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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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APR 16 2012

STATE OF NORTH DAKOTA

COLLETTE BISHOP )  
 )  
 APPELLANT, )  
 )  
 vs. )  
 )  
 NORTH DAKOTA )  
 WORKFORCE SAFETY & INSURANCE )  
 FUND, )  
 )  
 APPELLEE, and )  
 )  
 4 K'S TRANSPORTATION LLC, )  
 )  
 RESPONDENT. )  
 )

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APPEAL FROM THE DISTRICT COURT ORDER DATED NOVEMBER 9, 2011;  
 ORDER FOR JUDGMENT DATED FEBRUARY 1, 2012; AND  
 JUDGMENT DATED FEBRUARY 2, 2012  
 BURLEIGH COUNTY DISTRICT COURT  
 SOUTH CENTRAL JUDICIAL DISTRICT  
 THE HONORABLE CYNTHIA FELAND PRESIDING  
 BURLEIGH COUNTY CIVIL NUMBER 08-2011-CV-01546

SUPREME COURT CIVIL NUMBER: 20120138

**APPELLANT'S BRIEF**

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STATE OF NORTH DAKOTA

## **I. STATEMENT OF ISSUE**

Has WSI shown by the greater weight of the evidence that the identified return-to-work options are appropriate in light of Collette Bishop's diagnosed depression, anxiety, post-traumatic stress disorder, memory loss and impulse control disorder?

## **II. STATEMENT OF THE CASE**

Collette Bishop filed a claim for workers compensation on October 16, 2008 (Appendix 40 (App.)). On December 11, 2009, Workforce Safety and Insurance denied benefits for Ms. Bishop's diagnosed depression and anxiety, asserting that those conditions were unrelated to her 2004 and 2008 work-related closed head injuries (App. pp. 107-120). Following a full evidentiary hearing, the Administrative Law Judge ruled that, "The greater weight of the evidence shows that Ms. Bishop's depression and anxiety were caused by her work injuries in 2004 and 2008 and she is entitled to benefits" (App. p. 120). In arriving at her opinion, the ALJ relied on the opinions of Drs. Marland Brown, Benn Haynes, and Anthony Johnson as well as those of Nora Allen, FNP and Sharon Brown, LSW (App. pp. 107-120).

On June 6, 2010, WSI issued a Notice of Intention to Discontinue/Reduce Benefits, asserting that Ms. Bishop's Temporary Total Disability benefits were being discontinued because she had transferable skills to return to work as a dispatcher, customer service representative or receptionist. The NOID further indicated that the identified job goals were within Ms. Bishop's physical restrictions (App. 41). WSI's decision was based on a Vocational Consultant's Report dated April 20, 2010 (App. pp. 50-61). The VCR was based, in part, on a Functional Capacities Evaluation performed on December 1-2, 2009 (App. pp. 62-69), Dr. Richard Arazi's agreement with the FCE

results and his conclusion that the job goals of general office clerk, dispatcher, customer service clerk, information clerk and activities aide would be physically appropriate (App. pp. 48-49, 69). Neither Dr. Arazi nor any of Ms. Bishop's other medical providers were asked whether the identified job goals were mentally appropriate in light of her diagnosed depression, anxiety, PTSD, memory loss and impulse control disorder.

Ms. Bishop demanded a formal hearing of WSI's termination of disability benefits, asserting that the agency had failed to consider all of her functional limitations in approving a return-to-work option (App. 47). The formal administrative hearing was held on February 17, 2011 before the Hon. Janet Demarais Seaworth, Administrative Law Judge (App. pp. 134-168). ALJ Seaworth issued Findings of Fact, Conclusions of Law and Order on April 22, 2011 affirming WSI's proposed return-to-work plan (App. pp. 89-98). Ms. Bishop petitioned ALJ Seaworth for reconsideration on May 18, 2011, asserting, again, that WSI had failed to solicit or obtain an opinion from any of Ms. Bishop's various mental health providers approving the identified job goals in light of her diagnosed mental conditions and resulting cognitive impairments (App. pp. 101-105). ALJ Seaworth denied Ms. Bishop's Petition for Reconsideration on June 17, 2011 (App. pp. 131-132), and Ms. Bishop appealed to the District Court. The Honorable Cynthia Feland, District Judge, affirmed the ALJ's decision in an Order dated November 4, 2011 (App. pp. 169-174). The Order for Judgment was entered on February 1, 2012 and the Judgment was entered the following day (App. pp. 175-176). Ms. Bishop has appealed to this Court (App. p. 179).

