

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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|--|---|--|
| Collette Bishop, |) | Supreme Court Case No. 20120138 |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | |
| |) | |
| Workforce Safety and Insurance, |) | |
| |) | |
| Appellee, |) | |
| |) | |
| and |) | |
| |) | |
| 4 K's Transportation, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

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

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**APPEAL FROM 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**

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STATEMENT OF THE ISSUES

[1] Whether a reasoning mind could conclude that Collette Bishop (“Bishop”) had the cognitive and psychiatric ability to return to substantial gainful employment as a dispatcher, customer service representative, or information clerk/receptionist.

STATEMENT OF THE FACTS

[2] Bishop sustained two work related head injuries while employed as an over the road trucker driver. On April 4, 2004, she was in a motor vehicle accident where she was thrown forward striking her head on the windshield of her truck. (CR 359) She was diagnosed with post-concussion syndrome and impulse control disorder as a result of the April 2004 accident. (CR 366) Bishop had significant medical treatment after her April 2004 head injury with her primary care provider, Dr. Anthony Johnson, neurologist, Dr. Marco Benitez, psychiatrist, Dr. Benn E. Haynes, and neuropsychologist, Dr. Marland Brown. She was eventually able to return to work driving truck for 4-K’s Transportation (“4-K’s”). On September 29, 2008, Bishop fell from the top of her trailer while strapping down a load. (CR 1-3) She was diagnosed with post-traumatic headaches, neck pain, and low back pain on November 26, 2008. WSI accepted liability for head, cervical spine, and lumbar spine injuries. (CR 7) It was later determined that WSI also had liability for Bishop’s depression and anxiety as a result of the 2004 and 2008 injuries. (App. 120)

A. Medical Treatment After the 2004 Head Injury.

[3] On July 12, 2004, Bishop was seen by Dr. Brown for neuropsychological testing for complaints of memory dysfunction and depth perception. (CR 352) She was not working due to her injuries from the motor vehicle accident. Dr. Brown found that Bishop

was functioning in the average range of intelligence. (CR 353) She had some impairment on tasks of visual analysis, capacity to inhibit a competitive motor response when using her left hand, mental flexibility, and left hand motor inhibition, but all other cognitive abilities were well within the average range. (CR 353) Dr. Brown assessed Bishop with mild post-concussion syndrome and recommended retesting in six weeks. (CR 354)

[4] On August 23, 2004, Dr. Brown reexamined Bishop and found noticeable improvement in her cognitive functioning. (CR 356) She was not ready, however, to return to truck driving because of deficits in visual analysis and mental flexibility. (CR 356) Bishop underwent repeat neuropsychological evaluation on October 18, 2004. (CR 357) She expressed concerns about trouble judging distances and depth perception. (CR 357) Because of these problems Dr. Brown thought Bishop was not ready to return to truck driving. (CR 357)

[5] On December 12, 2004, Bishop saw Dr. Haynes, psychiatrist, for complaints of anger, memory problems and verbal impulsiveness. (CR 360) Bishop had been seeing Dr. Haynes for depression and anxiety since April 29, 2002. (CR 337, 359) Dr. Haynes noted that Bishop's thinking was logical and goal oriented, there were no associative abnormalities, and her concentration was normal. (CR 362) He diagnosed Bishop with impulse control disorder, secondary to closed head injury, and post-concussion syndrome. (CR 363) Depakote was prescribed to stabilize Bishop's anger and impulsivity. (CR 363)

[6] On January 8, 2005, Bishop followed up with Dr. Haynes for impulse control disorder. (CR 364) She reported that Depakote had "made a major difference for the best," her anger control was definitely improved, and her memory was improving. (CR

364) Dr. Haynes noted that Bishop might be able to return to work as a truck driver with further improvement. (CR 364-65)

[7] On January 27, 2005, Bishop had another neuropsychological evaluation with Dr. Brown. (CR 367) She reported significant improvement in her overall level of functioning, especially since taking Depakote, which helped her frustration and anger issues. Dr. Brown attributed her frustration and anger to her inability to work. (CR 368) Bishop also reported improved visual analysis. Dr. Brown found that her cognitive abilities were well within average range and that her depth perception and distance perception deficits had resolved. (CR 368) Dr. Brown advised that she should be able to return to work as a truck driver. (CR 368) Dr. Benetiz agreed with this assessment on February 10, 2005. (CR 369)

