

ORIGINAL
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20090081

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 8, 2009
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Douglas S. McArthur,)	Supreme Court Case No. 20090081
)	
Appellant,)	
)	
vs.)	
)	
North Dakota Workforce Safety)	
and Insurance,)	
)	
Appellee,)	
)	
And)	
)	
Central Dakota Beef, LLC,)	
)	
Respondent.)	
)	

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

+++++

**APPEAL FROM ORDER DATED NOVEMBER 12, 2008,
AND JUDGMENT ENTERED JANUARY 23, 2009
WELLS COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JAMES BEKKEN**

+++++

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STATEMENT OF THE CASE

1. This is an appeal by the claimant, Douglas McArthur (“McArthur”), from a judgment entered in Wells County District Court on January 23, 2009. (App.¹ 34) The judgment is based on the Honorable James Bekken’s Memorandum Decision and Order Dismissing Appeal, dated November 12, 2008, affirming the Final Order of North Dakota Workforce Safety and Insurance Fund (“WSI”), dated October 22, 2007. (App. 20-29; C.R.² 223-229) WSI’s Final Order adopted Administrative Law Judge Janet Demarais Seaworth’s Recommended Findings of Fact, Conclusions of Law and Order, dated October 11, 2007. (App. 98) McArthur contends that WSI’s Final Order is not in accordance with the law, that findings of fact are not supported by a preponderance of the evidence, and the conclusions of law are not supported by the findings of fact. (App. 34)

STATEMENT OF FACTS

2. McArthur was employed by Central Dakota Beef as a Sanitation Engineer in July of 2004. Central Dakota Beef operates a meat processing facility. (Tr.³ at 53-54) As a Sanitation Engineer, McArthur was responsible for maintaining sanitary conditions in areas of the facility devoted to processing sausage. (Id.) On July 12, 2005, McArthur was on a ladder cleaning the ceiling at Central Dakota Beef. The ladder failed and he fell to the floor, landing on his left side. (Id. at 99-100) He noticed pain in the posterior left shoulder and numbness going down his left arm. (C.R. 114)

¹ “App.” Refers to the Appendix filed in connection with this appeal.

² “C.R.” will refer to the Certificate of Record on Appeal to District Court, dated January 16, 2008, filed pursuant to N.D.C.C. § 28-32-44.

3. McArthur was transported by ambulance to the emergency room at St. Aloisius Medical Center in Harvey, ND. An X-ray of the left shoulder was negative, but out of concern for a neck injury, McArthur was transferred to Trinity Medical Center in Minot, ND, for an MRI of the cervical spine. (C.R. 114-120) The MRI showed no acute injury to the cervical spine or the lumbar spine. (C.R. 194; 199-200) McArthur also complained of weakness in his left arm, which Dr. Charles Stillerman thought might be a brachial plexus injury. (C.R. 187; 194) McArthur was discharged from Trinity Medical Center and returned to Central Dakota Beef doing light duty work with no overhead work and no heavy lifting. (C.R. 81)
4. McArthur filed a claim for workers compensation benefits on July 14, 2005, alleging injuries to his left shoulder and upper and lower back. (C.R. 1) On July 26, 2005, WSI issued its Notice of Decision Accepting Claim and Awarding Benefits. (C.R. 17)
5. McArthur saw Dr. Hiltrud Thurmann at Central Dakota Clinic on July 22, 2005, and again on August 1, 2005. (C.R. 81, 83) He advised Dr. Thurmann on August 1, 2005, that he had severe back pain following his return to work and had been required to perform his regular duties as opposed to a modified job. (C.R. 83) Dr. Thurman recommended that McArthur not work until his scheduled appointment with Dr. Stillerman on August 4, 2005. (Id.)
6. McArthur followed up with Dr. Stillerman on August 4, 2005. He presented with left shoulder pain and left hand weakness. Dr. Stillerman did not

³ "Tr." refers to the transcript of the administrative hearing held on August 1, 2007, followed by the page reference. The transcript is found at App. 91 and C.R. 241.