### III. STATEMENT OF FACTS

Collette Bishop had worked as a bulldozer operator for seventeen years when she suffered her first work-related injury on September 17, 1983 (App. p. 148 - Hearing Transcript pp. 48-49). Ms. Bishop was struck by another bulldozer which “popped my head off my spinal column” (App. p. 148 - HT p. 49). It took her ten years to recover from that injury (Id.). Unable to return to work as a bulldozer operator, Ms. Bishop then worked as an over-the-road truck driver for ten years (App. p. 148 - HT p. 48). In 2004, Ms. Bishop suffered her second work-related injury when “I took the windshield out of a Peterbilt with my face” (App. p. 148 - HT p. 49). On September 30, 2008, Ms. Bishop suffered her third and final work-related injury when she fell fourteen feet from her truck while strapping the load on her trailer, first striking her head on the truck and then on the ground (App. pp. 40, 148 - HT p. 50).

Ms. Bishop treated with a number of Bismarck health care providers after her 2008 work injury: Dr. Richard Arazi, a neurologist who tested Ms. Bishop “a couple of times” but did not provide any actual treatment (App. p. 148 - HT p. 51); Dr. Michael Quast, an anesthesiologist who treated Ms. Bishop’s pain (Id.); Dr. Anthony Johnson, a family practitioner who coordinated the other providers’ treatment (Id.); Dr. Marland Brown, a neuropsychologist who tested Ms. Bishop’s mental functioning and prescribed speech therapy (App. p. 149 - HT p. 52); Dr. Benn Haynes, a psychiatrist who prescribed psychotropic medications for Ms. Bishop’s mental condition stemming from her work-related head injury (App. p. 149 - HT pp. 52-53); and Ms. Sharon Brown, a licensed social worker who counseled Ms. Bishop at the request of Dr. Haynes (App. p. 149 - HT pp. 53-54). Ms. Bishop was diagnosed with significant depression with suicidal ideation,

post-traumatic stress disorder, severe headaches, memory loss, myofascial pain syndrome, and impulse control disorder (App. pp. 74, 77-78). Ms. Bishop's cognitive functioning has been impaired to the point that she can no longer balance her checkbook or drive (App. p. 149 - HT p. 54; App. p. 150 - HT p. 56). She has had to relearn everyday activities and needs daily help with simple household tasks (Id.).

#### IV. LAW AND ARGUMENT

N.D.C.C. Section 65-05.1-01 directs WSI to select the first appropriate return-to-work option that satisfies that section's income test. N.D.C.C. Section 65-05.1-02.1 defines the process and contents of the vocational consultant's report. WSI must consider all preexisting and work-related conditions in arriving at an appropriate return-to-work option. See: Svedberg v. North Dakota Workers Compensation Bureau, 1999 ND 181, 599 N.W.2d 323. Furthermore, WSI has the burden of proving that it has considered Ms. Bishop's diagnosed mental conditions in determining the appropriateness of any identified job goals. See: Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96, 644 N.W.2d 844. In the instant case, WSI commissioned a two-day functional capacities evaluation, asked the physical therapist to determine if the identified job goals were physically appropriate, given Ms. Bishop's physical limitations, and asked Dr. Arazi whether he agreed with the physical appropriateness of the identified job goals. WSI thus took the steps which it considered necessary and prudent to determine the physical appropriateness of the identified job goals. Ms. Bishop's injuries were not merely physical, however. As has been previously referenced, she had a number of diagnosed mental conditions that affected her cognitive functioning. Rather than ask any of her mental health providers whether the identified job goals were appropriate in light

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of her diagnosed mental conditions, WSI relied on the opinion of the vocational consultant who prepared the VCR to determine that matter (App. p. 147- HT p. 44).

Ms. Bishop has identified a number of Findings of Fact and Conclusions of Law in which the ALJ erred:

#### Findings of Fact

3. On May 4, 2009, WSI completed a Vocational Rehabilitation Referral Request asking Corvel Corporation to initiate vocational rehabilitation services. WSI identified Dr. Richard Arazi, neurologist, as Ms. Bishop's treating physician and detailed Ms. Bishop's diagnoses, including a head injury, intracranial injury, post-traumatic stress disorder (PTSD) and impulse control disorder.

Finding of Fact 3 is incorrect. Ms. Bishop had a number of treating medical providers, as already mentioned. Dr. Arazi, who incorrectly diagnosed Ms. Bishop with multiple sclerosis (App. p. 70), was only one of a series of providers who tested and treated her. When WSI sought a physician's approval of the FCE and job match performed by the physical therapist, Ms. Bishop was still treating with Drs. Johnson, Haynes and Quast as well as Mses. Allen and Brown, but she had not seen Dr. Arazi for four months (App. p. 145 - HT p. 38). Furthermore, although the ALJ correctly noted some of Ms. Bishop's diagnoses, neither Dr. Arazi nor any other treating provider was asked to consider those diagnoses in approving the identified return-to-work option.

