

ORIGINAL

20090120

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

RICHARD J. SHOTBOLT  
Appellant,  
vs.  
NORTH DAKOTA  
WORKFORCE SAFETY & INSURANCE,  
Appellee, and  
INDUSTRIAL CONTRACTORS, INC.  
Respondent.

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STATE OF NORTH DAKOTA

APPEAL FROM THE OPINION AND ORDER DATED FEBRUARY 10, 2009  
THE HONORABLE GAIL HAGERTY PRESIDING, AND THE  
FEBRUARY 18, 2009, ORDER FOR JUDGMENT  
AND JUDGMENT ENTERED ON FEBRUARY 19, 2009  
MERCER COUNTY, SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO.: 08-C-1171  
SUPREME COURT CIVIL NO.: 20090120

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APPELLANT'S BRIEF  
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## I. STATEMENT OF ISSUE

Are WSI's findings of facts supported by the greater weight of the evidence?

## II. STATEMENT OF FACTS

Richard Shotbolt was a 55 year-old high school graduate with 34 years' experience as an industrial electrician when, on December 8, 2005, a blowout arc chute for high voltage switchgear, weighing 80 to 100 pounds, fell on his left arm, rupturing his distal biceps tendon (Appendix (App.) pp. 32, 43, 43, 135 - Hearing Transcript (HT) pp. 20-21). Mr. Shotbolt returned to his home in Belville, Michigan and began treating with Dr. Lawrence McMaster, DO, who had been his treating physician since 2001 (App. p. 136 - HT p. 26). Dr. McMaster referred Mr. Shotbolt to Dr. Homer C. Linard, DO, for an orthopedic evaluation on December 12, 2005 (App. pp. 44-45). Dr. Linard performed a surgical repair of Mr. Shotbolt's distal biceps tendon rupture in December, 2006 (App. p. 46).

Following his surgery, Mr. Shotbolt again began treating with Dr. McMaster, who diagnosed Mr. Shotbolt with persistent weakness in his left arm despite the surgery and 4 months of physical therapy (App. pp. 49, 54). Dr. McMaster also noted that Mr. Shotbolt had other, pre-existing, medical problems that made it difficult for him to perform his usual occupation as an industrial electrician (App. p. 54). On June 22, 2007, Mr. Shotbolt underwent a functional capacity evaluation which revealed that his left-arm strength was approximately one-half that of his right arm (App. pp. 55, 56). Mr. Shotbolt confirmed that, despite the surgery and physical therapy, no more than half of his left arm strength had returned (App. p. 136 - HT pp. 23-24).

Mr. Shotbolt explained that following his injury, he could no longer perform the required demands of an industrial or commercial electrician. He explained that,

I've done much mechanical installation. That's most of the electrical job, and that involves a lot of rigid conduit, which I've done from three-quarter inch to four-inch. I could not lift the four-inch or even operate the die with my arm. I don't have the strength to lift it. The cable tray, they come in 20-foot lengths. They can be aluminum, but more often it's steel. Just the weight of them, getting them in place and lifting. There's all kinds of lifting apparatus that have to be taken up and hung up to be able to lift things. I'm not strong enough to lift any of this. I can't physically do it, and I wouldn't be safe to others trying to do it because I know that I haven't got the strength to do it.

(App. p. 136 - HT pp. 24-25). Mr. Shotbolt went on to explain that he was unqualified to be a residential electrician.

I've never done residential. It's a different field than industrial. I could do it. I would be slower at it compared to a person who does it all the time. I'm not quite up to the code in that department as good as I would be on others. I could do it, yes. I'm licensed to do it.

(App. p. 139 - HT pp. 36-37).

Usually people that do industrial and commercial never do residential. I don't know any that have. . . . It's just a different field and it's -- it's not their type of work that they would be comfortable in. They're licensed to do it, but it's just something that they've never done and they wouldn't be proficient at it as somebody that has done it all the time. . . . I just -- I'm not updated on the codes. It's not my type of work. I'm trained for industrial, for everything that comes with industrial, like from bending conduit -- I would be proficient at it. I probably wouldn't be good enough to make a living at it.

(App. p. 143 - HT. pp. 52-53). Mr. Shotbolt did not return to work as an industrial or commercial electrician following his December 8, 2005, work injury and was never again offered employment as an industrial or commercial electrician (App. pp. 135, 139 - HT pp. 22, 35).