[8] Bishop continued to see Dr. Haynes from February 19, 2005 to November 2006. (CR 370-386) She had returned to work driving truck, and was still taking Depakote daily. (CR 370-386) On November 6, 2006, Dr. Haynes noted that Bishop was showing signs of post-traumatic stress disorder partially related to her 2004 motor vehicle accident. (CR 384) On January 11, 2007, Dr. Haynes noted that “it sounds like she is doing a good job in coping with her work and is keeping herself safe.” (CR 387) On July 3, 2007, Bishop reported that she had a couple of episodes where she got upset with other motorists. (CR 389) Dr. Haynes talked her through this and explained that she is going to meet “stupid people” no matter where she is and she can’t let them have control over her mental and emotional life. (CR 389) Dr. Haynes also cautioned Bishop against self-regulating her medications—she had unilaterally reduced her dosage of Depakote, and told her to be on guard for recurring problems with irritability if she was not taking Depakote daily. (CR 390)

[9] On November 11, 2007, Bishop reported that she had stopped taking Depakote entirely. (CR 391) Dr. Haynes told her to call if symptoms returned. (CR 392) On January 30, 2008, Dr. Haynes put Bishop back on Depakote. (CR 394) At her next session with Dr. Haynes on March 26, 2008, Bishop complained of increased problems with irritability and anger. (CR 394) Dr. Haynes tried increasing her dosage of Depakote, but this caused unpleasant side effects and the dosage was reduced. (CR 394-96)

[10] At her May 7, 2008, session Bishop reported feeling more stressed due to financial difficulties and difficulty coping in general. (CR 396) Dr. Haynes prescribed Lexapro 5 mg increasing to 10 mg and lorazepam 0.5 mg up to three times daily in addition to the Depakote. (CR 397) On June 4, 2008, Bishop again reported additional stress and wanted her medications adjusted to level out her moods. (CR 398-99)

[11] On June 25, 2008, Dr. Haynes noted that Bishop's concentration and memory were good, her speech was normal, and her mood was satisfactory. (CR 402) On August 28, 2008, Dr. Haynes suggested that Bishop repeat the neuropsychological testing with Dr. Brown. (CR 404) Before Bishop could be retested, she fell from her trailer on September 30, 2008, sustaining additional head and bodily injuries. (CR 1, 405)

B. Medical Treatment after the 2008 Head Injury

[12] On October 8, 2008, Bishop saw Dr. Johnson for injuries sustained in the fall from the trailer. (CR 406) She was diagnosed with head contusion with mild to moderate concussion and left shoulder pain. (CR 407) She was restricted from working because of the concussion. (CR 407) On October 9, 2008, Bishop reported to Dr. Haynes that she felt back to normal mentally and emotionally, but was physically hurting from the fall. (CR 408) She denied mood instability and reported that the Depakote, Lexapro and lorazepam

were working well. (CR 409) Dr. Haynes instructed her to return once the repeat neuropsychological testing was complete. (CR 409)

[13] On October 14, 2008, Bishop saw Dr. Johnson. (CR 219) She reported having left elbow pain, headaches, and right chest and rib pain. Dr. Johnson noted that she was slowly improving, but could not be cleared to drive just yet. (CR 219) Two weeks later, on October 28, 2008, Dr. Johnson referred Bishop for neurological consultation with Dr. Arazi “to help us determine when and if [Bishop] would be okay at going back to driving.” (CR 222) She was complaining of weakness, numbness and paresthesias in her legs. (CR 222)

[14] Dr. Arazi first examined Bishop on November 3, 2008 and assessed “post-traumatic syndrome with vascular headaches.” (CR 154-56) Dr. Arazi was aware of her previous head injuries. (CR 154) On November 26, 2008, Dr. Arazi diagnosed post-traumatic headaches, neck pain and low back pain. (CR 157) He ordered EMG testing—the results were normal. (CR 160) Dr. Arazi returned Bishop to part-time work on December 5, 2008. (CR 160-61) Dr. Johnson and Dr. Brown agreed with the release. (CR 227-28) Bishop then returned to driving truck at 4-K’s Transportation part-time. (CR 167)

[15] On December 9, 2008, Bishop saw Dr. Haynes after having repeat neuropsychological testing on December 4 and 8, 2008. (CR 411) Dr. Haynes had a copy of Dr. Brown’s draft results and noted:

The findings were representative of **continued improvement in her overall level of cognitive functioning despite the history of an additional head injury**. He mentioned the initial evaluation in 2004 which was consistent with impairment of right frontal lobe functioning, and which were indicative of a closed head injury. He noted that while continued improvement in her

level of functioning is noted, there still remains mild residual right hemispheric cognitive dysfunction.

(CR 411) (emphasis added).