4. Bishop completed a Job readiness Skills and Employment Questionnaire and Skills inventory. She indicated that she had many personal and transferable skills. She didn't check any skills related to working with people. On May 26, 2009, the vocational consultant noted that Ms. Bishop reported problems with dizziness and confusion and that her memory was not what it used to be. She was seeing Dr. Benn Haynes 'to deal with her psychiatric issues which are at this point at least stable.' Exhibits p. 35.

Finding of Fact 4 is incorrect. The fact that Ms. Bishop's "psychiatric" issues may be stable is irrelevant to her level of function or ability to obtain and retain substantial



gainful employment. While the ALJ noted Dr. Haynes' opinion of Ms. Bishop's mental condition in May of 2009, she failed to note that Dr. Haynes was never asked whether that condition precluded or limited Ms. Bishop's return to work in any of the job goals identified. Again, it is WSI's burden to prove that the jobs identified were reasonably attainable. See: N.D.C.C. Section 65-05.1-01 (3). How can that agency sustain its burden of proof when it fails to consult with the doctor treating the work-related condition?

5. On June 10, 2009, Ms. Bishop returned to part-time transitional work with her preinjury employer. She performed light computer work. On June 24, 2009, Ms. Bishop complained of recurrent low back pain and that she was unable to work four hours per day in addition to all her other activities, which were mostly doctor appointments. Dr. Arazi removed her from work until a decision could be made as to how to handle her work and therapy. On June 30, 2009, he noted that she could return to primarily sedentary work two to four hours per day and a work site assessment would be completed. A work site assessment was completed on July 6, 2009 to determine if modifications were needed to improve work tolerance. Ms. Bishop's chair was modified and it was recommended that Ms. Bishop sit no longer than 30-45 minutes with a break every hour. There is no evidence that Ms. Bishop's head injury impeded her ability to do this work.

Finding of Fact 5 is incorrect. First of all, the ALJ completely missed the point. Absence of evidence is not evidence of absence. WSI cannot sustain its burden to prove the appropriateness of the identified job goals by failing to consult with the medical providers treating Ms. Bishop's mental conditions and then decrying an absence of evidence. Furthermore, Ms. Bishop testified that her employer-of-injury, 4 Ks Transportation, was unwilling to make the workplace modifications necessary to accommodate her physical restrictions (App. p. 153 - HT p, 69). Ms. Bishop has never disputed the FCE results or the fact that some jobs may be physically appropriate if modified as recommended by the work-site assessment. Her position has always been, and remains, that her injuries are not simply physical; they're mental, too. WSI has failed

to inquire of any of her treating doctors as to whether a return to work in any of the identified jobs would be reasonably attainable for someone with severe depression, anxiety, PTSD, memory loss, and impulse control disorder. Ms. Bishop testified that her work-related mental conditions have left her functionally unable to converse on the telephone, perform simple record-keeping, or tolerate interaction with customers or coworkers (App. p. 149 - HT p. 54; App. p. 150 - HT pp. 56, 57; App. p. 153 – HT p. 70). Ms. Bishop's self-report is not objective medical evidence. There is no objective medical evidence on this issue because WSI failed to obtain it. Once more, WSI failed to sustain its burden of proof.

8. Steve Churchill, physical therapist, completed a job match based on the FCE. Mr. Churchill determined that the jobs of dispatcher, customer service, activities aide, general office clerk, data entry clerk and information clerk matched Ms. Bishop's physical capabilities as identified in the FCE. On December 24, 2009, Nora Allen, FNP, concurred in the FCE results and the job match comparison completed by Mr. Churchill. On January 25, 2010, Dr. Arazi concurred in the FCE and the job match comparisons. (App. p. 91).

Finding of Fact 8 is incorrect. Dr. Arazi quit treating Ms. Bishop on August 13, 2009 (App. pp. 72-73). Those medical providers still treating Ms. Bishop on January 25, 2010, when Dr. Arazi approved the FCE and job match, were never consulted (App. p. 48-49). Furthermore, Dr. Arazi was never provided with the other treating providers' records or asked to base his work release on anything besides the FCE and job match. Finally, WSI did not accept liability for Ms. Bishop's anxiety and depression until January 15, 2010 (thirty days after the earlier decision became final (App. p. 120)). In sum, Dr. Arazi never treated Ms. Bishop's various work-related mental conditions, never reviewed the other treating providers' records and was not asked whether those conditions affected her return to work.