To contradict the opinions of Mr. Shotbolt and Dr. McMaster, WSI obtained the opinion of its former medical director, Dr. Gregory Peterson (App. pp. 76-77). Dr. Peterson never examined or treated Mr. Shotbolt; rather, he simply performed a records review (Id.). Dr. Peterson acknowledged that Mr. Shotbolt had pre-existing medical conditions including Reiter's Syndrome (an inflammatory arthritis) which could cause impairment or disability by itself, and he admitted that Mr. Shotbolt had a pre-existing brain aneurysm and a pre-existing abdominal aneurysm (App. p. 148 - HT 71-72). Dr. Peterson admitted that the FCE restricted Mr. Shotbolt to lifting approximately one-half of the weight with his left arm that he could lift with his right arm (App. p. 148 - HT p. 74). Dr. Peterson was surprised "by the degree of the measurement of the weakness" that was revealed by the FCE and Mr. Shotbolt's medical providers (App. p. 149 - HT p. 75). He agreed that none of Mr. Shotbolt's treating doctors had indicated any findings of symptom magnification (App. p. 149 - HT p. 77). He agreed that there was no evidence that WSI found Dr. McMaster's care inappropriate or found Dr. McMaster unqualified to treat Mr. Shotbolt for his work injury (App. p. 150 - HT p. 79). Finally, Dr. Peterson did not understand the strength demands required of an industrial electrician (App. p. 152 - HT pp. 87-88). Mr. Shotbolt, had made \$30 per hour working 10-hour days at the time of his work injury, was approved for Social Security disability benefits in March of 2006 (App. pp. 137, 143 - HT pp. 30, 52).

### III. STATEMENT OF THE CASE

Richard Shotbolt filed his claim for workers compensation benefits on December 8, 2005 (App. p. 32). WSI accepted Mr. Shotbolt's claim the next day (App. p. 33). Mr. Shotbolt filed a claim for wage-loss benefits

on January 14, 2006 (App. p. 34). That claim for wage loss indicated that he was earning \$30.18 per hour at the time of injury and was working 10 hour shifts. WSI issued an Order Denying Further Disability & Vocational Rehabilitation Benefits on June 1, 2006 (App. pp. 35-39). That Order provided that Mr. Shotbolt could return to his pre-injury occupation. Mr. Shotbolt requested reconsideration and demanded formal hearing on August 7, 2006 (App. p. 40). A formal administrative hearing was held on May 7, 2008, before Administrative Law Judge Robert A. Keogh (App. p. 129). ALJ Keogh issued Recommended Findings of Facts, Conclusions of Law and Order on July 16, 2008 (App. pp. 78-102). WSI issued its Final Order affirming Mr. Shotbolt's rehabilitation plan on July 31, 2008 (App. pp. 103-128). Mr. Shotbolt appealed to the District Court, challenging a number of WSI's Findings of Fact and Conclusions of Law. The Honorable Gail Hagerty, District Judge, issued an Opinion and Order on February 10, 2009, affirming ALJ Keogh's decision (App. pp. 18-24). Judgment was entered on February 19, 2009, and Mr. Shotbolt has, once again, appealed (App. p. 29).

#### IV. LAW AND ARGUMENT

WSI's findings of fact are not supported by the greater weight of the evidence.

##### Discussion of law and Medical Evidence

- B. Dr. McMaster is an internal medicine specialist who was Claimant's primary doctor before and after the injury. An internal medicine specialist does not have, at least based on the testimony of Dr. Peterson, the knowledge or background to credibly determine the Claimant's ability to return to work. His opinion further is really not supported by any objective medical evidence.

(App. p. 123).

There are two principle problems with this finding. Firstly, Dr. McMaster was Mr. Shotbolt's treating doctor both before and after his work injury. Consequently, he was in the best position, by far, to evaluate the effects of that injury. Furthermore, ALJ Keogh's opinion seems to be that Dr. McMaster was qualified to treat Mr. Shotbolt for his work injury but not qualified to render an opinion as to the functional effects of that injury. N.D.C.C., Section 65-05-28 allows WSI to require an injured worker to change treating doctors "to better direct the medical aspects of the injured employee's claim." WSI considered Dr. McMaster qualified to treat Mr. Shotbolt. It is axiomatic that he was also qualified to render an opinion regarding the functional consequences of Mr. Shotbolt's work-related injury. Finally, Dr. McMaster's opinion is supported by FCE and EMG results and is, itself, objective medical evidence (See: Swenson v. North Dakota Workforce Safety & Insurance, 2007 ND 149, 738 N.W.2d 892. Clearly, ALJ Keogh did not understand the meaning of "objective medical evidence" as determined by this Court.

