

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard J. Shotbolt,)
)
 Appellant,)
)
 vs.)
)
 North Dakota Workforce Safety)
 and Insurance,)
)
 Appellee,)
)
 And)
)
 Industrial Contractors, Inc.,)
)
 Respondent.)
 _____)

Supreme Court Case No. 20090120

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 JUNE 18, 2009
 STATE OF NORTH DAKOTA

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

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**APPEAL FROM ORDER DATED FEBRUARY 10, 2009,
 AND JUDGMENT ENTERED FEBRUARY 19, 2009
 MERCER COUNTY DISTRICT COURT
 SOUTH CENTRAL JUDICIAL DISTRICT
 THE HONORABLE GAIL HAGERTY**

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STATEMENT OF THE CASE

1 This is an appeal by the claimant, Richard Shotbolt (“Shotbolt”), from a judgment entered in Mercer County District Court on February 19, 2009. (App.¹ 26) The judgment is based on the Honorable Gail Hagarty’s Opinion and Order, dated February 10, 2009, affirming the Final Order of North Dakota Workforce Safety and Insurance Fund (“WSI”), dated July 31, 2008. (App. 18-24) WSI’s Final Order adopted Administrative Law Judge Robert Keogh’s Recommended Findings of Fact, Conclusions of Law and Order, dated July 16, 2008. (App. 78-100; C.R.² 112-134) On appeal, Shotbolt contends that WSI’s Final Order is not in accordance with the law, that certain 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. 13-14)

STATEMENT OF FACTS

2 Shotbolt submitted a claim for benefits with WSI for a work injury to his left bicep suffered on December 8, 2005. (App. 32; C.R. 1) The distal bicep tendon of his left elbow ruptured while he was moving a piece of equipment weighing approximately 200 lbs. (C.R. 40-41) At the time, Shotbolt was a journeyman electrician and working for Industrial Contractors, Inc. at the Leland Olds Power Plant in Stanton, North Dakota. (C.R. 2) WSI issued an informal decision on December 9, 2004, accepting liability for the work injury. (App. 33; C.R. 6)

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

² “C.R.” refers to the Certificate of Record, filed with the District Court on September 25, 2008, followed by the bate stamp page of the referenced page number of the exhibit.

3 After initial treatment at MedCenter One in Bismarck, North Dakota, Shotbolt returned to his home state of Michigan, where he was seen by Dr. Lawrence McMaster, his regular family physician. (C.R. 103j; App. 129³ at 26) Dr. McMaster diagnosed a rupture of the biceps tendon on Shotbolt's left elbow and referred him to Dr. Homer Linard for an orthopedic evaluation. (C.R. 103j) Dr. Linard confirmed Dr. McMaster's diagnosis and recommended surgical repair of the ruptured tendon, which was performed on December 22, 2005. (App. 44-45; C.R. 49, 61-62) Following surgery, Shotbolt's left arm was placed in a fiberglass cast, and he was taken off work. (App. 46; C.R. 63)

4 Shotbolt returned to Dr. Linard for a recheck of the left arm on February 7, 2006. Dr. Linard removed the fiberglass cast and replaced it with a left arm sling with an elbow brace. He also prescribed physical therapy and released Shotbolt to work, provided he did not use the left arm. (C.R. 64) Shotbolt attended 25 physical therapy sessions between February 15, 2006, and June 15, 2006. (C.R. 52-60)

5 Shotbolt returned to Dr. Linard on April 11, 2006. On examination, Dr. Linard noted that Shotbolt had nearly full extension and flexion of the left elbow, and the strength was slowly improving. Dr. Linard released Shotbolt to return to work "with moderate use of the left arm, no lifting over 15 pounds." (App. 47; C.R. 66) Dr. Linard also indicated that he anticipated discharging Shotbolt from care and releasing him to full duty at the next recheck. (C.R. 67)

³ App. 129 and C.R. 164 is the transcript from the administrative hearing held on May 7, 2008. Citation to the transcript will be to App. 129 and C.R. 164 followed by the individual page within the transcript.