[16] On February 5, 2009, Bishop followed up with Dr. Arazi for increased pain in her low back and right leg. (CR 165) The low back and right leg pain was interfering with her ability to drive truck. (CR 165) The medical record reflects that she was still on the medication regimen prescribed by Dr. Haynes: Depakote ER 500 mg/day, lorazepam 0.5 mg up to three times daily, and Lexapro 10 mg/day. (CR 165) On February 11, 2009, Bishop reported to Dr. Haynes that she did not feel she could safely drive truck because of sciatica in her right leg and numbness and weakness in the left leg. (CR 413) Bishop's right leg pain continued to get worse. (CR 166-67) On February 23, 2009, Dr. Arazi ordered physical therapy and restricted Bishop from working. (CR 167)

[17] During a follow-up visit on March 26, 2009, Dr. Arazi noted that Bishop's physical conditions were gradually improving. (CR 169) She was motivated to return to truck driving, but Dr. Arazi would not release her because she was not yet able to pull the tarps that weighed 75 to 100 pounds. (CR 169) Dr. Arazi was informed that 4-K's had transitional secretarial work available for Bishop. (CR 169) Dr. Arazi agreed that some form of work would be good for Bishop, but wanted to wait until she had another month of physical therapy to assess her capabilities. (CR 169-70) Dr. Arazi instructed Bishop to begin sedentary activities on her own four hours/day to see how she did. (CR 169-70)

[18] In an April 9, 2009, recheck with Dr. Johnson, Bishop complained of a great deal of pain in her right rib cage through her back and into her chest and sporadic shoulder pain. (CR 415) She was still having headaches from time to time as well. (CR 415)

Regarding her physical capabilities, Dr. Johnson remarked that he did not think driving truck would be an option for Bishop anymore. (CR 415)

[19] At her next session with Dr. Haynes on April 15, 2009, Bishop, who had been off work for more than six weeks, reported that she was seeking Social Security disability benefits. (CR 416) Dr. Haynes wrote in his report 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. 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.” (CR 416) A few weeks later, on or about May 2, 2009, Dr. Arazi released Bishop to part-time transitional work performing secretarial duties for 4-K’s. (CR 176)

[20] On May 4, 2009, WSI initiated vocational rehabilitation services through Corvel. (CR 13-14) Bishop took the Test of Adult Basic Education and scored the following grade equivalencies: reading 12.9+; math 12.4; and language 12.1. (CR 43) During rehabilitation, Bishop received skills upgrading starting with a beginning computer class on May 18, 2009. (CR 19) On May 26, 2009, Bishop met with the vocational rehabilitation counselor and reported that she was “anxious to return to work, even if it is not the work she used to do prior to her injury.” (CR 39)

[21] On June 3, 2009, Bishop saw Nora Allan, FNP, for a pain management consultation. (CR 421) FNP Allan assessed generalized pain, myofascial pain, and headaches and discussed treatment options with Bishop. (CR 412) During this examination, Bishop alluded to suicidal ideation, and FNP Allan strongly encouraged her to follow up with Dr. Haynes. (CR 424) Shortly after this appointment, Bishop was

hospitalized for a few days. (CR 45-46) When she saw Dr. Johnson about a week later on June 11, 2009, Bishop reported doing better since her hospital stay. (CR 426) She was working four hours a day doing bookkeeping and scheduling at 4-K's. (CR 426, 46) Dr. Johnson reported that he did not have much more to offer Bishop, but he strongly recommended that she continue with psychiatric treatment. (CR 426)

[22] Dr. Arazi's next visit with Bishop was June 12, 2009. (CR 177) Bishop reported feeling better, however, Dr. Arazi noted she had some depression and insomnia. Dr. Arazi recommended she continue her part-time work. (CR 178) On June 18, 2009, Bishop told Dr. Haynes that WSI wanted her to return to full-time work in two weeks, but Dr. Haynes did not believe she was ready for that. (CR 427-28)

[23] On June 24, 2009, Bishop reported increased low back pain to Dr. Arazi. (CR 179) She reported she "[was] unable to work four hours a day in addition to all of her other activities which are mostly doctors (sic) appointments." (CR 179) Dr. Arazi recommended that Bishop take a day off work, and also recommended she see the physical therapist to determine her work abilities and have a work site assessment. (CR 180)

[24] Also on June 24, 2009, Bishop underwent repeat neuropsychological testing. (CR 430) She reported working as a secretary to Dr. Brown. (CR 430) Dr. Brown observed that Bishop was pleasant and cooperative; she expressed her cognitive concerns in great detail; she managed to sustain focused concentration for adequate periods of time, her speech was fluid and clearly articulated, her language was substantive and grammatical without evidence of word retrieval problems. (CR 430) The neuropsychological test results revealed:

language related subskills—average verbal fluency, difficulty thinking of appropriate responses, average word retrieval skills, average fund of general information, and impaired mental tracking skills;

judgment and reasoning—average abstract reasoning;

visuospatial subskills—average visuospatial judgments on a line orientation, severely impaired complex visual analysis, basic visual discrimination was intact;

attention and memory—auditory attention average, immediate recall was average, delayed recall was also average;

motor subskills—within normal limits;

mental flexibility—ability to maintain a cognitive set was low average, capacity to shift between cognitive sets was within normal limits, ability to inhibit a competitive response on the Stroop Color Word test was impaired.