#### Discussion of law and Medical Evidence

- C. Dr. Peterson did not meet or treat the claimant. He lacks that advantage. His opinions are based on his review of all the medical records in the case and he uses the phrase 'reasonable degree of medical certainty'. His speciality is in the field of physical medicine and rehabilitation, and his experience as described in his testimony renders his opinions credible and thorough. Between his letter and his testimony he provided a complete and detailed analysis of Claimant's medical situation and showed the objective medical evidence that supported his opinions. While the 'length' of Dr. Peterson's testimony and letter, and the number of words he used to convey his message are not of themselves controlling, it can't be argued that the record does not contain many times the volume of evidence from Dr. Peterson as compared to that of Drs. Linard and McMaster combined.



Therefore, the opinions of Drs. Linard and Dr. Peterson are accepted and the opinion of Dr. McMaster is rejected.

(App. pp. 123-124).

While WSI may have broad authority to weigh conflicting medical opinions, it may not do so in an unreasoned manner. ALJ Keogh, despite his protestations to the contrary, clearly based this finding, in large part, on the length of Dr. Peterson's written and oral opinion. Rather than discuss how the opinion of a records reviewer is more persuasive than that of a treating physician of many years, ALJ Keogh placed his emphasis on the length of the opinion, itself. Furthermore, ALJ Keogh neglected to note that Dr. Peterson was a medical consultant to WSI and had, in the past, been WSI's medical director (App. p. 145 - HT p. 61). While both Drs. Peterson and McMaster are admittedly qualified to offer opinions on Mr. Shotbolt's ability to return to work as an industrial electrician, only Dr. McMaster had examined and treated Mr. Shotbolt over the course of a number of years. On the other hand, only Dr. Peterson relied on a records review; only Dr. Peterson had a employee/employer relationship with one of the parties; only Dr. Peterson was unaware of the physical demands of an industrial electrician. Rather than analyze the relevant differences between the bases for Dr. McMaster's and Dr. Peterson's opinions, ALJ Keogh simply relied on the length of their respective opinions.

Finding of Fact 34.

A preponderance of the evidence establishes that the Claimant is able to return to work as an electrician, his life long career. Claimant testified that he could work as an electrician.

As stated previously, Mr. Shotbolt had spent 34 years as a journeyman electrician, 80 percent of that time as an industrial electrician and 20 percent as a commercial electrician (App. p. 136). Mr. Shotbolt had no experience as a residential electrician (App. p. 139 - HT p. 36). Not only are the strength demands of an industrial and commercial electrician different than those of a residential electrician but so are the skills required. Essentially, after his work injury, Mr. Shotbolt lacked the strength to continue working in his "life-long career" as an industrial electrical and lacked the skills to compete as a residential electrician (App. pp. 136, 143 - HT p. 25, 53). There is no evidence of the contrary. The goal of WSI's vocational rehabilitation process is to return an injured worker to substantial gainful employment, defined as ninety percent of prejury wage. See: N.D.C.C., Section 65-05.1-01. In the instant case, there was no evidence that Mr. Shotbolt would be able to obtain substantial gainful employment as a residential electrician, a field he had never work in.

Mr. Shotbolt also had a number of pre-existing medical conditions, which Dr. Peterson agreed could be disabling and which were not considered in determining whether he could return to work. This Court has determined that WSI must consider not only the functional limitations caused by the work injury but any pre-existing conditions as well See: Svedberg v. ND Workers Compensation Bureau, 1999 ND 181, 599 N.W.2d 323.

Finding of Fact 36.

A preponderance of the evidence establishes that WSI identified the correct rehabilitation option for Claimant, and that such option will give Claimant a reasonable opportunity for substantial gainful employment.

(App. p. 125).

Again, the uncontroverted evidence shows that Mr. Shotbolt can no longer perform the physical demands of an industrial or commercial electrician and lacks the skills to be employable as a residential electrician, a job he has never performed.

Conclusion of Law 3.

Claimant has agreed he can perform the job of an electrician.

(App. p. 126)

ALJ Keogh apparently did not understand Mr. Shotbolt's testimony. There are three types of electrician: industrial, commercial, and residential. While all three may fit under the umbrella label of electrician, they are not the same job. The physical demands, skills, training, and income for each of those types of electrician differs. Simply put, if Richard Shotbolt could find and perform substantial gainful employment as a residential electrician he would be working today rather than subsisting on Social Security disability benefits.

Conclusion of Law 4:

The bare allegation that Claimant is receiving social security disability and is considered disabled by the Social Security Administration, absent more relevant information and supporting medical evidence, is not sufficient to affect the determination of whether WSI selected the most appropriate rehabilitation option.

(App. p. 126).