know what was causing the left arm symptoms but recommended an evaluation by a neurologist with electrophysiologic testing. He also recommended that McArthur should not work until the situation resolved for him. (C.R. 202) On August 5, 2005, Dr. Thurmann took McArthur off work for two weeks so he could attend physical therapy and avoid repetitive strain and the risk of progressive injury. (C.R. 85)

7. McArthur saw Dr. Michael Martire on August 17, 2005, for a pain management consultation. (C.R. 131) Dr. Martire's impressions were cervical pain and radiculopathy with left arm pain and weakness. Dr. Martire also diagnosed left shoulder pain consistent with probably rotator cuff tendinitis. (C.R. 133) He recommended that McArthur undergo electrodiagnostic studies to rule out significant cervical radiculopathy, which were performed on August 26, 2005. (C.R. 133, 135-138) The upper extremity EMG showed evidence of left C6 radiculopathy. (C.R. 136) Dr. Martire continued to keep McArthur off work because of his pain. (C.R. 134)
8. McArthur returned to Dr. Martire on September 15, 2005, complaining of left arm pain and numbness and low back and bilateral leg pain. (C.R. 140) In addition to a cervical epidural steroid injection, Dr. Martire recommended an EMG to rule out significant lumbar radiculopathy as the cause of McArthur's bilateral leg pain, weakness and numbness. (Id.) The EMG, performed on September 30, 2005, was normal, with no evidence of lumbar radiculopathy. (C.R. 141)

9. In his note of November 15, 2005, Dr. Martire approved McArthur to work as a CNA so long as the position did not involve any repetitive bending. (C.R. 147) Dr. Martire noted in his follow up note from December 1, 2005, that McArthur was working 15 to 17 hours a week as a dietary aide at the St. Aloisius Medical Center in Harvey, and those hours would be increasing with time. (C.R. 153) McArthur worked as a dietary aide until February of 2006, when he was terminated because of conflicts with his co-workers. (Tr. at 68-69)
10. Dr. Martire had McArthur attend a Functional Capacity Evaluation (“FCE”) on January 31 and February 1, 2006. (C.R. 156-166) The FCE placed McArthur in the “medium” work Labor Department Work Category. (C.R. 158) The results of the FCE indicated that McArthur’s position as a dietary aide was within his work restrictions but his previous employment with Dakota Central Beef was beyond his physical limitations. (C.R. 158)
11. WSI initiated vocational rehabilitation on February 15, 2006, following the FCE. (C.R. 37-38) The initial rehabilitation consultation report indicated that McArthur was no longer working at St. Aloisius and had returned to Central Dakota Beef on a part-time basis doing janitor work within his restrictions. (C.R. 59, 168) On March 8, 2005, CorVel vocational rehabilitation consultant Joyce Olson wrote Dr. Martire to advise that a vocational plan would be created for McArthur using the guidelines addressed in the FCE. She also asked Dr. Martire whether he had any concerns with the medium full-time release recommended in the FCE. (C.R. 53) Dr. Martire responded that he agreed with the FCE but felt McArthur was at the lower end of the “medium” category and had to change

positions frequently. Dr. Martire added that whether McArthur had a full-time release depended on whether the job identified met all of the limitations under the FCE. (C.R. 170)

12. On May 26, 2006, Joyce Olson advised Dr. Martire that Central Dakota Beef had offered McArthur a full-time, modified position as Sanitation & Further Processing Personnel. (C.R. 63-64) Karen Rasmussen, a physical therapist, had performed an onsite job evaluation of the proposed position on April 26 and May 11, 2006. (C.R. 104-105, 106-108) Ms. Olson provided Dr. Martire with a copy of Karen Rasmussen's on-site job analysis. Dr. Martire would not approve the modified job because he felt McArthur could not operate meat slicing machinery due to drowsiness from his medication. In addition, the modified job appeared to involve repetitive bending and lifting which McArthur could not perform. (C.R. 64, 176) Dr. Martire did release McArthur to work at Dakota Central Beef putting boxes together and putting labels on meat on a trial basis for 2-4 hours as tolerated. (C.R. 177)
13. Dr. Luis Vilella, WSI's Medical Director, also reviewed the requirements of the modified position and the on-site job site analysis. He agreed that McArthur should not operate machinery and in particular equipment with cutting blades. Dr. Vilella also had reservations about McArthur's ability to sort meat packages, due to varying weights that could contribute to recurrent pain aggravation. He also recommended that McArthur be provided ample opportunities to pace himself during the work day and not work above a sedentary

