 11, 746 N.W.2d 158, 162 (considering whether WSI and the ALJ properly considered claimant's dependency on narcotics and chronic pain in denying benefits); Thompson v. N.D. Workforce Safety & Ins., 2006 ND 69, ¶

definition limits what injuries are, and are not, compensable.[38] North Dakota Century Code section 65-01-02(10) defines a compensable injury as "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings."[39] The language, "arising out of," was added to the definition of a compensable injury in 1977.[40]

The North Dakota Supreme Court, in *Choukalos v. North Dakota Workers' Compensation Bureau*,[41] held the language, "course of employment," refers to the circumstances, time, and place of the accident relative to the employment, while "arising out of" refers to the causal origin.[42] In *Fetzer*, the controversy specifically surrounded the interpretation of the "arising out of" element and what causality burden is appropriate to meet the "arising out of" element in the case of an unexplained fall.[43]

C. THE "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" ELEMENT: THREE APPROACHES

In determining whether an unexplained fall at work satisfies the "arising out of" element of a workers' compensation claim, states have taken three distinct approaches. These approaches include: (1) the positional risk doctrine, (2) requiring a causal connection between the injury and the employment, and (3) requiring an employee to rule out idiopathic causes for the fall.[44] Each approach imposes a different causality burden on employees,[45] and until *Fetzer*, it was unclear which approach North Dakota followed for injuries resulting from neutral risks.[46]

1. *The Positional Risk Doctrine*

A majority of courts have adopted the positional risk doctrine in unexplained fall cases.[47] Under the positional risk doctrine, "[a]n injury

8, 712 N.W.2d 309, 311 (considering whether claimant showed with reasonable medical certainty that his cervical spine injury was work-related).

38. *See* N.D. CENT. CODE § 65-01-02(10).

39. *Id*.

40. 1977 N.D. 579.

41. 427 N.W.2d 344 (N.D. 1988).

42. *Choukalos*, 427 N.W.2d at 345-46 (citing 1 ARTHUR LARSON, LARSON'S WORKMENS' COMPENSATION LAW § 6.10, at 3-3 (1985)).

43. Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, ¶ 9, 815 N.W.2d 539, 541.

44. Milledge v. Oaks, 784 N.E.2d 926, 931 (Ind. 2003).

45. *Id*.

46. *Fetzer*, ¶ 8, 815 N.W.2d at 542.

47. *See* 1-3 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 7.04[1][a], at 7-24 (2012); *see also* Circle K Store No. 1131 v. Indus. Comm'n of Ariz., 796 P.2d 893, 898

arises out of the employment if it would not have occurred *but[-]for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured."[48] The positional risk doctrine, however, is limited to only injuries resulting from neutral risks.[49]

In examining a workers' compensation claim resulting from a neutral risk, jurisdictions that have adopted the positional risk doctrine require only that the employment create a zone of special danger from which the injury arises to satisfy the "arising out of" element of the claim.[50] The controversial aspect of the positional risk doctrine is the loss burden of a neutral risk does not fall exactly upon the employer or the employee.[51] As a result, courts generally look to the legislative intent and history behind the applicable workers' compensation act in that state to determine if the positional risk doctrine is compatible with the intent of the legislature.[52]

2. *Requiring a Causal Connection*

The second approach requires the claimant to show a causal connection between the injury and the employment.[53] Where the positional risk doctrine only applies a but-for test to satisfy the "arising out of" element, the causal connection requirement forces the claimant to demonstrate the resulting injury has a special connection to the work or conditions under which it is performed.[54] This approach leaves the burden on the employee to demonstrate a causal connection, and it is "the most difficult burden to meet when an injury occurs without explanation."[55]