6 Shotbolt returned to Dr. Linard on May 5, 2006. Dr. Linard's examination on that day revealed good range of motion of the left elbow. He noted some weakness of the bicep, which Dr. Linard believed would improve over time. Dr. Linard discharged Shotbolt from his care and released him to work with no restrictions. (App. 48; C.R. 68) On June 7, 2006, Dr. Linard advised WSI that Shotbolt had no permanent impairment to his left bicep as a result of the work injury. (C.R. 69-70)

7 On March 21, 2006, WSI requested CorVel initiate vocational rehabilitation services on behalf of Shotbolt after Industrial Contractors, Inc. advised that he would not be asked to return following his recovery. (C.R. 27) Industrial Contractors, Inc. laid off Shotbolt on April 12, 2006. (C.R. 30) On April 5, 2006, CorVel wrote Dr. Linard to ask if and when Shotbolt would be medically able to return to full duty without any restrictions. (C.R. 29) Following receipt of Dr. Linard's full work release on May 5, 2006, CorVel issued a Vocational Consultant's Report that recommended a "return to same occupation, any employer" rehabilitation option under N.D.C.C. § 65-05.1-01(4). (C.R. 37) On May 23, 2006, WSI advised Shotbolt that it had approved the "Plan B" rehabilitation option recommended by CorVel. (C.R. 38)

8 Shotbolt saw Dr. McMaster on June 2, 2006, complaining of left shoulder pain. Shotbolt described injuring the left shoulder while wearing the cast on his arm following surgery on his bicep tendon. Upon examination, Dr. McMaster noted "[b]iceps areas still is not as strong as the right." (C.R. 103c) Dr. McMaster diagnosed left shoulder impingement and prescribed a course of

physical therapy. (Id.) Shotbolt attended fourteen (14) sessions of physical therapy for his left shoulder between June 15, 2006, and August 22, 2006. (C.R. 103k-r)

9 On January 16, 2007, Shotbolt saw Dr. McMaster complaining of a persistent weakness in his left bicep and pain and numbness in his left leg. Shotbolt advised Dr. McMaster of his belief that he was unable to work because of the weakness in the bicep. He also continued to have pain in his left leg and numbness in his left foot since surgery in October of 2006 to repair an aneurysm. Dr. McMaster's assessment was chronic left leg pain following surgery. He referred Shotbolt to the Physical Medicine and Rehabilitation Clinic for evaluation. He did the same for Shotbolt's left upper arm extremity. Dr. McMaster also assisted Shotbolt complete the paperwork necessary for him to obtain a handicap parking permit because of the chronic leg pain. (C.R. 103b)

10 Shotbolt was evaluated by Dr. Joseph Hornyak with the Physical Medicine and Rehabilitation Clinic on January 17, 2007. Dr. Hornyak noted Shotbolt's past medical history as significant for peripheral vascular occlusive disease, an aortic and iliac aneurysm repair in October of 2006, a cerebral aneurysm "which was surgically clipped at an outside facility" and "Reiter syndrome" affecting most of his joints, including the knees and ankles. (C.R. 94) Examination of Shotbolt's left upper extremity showed a biceps strength of 4/5. (C.R. 95) Dr. Hornyak's assessment was "chronic bicep weakness status post bicep rupture and repair in 2005 and left leg numbness positional symptoms consistent with diagnoses left-sided claudication and possible weakness in the

left gastroc.” (Id.) Other than an EMG of the left upper extremity and left lower extremity, Dr. Hornyak did not believe further intervention was warranted. (C.R. 95)

11 Shotbolt underwent the EMG on January 23, 2007, and he saw Dr. Hornyak on February 7, 2007, to review the results. (App. 68-69; C.R. 97-98) The EMG of the left upper extremity showed “chronic denervation, reinnervation injury of the left biceps,” but no evidence of “cervical radiculopathy, plexopathy, or neuropathy.” The EMG also showed no evidence of on-going nerve damage to the bicep. Dr. Hornyak concluded that the strength of Shotbolt’s left bicep was stable and he was to continue with his normal activities as tolerated. (Id.) The EMG of the left lower extremity was normal, and Dr. Hornyak’s assessment was left-sided claudication. He advised Shotbolt to build his exercise tolerance to reduce any pain. Dr. Hornyak noted that it was not necessary for Shotbolt to see him again unless he had further specific questions. (Id.)

12 Shotbolt returned to Dr. McMaster on March 2, 2007, who noted continuing problems with Shotbolt’s left leg and arm. Dr. McMaster noted that Shotbolt’s physical examination was unchanged since his last visit. His assessment was “chronic left upper extremity weakness” and “left leg numbness, possible due to claudication.” Dr. McMaster refilled Shotbolt’s Darvocet prescription and completed paperwork for “his disability case.” (C.R. 103a) On that same day, Dr. McMaster wrote WSI to advise that Shotbolt was “unable to return to work because of the arm injury.” (C.R. 72)

13 Because the opinion of Dr. McMaster was contrary to that of Dr. Linard, WSI ordered Shotbolt to undergo a Functional Capacity Assessment (“FCA”) to assist in determining whether he could perform the duties of a journeyman electrician; performing commercial and industrial construction. (C.R. 73-75) The FCA was performed on June 22, 2007. (App. 55-67; C.R. 80-92) WSI provided the results from the FCA, a job description for an electrician and Shotbolt’s medical records to Dr. Gregory Peterson for a records review and opinion on whether the work injury would prevent Shotbolt from working as an electrician. (C.R. 104-109)