level. If the employer could provide these accommodations, Dr. Vilella believed the modified position would be appropriate for McArthur. (C.R. 2; Tr. at 28-35)

14. Joyce Olson contacted Aaron Baustad (“Baustad”), the plant manager at Central Dakota Beef, to discuss the concerns of Dr. Martire and Dr. Vilella with the modified job offer. (C.R. 67) Baustad advised Joyce Olson that McArthur would not be required to do anything outside of what was discussed. (Id.) He testified that the modified job would have McArthur placing product weighing a pound or less into a machine for packaging and labeling, and there would be no overhead lifting. Central Dakota Beef also would provide McArthur with a stool if he wanted. Furthermore, McArthur would be allowed to take breaks as needed, and he could work the hours he saw fit. (Tr. at 86-87)

15. Central Dakota Beef offered McArthur the modified position on June 8, 2006, with the additional modifications recommended by Dr. Vilella. (C.R. 3, 20) McArthur was supposed to report to work on June 12, 2006, but he did not show up. (C.R. 3) McArthur contacted WSI on June 14, 2006, and advised that he did not know he was supposed to report for work on June 12, but he would report on June 19. (Id.) McArthur showed up at Central Dakota Beef on June 19, 2006, but advised that he could not start work because Dr. Martire had not released him. (C.R. 4) WSI contacted McArthur on June 21, 2006, about his returning to work. McArthur had yet to return to work but advised he had scheduled a telephone conference on June 22, 2006, with Dr. Martire and Central Dakota Beef. (C.R. 4) On June 27, 2006, Baustad advised that McArthur had cancelled the telephone conference. (C.R. 5)

16. On June 28, 2006, WSI issued its Notice of Intention to Discontinue/Reduce Benefits (NOID), effective July 19, 2006. (C.R. 6) The NOID advised McArthur that he was in noncompliance with the vocational rehabilitation plan and had voluntarily limited his income by failing to return to the modified position provided by Dakota Central Beef. The NOID further indicated that the modified position was within the functional capacities evaluation and had been approved by physical therapist Karen Rasmussen and WSI's medical director. Furthermore, Dr. Martire had not provided objective medical findings that he was unable to return to the modified position. Finally, to come back into compliance with the vocational plan, McArthur had to return to the modified position and remain in compliance for an additional 30 days. (C.R. 6-7)
17. McArthur contacted WSI on July 13, 2006, to find out what he had to do to come back into compliance. (C.R. 8) McArthur advised that he would return to work after a conference call involving him, Dr. Martire and Aaron Baustad. (Id.) McArthur called WSI on July 18, 2006, to inform that the conference call with Dr. Martire had been cancelled, and he would try to start work on July 19, 2006, putting boxes together and labeling meat packages for 2-4 hours per Dr. Martire's instructions. (C.R. 9)
18. McArthur reported to work on July 19, 2006. He worked 4 hours on July 19 and then took a few days off. He returned on July 24 and worked 7 hours. He worked 7 or 8 hours on July 25. On July 27, McArthur worked 5 hours. His last day at Central Dakota Beef was July 27, 2006. He left without giving anyone a

reason. During the time he did work at the modified job, McArthur never complained to Baustad that his job duties were causing him problems physically. (C.R. 221 at 90)