11. The vocational consultant's report dated April 20, 2010 notes Ms. Bishop's head injuries, PTSD and Impulse Control Disorder. The consultant noted that the impulse control disorder was controlled with medication. The consultant also noted that a neuropsychological evaluation on June 24, 2009 showed that Ms. Bishop was functioning in the average range of intelligence, with persistent impairment of verbal fluency, mental tracking visual analysis, and capacity to inhibit a competitive cognitive response set. The consultant also noted Ms. Bishop's psychotropic medications and that Ms. Bishop's vocational testing showed a reading grade equivalent of 12.9+, a math grade equivalent of 12.4, and a language grade equivalent of 12.1. (App. p. 92).

Finding of Fact 11 is incorrect. Dr. Marland Brown's neuropsychological report dated July 15, 2009, noted persistent impairment in verbal fluency, mental tracking, visual analysis and capacity to inhibit a competitive response set (whatever that means) (App. p. 83). Similarly, Dr. Brown noted on December 16, 2010, that mental tracking skills were impaired (App. p. 87). Dr. Brown noted that his findings were indicative of a frontal lobe cognitive dysfunction (App. p. 88). The ALJ simply inferred that, if Ms. Bishop has average intelligence, she can return to work in the identified job goals. While the vocational consultant was aware of the verbal, mental, visual and inhibitory impairments diagnosed by Dr. Brown, she made no attempt to ask him or anyone else whether those impairments would be expected to affect a return to work in any of the jobs identified. Again, WSI has not sustained its burden of proof.

12. Ms. Bishop's significant work history includes truck driver (over the road) and owner and operator of a truck company. These positions have medium/heavy physical demands and therefore, returning to the same position was not physically appropriate. Nor was it appropriate to return to her pre-injury occupation with any employer. A return to a modified position with her employer was not possible, as the employer did not have permanent light duty work available; nor had Ms. Bishop secured alternative employment. Accordingly, Corvel looked at the option of returning Ms. Bishop to employment within the local job pool suited to her education, experience and marketable skills. The occupations of dispatcher, customer service representative, information clerk and receptionist were identified as viable options. All three positions were

deemed a match with her physical capabilities by physical therapist Steve Churchill, Nora Allen, FNP, and Dr. Arazi. Ms. Bishop offered no evidence showing that she can't physically perform these jobs. (App. p. 92).

Finding of Fact 12 is incorrect. This Finding simply points out the lengths Corvel (WSI's vocational rehabilitation services provider) and WSI went to in order to determine whether the identified job goals were appropriate in light of Ms. Bishop's physical impairments identified by the FCE. What steps did Corvel or WSI take to insure that Ms. Bishop's diagnosed cognitive impairments were considered in determining the appropriateness of the identified job goals? The goal of WSI's rehabilitation process is to identify job goals which are "reasonably attainable." Surely, Ms. Bishop's "marketable skills" include more than physical abilities. They include cognitive abilities, as well. Corvel and WSI focused exclusively on Ms. Bishop's physical impairments and ignored her documented cognitive impairments altogether.

15. Actually, several doctors have weighed in on the effect of Ms. Bishop's closed head injury. Dr. Arazi, a neurologist, was Ms. Bishop's treating physician addressing her head injuries. He first saw her on November 3, 2008, on referral from Ms. Bishop's family practice physician, Dr. Anthony Johnson. Dr. Johnson's medical records make it clear that he was deferring to Dr. Arazi with regard to Ms. Bishop's head injuries and ability to work. On December 11, 2008, Dr. Johnson noted that he was relying on "the help of Dr. Brown and Dr. Arazi to determine when she can get back to full-time work if at all." Exhibits p. 227. Nora Allen, FNP, noted on July 3, 2009, that Dr. Arazi "is in charge of her C3." Exhibits p. 286. Dr. Arazi saw Ms. Bishop from November, 2008 until August, 2009. He detailed Ms. Bishop's work injuries, her medical, social, family, surgical and medication history. He noted her neuropsychiatry status and performed neurological exams. He directed her care, including diagnostic testing and treatment. He ordered physical therapy and addressed her work status. On January 25, 2010, Dr. Arazi concurred in the FCE and the identified jobs. Dr. Arazi, a neurologist who treated Ms. Bishop for nearly a year following her injury is fully qualified to provide an opinion regarding Ms. Bishop's ability to work. That opinion, along with the medical records and in conjunction with Dr. M.C. Brown's neuropsychological testing and Dr. Haynes' medical records and reports to

WSI that Ms. Bishop's impulse control disorder is stable, was sufficient for Corvel to determine Ms. Bishop's limitations and supports a conclusion that Ms. Bishop's head injuries do not preclude her from performing the identified occupations. (App. pp. 93-94).