(Ariz. 1990); Horodyskyj v. Karanian, 32 P.3d 470, 477 (Colo. 2001); Ryerson v. A.E. Bounty Co., 140 A. 728, 731 (Conn. 1928); Mayo v. Safeway Stores, Inc., 457 P.2d 400, 402 (Idaho 1969); Tommy Thompson Produce Co. v. Coulter, 678 S.W.2d 794, 795 (Ky. Ct. App. 1984); Mulready v. Univ. Research Corp., 756 A.2d 575, 581 (Md. 2000); Stanley Baran's Case, 145 N.E.2d 726, 727 (Mass. 1957); Whetro v. Awkerman, 174 N.W.2d 783, 786 (Mich. 1970); United Fire & Cas. Co. v. Maw, 510 N.W.2d 241, 246 (Minn. Ct. App. 1994); Johnson v. Roundtree, 406 So. 2d 810, 811 (Miss. 1981); Ensley v. Grace, 417 P.2d 885, 888 (N.M. 1966); Grimaldi v. Shop Rite Big V, 456 N.Y.S.2d 176, 176 (N.Y. App. Div. 1982); Taylor v. Twin City Club, 132 S.E.2d 865, 869 (N.C. 1963); Smith v. Apex Div., Cooper Indus. Inc., 623 N.E.2d 700, 703 (Ohio Ct. App. 1993); Turner v. B Sew Inn, 18 P.3d 1070, 1076 (Okla. 2000); Steinberg v. S.D. Dep't of Military & Veterans Affairs, 607 N.W.2d 596, 602-03 (S.D. 2000); Clodgo v. Rentavision, Inc., 701 A.2d 1044, 1047 (Vt. 1997).

48. LARSON, *supra* note 47, § 3.05, at 3-6 (2012).

49. 82 AM. JUR. 2D *Workers' Comp.* § 244 (2012).

50. 99 C.J.S. *Workers' Comp.* § 378 (2012).

51. Milledge v. Oaks, 784 N.E.2d 926, 932 (Ind. 2003).

52. *Id.*

53. Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, ¶ 21, 815 N.W.2d 539, 546 (Maring, J., dissenting).

54. 99 C.J.S. *Workers' Comp.* § 466 (2012).

55. *Milledge*, 784 N.E.2d at 931.

3. *Ruling Out Idiopathic Causes*

The third approach requires the employee to rule out any idiopathic causes for the injury.[56] If the employee can carry that burden, then "an inference arises that the fall arose out of employment."[57] This approach hinges on the theory that workers' compensation benefits should not be awarded if the cause of the injury was idiopathic, or personal to the claimant, rather than work related.[58]

III. ANALYSIS

The issue presented in *Fetzer* focused on whether an unexplained fall at work satisfied the "arising out of" element of a workers compensation claim under North Dakota Century Code section 65-01-11.[59] As the North Dakota Supreme Court had never previously examined the "arising out of" element in the context of an unexplained fall, this case presented an issue of first impression.[60] In a four to one decision, with Justice Maring dissenting, the North Dakota Supreme Court held claimants attempting to recover workers' compensation benefits for an unexplained fall at work are required to demonstrate a causal connection between their employment and the injury.[61]

A. THE MAJORITY OPINION: AN ARGUMENT FOR A CAUSAL CONNECTION

Writing for the majority, Justice Kapsner, joined by Chief Justice VandeWalle, and Justices Crothers and Sandstrom, articulated the decision in *Fetzer* hinged on the North Dakota Supreme Court's interpretation of the "arising out of" element of a workers' compensation claim.[62] To reach their conclusion, the majority relied heavily on (1) the legislative history of the North Dakota Workforce Safety and Insurance Act,[63] and (2) the decisions by courts in Nevada, a state with a similar workers' compensation act.[64] After engaging in this analysis, the North Dakota Supreme Court concluded

56. *Id*.
57. *Id*.
58. 82 AM. JUR. 2D *Workers' Comp*. § 358 (2012).
59. Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, ¶ 4, 815 N.W.2d 539, 540.
60. *Id*. ¶ 8, 815 N.W.2d at 542.
61. *Id*. ¶ 13, 815 N.W.2d at 544.
62. *Id*. ¶ 8, 815 N.W.2d at 542.
63. *Id*.
64. *Id*. ¶ 12, 815 N.W.2d at 543.

the positional risk doctrine is incompatible with the intent and purpose of the North Dakota Workforce Safety and Insurance Act.[65]

1. *The Workforce Safety and Insurance Act's Legislative History*

In 1977, the North Dakota legislature altered the definition of a compensable injury by adding the language "arising out of."[66] Fetzer argued the addition of the "arising out of" language meant the compensable injury element was satisfied so long as the employee had not abandoned or deviated from their employment.[67] WSI countered by asserting the legislative history of the North Dakota Workforce Safety and Insurance Act strongly indicated that a causal connection between the employment and the injury is required to recover benefits under the Act.[68] After a review of the legislative history, the majority agreed with WSI.[69]