19. On August 1, 2006, Central Dakota Beef received a call from a telemarketing company in Fessenden regarding a reference for McArthur. (C.R. 9) McArthur called WSI on August 11, 2006, and stated he had taken a new job as a telemarketer on August 9, 2006. WSI asked McArthur if he had informed his employer about his new job. McArthur said that he had not, claiming he had been too busy. (C.R. 13) He eventually called Aaron Baustad and told him that he was working at a telemarketing company in Fessenden. (Tr. at 90)

20. When McArthur saw Dr. Martire on August 8, 2006, he advised that he had switched jobs to be a telemarketer. He also reported to Dr. Martire that his employer recently made him lift past his restrictions. (C.R. 180) Dr. Martire felt McArthur could do the telemarketer job as long as he could get up and down as needed. (Id.) McArthur voluntarily terminated his telemarketer job on August 24, 2006. The employer advised WSI that McArthur had become frustrated one day and quit. When the employer called to ask him to come back, he said he would but did not report to work for the next three days. The employer terminated McArthur under its “no show” policy. (C.R. 16)

21. When McArthur returned to Dr. Martire on September 5, 2006, he reported that he was unable to tolerate the telemarketer job because there was too much sitting. (C.R. 181) McArthur’s employment as a telemarketer was his last

job. He filed an application for Social Security Disability Benefits on August 29, 2006. (Id. at 108-109)

22. WSI issued its formal Order Denying Further Disability & Vocational Rehabilitation Benefits on September 20, 2006. (C.R. 24-28) The Order determined that the first appropriate rehabilitation option for McArthur under N.D.C.C. § 65-05.1-01(4)(c) is return to a modified position, and McArthur had voluntarily limited his income by refusing to accept employment suitable to his physical limitations. (Id.)
23. McArthur requested a formal hearing that was held on August 1, 2007, before Administrative Law Judge Janet Demarais Seaworth (“ALJ Seaworth”). (App. 108; C.R. 241) On October 11, 2007, ALJ Seaworth issued a recommended decision finding by a preponderance of the evidence that McArthur had voluntarily limited his income by terminating his employment with Central Dakota Beef without good cause. She recommended that WSI’s formal order be affirmed and McArthur was not entitled to further disability and vocational rehabilitation benefits under N.D.C.C. § 65-05-08(7). (App. 91-97; C.R. 211-220) On October 22, 2007, WSI issued its own Final Order adopting ALJ Seaworth’s recommended decision. (App. 98; C.R. 230)
24. McArthur requested reconsideration on November 16, 2007, and submitted additional information. (App. 99-106; C.R. 232-39) WSI advised McArthur by letter of November 27, 2007, of its denial of his request for reconsideration. (App. 107; C.R. 240)

25. McArthur appealed WSI's Final Order to the Wells County District Court by Notice of Appeal filed on December 14, 2007. On November 12, 2008, District Court Judge James Bekken issued the Court's Memorandum Decision and Order Dismissing Appeal and Order Affirming October 22, 2007, Final Order. (App. 20-28) Judge Bekken found that WSI/ALJ Seaworth's findings of fact were supported by a preponderance of the evidence, the conclusions of law were supported by the findings of fact, and the order was supported by the conclusion of law. (Id.)
26. Judgment in the District Court was entered on January 23, 2009 (App. 30), and Notice of Entry of Judgment was served on February 4, 2009 (App. 32) McArthur filed his Notice of Appeal to this Court on February 27, 2009. (App. 34)

STATEMENT OF THE ISSUE

27. Whether the weight of the evidence from the entire record supported WSI/ALJ Seaworth's determination that Douglas McArthur voluntarily limited his income without good cause by terminating a permanent, modified position that fell within his work restrictions?

LAW AND ARGUMENT

- I. **Burden of Proof and Scope of Review of Agency Decisions.**
28. A claimant bears the burden of establishing the right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129 ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. This burden requires a proof by a preponderance of the evidence that the claimant is entitled to

benefits available from the Fund. Reynolds v. North Dakota Workmen's Compensation Bureau, 328 N.W.2d 247 (N.D. 1982); Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2d 730 (N.D. Ct. App. 1988). A preponderance of the evidence is defined as "evidence more worthy of belief," or "the greater weight of the evidence," or "testimony that brings the greater conviction of truth." Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

29. This Court's review is limited to the record before WSI. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d 784, 789; Fuhrman v. North Dakota Workers Compensation Bureau, 1997 ND 191, 569 N.W.2d 269. WSI's decision must be affirmed unless its "findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, or its decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4 (N.D. 1997).