Finding of Fact 15 is incorrect. Dr. Arazi was only asked whether he concurred with the FCE results and the job match comparison completed by Mr. Churchill (App. pp. 48-49). He was never asked to evaluate a return to work in light of Ms. Bishop's cognitive impairments, nor were any of her other medical providers. Instead, the vocational consultant made the determination that Ms. Bishop's cognitive impairments posed no bar to a return to work. The ALJ relied on the rehabilitation consultant who formulated the rehabilitation plan to confirm that the plan was medically appropriate. It is not Corvel's function to determine if the identified vocational plan is medically appropriate. That is the function of the treating doctors. None of those doctors – Drs. Johnson, Arazi, Brown or Haynes – were ever asked whether the plan was appropriate in light of Ms. Bishop's cognitive impairments. Furthermore, because Dr. Arazi had not evaluated Ms. Bishop for several months he could not provide an opinion of her disability (See: N.D.C.C. Section 65-05-08.1 (2)).

16. Other medical evidence supports that conclusion. On March 19, 1985, a comprehensive evaluation by Dr. Harold D. Hase, clinical psychologist, showed that Ms. Bishop had average intellectual abilities and would be able to deal with a number of alternative vocations. A neuropsychological evaluation performed by Dr. M.C. Brown on June 24, 2009, showed that Ms. Bishop was pleasant and cooperative. "She managed to sustain focused concentration for adequate periods of time. Speech was fluent and clearly articulated. Language was substantive and grammatical, with no evidence of word retrieval problems during spontaneous conversation or formal testing. Motor activity was unremarkable." Exhibit 174. Test results showed that Ms. Bishop was functioning in the overall average range of intelligence, although persistent impairment was noted on tasks of verbal fluency, mental tracking, visual analysis, and capacity to inhibit a competitive cognitive response set. Ms. Bishop complains that her memory is affected, but she performed in the average range and recall was

within normal limits. Ms. Bishop may very well have scored significantly higher on the tests prior to her head injuries, but the record does not support Ms. Bishop's claims that her memory and concentration are so affected as to preclude her from work. (App. p. 94).

Finding of Fact 16 is incorrect. Dr. Hase's 1985 evaluation of Ms. Bishop's cognitive function at that time is irrelevant to her condition following her 2004 and 2008 closed head injuries. While Ms. Bishop is not a licensed medical provider and, consequently, cannot offer an expert opinion on her functional ability to return to work, neither is the vocational consultant or the ALJ. Those licensed medical providers who could offer an expert opinion were never asked for one. Once more, WSI has failed its burden to prove that the identified job goals would be "reasonably attainable" for Collette Bishop.

17. Ms. Bishop's post-traumatic stress disorder and impulse control disorder do not preclude her from working. Ms. Bishop says she can't work because her post traumatic stress disorder and her impulse control disorder would make her unable to manage her reactions appropriately. The record does not support Ms. Bishop's claims. She had been on Depakote ER as a mood stabilizer since at least December, 2004, when Dr. Haynes prescribed it upon diagnosing impulse control disorder. It has been quite effective for her. On January 15, 2005, Ms. Bishop followed up with Dr. Haynes and noted definite improvement in her anger and memory on the Depakote. On January 27, 2005, she told Dr. Brown that the Depakote had been especially helpful in increasing her tolerance of frustrations and anger resulting from not working. A few days later, on February 1, 2005, Ms. Bishop reported to psychiatrist Dr. Haynes that she was not quite at baseline with regard to irritability, but she was significantly improved – she could walk away from situations without getting upset or saying something she may regret. Dr. Haynes returned her to work. Clearly, Ms. Bishop's problems with irritability did not prevent her from working. And her concerns expressed at the hearing about working with stupid people do not preclude her from work. Ms. Bishop expressed the same concerns to Dr. Haynes. He was not sympathetic. He told her that she is going to meet "stupid individuals" no matter where she is and that "she really needs to just brush off the stupid things people do on the highway. She needs to be completely professional in her job and do the job that she knows that needs to be done." Exhibits p. 389. (App. pp. 94-95).

Finding of Fact 17 is incorrect. As previously discussed, Collette Bishop had two work-related closed-head injuries: in 2004 and 2008. She returned to work driving truck after her 2004 injury. The ALJ's reliance on medical records documenting her functioning before her 2008 injury is irrelevant and misleading. The ALJ's implication that Ms. Bishop's cognitive functioning before her 2008 work injury has any relevance to her functioning after that event is simply incorrect. Furthermore, the ALJ's dismissive attitude toward Ms. Bishop's concerns begs the question. There is not a single medical opinion in the hundreds of pages of medical records in evidence that says that Ms. Bishop's diagnosed cognitive impairments – severe depression, anxiety, memory loss, PTSD, and impulse control disorder – would allow her to reasonably attain any of the job goals identified. Finally, the ALJ failed to note Dr. Haynes' January 22, 2010, chart note, "As a dispatcher she would have to deal with people all the time and she knows that it would be very difficult because of her proneness to quick irritability (emphasis added) (App. p. 85).