14 Dr. Peterson provided an opinion that the work injury would not prevent Shotbolt from performing the duties of an electrician. (App. 76-77; C.R. 110-111) Dr. Peterson noted that the limitations indicated in the FCA applied to standing, walking, stair climbing, crawling and kneeling, none of which had anything to do with the left biceps tendon injury. (Id.) Dr. Peterson disagreed with the opinion Dr. McMaster provided in his letter of March 2, 2007, finding it to be conclusory and unsupported by objective findings. (Id.) Dr. Peterson did agree with the full work release provided by Dr. Linard on May 5, 2005. He wrote that [Dr. Linard’s] opinion is consistent with the nature of Mr. Shotbolt’s left arm condition, the expected natural history, the objective findings, and Dr. Linard’s expertise as an orthopedic surgeon.” (Id.)

15 Dr. McMaster responded to Dr. Peterson’s opinion by letter dated April 7, 2008. Dr. McMaster noted that Shotbolt continued to have left arm weakness which, according to Shotbolt himself, results in “limitations.” Although Dr.

McMaster admitted to not knowing what Shotbolt's job entailed, he continued to "feel that [the] injury prevents him from returning back to his pre-injury status." (App. 74-75; C.R. 103s-103t)

16 On June 1, 2006, WSI issued its formal Order Denying Further Disability & Vocational Rehabilitation Benefits. (App. 35-37; C.R. 9-11) Shotbolt requested reconsideration and a formal hearing on August 7, 2006. (C.R. 14) The formal evidentiary hearing was held on May 7, 2008, with Administrative Law Judge Robert Keogh ("ALJ Keogh") presiding. (App. 129; C.R. 164)

17 On July 16, 2008, ALJ Keogh issued his Recommended Findings of Fact, Conclusions of Law and Order affirming WSI's Order Denying Further Disability & Vocational Rehabilitation Benefits. (App. 78-100; C.R. 112-134) ALJ Keogh determined that a preponderance of the evidence established that Shotbolt could work as an electrician, and therefore WSI had correctly identified the first appropriate rehabilitation option that would provide Shotbolt with a reasonable opportunity for substantial gainful employment. (App. 98 and C.R. 132, Findings of Fact 34 and 36) In reaching this decision, ALJ Keogh found the opinions of Dr. Homer Linard and Dr. Gregory Peterson that Shotbolt could work as an electrician to be more persuasive than Dr. McMaster's opinion that he could not. (App. 93-98 and C.R. 127-131, DISCUSSION OF LAW AND MEDICAL EVIDENCE) WSI adopted ALJ Keogh's recommended decision as its Final Order on July 31, 2008. (App. 104-127; C.R. 139-162)

18 On August 28, 2008, Shotbolt appealed from WSI's Final Order to Mercer County District Court. (App. 13-14) On February 10, 2009, District

Court Judge Gail Hagerty issued her Opinion and Order affirming WSI's Final Order. (App. 18-24) Judge Hagerty held that WSI and ALJ Keogh could reasonably have concluded the rehabilitation plan to return Shotbolt to his occupation as an electrician was the appropriate result based on the evidence in the record as a whole. (Id. At 24)

19 Judgment was entered in the district court on February 19, 2009, and Notice of Entry of Judgment was served on February 23, 2009. (App. 26-27) Shotbolt appealed from the Judgment to this Court on April 10, 2009. (App. 29)

STATEMENT OF THE ISSUE

20 Whether WSI/ALJ Keogh could reasonably have concluded from the weight of the evidence that N.D.C.C. § 65-05.1-01(4)(b)—return to the same occupation, any employer—was the first appropriate rehabilitation option for the Claimant?

LAW AND ARGUMENT

I. Scope of Review of Agency Decision.

21 This Court exercises a limited review in appeals of WSI decisions. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d at 789. 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).

22

On appeal, this Court should exercise restraint in determining whether WSI's decision is supported by a preponderance of the evidence. Elshaug, supra, 2003 ND 177 ¶ 12, 671 N.W.2d at 790. The Court should not reweigh the evidence, make independent findings of fact or substitute its judgment for that of the agency. Rooks v. North Dakota Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993); 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). 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.

