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I. STATEMENT OF ISSUE

Has Workforce Safety & Insurance shown by the greater weight of the evidence that Douglas McArthur was intentionally non-compliant with his vocational rehabilitation obligations and that he voluntarily limited his income thereby disqualifying himself from further disability and vocational rehabilitation benefits?

II. STATEMENT OF THE FACTS

Douglas McArthur was working at Central Dakota Beef in Harvey, North Dakota when, on July 12, 2005, he fell off a ladder approximately 12 feet to a concrete floor, injuring his left shoulder, and upper and lower back (Appendix (App.) p. 36); (App. p. 135 - (Hearing Transcript p. 100 (HT))). On January 31, 2006, Mr. McArthur underwent an Isernhagen Functional Capacity Evaluation (FCE) which found him capable of medium level work with restrictions on lifting, pushing, pulling, carrying, gripping, forward bending, crawling, kneeling, squatting, climbing and repetitive left upper extremity use. (App. pp. 57-67). The evaluator found Mr. McArthur highly motivated to keep working and willing to work hard to get a task accomplished the right way (App. p. 59).

Mr. McArthur's treating doctor, Michael P. Martire, M.D., noted on February 1, 2006, that he had decreased cervical spine and lumbar spine range of motion (App. p. 68). Dr. Martire noted on February 27, 2006, that Mr. McArthur had chronic pain in his cervical spine and lumbar spine, chronic myofascial pain, insomnia from pain, and an antalgic gait (App. p. 69). Dr. Martire wrote a letter to Mr. McArthur's vocational rehabilitation consultant on March 14, 2006, indicating that he agreed with Mr. McArthur's functional capacity evaluation and would release him

to return to work within the restrictions identified by that evaluation (App. p. 70). Dr. Martire further noted on May 22, 2006, that Mr. McArthur had difficulty with prolonged sitting, bending or lifting and needed to pace himself while working (App. p. 71).

On July 11, 2006, Dr. Martire approved Mr. McArthur's return to work in a modified job on a trial basis, putting boxes together and putting labels on meat, for two to four hours each day as tolerated and recommended changing positions and activities during the day within the FCE guidelines (App. p. 73). Shortly thereafter, on July 14, 2006, Dr. Martire refused to release Mr. McArthur to return to work in a full-time modified position at Central Dakota Beef because: 1. It would be unsafe for Mr. McArthur to operate machinery due to drowsiness caused by his medications; 2. It appeared that the modified position required bilateral upper extremity physical demands which Mr. McArthur was unable to perform; 3. It was uncertain how Mr. McArthur would be able to perform the other physical demands of the modified position; 4. Mr. McArthur would not be able to sort meats; 5. Mr. McArthur required a chair with a back support and was unable to bend and twist as required by the modified position; and 6. It was uncertain how much time would be spent on each job duty and in various static positions restricted by the FCE. In short, Dr. Martire determined that the full-time modified position did not provide a job match with Mr. McArthur's FCE (App. pp. 46-47).

Despite Dr. Martire's refusal to approve Mr. McArthur's return to work in a modified position with his preinjury employer, Mr. McArthur attempted to return to work at Central Dakota Beef but had to leave work due to increased pain on July 27 and 28, 2006, and August 1 and 2, 2006 (App. p. 74). Mr. McArthur noted that his supervisor at Central

Dakota Beef had forced him to lift beyond his restrictions; consequently, he decided to try working as a telemarketer (App. p. 75). Dr. Martire again noted that it was not safe for Mr. McArthur to return to work in the modified position at Central Dakota Beef "based on . . . experience and expertise, as well as just common sense" (App. p. 100). The plant supervisor, packing manager, and sanitation supervisor at Central Dakota Beef all noted that Mr. McArthur had been a good worker, had gotten along well with employees prior to his work injury but had complained of pain and was irritable after his work injury, and that, "Doug was unable to continue his job duties" at Central Dakota Beef after his injury because of increased pain (App. pp. 102-105). Mr. McArthur noted that his direct supervisor at Central Dakota Beef had required him to lift chunks of meat weighing more than 100 pounds and had threatened him with termination if he failed to comply (App. pp. 104-105). He was not allowed to take breaks as needed (App. pp. 136-137 - HT pp. 106-109). He noted that he had taken pain medications ever since his work injury and, while pain affected his sleep and his mood, the pain medications affected his concentration (App. pp. 128-129 - (HT pp. 75-77)).

Mr. McArthur testified that he looked for other work when Central Dakota Beef failed to provide the necessary accommodations (App. p. 136 - HT p. 107). He took a lighter job as a telemarketer but was unable to take pain prescribed medications because they made him drowsy and his resulting pain left him unable to tolerate the required sitting (App. p. 136 - HT p. 107). Dr. Martire noted on September 5, 2006, that Mr. McArthur was unable to tolerate the telemarketer position due to the sitting demands (App. p. 76). After he failed to successfully perform

the modified duties at Central Dakota Beef or the demands of a telemarketer, Mr. McArthur applied for and was granted Social Security disability benefits (App. p. 137 - HT p. 108; App. pp. 77-82).