18. Ms. Bishop continued the Depakote and on December 9, 2008, Dr. Haynes noted that the medication was keeping things under reasonable control. On April 9, 2009, Ms. Bishop saw Dr. Johnson, who noted that Ms. Bishop's psychiatric issues were stable. On April 1, 2009, Dr. Haynes stated that from the psychiatric standpoint I could not state that she was totally disabled based on posttraumatic stress disorder and her impulse control disorder, though these do complicate the other problems going on in her life." Exhibits p. 416. On July 22, 2009, Ms. Bishop told Dr. Haynes that she would be working at her former employer and that it was going to be difficult because she misses driving truck. Dr. Haynes told her that "no matter where she works there is the possibility that she would never be able to return to driving and she understands that. I told her that the more she is there the easier it will be to deal with that particular issue." Exhibits p. 433. Ms. Bishop raised the same concern at the hearing, stating that being a dispatcher would not work because she would be around trucks and she'd want to drive them. Clearly, however, that concern is not sufficient to preclude her from work. On the contrary, Dr. Haynes said that

the more she is exposed to that situation, the easier it will be to deal with it. (App. p. 95).

Finding of Fact 18 is incorrect. The ALJ failed to include Dr. Haynes' entire opinion. He went on to say,

That is not to say that I do not think she is disabled because I do. It is just that I cannot say that she is totally disabled because of psychiatric problems. I encouraged her to find out where she stands with the possibility of Social Security Disability and medical assistance (App. p. 75).

Like Dr. Haynes, the Social Security Administration, considered Ms. Bishop to be a whole person, both physical and mental, and awarded her disability benefits shortly before her hearing (App. p. 153 - HT p. 68). The ALJ's selective reference to snippets of Dr. Hayne's notes is troubling. This Court has repeatedly cautioned WSI not to place itself in a position "fully adversarial" to the claimant. See: Fuhrman v. N.D. Workers Comp., 1997 N.D. 191, 569 N.W.2d 269. The ALJ's failure to consider the entire record does not demonstrate impartiality.

19. On November 10, 2009, Ms. Bishop reported that her mood had leveled out and 'her present regimen of medication had stabilized her Impulse Control Disorder as well as benefited her anxiety and depression.' Exhibits p. 444. Dr Haynes advised Ms. Bishop that 'in my opinion I do feel her Impulse Control Disorder is stabilized and I will dictate a letter to [WSI] stating so. I will also state that the reason it has stabilized is because she is on the present regimen of medication including the Depakote, Lexapro, regular lorazepam, and trazodone.' Exhibits p. 445. By letter dated November 11, 2009, Dr. Haynes advised WSI that Ms. Bishop's Impulse Control Disorder was stabilized on her present medications. The vocational consultant noted that in her report. (App. pp. 95-96).

Finding of Fact 19 is incorrect. Whether Ms. Bishop's cognitive impairment is stable or not is irrelevant to the issue of whether it affects a return to work. The ALJ's implication that stability is equivalent to a functional ability to return to work is



unfounded. There simply is no qualified medical opinion in evidence which supports the ALJ's belief that Ms. Bishop's cognitive impairments permit her to return to work at any of the identified job goals.

20. The greater weight of the evidence shows that WSI did take Ms. Bishop's closed head injuries into account when developing and approving the employment options in her vocational rehabilitation plan. Based on the evidence before it, including medical records from Drs. Brown, Arazi, and Haynes, and therapist Sharon Brown, Corvel was able to assess the limitations, if any, imposed by Ms. Bishop's closed head injuries. Corvel consultant Kelly Kraus testified that Ms. Bishop always presented herself well. Further, the evidence shows that Ms. Bishop was always appropriate with others throughout the course of her medical treatment, vocational training (including computer classes), and vocational plan development. She also worked for a number of years with a diagnosis of impulse control disorder and she returned to part-time transitional work with her pre-injury employer and there was no evidence that she was unable to work because of her closed head injuries. Kelly Kraus reviewed the medical records and found no red flags: Ms. Bishop's impulse control was stable and she has functional average intelligence. Ms. Bishop's cognitive abilities may not be what they once were, but they are sufficient to allow her to perform the identified jobs. (App. p. 96).