The majority examined two critical pieces of legislative history: (1) a drafter's note to the 1977 amendment of the North Dakota Workforce Safety and Insurance Act,[70] and (2) the testimony from hearings before the Senate Industrial, Business, and Labor Commission.[71] First, Justice Kapsner noted the 1977 amendment was designed to require future claimants to demonstrate their injury was more than simply an injury suffered on the premises of their job, or during work hours, in order to recover benefits.[72] Prior to the 1977 amendment, North Dakota Century Code section 65-01-02 only required "that an injury arise in the course of employment."[73]

Second, the majority looked to testimony from a hearing before the North Dakota Senate Industry, Business, and Labor Commission.[74] This testimony provided insight into the changes the legislature intended to make by adding "arising out of and" to the definition of a compensable injury.[75] The addition of the conjunctive language, according to the majority,

65. *Id.* ¶ 13, 815 N.W.2d at 544.

66. 1977 N.D. Laws 579.

67. *See* Brief for Appellant ¶ 42, Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, 815 N.W.2d 539 (No. 20110251).

68. *See* Brief for Appellee ¶ 29, Fetzer v. N.D. Workforce Safety & Ins., 2012 ND 73, 815 N.W.2d 539 (No. 20110251).

69. *Fetzer,* 2012 ND 73, ¶ 13, 815 N.W.2d at 543.

70. *Id.* ¶ 8, 815 N.W.2d at 542.

71. *Id.*

72. *Id.*

73. 1977 N.D. Laws 579.

74. *Hearing on S B. 2158 Before the Senate Indus., Bus., and Labor Comm.*, 45th Legis. Sess. (N.D. 1977) (testimony of Richard Gross, Counsel for Workmens' Comp. Bureau).

75. *Id.*

indicated the legislature's intent was to require future claimants to prove a causal connection.[76]

2. *Distinguishing Mitchell: No Implicit Adoption of Positional Risk*

Having examined the legislative history of the Act, the majority turned to Fetzer's argument that the North Dakota Supreme Court had implicitly recognized the positional risk doctrine in *Mitchell*.[77] *Mitchell* involved a case of horseplay and third-party tortfeasors, where Mitchell, a police officer, had his knees knocked out from under him by Sanborn, another police officer, while on duty.[78] Mitchell recovered workers' compensation benefits, and also proceeded to file a personal injury claim against Sanborn.[79] The issue in *Mitchell* was whether the exclusive remedy provisions of North Dakota Century Code sections 65-01-01 and 65-01-08 barred Mitchell's tort claim.[80]

The majority in *Fetzer* noted, however, the *Mitchell* case focused on the analysis of the "course of employment" element.[81] This distinguished *Mitchell* from *Fetzer* because the "arising out of" element was not addressed in *Mitchell*.[82] Additionally, the majority noted the coemployee immunity test for horseplay, as outlined in *Mitchell*, has no application for determining compensability in cases involving unexplained falls.[83] Therefore, Justice Kapsner and the majority rejected Fetzer's argument the North Dakota Supreme Court implicitly adopted the positional risk doctrine in *Mitchell*.[84]

3. *Looking to Nevada: A State with a Similar Act*

After concluding the holding in *Mitchell* was not applicable to the issue presented in *Fetzer*, the court addressed whether the positional risk doctrine was compatible with North Dakota law. Although the positional risk doctrine had not been implicitly adopted, the North Dakota Supreme Court had to determine if the positional risk doctrine was compatible with North

76. *Fetzer*, ¶ 8, 815 N.W.2d at 542.
77. *Id.* ¶ 9.
78. Mitchell v. Sanborn, 536 N.W.2d 678, 681 (N.D. 1995).
79. *Id.*
80. *Id.* at 683.
81. *Fetzer*, ¶ 10, 815 N.W.2d at 543.
82. *Id.* ¶¶ 10-11.
83. *Id.* ¶11.
84. *Id.*

Dakota Century Code section 65-01-01.[85] Fetzer argued the but-for test required with the positional risk doctrine was wholly consistent with section 65-01-01.[86]