30. The Court should exercise restraint in determining whether WSI's decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Elshaug, 2003 ND 177 ¶ 12, 671 N.W.2d at 790; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436 (N.D. 1988); Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). This Court cannot make independent findings of fact or substitute its

judgment for that of the agency. See Hopfauf v. North Dakota Workers Compensation, 1998 ND 40, 575 N.W.2d 436. The Court need determine “only whether or not a reasoning mind could have decided the agency’s findings were proven by the weight of the evidence from the entire record.” Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290; Johnson v. North Dakota Workers Compensation Bureau, 496 N.W.2d 562, 564 (N.D. 1993); Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459, 462 (N.D. 1992).

31. McArthur, in his brief, frames the issue as follows: “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?”
32. McArthur’s issue is an invitation for this Court to go beyond its limited review of WSI appeals and reweigh the evidence. As noted below, this Court’s review is limited to determining “whether or not a reasoning mind could have decided the agency’s findings were proven by the weight of the evidence from the entire record.” Barnes v. Workforce Safety and Insurance, 2003 ND 14 ¶ 9, 668 N.W.2d 290, 292.

II. The Evidence from the Record as a Whole Supports WSI/ALJ Seaworth's Findings and Conclusion that McArthur Voluntarily Limited His Income Without Good Cause.

33. ALJ Seaworth determined that McArthur was not entitled to further disability benefits because he had voluntarily limited his income without good cause in violation of N.D.C.C. 65-05-08(7), which provides in relevant part:

No benefits may be paid for disability, the duration of which is less than five consecutive calendar days. . . . If the period of disability is five consecutive calendar days' duration or longer, benefits must be paid for the period of disability provided that:

* * *

7. If the 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.

* * *

An injured worker has good cause for refusing employment under N.D.C.C. § 65-05-08(7) if a reasonably prudent person would do so under the same or similar circumstances. Lawrence v. North Dakota Workers Comp. Bur., 2000 ND 60, ¶ 27, 600 N.W.2d 254, 262.

34. Here, there was ample evidence supporting the ALJ's conclusion that McArthur voluntarily limited his income without good cause by terminating his modified position at Central Dakota Beef.

A. The Central Dakota Beef modified job was within McArthur's physical limitations.

35. The record contains ample evidence that WSI took precautions to insure the modified job with within McArthur's physical limitations. The FCE

performed on January 31 and February 1, 2006, placed McArthur in “medium” Labor Department Work Category. (C.R. 158) WSI retained Physical Therapist Karen Rasmussen to perform a job-site analysis and evaluate it against McArthur’s physical limitations as reported by the FCE.

36. The modified job was forwarded to Dr. Martire for his review and input. The modified job was also provided to WSI’s medical director, Dr. Vilella. As a result, the modified job was further revised by eliminating the duties of meat slicing and sorting meat packages. Dr. Vilella also directed that McArthur should not work above a sedentary level and should be given ample opportunities to pace himself. (C.R. 2; Tr. at 28-25). WSI did obtain a release from Dr. Martire for McArthur to work at Dakota Central Beef labeling meat and putting boxes together for 2-4 hours per day as tolerated. (C.R. 177)

37. Aaron Baustad, Central Dakota Beef’s plant manager, testified that he met with physical therapist Karen Rasmussen and vocational consultant Joyce Olson and had a good understanding of McArthur’s physical limitations. (Tr. at 94-95) The modified job had McArthur placing product, usually weighing less than one pound, in a machine for vacuum sealing. He also did some labeling of product, which might require lifting 10 lbs. at most, as well as some inventory. (Tr. at 86-87) The modified job did not involve any overhead lifting, and McArthur was to work at his own pace and his own hours. (Tr. at 87, 96)