23

The dispositive issue is whether the vocational plan adopted by WSI was appropriate under N.D.C.C. § 65-05.1-01, which provides in part:

3. It is the goal of vocational rehabilitation to return the disabled employee to substantial gainful employment with a minimum of retraining, as soon as possible after an injury occurs. 'Substantial gainful employment' means bona fide work, for remuneration, which is reasonably attainable in light of the individual's injury, functional capacities, education, previous occupation, experience, and transferrable skills, and which offers an opportunity to restore the employee as soon as practicable and as nearly as possible to ninety percent of the employee's average weekly earnings at the time of injury or to sixty-six and two-thirds percent of the average weekly wage in this state on the date the rehabilitation consultant's report is issued under section 65-05.1-02.1, whichever is less. The purpose of defining substantial gainful employment in terms of earnings is to determine the first appropriate priority option under subsection 4 which meets the income test set out above.
4. The first appropriate option among the following, calculated to return the employee to substantial gainful employment, must be chosen for the employee:

- a. Return to the same position.
- b. Return to the same occupation, any employer.
- c. Return to a modified position.
- d. Return to a modified or alternative occupation, any employer.
- e. Return to an occupation within the local job pool of the locale in which the claimant was living at the date of injury or of the employee's current address which is suited to the employee's education, experience, and marketable skills.
- f. Return to an occupation in the statewide job pool which is suited to the employee's education, experience, and marketable skills.
- g. On-the-job training.
- h. Short-term retraining of the fifty-two weeks or less.
- i. Long-term retraining of one hundred four weeks or less
- j. Self-employment.

24 WSI adopted a vocational rehabilitation plan that chose §65-05.1-01(4)(b), return to the same occupation, any employer, as the first appropriate option that would return Shotbolt to substantial gainful employment. Shotbolt challenged the appropriateness of the vocational rehabilitation plan, claiming that he does not have the physical ability to work successfully and competitively as a journeyman electrician.

25 This Court should not reverse WSI's selection of a vocational rehabilitation plan under N.D.C.C. §65-05.1 if there is "evidence from which a reasoning mind could have reasonably concluded that the rehabilitation plan would return [the worker] to substantial gainful employment which was reasonably attainable in light

of his injury and which would substantially rehabilitation his earning capacity. . . .”

Thompson v. N.D. Workers Comp. Bureau, 490 N.W.2d 248, 254 (N.D. 1992)

26 In reaching its decision, WSI rejected certain medical evidence favorable to Shotbolt’s claim for benefits and accepted unfavorable medical evidence. It is well-settled that WSI has the responsibility to “weigh and resolve conflicting medical opinions.” Thompson v. Workforce Safety and Insurance, 2006 ND 69, ¶ 11, 712 N.W.2d 309 (citing Negaard-Cooley v. North Dakota Workers Comp. Bureau, 2000 ND 122, ¶ 18, 611 N.W.2d 898). WSI must adequately explain its reason for disregarding medical evidence favorable to the claimant in denying benefits. Hein v. North Dakota Workers Comp. Bureau, 1999 ND 200, ¶ 14, 601 N.W.2d 576, 578. The explanation for rejecting medical evidence favorable to the claimant may consist of the analysis of why it accepted contrary evidence. Hein, 1999 ND 200, ¶ 15, 601 N.W.2d 576. In reviewing WSI’s resolution of conflicting medical opinions, this Court must avoid making independent findings or substituting its judgment for that of the agency, even if the Court may not have reached the same result. Barnes v. Workforce Safety and Insurance, 2003 ND 141, ¶ 9, 668 N.W.2d 290.

II. The Evidence from the Record as a Whole Supports WSI/ALJ Keogh’s Factual Findings and Conclusion that WSI Selected the First Appropriate Vocational Rehabilitation Option for Shotbolt under N.D.C.C. § 65-05.1-01(4).

27 WSI/ALJ Keogh determined that the appropriate rehabilitation option under N.D.C.C. §65-05.1-01(4) was “return to same occupation, any employer.” The record contains substantial evidence from which WSI/ALJ Keogh could have reasonably concluded that the rehabilitation plan would return Shotbolt to

substantial gainful employment which was reasonably attainable in light of his injury and which would substantially rehabilitation his earning capacity. That evidence includes, but is not limited to the full work release provided by Shotbolt's treating orthopedic surgeon, Dr. Homer Linard, on May 5, 2005. (App. 48; C.R. 68)

28 In addition, Dr. Gregory Peterson reviewed Shotbolt's medical records, the results of the FCA performed on June 22, 2007, and a Functional Job Analysis for the job demands of a journeyman electrician performing work on commercial and industrial construction projects. Based on his review of this evidence, Dr. Peterson provided a written medical opinion that, while Shotbolt had some residual weakness to his left (non-dominant) arm as a result of the work injury, the loss of strength was not significant and therefore would not prevent him from returning to work as an electrician. (App. 76-77; C.R. 110-111)

29 In addition to his written medical opinion, Dr. Peterson also testified at the administrative hearing, where he provided the bases for his opinion in far more detail. (App. 129 and C.R. 164 at 60-88) Dr. Peterson also testified as to the reasons that he disagreed with the medical opinion offered by Dr. McMaster. (Id. at 77-78; 80-81)

A. WSI/ALJ Keogh's Finding that Dr. McMaster was Less-Qualified than Dr. Peterson to Provide a Medical Opinion on Shotbolt's Ability to Return to Work was Supported by the Evidence in the Record.