(CR 431) Bishop's functioning overall was in the average range of intelligence.

[25] On July 16, 2009, Dr. Arazi re-examined Bishop. (CR 181) She was still doing secretarial work at 4-K's. (CR 181) Dr. Arazi reviewed the work site assessment performed on July 6, 2009, and cleared Bishop to continue part-time work. (CR 181-82)

[26] On July 22, 2009, Bishop returned to Dr. Haynes reporting that she definitely wanted to work at 4-K's, but that it would be difficult because she missed driving truck. (CR 433) Dr. Haynes advised that she may never be able to return to truck driving and that the more she was around it the easier it would be for her. (CR 433) Bishop also reported that family issues had caused her increased stress. (CR 434) Dr. Haynes increased her Depakote to 1,500 mg/day and recommended that she start individual counseling. Bishop began individual counseling with Sharon Brown, LICSW, on August 5, 2009. In her initial report, Ms. Brown noted that therapy would be aimed at mood stabilization, improved coping, processing her past issues, and improved self care. (CR 439)

[27] On July 27, 2009, Bishop went to the emergency room with complaints of increased numbness and weakness in her legs and inability to walk. (CR 272) The ER physician wanted to admit her for observation, but she declined and left with her husband. (CR 273) During her August 13, 2009, examination Bishop reported worsening low back pain to Dr. Arazi. (CR 184) Dr. Arazi's impression was persistent low back pain, right leg pain, and neck and shoulder pain. (CR 184) Dr. Arazi released her to continue with her vocational skills upgrading and recommended hydrotherapy, followed by a functional capacity evaluation ("FCE"). (CR 185)

[28] Bishop continued with vocational rehabilitation services through Corvel. By the end of October 2009, she had finished an introductory computer class and intermediate computer class. (CR 58) She completed a Microsoft word class in December 2009. (CR 74) On October 22, 2009, Dr. Arazi cleared Bishop to participate in an FCE and planned to see her after it was completed. (CR 185-86)

[29] On November 10, 2009, Bishop reported to Dr. Haynes that she had been seeing Sharon Brown in weekly therapy sessions and it was helping her cope with life stressors. (CR 444) She further reported that her moods had leveled and her impulse control disorder was under control. (CR 444) Dr. Haynes advised WSI on November 11, 2009, that Bishop's impulse control disorder was stabilized with medications. (CR 446)

[30] Bishop's FCE was conducted on December 1 and 2, 2009, with physical therapist, Steve Churchill. (CR 145) The results of the two day testing showed Bishop was capable of full-time light level work. (CR 145) Mr. Churchill was asked to complete a job match to determine whether forklift operator, assembler, dispatcher, customer service clerk, activities aide, general office clerk, data entry operator, and information clerk were within

Bishop's physical capacity. (CR 67-70) Mr. Churchill rejected the forklift operator and assembler positions, but approved the others. (CR 88)

[31] On December 28, 2009, FNP Allan approved the FCE results and the job match comparison. She advised, however, that it may take some time for Bishop to adjust to a 40-hour work week. (CR 296, 72) Dr. Arazi approved the FCE results and job match goals on January 25, 2010. (CR 78-79)

[32] On January 20, 2010, Bishop reported to Dr. Haynes that WSI was looking at her returning to work as a dispatcher, but she was leery of that position because of her impatience level, irritability and organization abilities. (CR 464) Dr. Haynes encouraged Bishop to try and "told her that if someone did want her to work [he] would hope that they would promise that if she could not do that work, any compensation would be based on her previous job rather than on the job they suggest she try and then fail." (CR 464) Sometime in February 2010, an ovarian cyst burst and Bishop had to have her uterus removed. (CR 88) Thereafter, she was also diagnosed with cancer. (CR 88)

[33] A vocational consultant's report ("VCR") was issued on April 20, 2010, concluding that option "E" (return to an occupation within the local job pool) was the first appropriate return to work option for Bishop. (CR 96) The VCR identified the job goals of dispatcher, customer service representative, and information clerk/receptionist as viable options in light of her injuries, education, skills, and functional capacities. (CR 96-97). In the report, the consultant discussed Bishop's other medical concerns/comments as follows:

Ms. Allan, FNP, concurred with the job match comparison on 12-24-09 and Dr. Arazi concurred on 1-25-2010. In 2010 Ms. Bishop had an ovarian cyst burst and reports her uterus was removed. She was diagnosed with granulosa cell tumor cancer and will be treating at Mayo Clinic. She received chiropractic treatment in 2009 for shoulder and neck pain. According to Dr. Arazi, Ms. Bishop was diagnosed with MS in 2009. Ms.