38. Baustad also testified that he advised everyone working in the processing department of McArthur’s restrictions and the modified job, including Doug Firth, McArthur’s supervisor. (Tr. at 87-88) Baustad told Doug Firth that McArthur

was to work within the modified job and could do less but not more. (Tr. at 88)
Baustad also did “spot checks” on McArthur while he was working to see how things were going. (Tr. at 89)

39. McArthur claimed that Dan Firth “forced” him to work beyond his restrictions and specifically that Firth told him on two occasions to move pieces of meat weighing up to 150 pounds from one container to another. (Tr. at 103-105) McArthur testified that he told Firth that he could not lift the meat, but Firth told him to do it anyway or get fired. (Tr. at 105) McArthur refused Firth’s demands on both occasions but was never fired. (Tr. at 112) McArthur further testified that Firth would not allow him to limit his activities or take breaks when needed, which lead to two meetings with McArthur, Firth and Aaron Baustad. (Tr. 105-106)

40. Baustad, however, testified that he met with McArthur a number of times to see how he was doing, and McArthur never complained that he was being asked to work beyond the modified job and in fact indicated things were going well. (Tr. at 88) Both Baustad and McArthur testified at the hearing. It is well-settled that “[i]t is within [WSI’s] province to weigh the credibility of the evidence presented.” Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 466, 450 (N.D. 1992). See also Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d 784. ALJ Seaworth obviously found Baustad’s testimony to be credible.

B. McArthur’s voluntary termination of his employment with Central Dakota Beef was not justified.

41. McArthur was offered the modified position on June 8, 2006. (C.R. 3, 20) He was supposed to start the modified job on June 12, 2006, but failed to show up. (C.R. 3) He showed up at Central Dakota Beef on June 19, 2006, but did not work. Instead he advised Central Dakota Beef and WSI that he would not start work until released to do so by his own physician. (C.R. 4) On June 21, McArthur advised WSI that he had scheduled a conference call with Dr. Martire and Central Dakota Beef. (Id.) On June 27, 2006, Central Dakota Beef advised WSI that McArthur had cancelled the conference call. (C.R. 5) McArthur did not contact WSI about returning to work in the modified position until after WSI issued is Notice of Intention to Discontinue/Reduce Benefits on June 28, 2006. (C.R. 8)
42. McArthur worked a total of four days at the modified position. During those 4 days, he never complained to anyone about the working conditions, and in fact told plant manager Aaron Baustad that everything was going well. (Tr. at 88-89) He started work on July 19, 2006. He worked on July 24, July 25 and July 27, which was his last day. He left without giving anyone a reason. He never told anyone at Central Dakota Beef that he was having problems and was quitting.
43. On August 2, 2006, McArthur called Dr. Martire's office to report that he had to leave the modified job early on July 27, July 28, July 31, August 1 and August 2 due to increased pain. However, McArthur only worked at the modified job a total of four days, the last being July 27. (C.R. 179) Central Dakota Beef received a call on August 1, 2006, from a telemarketing company regarding a reference for McArthur. (C.R. 9) McArthur returned to Central Dakota Beef on

August 3, 2006, to pick up his check. He advised at that time he was quitting and did not need to take this “s---.” (C.R. 13) That same day he advised WSI that he met with Aaron Baustad and Dan Firth and everything was straightened out. (C.R. 12)

44. McArthur called WSI on August 11, 2006, to say that he had started a new job as a telemarketer on August 9, 2006. (C.R. 13) He advised WSI that he had been too busy to tell anyone at Central Dakota Beef about his new job as a telemarketer. (C.R. 13) McArthur left his telemarketing position on August 24, 2006, after becoming frustrated. When the employer called to ask him to return, McArthur said he would but never did. The employer terminated McArthur under its “no show” policy. (C.R. 16)

45. The evidence from the record as a whole supports WSI/ALJ Seaworth’s finding that the modified position McArthur was offered on June 8, 2006, was within his physical limitations. The evidence further supports WSI/ALJ Seaworth’s finding that McArthur’s termination from his modified position with Central Dakota Beef was voluntary and unjustified.