30 Shotbolt attacks WSI's finding of fact that Dr. McMaster, as an internal medicine specialist, lacked the knowledge or background to credibly determine Shotbolt's ability to return to work as an electrician. Shotbolt argues that Dr.

McMaster, as his treating physician, was in “the best position, by far, to evaluate the effects of that injury[,]” and his opinion should receive more weight than Dr. Peterson’s. (Shotbolt’s Brief at pg. 5) It should be noted that this Court has declined on more than one occasion to establish a presumption that a claimant’s treating physician is entitled to “great weight.” See Myrhre v. Workers Compensation Bureau, 2002 ND 186, ¶ 24, 653 N.W.2d 705, 712; Symington v. N.D. Workers Comp. Bureau, 545 N.W.2d 806, 809-10 (N.D. 1996).

31 Furthermore, the finding was based on a comparison of Dr. McMaster’s specialty as an internal medicine physician to Dr. Peterson’s specialty in the field of physical medicine and rehabilitation. Dr. Peterson testified at the hearing regarding his qualifications and experience as they applied to his medical opinions, while Dr. McMaster did not. In response to a question by ALJ Keogh, Dr. Peterson testified that an internal medicine physician was “poorly qualified” to offer an opinion about what one would expect as a result of a biceps tendon rupture.” (App. 129 and C.R. 164 at 80) He further testified that the four specialties that could provide a “qualified” opinion on the subject would be orthopedic surgeon, physical medicine and rehabilitation specialist, occupational medicine specialist and rheumatologist.⁴ (Id. at 81) In the absence of any testimony or evidence that Dr. McMaster, as an internal medicine physician was more qualified to provide an opinion regarding Shotbolt’s ruptured biceps tendon, it was reasonable for ALJ Keogh to find that Dr. Peterson’s opinion was the more persuasive.

⁴ It should be noted that on January 16, 2007, Dr. McMaster referred Shotbolt to Dr. Hornyak at the Physical Medicine and Rehabilitation Clinic for an evaluation of Shotbolt’s left lower extremity and left upper extremity. (C.R. 103b, 94-96 and 97-98)

32 Moreover, ALJ Keogh noted other reasons in addition to qualifications for finding the opinion of Dr. Peterson more persuasive than Dr. McMaster's. ALJ Keogh found that Dr. Peterson's letter opinion and his testimony "provided a complete and detailed analysis of Claimant's medical situation and showed the objective medical evidence that supported his opinion." (App. 97; C.R. 131)

33 Dr. McMaster's opinion that Shotbolt could not work as an electrician appeared to be based solely on what Shotbolt told him. Even Dr. Hornyak, who noted that Shotbolt's left bicep was somewhat weaker than his right, did not say that Shotbolt could not work, nor did he place any work restrictions on Shotbolt. (C.R. 94-96) Because Dr. Peterson provided a detailed and thorough analysis of Shotbolt's medical condition and return to work situation, it was reasonable for ALJ Keogh to find his opinion more persuasive than Dr. McMaster's.⁵

34 Finally, ALJ Keogh's finding that Shotbolt could return to work as an electrician was also supported by Dr. Homer Linard, the treating orthopedic surgeon who performed the repair of the ruptured biceps tendon on December 22, 2005. Following the surgery, Dr. Linard saw Shotbolt for rechecks in January, February, March and April of 2006, and he released Shotbolt to work without restrictions on May 5, 2006. (C.R. 68) ALJ Keogh found that Dr. Linard's specialty as an orthopedic surgeon rendered him "highly qualified to give an opinion regarding the type of injury suffered by the Claimant, the status of recovery or healing, and the ability of the Claimant to work following recovery." (App. 96;

⁵ In fact, no where in his Brief does Shotbolt argue that Dr. Peterson is not qualified to offer an opinion on whether he can return to work as an electrician. To the contrary, on page 6 of the Brief, Shotbolt admits that both Dr. McMaster and Dr. Peterson are qualified to offer opinions on his ability to return to work as an industrial electrician.