Finding of Fact 20 is incorrect. The ALJ's suggestion that WSI can dispense with obtaining the opinions of the treating neurologist, neuropsychologist, psychiatrist and licensed social worker and rely, instead, on the opinion of the vocational rehabilitation consultant that Ms. Bishop's cognitive impairments would not adversely affect her return to work in any of the job goals identified by that same consultant is simply incorrect. The Corvel Consultant, Kelly Kraus, is not a doctor (App. p. 144 - HT p. 32). She is no more qualified to render an expert medical opinion than is Collette Bishop. Ms. Bishop's 2008 work injury caused both physical and mental impairments. WSI addressed the effect of her physical impairments on a return to work by obtaining an FCE and job match from a physical therapist and then asking both Dr. Arazi and FNP Nora Allen whether they agreed with the physical therapist's findings. WSI addressed the effect of her cognitive

impairments on a return to work by asking the vocational consultant if she thought it was OK. Undoubtedly, Ms. Kraus had an opinion on the matter. After all, it was her work product at issue. Clearly, however, she was no more qualified to provide an expert medical opinion on Ms. Bishop's return to work than any other lay person would be.

21. The greater weight of the evidence shows that Ms. Bishop is able to return to a job in the local job pool. The Jobs are reasonably attainable in light of her injury, functional capacities, education, previous work, experience and transferable skills. The jobs offer Ms. Bishop the opportunity to restore ninety percent of her average weekly earnings at the time of her injury. Ms. Bishop presents evidence of her condition after the Vocational Consultant's Report and the WSI order dated August 13, 2010. Those records show that Ms. Bishop's bout with cancer and chemotherapy in the spring and summer of 2010 affected her condition and according to Ms. Bishop 'she never really had a chance what she could do prior to her cancer diagnosis and then her chemotherapy treatment.' Exhibits p. 479. Ms. Bishop now has that chance. (App. p. 96).

Finding of Fact 21 is incorrect. WSI failed to consider Ms. Bishop's documented cognitive impairments in approving its vocational plan. Ms. Bishop has never argued that her post-injury cancer must be considered in evaluating a return to work. Instead, she has argued throughout these proceedings that WSI must obtain expert medical opinion that she is functionally capable, both physically and mentally, of returning to work in the identified job goals.

#### Conclusions of Law

2. Section 65-05.1-01(4), N.D.C.C., provides that the first appropriate option among the following, calculated to return the employee to substantial gainful employment, must be chosen for the employee:

...

- e. Return to an occupation within the local job pool of the locale in which the claimant was living at the date of injury of the employee's current address which is suited to the employee's education, experience, and marketable skills.

...

WSI concluded that option (e) was the first appropriate rehabilitation option to return Ms. Bishop to substantial gainful employment. Ms. Bishop says the job goals are not attainable in light of her injury and functional capacities. The greater weight of the evidence shows however that Ms. Bishop can work at the light-duty level on a full time basis; the FCE found she was capable of working at a light-duty level on a full time basis; Ms. Bishop's treating neurologist, physical therapist and nurse practitioner at the pain clinic agreed that she was capable of doing so and approved the job goals; Dr. Brown's neuropsychological testing does not show that she is incapable of working and psychiatrist Haynes opined that Ms. Bishop's impulse control disorder was stabilized with medication. (App. p. 97).

Conclusion of Law 2 is incorrect. The ALJ failed to consider the impairments documented by Dr. Brown and Dr. Haynes' subsequent opinion of disability. Curiously, the ALJ cited this Court's opinion in Genter v. Workforce Safety & Insurance Fund, 2006 ND 237, 724 N.W.2d 132 to support her contention that WSI was not required to obtain a medical opinion that Ms. Bishop's cognitive impairments did not affect her return to work in any of the identified job goals. Paul Genter was a Burleigh County sheriff's deputy who had a work-related low back injury. The Supreme Court ruled that WSI did not have to consider his pre-existing hearing loss in arriving at an appropriate return-to-work option because he had worked successfully for many years before his work injury in spite of his hearing loss. In the instant case, Collette Bishop's severe depression, anxiety, memory loss, PTSD, and impulse control disorder stem from her 2008 work-related closed head injury. Following that injury, she worked for approximately two weeks with her pre-injury employer (App. p. 153 - HT p. 68). When that employer was unwilling to make the workplace modifications necessary for Ms. Bishop, she was terminated (App. p. 153 - HT p. 69). Ms. Bishop explained clearly how her cognitive impairments prevent her from using a telephone, performing simple record-

keeping, dealing with demanding customers and being in stressful situations (App. p. 150 - HT pp. 56-58). The Genter decision is readily distinguishable.

3. The employee has a responsibility to minimize the extent of her disability by looking for suitable work. Section 65-05.1-04 N.D.C.C. Because Ms. Bishop hasn't made a good faith work trial, her argument that she might lose her temper while working is purely speculative and does not excuse her from her responsibility to make a good-faith work trial or work search. Maginn v. North Dakota Workers Compensation Bureau, 550 N.W.2d 412 (N.D. 1996). (App. pp. 97-98).