Bishop sustained a work related head injury in ND 4-4-04. She was diagnosed with PTSD and Impulse Control Disorder following the injury. The impulse control disorder is controlled with medication. She reports two additional head injuries, of which one was in 1983, she could not recall the year of the second injury.

Ms. Bishop underwent a neuropsychological evaluation with Dr. Brown 6-24-09. Several tests were administered with Dr. Brown indicated overall Ms. Bishop is functioning in the overall Average range of intelligence. He noted persistent impairment on verbal fluency, mental tracking, visual analysis, and capacity to inhibit a competitive cognitive response set. The findings are consistent with persistent frontal lobe dysfunction, with greater right hemisphere brain involvement. Psychotropic medications include Depakote, Lorazepam, Lexapro and Trazadone.

(CR 88-89)

[34] WSI approved the VCR on May 24, 2010. (CR 4) Bishop appealed the vocational plan and requested hearing. An evidentiary hearing was held on February 17, 2011. ALJ Janet Demarais Seaworth (“ALJ Seaworth”) issued Findings of Fact, Conclusions of Law and Order on April 22, 2011, concluding that WSI had proven Bishop was capable of substantial gainful employment. (CR 551-62) Bishop appealed to the district court. On November 9, 2011, the district court rejected the appeal and affirmed ALJ Seaworth’s decision.

LAW AND ARGUMENT

[35] Both parties agree that Bishop is physically capable of returning to work and that there is a viable labor market for the job goals identified in the VCR. The dispute is whether Bishop has the cognitive and psychiatric ability to return to work. Bishop contends that the vocational rehabilitation plan is fatally flawed because none of her physicians were asked whether her cognitive impairments and psychiatric conditions preclude her from working. She has been diagnosed with depression, anxiety, impulse control disorder and PTSD. WSI submits that these conditions were adequately considered during the vocational

rehabilitation process and that a reasoning mind could conclude based on a reasonable interpretation of the evidence that Bishop is capable of substantial gainful employment.

I. BURDEN OF PROOF AND SCOPE OF REVIEW ON APPEAL

[36] The standard of review on an appeal from an agency determination has recently been summarized as follows:

In an appeal from a district court's review of an administrative agency decision, we review the agency's decision, not the district court's decision. See [Spectrum Care v. Stevick](#), 2006 ND 155, ¶ 8, 718 N.W.2d 593 (citing [Baier v. Job Serv. N.D.](#), 2004 ND 27, ¶ 6, 673 N.W.2d 923). Under N.D.C.C. §§ 28-32-46 and 28-32-49, this Court must affirm the decision of an administrative agency unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative judge.

N.D.C.C. § 28-32-46; [Bergum v. N.D. Workforce Safety & Ins.](#), 2009 ND 52, ¶ 8, 764 N.W.2d 178. This Court reviews the administrative agency's decision, but "giv[es] due respect to the district court's analysis and review." [Bergum](#), 2009 ND 52, ¶ 8, 764 N.W.2d 178. "[T]his Court does not make independent findings of fact or substitute its judgment for that of the administrative agency." [Rodenbiker v. Workforce Safety & Ins.](#), 2007 ND 169, ¶ 14, 740 N.W.2d 831. Rather, "we determine whether a reasoning mind reasonably could have decided the agency's findings were proven by the weight of the evidence from the entire record." [Bergum](#), at ¶ 9. Finally, "[w]e do not give deference to the ALJ's legal conclusions, and questions of law are fully reviewable on appeal." [Johnson v. N.D. Workforce Safety & Ins.](#), 2012 ND 27, ¶ 9.

[Johnson v. WSI](#), 2012 ND 87, ¶6.

II. ALJ SEAWORTH'S CONCLUSION THAT BISHOP IS CAPABLE OF EMPLOYMENT IS SUPPORTED BY A REASONABLE INTERPRETATION OF THE EVIDENCE.