C.R. 131) On that basis, he found Dr. Linard's opinion more persuasive than the opinion offered by Dr. McMaster. (Id.) Dr. Linard's full work release of Shotbolt on May 5, 2005, is barely mentioned in Shotbolt's brief, much less questioned. The lack of any attack at all on Dr. Linard's opinion by Shotbolt confirms its legitimacy.

35 Shotbolt also argues that, if Dr. McMaster was qualified to treat Shotbolt for the work injury, then he was certainly qualified to "render an opinion as to the functional effects of that injury." (Shotbolt's Brief at pg. 5) That statement, however, is not supported by the medical evidence in the record. While it is true that Shotbolt saw Dr. McMaster upon his return to Michigan following the work injury of December 8, 2005, Dr. McMaster examined Shotbolt but provided no treatment. Instead, he referred Shotbolt to Dr. Homer Linard for surgical repair of the ruptured distal biceps tendon. (C.R. 103j)

36 Shotbolt did not see Dr. McMaster again until January 16, 2007, when Shotbolt presented with complaints of pain in his left leg and numbness in the left foot, as well as left arm weakness. Dr. McMaster examined him but provided no treatment. Instead, he referred Shotbolt to Dr. Hornyak at the Physical Medicine and Rehabilitation Clinic for evaluation and treatment. (C.R. 103b) Dr. Hornyak ordered an EMG of the left side upper and lower extremities but otherwise determined no further "intervention" was warranted with either condition. (C.R. 95) Dr. McMaster's referral of Shotbolt to an orthopedic surgeon and physical medical and rehabilitation specialists is compelling evidence that Dr. McMaster is not qualified to offer an opinion on whether the work injury significantly impaired Shotbolt's ability to work in his pre-injury occupation. At a minimum, the referral

is strong evidence that Dr. McMaster is less qualified than Dr. Peterson to provide an opinion, since Dr. Peterson's specialty is physical medicine and rehabilitation.

B. WSI/ALJ Keogh's Finding That the Medical Opinions of Dr. Peterson and Dr. Linard were More Persuasive Than the Medical Opinion of Dr. McMaster is Supported by the Evidence in the Record.

1. WSI/ALJ Keogh Adequately Explained the Reasons Medical Evidence Favorable to Shotbolt was Rejected and Medical Evidence Unfavorable to Shotbolt was Accepted.

37 Shotbolt next complains that WSI acted unreasonably when it found Dr. Peterson's opinion to be more persuasive because ALJ Keogh focused on its "length." This argument misconstrues ALJ Keogh's findings with regard to Dr. Peterson's written opinion and his testimony at the administrative hearing. ALJ Keogh specifically mentioned that the "length" of Dr. Peterson's written and oral opinions were not controlling. (App. 97; C.R. 131) Rather, ALJ Keogh noted that Dr. Peterson's opinions were based on all of Shotbolt's medical records, and his specialization in the field of physical medicine and rehabilitation gave him credibility. ALJ Keogh further noted that, "[b]etween his letter and testimony, [Dr. Peterson] provided a complete and detailed analysis of Claimant's medical situation and showed the objective medical evidence that supported his opinions." (Id.)

38 Therefore, it was the amount and quality of the information provided by Dr. Peterson through his opinions that ALJ Keogh found persuasive and superior to the opinions offered by Dr. McMaster. ALJ Keogh's analysis of the reasons why he found Dr. Peterson's opinions credible serves as the explanation for rejecting

medical evidence favorable to Shotbolt. Hein, 1999 ND 200, ¶ 15, 601 N.W.2d 576.

C. WSI/ALJ Keogh’s Finding That Shotbolt Was Able to Return to Work as an Electrician is Supported by the Evidence in the Record.

39 Shotbolt next attacks WSI/ALJ Keogh’s finding that he was able to return to work as an electrician. The finding was based on the full work release given by Dr. Linard, Shotbolt’s treating orthopedic surgeon, on May 5, 2005, and Dr. Peterson’s opinion that the left distal biceps tendon injury would not result in any significant limitation on his ability to perform his work duties as an electrician. (App. 48; C.R. 110-111)

40 Shotbolt’s challenge to the finding is to create three separate and distinct “categories” of electricians with the job description of “electrician”: industrial electrician, commercial electrician and residential electrician. The three “categories” were created by the unsupported testimony of Shotbolt. (App. 129 at 24-25) Shotbolt then claims, again without any support, that of the three categories, he does not have the physical strength to perform the work of an industrial or commercial electrician, and he is unqualified to do the work of a residential electrician. (Shotbolt’s Brief at 7-8)