Conclusion of Law 3 is incorrect. In truth, Ms. Bishop did make a good-faith work trial which was unsuccessful due to her work injury (App. p. 153 - HT pp. 68-69). That is precisely why WSI commissioned Corvel to come up with a different vocational rehabilitation option. Ms. Bishop did not ask the ALJ, and is not asking this Court, to accept her opinion that her cognitive impairments, including her diagnosed impulse control disorder, would affect the reasonable attainability of the identified job goals. Clearly, that is a matter for expert medical opinion. Instead, she asked the ALJ, and is asking this Court, to recognize that the effect of her cognitive impairments on her ability to successfully return to work is a matter for such expert medical opinion, recognize that WSI has failed to obtain any expert medical opinion, recognize that WSI has the burden of proving the appropriateness of the identified job goals, and recognize that WSI has failed to meet its burden of proof. In short, when Dr. Haynes described Ms. Bishop's "proneness to irritability" (App. p. 85) in connection with her work-related cognitive impairments, WSI had an obligation to ask him whether that condition would be expected to adversely affect a return to work. Instead, the agency, and the ALJ, chose to ignore it.

4. WSI has the burden of establishing that a rehabilitation plan is appropriate. Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96, 644 N.W.2d 884. WSI has satisfied that burden. The rehabilitation plan proposed by WSI gave Ms. Bishop a reasonable

opportunity to obtain substantial gainful employment in this state. Svedberg v. North Dakota Workers Compensation Bureau, 1999 ND 181, 599 N.W.2d 323 (ND 1999). (App. p. 98).

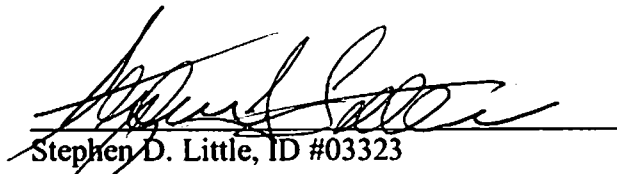
Conclusion of Law 4 is incorrect. Clearly, WSI did not treat Collette Bishop's work-related mental impairments in the same manner in which it treated her work-related physical impairments. That agency had her physical impairments tested, had a job match performed and obtained expert medical opinion of her physical ability to perform the identified jobs. WSI also had her cognitive impairments tested; then it ignored those test results, never even soliciting an expert medical opinion of the effect of those impairments on a return to work. Ms. Bishop's cognitive impairments are not merely cosmetic. She did not suffer a minor injury. She fell fourteen feet, striking her head on the side of her truck and again on the ground (App. p. 148 - HT p. 50). How can a reasoning mind conclude that WSI met its burden of establishing that the identified return-to-work options are appropriate?

## V. CONCLUSION

Collette Bishop cannot use a telephone or balance her own checkbook (App. p. 149 - HT p. 54; App. p. 150 – HT p. 57). Her son and daughter-in-law live with her in order to care for her (App. p. 148 - HT p. 48). She has been diagnosed with severe depression, anxiety, memory loss, PTSD and impulse control disorder—all stemming from her work-related injury. WSI insists that Ms. Bishop can go out and perform work she has never done before, but that agency failed (or more accurately, refused) to ask any of her treating medical providers whether the jobs identified were reasonably attainable in light of her mental impairments.

The Administrative Law Judge relied on pre-injury medical records to support her conclusion that Ms. Bishop is employable. She relied on the medical opinion of the vocational rehabilitation consultant. She allowed WSI to treat Ms. Bishop's physical impairments in a different manner than it treated her mental impairments. There is simply no authority for that. Ms. Bishop simply wants WSI to live up to its responsibility. She remains disabled and remains entitled to disability benefits until WSI can identify a return-to-work option that her doctors agree is appropriate in light of both her physical and mental impairments.

Respectfully submitted this 16<sup>th</sup> day of April, 2012.

A handwritten signature in black ink, appearing to read "Stephen D. Little", is written over a horizontal line.

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CERTIFICATE OF SERVICE

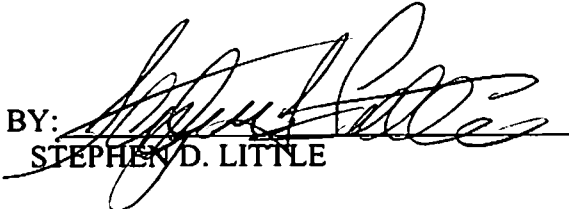
I, Stephen D. Little, certify that on the 16th day of April, 2012, true and correct copies of the Appellant's Brief with an attached Certificate of Service were hand delivered to:

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