[37] ALJ Seaworth concluded that Bishop was capable of returning to work as a dispatcher, customer service representative, or information clerk/ receptionist and that these job goals provided Bishop with a reasonable opportunity to obtain substantial gainful employment in the local job pool. (CR 558-560, Concl. of Law ¶¶ 1-2)

[38] The goal of vocational rehabilitation is to return an injured worker to substantial gainful employment as soon as possible. N.D.C.C. § 65-05.1-01(3). “Substantial gainful employment” means bona fide work for pay that is reasonably attainable in light of the injured worker’s injury, functional capacities, education, experience and transferrable skills. *Id.* WSI must consider the claimant’s work injuries and medical limitations that existed at the time of the work injury during the rehabilitation process. Svedberg v. N.D. Workers Comp. Bureau, 1999 ND 181, ¶14, 599 N.W.2d 323.

[39] Bishop contends that her psychiatric conditions and cognitive impairments preclude her from working as a dispatcher, customer service representative or information clerk/receptionist. ALJ Seaworth rejected these contentions and found that Bishop’s psychiatric conditions and cognitive impairments were not a bar to employment. (CR 558, Finding of Fact ¶ 21) Though Bishop parses many of ALJ Seaworth’s findings of fact for perceived errors, the recurring challenges to each questioned finding are (1) whether WSI was required to expressly ask Bishop’s mental health providers and/or medical doctors whether her psychiatric conditions and cognitive impairments precluded her from working; and (2) whether there was sufficient evidence in the record for ALJ Seaworth to conclude

that Bishop's psychiatric conditions and cognitive impairments were not a bar to employment.

[40] WSI acknowledges that the question of whether Bishop's PTSD, depression, anxiety, memory loss and impulse control disorder precluded her from employment was not expressly asked of her treating medical providers during the vocational rehabilitation process. In Svedberg this Court said that an employee's medical limitations which existed at the time of the work injury must be taken into consideration when WSI determines whether certain employment options present an opportunity for "substantial gainful employment." Id. ¶14. Once the worker's restrictions and limitations are identified, the vocational consultant must assess the job options in light of those restrictions and limitations. Id. ¶15.

[41] ALJ Seaworth found that WSI did take Bishop's heard injuries into account when developing and approving the vocational rehabilitation plan. (CR 558, FOF 20) She further found that Bishop is able to return to a job in the local job pool. (CR 558, FOF 21) ALJ Seaworth's decision was based on a review of the medical records from Drs. Brown, Arazi, and Haynes, and Bishop's therapist Sharon Brown. ALJ Seaworth found that Dr. Arazi, Bishop's treating neurologist, was fully capable of addressing Bishop's ability to work. Dr. Arazi detailed her work injuries, her medical, social, family, surgical and medication history, performed neurological exams and noted her neuropsychological status. Dr. Arazi did not have to be directly asked whether Bishop's psychiatric conditions and cognitive impairments impeded her ability to work because he was fully aware of her impairments and conditions. That Bishop worked for a number of years with a diagnosis of impulse control disorder and returned to part-time transitional work was also persuasive to

ALJ Seaworth. ALJ Seaworth further noted that Bishop's impulse control disorder was stable and she was functioning in the average range of intelligence.

A. Bishop Was Not Restricted from Working Based on Psychiatric Conditions or Cognitive Impairments When Vocational Services Were Initiated.

[42] When vocational rehabilitation services were initiated in May 2009, Bishop's work restrictions were based on physical conditions, not psychiatric conditions or cognitive impairments. In other words, the reason she was not working was not because she was depressed and anxious, couldn't control her impulses, or had memory problems. Bishop had returned to truck driving part-time in December 2008, and was later taken off work because of leg pain and numbness.

[43] After the accident in September 2008, Dr. Johnson, her primary care provider, did restrict Bishop from driving due to her concussion and head contusion. Dr. Johnson was fully aware of her closed head injuries and symptoms associated with those injuries. She was diagnosed with post-traumatic headaches, neck pain and low back pain as a result of the 2008 accident. She carried previous diagnoses of depression, anxiety, impulse control disorder and PTSD. Dr. Johnson referred Bishop to Dr. Arazi for neurological testing in November 2008 with the specific purpose of having Dr. Arazi "give us guidance in terms of allowing her back to driving." (CR 227) In December 2008, Dr. Arazi cleared Bishop to return to work part-time, driving truck. (CR 160-61) Dr. Johnson and Dr. Brown, her treating neuropsychologist, approved the work release. (CR 227-28) In fact, Dr. Johnson notes in his December 11, 2008 report that Bishop had been returned to work with the input of Dr. Arazi and Dr. Brown. (CR 27-28)

[44] Bishop returned to driving truck part-time for 4-K's from December 2008 to February 2009. By February 5, 2009, Bishop was experiencing increased pain in her low back and right leg. (CR 165) This pain continued to get worse, and she started developing weakness in the left leg. On February 23, 2009, Dr. Arazi took Bishop off work and ordered physical therapy. He specifically addressed the physical reasons for the restriction, noting:

We will address her work status after she has gone through a few treatments of physical therapy. The patient is being kept off work now because she is getting physical therapy for her work injury.