41 Interestingly, Shotbolt does not make the same distinctions with regard to the job of “electrician” in his Request for Reconsideration Demand for Formal Hearing. In stating the grounds for the hearing request, Shotbolt’s attorney wrote that “Claimant is not able to perform the essential job functions of an **electrician** and, consequently, is unable to replace his pre-injury wage. (C.R. 14) (emphasis

added) Furthermore, Dr. McMaster, who has provided an opinion that the left elbow injury prevents Shotbolt from working, does not provide any information regarding the physical demands of an “industrial” electrician, as opposed to those of a “commercial” or “residential” electrician. (C.R. 72, 103, 103s-t) In fact, in his letter of April 17, 2008, Dr. McMaster admitted that he did not know what Shotbolt’s job entailed. (App. 74-75; C.R. 103s-t)

42 It should first be noted that, whatever type of electrician’s work Shotbolt was performing at the time of his work injury, his treating orthopedic surgeon, Dr. Linard, cleared him to return to work without restrictions on May 5, 2005. Furthermore, assuming for the sake of argument that there are separate categories for “industrial” and “commercial” electrician, the “FUNCTIONAL JOB ANALYSIS” that was provided to Dr. Peterson to review along with the FCA and Shotbolt’s medical records encompassed those categories. (App. 50-53) The FUNCTIONAL JOB ANALYSIS was for the position of Electrician: Journeyman/Apprentice. (Id. at 50) The JOB OBJECTIVE was identified as “[i]nstalls cable tray, conduit, wiring, fixtures, switch gears, electrical control panels and associated devices **for commercial and industrial construction[.]**” (Id. at 50) (emphasis added) Accordingly, the opinion that Dr. Peterson provided was based on the job demands of an electrician performing work on commercial and industrial construction projects. As stated above, Dr. Peterson concluded that the injury to the left distal biceps tendon would not significantly limit Shotbolt’s ability to perform his duties as an electrician.

43 Furthermore, Shotbolt’s claim that he cannot perform the physical demands of a commercial or industrial electrician is suspect in light of his admission that he has not worked as an electrician since December 8, 2005, nor has he done anything else for employment. (App. 129 at 22, 34)

44 Finally, Shotbolt admits that he is physically able to perform the work of a “residential” electrician, but he claims to be inexperienced in that “field” and therefore lacks the skills to obtain “substantial gainful employment.” (Shotbolt’s Brief at pgs. 7 and 10) The undisputed evidence is that Shotbolt has been working as a licensed electrician since 1969 and could perform that type of work:

Q. (Mr. Gigler) Okay. What I asked was, when you and I talked previously, you talked about work done by like a residential electrician and you said you are not up to the codes, you wouldn’t be proficient at first, but you’d be able to do it; right?

A. If I was to build my own house, I would be the only one that would wire it because I know it would be done correctly, mechanically and electronically secure. I would find every code involved and do it accordingly. I wouldn’t let someone else that does house wiring wire mine.

Q. So you can do that work?

A. If I had to yes, I would update my code. I would do my own so I could do it.

(App. 129 at 56-57)

45 Shotbolt’s claim that he could not find employment as a residential electrician finds no credible support in the record. What is clear from the record is that Shotbolt has done nothing to find employment as an electrician of any type since December 8, 2005, other than sign some “unemployment books” at the union hall. (App. 129 and C.R. 164 at 57) Shotbolt failed to make a good

faith work search as is his responsibility under N.D.C.C. § 65-05.1-01(4). Maginn v. N.D. Workers Comp. Bureau, 550 N.W.2d 412, 415 (N.D. 1996); Johnson v. North Dakota Workers' Compensation Bureau, 539 N.W.2d 295, 299 (N.D. 1995). There is substantial evidence in the record supporting WSI/ALJ Keogh's finding that Shotbolt was capable of working as an electrician.

D. WSI/ALJ Keogh Did Not Err by not Considering Alleged Pre-existing Conditions When Determining Shotbolt's First Appropriate Rehabilitation Option Under N.D.C.C. § 65-05.1-01(4)

46 Shotbolt also claims that WSI/ALJ Keogh erred by not considering a number of his pre-existing medical conditions in determining that he could return to work as an electrician. Although Shotbolt does not identify any of these so called pre-existing conditions in his brief, his counsel, during his cross-examination of Dr. Peterson, suggested that Reiter's syndrome, a brain aneurysm and an aortic aneurysm were the functional limitations that WSI/ALJ Keogh failed to take into consideration when preparing Shotbolt's vocational rehabilitation plan. (App. 129 and C.R. 164 at 70-72)

47 In support of that argument, Shotbolt relies on Svedberg v. North Dakota Workers Comp., 1999 ND 181, 599 N.W.2d 323, wherein the Supreme Court held that a vocational rehabilitation plan must take into all of the injured worker's functional limitations existing at the time of the injury, not just those directly caused by the work injury. Id. at ¶ 14. In that case, the injured worker's vocational rehabilitation plan was invalidated because it was prepared without consideration of limitations caused by prior back injuries and psychological problems that existed at the time of the work injury. Id.