III. WSI/ALJ Seaworth adequately explained the reasons medical evidence favorable to McArthur was rejected and medical evidence unfavorable to his claim was accepted.

46. Finally, McArthur in his brief takes issue with the fact that ALJ Seaworth did not find persuasive Dr. Martire’s opinion that McArthur was unable to perform the modified job. (C.R. 225 at finding of fact 6) Clearly, ALJ Seaworth is referring to Dr. Martire’s response to Joyce Olson’s letter to him of May 26,

2006.⁴ (C.R. 63)

47. WSI is under no obligation to accept Dr. Martire's opinions, even though he was McArthur's treating physician. WSI's responsibility is to weigh and resolve conflicting medical opinions, and adequately explain its reason for disregarding evidence favorable to the claimant in denying benefits. See Thompson v. Workforce Safety and Insurance, 2006 ND 69, ¶ 11, 712 N.W.2d 309.

48. Here, Karen Rasmussen and Dr. Vilella both determined that, with certain additional modifications, McArthur could safely perform the modified job. Dr. Vilella testified at the administrative hearing at length as to why he believed the modified job was physically appropriate for McArthur. Dr. Martire did not testify at the hearing. Rather, his "opinion" of the modified position at Central Dakota Beef was hand-written on Joyce Olson's letter to him dated May 26, 2006 (C.R. 63-64)

49. Dr. Martire disagreed with Karen Rasmussen's observation that the janitorial duties initially reviewed on April 26, 2006, would not require repetitive left upper extremity movement. However, he offered no objective basis for his position. Dr. Martire also took issue with Ms. Rasmussen's statement that the janitorial duties would not require "kneeling, crawling or climbing." He simply assumed that "cleaning restrooms would require kneeling" and therefore that job duty was physically inappropriate for McArthur. He also assumed the same

⁴ It should be noted that Dr. Martire subsequently approved the modified position on a trial basis 2-4 hours per day as tolerated. (C.R. 177)

duties would require “repetitive bending,” which McArthur was not permitted to do.

50. Dr. Martire was also “unclear” how McArthur would be able to handle with one hand the water hose used to clean out the smoke room, notwithstanding Ms. Rasmussen’s description of the hose as “regular” and not a “pressure hose.” It should be noted that Ms. Rasmussen considered but rejected a job task that would have required McArthur to use a pressurized water hose. In addition to questioning whether McArthur could operate the hose with one hand, Dr. Martire also questioned “who will roll up hose, pull up water, and do drains?”

51. In his brief, McArthur claims that ALJ Seaworth dismissed his opinion because he did not perform an onsite job assessment. A review of WSI/ALJ Seaworth’s Finding of Fact 6 shows that statement to be inaccurate. ALJ Seaworth explained that she did not find Dr. Martire’s opinion persuasive because he was “second guessing” the job site assessment performed by physical therapist Karen Rasmussen. Dr. Martire “read into” the modified position additional duties which he then claimed were outside of the FCE. WSI/ALJ Seaworth concluded that Karen Rasmussen, who actually performed the on-site assessment, was in the best position to identify the actual tasks McArthur would be required to perform as part of the modified position.

CONCLUSION

52. A reasoning mind reasonably could have determined that the factual conclusions reached by WSI were proved by the weight of the evidence from the entire record. Furthermore, WSI has adequately explained its rationale and

reasoning for accepting the opinions of Dr. Vilella and physical therapist Karen Rasmussen and rejecting the opinion of Dr. Martire. Accordingly, the Judgment of the Wells County Court, entered on January 23, 2009, affirming WSI's Final Order of October 20, 2007, should be affirmed in all respects.

Dated this 8th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, North Dakota Workforce Safety and Insurance, and the author of the Brief of Appellee North Dakota Workforce Safety and Insurance, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 5,122 words from the portion of the brief entitled "Statement of the Case" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 8th day of May, 2009.

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