In considering whether the positional risk doctrine was consistent with the Act, the majority noted the Act "specifically provides, '[t]his title may not be construed liberally on behalf of any party to the action or claim.'"[87] The majority then looked to a state with a similar act: Nevada.[88] Nevada, like North Dakota, requires its workers' compensation statute to not be interpreted liberally in favor of an employee, or the dependents of an employee, or an employer.[89] Additionally, the Nevada Supreme Court considered an unexplained fall case in 2005, where the claimant urged that court to adopt the positional risk doctrine.[90] The Nevada Supreme Court rejected the positional risk doctrine, stating the but-for reasoning circumvents Nevada's statutory requirements.[91] Recognizing the similarities between the Nevada Supreme Court's ruling and the facts presented in *Fetzer*, the majority agreed with Nevada: the but-for reasoning of the positional risk doctrine is simply "incompatible" with the North Dakota Workforce Safety and Insurance Act.[92]

4. *Deference to the Legislature*

Finally, the majority's analysis in *Fetzer* strongly suggests the questions presented in this case are more suited for the North Dakota Legislature than the courts.[93] Based on the plain language interpretation of North Dakota Century Code section 65-01-02(10), the North Dakota Supreme Court concluded Fetzer's argument for the adoption of the positional risk doctrine "directly contravenes . . . the Legislature's stated intent in adding the 'arising out of' element."[94] As the positional risk doctrine only requires a claimant to show he or she was injured at work, the court chose to reject the doctrine and maintain a plain meaning interpretation of the Act.[95] The majority noted the North Dakota

85. *Id.* ¶ 12.
86. *See* Brief for Appellant, *supra* note 67, ¶ 58.
87. *Fetzer*, ¶ 12, 815 N.W.2d at 543 (quoting N.D. CENT. CODE § 65-0-01 (2010)).
88. *Id.*
89. NEV. REV. STAT. § 616A.010(4) (2011).
90. Mitchel v. Clark Cnty. Sch. Dist., 111 P.3d 1104, 1105 (Nev. 2005).
91. *Id.* at 1106-07.
92. *Fetzer*, 2012 ND 73, ¶ 13, 815 N.W.2d at 543.
93. *Id.*
94. *Id.*
95. *Id.*

Legislature does not act without purpose,[96] and if the Legislature intended for WSI to award compensation for unexplained falls at work, the Legislature has the power to amend the plain language of the statute.[97]

B. THE DISSENT: AN ARGUMENT FOR THE POSITIONAL RISK DOCTRINE

Justice Maring authored the dissent in *Fetzer*.[98] The heart of the disagreement between the majority and Justice Maring harkens back to the fundamentals of the workers' compensation bargain: when an employee is injured at work, who should bear the burden of loss when the risk is neutral?[99] Justice Maring suggested in her dissent that adopting the positional risk doctrine is a more sensible approach as (1) it is consistent with the legislative intent behind North Dakota Century Code section 65-01-02(10),[100] and (2) it correctly places the burden of loss on employers, not employees, for injuries resulting from neutral risks.[101]

1. *Legislative History of "Arising Out of and In the Course of Employment"*

Like the majority, Justice Maring also begins her analysis by looking to the legislative history of the 1977 amendment to the North Dakota Workforce Safety and Insurance Act.[102] Justice Maring noted the majority's analysis is incomplete and leaves out several key aspects of the 1977 drafter's explanation to the amendment.[103] Specifically, Justice Maring directed attention to the following comment made at the same Senate hearing cited by the majority:

> Our courts have interpreted that to mean that if an employee is at the place he is supposed to be at the time he is supposed to be there, and engaged in an activity whose purpose is related to employment, any injury he receives is compensable. That interpretation has recently resulted in a court ruling requiring coverage for an employee involved in a fight with another employee because of an incident which had occurred during the prior weekend which bore no relationship to their work.

96. *Id.*
97. *Id.* at 544.
98. *Id.* ¶ 16 (Maring, J., dissenting).
99. *Id.* ¶ 22, 815 N.W.2d at 546.
100. *Id.* ¶ 17, 815 N.W.2d at 544.
101. *Id.* ¶ 23, 815 N.W.2d at 546.
102. *Id.* ¶ 17, 815 N.W.2d at 544.
103. *Id.* ¶ 18, 815 N.W.2d at 545.