III. STATEMENT OF THE CASE

Douglas McArthur suffered a compensable, work-related injury on July 12, 2005 (App. p. 36). On June 28, 2006, WSI issued a Notice of Intention to Discontinue Disability Benefits (NOID) asserting that Mr. McArthur was non-compliant with his vocational rehabilitation obligations in that he had failed to return to work (App. pp. 37-38). On September 20, 2006, WSI issued an Order Denying Further Disability and Vocational Rehabilitation Benefits, asserting that a return to work in a full-time modified position at Central Dakota Beef was appropriate (App. pp. 39-43). Mr. McArthur demanded a formal administrative hearing on December 1, 2006 (App. p. 44).

The issue specified for the administrative hearing was whether Mr. McArthur was entitled to further disability and vocational rehabilitation benefits after terminating a permanent modified position that fell within his work restrictions (App. p. 45). The administrative hearing was held on August 1, 2007 (App. p. 108). Since, WSI had asserted noncompliance, it had both the burden of proof and burden of going forward (App. p. 111 - HT p. 6). Temporary Administrative Law Judge (TALJ) Janet Seaworth issued Recommended Findings of Fact, Conclusions of Law, and Order on October 11, 2007 (App. pp. 83-89). WSI issued its Final Order adopting TALJ Seaworth's Recommended Decision on October 22, 2007 (App. pp. 90-98). Mr. McArthur petitioned for reconsideration and rehearing on November 16, 2007 (App. pp. 99-106). WSI denied Mr. McArthur's Petition for Reconsideration and Rehearing on November 27,

2007 (App. p. 107). Mr. McArthur filed his Notice of Appeal and Specification of Error on December 14, 2007 (App. pp. 15-19). Mr. McArthur specified Findings of Fact 6 and 12 and Conclusions of Law 1 as error in WSI's Final Order (App. p. 15).

FINDINGS OF FACT

6. Dr. Martire's opinion is not fully persuasive. He questions whether the job actually required certain activities, but he did not perform an onsite job assessment. His job is to evaluate the job offer and the actual duties performed (as identified by the physical therapist who performed the onsite job analysis), in light of the FCE. His job is not to second-guess the job site analysis. Accordingly, his opinion, to the extent it questions whether in fact the job actually required certain activities, is not persuasive.

App. p. 93

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12. The greater weight of the evidence shows that Mr. McArthur voluntarily limited his income by terminating his employment with Central Dakota Beef. The evidence does not show that he had good cause to do so. The modified job was within his restrictions. He was able to stand, walk or sit as needed and nothing weighed more than five pounds. Mr. McArthur accepted the position and worked sporadically until he quit and took another job. He now says that he quit because the employer was not really accommodating his work restrictions. He says he got no breaks, he was required to lift too much, and he was not provided with a chair. The employer disputes that Mr. McArthur did not get breaks. Not all of the packages of meat that Mr. McArthur was asked to lift exceeded his restrictions and Mr. McArthur admits that he did not lift those packages. There is nothing in the FCE that required the employer to furnish a chair for Mr. McArthur, although the employer agreed to do so. In any event, and even assuming that there were some problems in implementing the modifications required, Mr. McArthur met with his employer and his supervisor, and on August 4, Mr. McArthur told WSI that everything was straightened out. But he didn't return to work. He took another job at a telemarketing firm. He did not complain to Central Dakota Beef and he

didn't tell them he was leaving. He simply left, and when he asked whether he had informed his employer, he said that he had been too busy to do so.

App. p. 95

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CONCLUSIONS OF LAW

1. Section 65-05-08(7), N.D.C.C., provides that if an employee voluntarily limits income or refuses to accept employment suitable to the employee's capacity, offered to or procured for the employee, the employee is not entitled to any disability or vocational rehabilitation benefits during the limitation of income or refusal to accept employment unless the organization determines the limitation or refusal is justified. Whether a worker is justified in refusing a job offer, depends on whether a reasonably prudent person would refuse the offer under the same or similar circumstances. *Lawrence v. North Dakota Workers Comps. Bureau*, 2000 ND 60, 608 N.W.2d 254 (2000). Factors that may be considered include the diligence of the employee in trying to return to work, whether the employee has actually returned to work with some other employer and, whether the effort, risk, sacrifice or expense is such that a reasonable person would not accept the work. Mr. McArthur did not show diligence in returning to work. He worked only four days before he quit to work as a telemarketer. There is nothing in the record to suggest that those four days of work were so fraught with effort, risk, sacrifice or expense that a reasonable person would also have quit. Mr. McArthur's decision to quit his employment with Central Dakota Beef has consequences. He cannot now go back and attempt to justify his voluntary termination of that employment in order to reinstate benefits that a reasonable person would not have jeopardized in the first place. Accordingly, Mr. McArthur is not entitled to disability or vocational rehabilitation benefits during this period of a refusal of suitable employment.