48 Although Shotbolt’s past medical history is significant for Reiter’s syndrome, a brain aneurysm, and aortic aneurysm, there was no evidence any of these conditions imposed functional limitations on Shotbolt at the time of the work injury to his left bicep on December 8, 2005. Therefore, Svedberg is distinguishable from this case. Furthermore, Dr. Hornyak’s medical records indicate that Shotbolt began having problems with pain and cramping of his left leg only after the surgical repair of the aortic and iliac aneurysm in October of 2006. (C.R. 94; App. 129 at 19⁶) The work injury to Shotbolt’s left bicep occurred on December 8, 2005. Even assuming that the leg cramping constitutes a disabling condition, WSI still has no obligation to consider functional limitations caused by non-work related injuries that arose after the work injury itself. See Bjerke v. North Dakota Workers Compensation Bureau, 1999 ND 180, ¶¶ 21-22, 599 N.W.2d 329; Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469, 470-71 (N.D. 1992).

E. WSI/ALJ Keogh Did Not Err by Refusing to Give Weight To Shotbolt’s Unsupported and Undocumented Claim that He is Considered Disabled by the Social Security Administration.

49 Shotbolt also attacks WSI/ALJ Keogh’s Conclusion of Law #4 that the “bare” allegation that Shotbolt was receiving Social Security disability benefits was insufficient to affect the validity of WSI’s selection of the most appropriate vocational option for Shotbolt. Shotbolt does not direct this Court to any evidence in the record to support his argument. He merely claims that a finding by the Social Security Administration that Shotbolt is disabled goes to the issue

⁶ Shotbolt testified that “[b]efore December of 2005 when I had that accident, I didn’t have no problems with my left leg then. It was only after surgery for that aneurysm,

of whether WSI considered his pre-existing functional limitations when formulating the vocational rehabilitation plan. (Shotbolt's Brief at pg. 8-9)

50 It should be noted that WSI/ALJ Keogh's Conclusion of Law #4 is supported by the following finding of fact:

B. Evidence of Claimant's disability. A somewhat perplexing aspect of the case involves Claimant's testimony that he has applied for Social Security disability and was awarded disability benefits back to March 2006. **The record contains no exhibits that document or support Claimant's testimony, or provide any medical evidence that supported the decision.** Dr. Peterson in his testimony did note that Claimant did have other disabling conditions including low back pain (he was off work for one year because of that), left leg vascular condition, Reiter's Syndrome (a form of arthritis), knee pain, and shoulder pain. **There seems to have been adequate time for Claimant to have secured and presented here adequate evidence, including any applicable medical evidence, that related to any proceeding before the Social Security Administration and the basis for any finding of disability.** Such evidence would have been relevant, as in determining the appropriate rehabilitation option, WSI must consider more than just the work injury, it must consider any other conditions that exist.

(App. 97-98) (emphasis added)

51 Clearly, ALJ Keogh agreed with Shotbolt that information regarding his alleged application and receipt of Social Security disability benefits would have been relevant. However, despite having ample time and opportunity, Shotbolt presented no documentary evidence or medical records that would have assisted ALJ Keogh in determining whether the disability or disabilities were required to be considered by WSI in formulating Shotbolt's vocational rehabilitation plan. See e.g., Svedberg v. North Dakota Workers Comp., 1999 ND 181, ¶¶ 14-15, 599 N.W.2d 323, 327. In other words, the uncorroborated and unsupported

double aneurysm that I had problems with my left leg.” (App. 129 and C.R. 164 at 19)

testimony of Shotbolt was not enough to make ALJ Keogh question the substantial and credible medical evidence that WSI had selected the first appropriate rehabilitation option for Shotbolt.

CONCLUSION

52 WSI determined that the appropriate rehabilitation option under N.D.C.C. § 65-05.1-01(4) was “return to same occupation, any employer.” The record contains substantial evidence from which WSI/ALJ Keogh could have reasonably concluded that the rehabilitation plan would return Shotbolt to substantial gainful employment which was reasonably attainable in light of his injury and which would substantially rehabilitation his earning capacity. Accordingly, WSI respectfully requests this Court affirm WSI’s Final Order of July 21, 2008, adopting ALJ Keogh’s Recommended Findings of Fact, Conclusions of Law and Order, dated July 16, 2008.

Dated this 18th of June, 2009.

Respectfully submitted,

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