> Presumably all fights which occur in the course of employment, whether related to work or not, are now covered. It is hoped – and it is the intent of the Bureau – that the addition of "out of and" would change that interpretation.[104]

From this comment, Justice Maring suggested, unlike the majority interpretation, the addition of the words "out of and" were meant to only require that the injury have a relationship to the employment.[105]

Furthermore, Justice Maring noted the North Dakota Supreme Court previously held in *Kary v. North Dakota Workmen's Compensation Bureau*[106] that only occasionally is the employment the direct cause of the injury.[107] More often, the injury arises out of conditions incident to employment.[108] In this sense, the dissent concluded the positional risk doctrine is entirely consistent with the stated purpose of the Act.[109]

2. *Neutral Risks and But-For Reasoning*

Having determined the positional risk doctrine is compatible with the stated purpose of the Act, Justice Maring also concluded that neutral risks, or risks that are "neither distinctly employment nor distinctly personal character,"[110] satisfy the "arising out of" element if the injury resulting from the neutral risk meets the but-for test of the positional risk doctrine.[111] Citing Larson's Workers' Compensation Treatise, Justice Maring noted the most common example of a neutral risk is the unexplained fall at work, precisely the fact situation presented in *Fetzer*.[112] In the number of jurisdictions that have confronted the issue of compensability for an unexplained fall at work, a majority has awarded benefits under the positional risk doctrine.[113] For the dissent, if the claimant can demonstrate the injury would not have occurred but-for the claimant being at work, the "arising out of" element would be satisfied.[114]

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104. *Id.* (quoting *Hearing on S B. 2158 Before the Sen. Indus., Bus. and Labor Comm.*, 45th Legis. (N.D. 1977)).

105. *Id.*

106. 272 N.W. 340 (N.D. 1937).

107. *Kary*, 272 N.W. at 341.

108. *Fetzer*, ¶ 18, 815 N.W.2d at 545 (Maring, J., dissenting).

109. *Id.* ¶ 19.

110. *Id.* ¶ 20, 815 N.W.2d at 546 (citing *In re* Margeson, 27 A.3d 663, 667 (N.H. 2011)).

111. *Id.*

112. *Id.* ¶ 22, 815 N.W.2d at 547 (citing 1-3 ARTHUR LARSON, LARSON'S WORKMENS' COMPENSATION LAW, § 7.04[1][a], at 7-24 (2012)).

113. *Id.*

114. *Id.* ¶ 23, 815 N.W.2d at 547-48.

3. *Protecting Employees: Positional Risk Doctrine and Burden Shifting*

Besides articulating a preference for the positional risk doctrine in cases involving neutral risks, Justice Maring also posed a burden shifting question in her dissent.[115] Because neutral risks are neutral, who should bear the burden of the loss?[116] The majority in *Fetzer*, in holding the employee must demonstrate a causal connection between the injury and the employment, shifted the burden to the employee.[117] However, Justice Maring argued jurisdictions adopting the positional risk doctrine have done so on the fundamental principle that employees, who are on the job and performing duties for their employers, should be compensated for injuries occurring in the course of their employment.[118] Because either the employer or the employee must bear the loss, Justice Maring suggested, under North Dakota Century Code section 65-01-01, the positional risk doctrine is the superior approach because it is appropriate for the employer, and not the employee, to bear the burden of loss for neutral risks.[119]

IV. IMPACT

In 2011, North Dakota Workforce Safety and Insurance paid out over $124.2 million in benefits to claimants.[120] Undoubtedly, the North Dakota Supreme Court's decision in *Fetzer* will impact not only North Dakota employers and legal practioners, but also the 348,743 employees covered under the Act.[121] The new causality burden for neutral risks will be felt throughout the North Dakota workforce and legal community.

A. A NEW CAUSALITY BURDEN FOR EMPLOYEES

Without question, the North Dakota Supreme Court's holding in *Fetzer* establishes a higher causality burden for claimants who suffer from an unexplained fall at work.[122] Future claimants are now required to prove a causal connection between the injury and the employment.[123] However, it

115. *Id*.
116. *Id*.
117. *Id*. ¶ 13, 815 N.W.2d at 544 (majority opinion).
118. *Id*. ¶ 22, 815 N.W.2d at 546 (Maring, J., dissenting) (citing Lodgsdon v. ISCO Co., 618 N.W.2d 667, 673 (Neb. 2000)).
119. *Id*. ¶ 23, 815 N.W.2d at 548.
120. N.D. WORKFORCE SAFETY & INS., 2009-2011 BIENNIAL REPORT 6 (2012), *available at* http://www.workforcesafety.com/library/documents/reports/09-11BiennialReport.pdf.
121. *Id*.
122. *Fetzer*, ¶ 13, 815 N.W.2d at 544.
123. *Id*.