(App. pp. 96-97)

IV. LAW AND ARGUMENT

WSI has not demonstrated, by the greater of the evidence, that Mr. McArthur was intentionally non-compliant or that he voluntarily limited his income. TALJ Seaworth dismissed Dr. Martire's opinion that

Mr. McArthur was unable to perform the modified position at Central Dakota Beef, as Mr. McArthur subsequently demonstrated through an unsuccessful work trial, because he did not perform an onsite job assessment (App. p. 93 - Finding of Fact 6). Again, as pointed out, Dr. Martire's expert opinion that Mr. McArthur would have been unable to tolerate the demands of a return to work at Central Dakota Beef was borne out by Mr. McArthur's subsequent experience. Furthermore, this Court has said repeatedly that objective medical evidence can consist of, in part, a treating doctor's experience. See: Engebretson v. ND Workers Compensation Bureau, 1999 ND 112, 595 N.W.2d 312; Myhre v. North Dakota Workers Compensation Bureau, 2002 ND 186, 663 N.W.2d 705; and Swenson v. Workforce Safety & Insurance Fund et al, 2007 ND 149, 738 N.W.2d 892. In other words, the administrative law judge cannot simply dismiss a treating doctor's opinion based, in part, on the doctor's experience by saying that he is not entitled to have experience.

Dr. Martire based his opinion on "experience and expertise, as well as just common sense" (App. p. 100). He asserted that he had an ethical obligation to make sure that Mr. McArthur did not return to work duties that would "significantly aggravate or worsen his condition" (Id.). Dr. Martire disagreed with the conclusion of Karen Rasmussen, the job site evaluator, that duties such as sweeping floors, washing dishes, wiping down benches or cleaning restrooms would not require repetitive upper extremity movements (Id.). He noted that Mr. McArthur was unable to perform repetitive bending, which appeared to be required, and could not perform prolonged sitting or standing activities, which the job site evaluation did not address (Id.).

It is, of course, Mr. McArthur's responsibility to seek and maintain

reasonable employment. See: N.D.C.C., Sections 65-05-08(7) and 65-05.1-04(4). Mr. McArthur contends that he has satisfied his statutory obligation. Indeed, an injured worker must make reasonable efforts, not superhuman efforts, to find and maintain employment. See: Lawrence v. North Dakota Workers Compensation Bureau, 2000 ND 60, 608 N.W.2d 254. In the instant case, Dr. Martire found that Mr. McArthur would not be able to tolerate the demands of either the full-time modified position at Central Dakota Beef or the sitting demands required of a telemarketer. Between his chronic pain and the side effects from his medications, he simply was not able to perform the duties required of him. Dr. Martire's opinion was subsequently borne out by Mr. McArthur's experience and verified by three of Mr. McArthur's supervisors at Central Dakota Beef. Frankly, it is hard to fathom what else Mr. McArthur should have done in making a "reasonable" attempt to return to work.

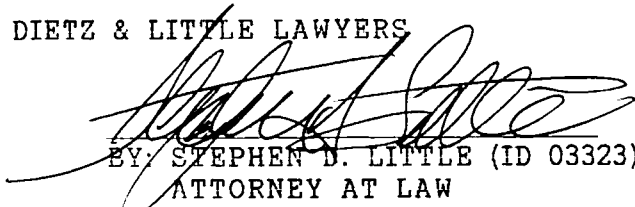
V. CONCLUSION

Douglas McArthur was a good, hard working employee before he fell 12 feet to a concrete floor. Afterwards, he was racked by chronic pain, insomnia, and the side-effects of his medications. Despite his treating doctor's prediction that he would be unable to tolerate the demands of full-time modified employment at Central Dakota Beef, Mr. McArthur returned to work. There, he was forced to exceed his physical restrictions, and he proved Dr. Martire right. Having failed to successfully perform modified work at Central Dakota Beef, Mr. McArthur attempted working as a telemarketer. There, he was unable to take his pain medications because of their effect on his concentration, and the sitting demands required of the position proved too much for him.

Again, Dr. Martire confirmed that Mr. McArthur was unable to perform the job. Mr. McArthur would be a good, hard working employee today if he were physically able to do so. The fact that he is receiving Social Security disability benefits is prima facie evidence of his inability to work in the general labor market. He is unable to return to work and is entitled to disability and vocational rehabilitation benefits until he is reasonably able to do so.

Respectfully submitted this 10th of April, 2009.

DIETZ & LITTLE LAWYERS



BY: STEPHEN D. LITTLE (ID 03323)
ATTORNEY AT LAW

ATTORNEYS FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501
(701) 222-1761