(CR 166-67)

[45] Approximately five weeks later, on March 26, 2009, Bishop reported wanting to return to driving truck, but Dr. Arazi wouldn't let her because of the physical requirements that she be able to pull tarps weighing between 75 and 100 pounds. (CR 169) Dr. Arazi, who was Bishop's treating neurologist for nearly a year and was aware of her closed head injuries, did not restrict her from working as a truck driver because of cognitive impairments or psychiatric conditions, he kept her off work because she was not physically ready for the job demands.

[46] Dr. Arazi was not oblivious to Bishop's psychiatric state. He was aware of her diagnosis of depression as reflected in his June 12, 2009 note. (CR 177) Dr. Arazi was also aware that Bishop was taking Depakote, a mood stabilizer, Lexapro for depression, and lorazepam for anxiety. (CR 165) Even so, Dr. Arazi returned Bishop to work at the sedentary level for 20 hours/week in July 2009. (CR 182-83) He also approved her to participate in an FCE in October 2009, and approved the FCE results and job goals in January 2010. Although Bishop criticizes Dr. Arazi's approval of the FCE results in January 2010 since he had not seen her since August 2009, she fails to

recognize that her condition had not changed during that time. ALJ Seaworth found that Dr. Arazi was qualified to provide an opinion regarding Bishop's ability to work. (CR 555, Finding of Fact 15) This finding is supported by the evidence.

[47] Bishop was also seeing Dr. Haynes, who had been her psychiatrist since April 2002. When Bishop reported to him that she was applying for social security disability benefits on April 15, 2009, Dr. Haynes specifically noted that her psychiatric conditions were not totally disabling:

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. 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.

(CR 416) Dr. Haynes did not elaborate on the "other reasons" that supported his conclusion that Bishop was disabled. Presumably, Dr. Haynes was referring to physical conditions, but he was not treating Bishop's physical injuries.¹ If Dr. Haynes could not conclude that Bishop was totally disabled because of her psychiatric conditions, how can it be erroneous for ALJ Seaworth to rely on his opinion in support of her findings and conclusions? There is no evidence in the record that Bishop was taken off work because of her psychiatric conditions or cognitive impairments.

B. Bishop Worked in a Secretarial Capacity after the 2008 Injury.

[48] ALJ Seaworth also gave credence to Bishop's transitional work with 4-K's to support the determination that Bishop was capable of employment. In July 2009, Bishop returned to transitional employment at 4-K's performing secretarial duties. She

¹ That she is not totally physically disabled is demonstrated by the FCE results and Dr. Arazi's and FNP Allan's approval of the results. Even Bishop agrees that she is not challenging her *physical* capacity to return to work within the FCE guidelines.

did this with Dr. Haynes's knowledge and consent. (CR 433) On July 22, 2009, Bishop told Dr. Haynes she was going to work at 4-K's and that "she definitely want[ed] to work." (CR 433) Dr. Haynes did not discourage her from working, tell her she was unable to work, or take her off work. (CR 433) Instead, he encouraged Bishop and told her the more she was exposed to working around trucks the easier it would be for her to deal with not being able to drive truck. (Bates 433)

[49] Bishop argues that her return to transitional work at 4-K's was a failed "good faith work trial" that proves the vocational plan was not appropriate. The reason that Bishop was not able to continue in the position, however, was not because of her psychiatric conditions or cognitive impairments. To the contrary, the company was just not able to provide full-time transitional work. (CR 89, Hearing Trans. p. 28) 4-K's had temporary clerical activities that Bishop would perform but not permanent employment. (Hearing Trans. p. 28) WSI had to look at other full-time employment options for Bishop to return her to substantial gainful employment.

C. The Objective Testing Results are Evidence of Bishop's Ability to Work.

[50] Bishop also argues that there is no evidence in the record that she can perform the job goals in light of her cognitive impairments. The results of her neuropsychological and TABE testing are in the record. The neuropsychological tests and TABE results are probative evidence of Bishop's ability to perform the occupations of dispatcher, customer service representative, and information clerk/receptionist. ALJ Seaworth could reasonably conclude that these tests show that Bishop's cognitive impairments are not a bar to employment in those job goals. (CR 555-56, FOF 15)