is worth highlighting again Justice Maring's concern about burden shifting.[124] With the precedent for a higher causality burden on employees, will North Dakota experience a chilling effect in workers' compensation claims?[125] While it is difficult to hypothesize what long-term impact this new causality burden will exactly have on future claimants, the North Dakota Supreme Court's holding in *Fetzer* will, without question, place a higher causality burden on employees.[126]

B. UNANSWERED QUESTIONS: DEFINING OTHER NEUTRAL RISKS UNDER *FETZER*

Although the majority's opinion in *Fetzer* offers a clear standard for satisfying the "arising out of" element in cases of unexplained falls, it raises several unanswered questions. First, what is the definition of a neutral risk? As a result of *Fetzer*, it is clear an unexplained fall is a neutral risk and requires a higher causality burden; however, what if an employee is injured in an unexplained accident at work?[127] As several cases from across jurisdictions suggest, unexplained accidents at work are not uncommon, and according to Professor Larson, denying compensation in one case, and not the other, can create confusion.[128]

Second, assuming the North Dakota Supreme Court offered a definition of a neutral risk, are all neutral risks subject to a higher causality burden, or only cases involving unexplained falls? As Justice Maring in dissent suggested, it is significant that a majority of courts have awarded compensability in cases involving neutral risks.[129] Does the North Dakota Supreme Court believe the higher causality burden is applicable in all cases of neutral risks to satisfy the "arising out of" element, and how particular does the risk need to be related to the work environment? The majority leaves these questions open to future examination and litigation by limiting its holding to only cases of unexplained falls at work. Future litigation on these questions will shed greater light on the interpretation of neutral risks and the causality burden.

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124. *Id.* ¶ 22, 815 N.W.2d at 546 (Maring, J., dissenting).

125. *See* Anderson & Deloss, *supra* note 32, at 385 (questioning whether the 1995 North Dakota legislative enactments to the Workforce Safety & Insurance Act have actually provided the same level of protection to employers, employees, and the WSI).

126. *Fetzer*, 815 N.W.2d at 547-48 (Maring, J., dissenting).

127. *See* LARSON, *supra* note 47, § 7.04[1][a], at 7-24 (citing Upton v. Great Cent. Ry., [1924] A.C. 302 (H.L.)).

128. *See generally* LARSON, *supra* note 47, § 7.04[1][a], at 7-24.

129. *Fetzer*, ¶ 22, 815 N.W.2d at 547 (Maring, J., dissenting).

C. REVISITING THE WORKERS' COMPENSATION BARGAIN

The workers' compensation bargain is, at its heart, a compromise between employers and employees. The majority's opinion in *Fetzer* brings the discussion full circle by shifting a substantial burden back on employees. Is the workers' compensation bargain undermined when employees must carry a heavier burden for neutral employment risks than employers? However, is the bargain also being undermined when employers are forced to carry the burden of loss for any injury on the job, no matter how far removed from the purpose of the employment?

One scholar suggests the optimal solution to this workers' compensation dilemma is revisiting the primary motivator behind workers' compensation laws: worker safety.[130] The "safety paradigm" keeps the protection of employees at the heart of the workers' compensation bargain, while increasing employment safety standards to reduce the risks to employers and employees alike.[131] Decisions like *Fetzer* can reveal the often complex nature of the workers' compensation bargain, but these same decisions can also allow for new questions and discussions regarding worker safety in North Dakota.

V. CONCLUSION

In *Fetzer*, the North Dakota Supreme Court rejected the positional risk doctrine and held a causal connection between an unexplained fall at work and employment is required to satisfy the "arising out of and in the course of employment" element of a workers' compensation claim under the North Dakota Workforce Safety and Insurance Act.[132] While this ruling further clarifies the "arising out of" element of workers' compensation claims, it remains unclear whether and how this ruling will impact other cases resulting from neutral risks at work. However, until the courts answer these questions, claimants suffering injuries from unexplained falls at work, and likely other arguable neutral risk injuries, will face a high causality burden

130. Haas, *supra* note 17, at 269.
131. *Id.*
132. *Fetzer*, ¶ 13, 815 N.W.2d at 544.

in order to recover benefits under the North Dakota Workforce Safety and Insurance Act.[133]

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133. *See supra* Part IV.B-C.

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