Either Mr. Shotbolt is disabled or he is able to work as a residential electrician without limitation or retraining. While the Social Security Administration's determination of disability may not be binding on WSI, it is clearly relevant. There is no evidence that Mr. Shotbolt suffered any disabling medical condition subsequent to his work injury. In short, the only reasonable basis for the Social Security

Administration's determination of disability is a review of Mr. Shotbolt's functional limitations caused by his work injury and pre-existing conditions, exactly what WSI was obligated to consider in its vocational rehabilitation process.

Conclusion of Law 6.

WSI has met it's [sic] burden in that a preponderance of the evidence does establish that the Claimant is capable of returning to work as an electrician.

(App. p. 126).

What kind of an electrician? Mr. Shotbolt lacks the strength to return to the type of work that he has done for 34 years and lacks the skills to engage in a type of work he has never done. There simply is no contrary evidence.

In response to WSI's suggestion that Mr. Shotbolt should have been ready to return to work fifty-six days after surgery (App. pp. 41-42), Dr. Linard released him to return to work on April 7, 2006, with restrictions on lifting more than fifteen pounds with his left arm (App. p. 47). On May 5, 2006, Dr. Linard, noting continued weakness in Mr. Shotbolt's left biceps, released him to return to work without restrictions but in the expectation that his left arm weakness would improve over time (App. p. 48). There was no evidence introduced which indicated that Dr. Linard was familiar with Mr. Shotbolt's job demands.

On January 23, 2007, an EMG showed that Mr. Shotbolt's left biceps injury had become chronic (App. pp. 70-73). Dr. Joseph Hornyak, a physical medicine and rehabilitation specialist, diagnosed Mr. Shotbolt with chronic left biceps weakness on February 7, 2007 (App. p. 68). Dr.

McMaster restricted Mr. Shotbolt from returning to a job he described as "heavy industrial work/lifting," noting that he continued to have "poor strength" in his left biceps (App. p. 49).

On June 22, 2009, Mr. Shotbolt completed a valid functional capacity evaluation (FCE) which indicated that he could only lift 15.2 pounds occasionally with his left arm (App. pp. 55-57). His left arm was approximately half as strong as his right arm (App. p. 57). The critical demands of electrician require lifting up to 40 pounds frequently (App. p. 51). The blowout chute that fell on Mr. Shotbolt's left arm weighed 80-90 pounds (App. p. 135 - HT p. 21). On April 7, 2008, Dr. McMaster concluded that Dr. Linard had been wrong in his expectation that Mr. Shotbolt's left arm strength would improve over time - it hadn't. Dr. McMaster noted that both Dr. Hornyak, a specialist in physical medicine and rehabilitation, and the EMG results confirmed the chronicity of Mr. Shotbolt's left arm weakness (App. pp. 74-75). In fact, Dr. Hornyak was not surprised that Mr. Shotbolt's left arm injury had become chronic, given the nature of the rupture injury and the subsequent repair.

Dr. Peterson mistakenly concluded that, based on the FCE, Mr. Shotbolt had no restrictions in returning to work. Consequently, Dr. Peterson agreed with Dr. Linard whose prediction was disproven by subsequent developments (App. pp. 76-77).

Dr. McMaster reviewed Drs. Linard's and Hornyak's opinions, the EMG and FCE reports and Dr. Peterson's analysis and - based on those records and six years of treating Mr. Shotbolt both before and after his work injury - concluded that he could not return to work in his

pre-injury occupation. Although none of the doctors offering opinions had observed Mr. Shotbolt at work, Dr. McMaster understood that his job required heavy industrial work/lifting (App. p. 49).

#### V. CONCLUSION

Richard Shotbolt never fully recovered from his workplace injury. Despite surgery and physical therapy, Mr. Shotbolt no longer has the strength to work as either an industrial or commercial electrician. While he may be able to perform the physical demands of a residential electrician, he has never worked in that job and lacks the skills to be competitively employable, i.e., to obtain "substantial gainful employment." See: N.D.C.C., Section 65-05.1-01(3). There is no evidence to the contrary.

Dr. McMaster was qualified to treat Mr. Shotbolt's workplace injury, and he is qualified to offer an opinion of the functional effects of that injury. His opinion is substantiated by the FCE, EMG, Dr. Hornyak's opinion, and Mr. Shotbolt's testimony. Mr. Shotbolt is disabled, as confirmed by the Social Security Administration. WSI has failed to consider Mr. Shotbolt's pre-existing, medical condition. He remains entitled to disability benefits.

Dated this 20th day of May, 2009.

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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 20th day of May, 2009, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

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