[51] Bishop had neuropsychological testing on July 12, 2004, August 23, 2004, October 18, 2004, January 27, 2005, December 4 and 8, 2008, and June 24, 2009. (CR 352, 355, 357, 367, 411, 430) The results consistently indicate that she functions in the average range of intelligence. The results further show consistent improvement in Bishop's cognitive function. Bishop argues she has memory loss, but the testing on June 24, 2009, showed that her auditory attention was average, her immediate recall was average, and her delayed recall was also average. (CR 431) Additionally, her judgment and reasoning were scored as average and her abstract reasoning was average in June 2009. (CR 431)

[52] Bishop's most recent neuropsychological testing was on December 16, 2010. (CR 500) Dr. Brown observed that Bishop was able to sustain focused concentration for extended periods of time, without fatigue or distraction, her speech was fluent and clearly articulated, and her language was substantive and grammatical. (CR 500) As to formal test results, the data indicated that she had deficits on tasks of verbal fluency, visual analysis, mental flexibility, and capacity to inhibit a competitive cognitive response set. (CR 501) Dr. Brown's impression was that Bishop functioned in the overall average range of intelligence. (CR 501)

[53] Bishop's TABE test results further support ALJ Seaworth's conclusion that she has the cognitive ability to perform the positions of dispatcher, customer service representative, or information clerk/receptionist. Bishop scored higher than a high school graduate equivalency in math, reading, and language when tested on June 16, 2009. (CR 43) These positions are generally entry level positions with training provided by the employer. (Hearing Trans. p.26) This Court has never held that a person operating with

average intelligence, average memory, and average reasoning and judgment and with a grade equivalency of 12+ in reading, math and language is cognitively impaired and incapable of employment.

[54] The fact that Bishop returned to a transitional position doing secretarial tasks, tasks that were new to her, after the 2008 head injury with 4-K's, is further evidence that her cognitive impairments do not preclude her from working or learning new things. She was also able to learn computer skills in the computer classes that she completed during the vocational rehabilitation process. ALJ Seaworth noted that Bishop was able to participate in those classes appropriately without interference by her impulse control disorder. (CR 558, FOF 20) It was not erroneous for ALJ Seaworth to rely on the neuropsychological tests results, TABE and Bishop's transitional employment and skills upgrading to conclude that Bishop was capable of performing the job goals.

D. Evidence that Bishop's Psychiatric Conditions are Stable is Probative.

[55] Bishop has PTSD, depression, anxiety and impulse control disorder. She argues her quick temper and irritability are bars to employment in jobs dealing with the public. ALJ Seaworth rejected this contention because she found that Bishop's conditions were stabilized with medications. (CR 557, FOF 19) Bishop argues without any citation to authority that it is irrelevant that her psychiatric conditions are stable with medication. That argument is without merit.

[56] The fact that Bishop's psychiatric conditions are stabilized by medication demonstrates that she is in a position to pursue gainful employment. If her conditions were not stable, such as being so erratic that she had to be hospitalized, she would not be

in a position to return to work, but that is not the case. She is not suicidal, in the throes of a debilitating depression, or having hallucinations. Bishop is in a stable condition on her medication regimen and has been for some time. (CR 445) More importantly, no doctor has restricted Bishop from working based on her psychiatric conditions.

[57] On November 10, 2009, Bishop reported to Dr. Haynes that her moods had leveled out. (CR 444) She felt her medications had stabilized her impulse control disorder as well as benefited her anxiety and depression. She reported that the addition of Lexapro in May 2008 had “made a difference in her mood lability, ability to cope with stressors, and even the depression.” (CR 444) Dr. Haynes noted that Bishop was pleasant and cooperative during the session, made good eye contact, was alert and oriented, and answered questions appropriately. (CR 445) He further reported that she was not delusional, her mood was satisfactory, and her affect normal in range and intensity. (CR 445) Dr. Haynes informed WSI on November 11, 2009 that Bishop’s impulse control disorder was stabilized on her current medications and that the Lexapro was helping her cope with her depression and other stressors. (CR 446) He also advised WSI that the counseling with Ms. Brown was helping Bishop deal with her other life stressors. (CR 446)

[58] ALJ Seaworth additionally considered Bishop’s demeanor during the hearing, and the testimony that she was well spoken, professional, and presented herself well during the course of rehabilitation. Bishop also took skills upgrading courses for computers without any interference from “personality” problems. Bishop, herself, reported that “the Word class went well and she enjoyed the new class structure. She just

wishes it was longer.” (CR 80) This “real life” evidence supports ALJ Seaworth’s conclusion that Bishop is able to adequately cope with the public.

E. A Reasoning Mind Could Conclude that there was Sufficient Evidence to Support the Vocational Rehabilitation Plan.

[59] The sum of Ms. Bishop’s attacks on ALJ Seaworth’s findings of fact and conclusions of law is her contention that WSI did not meet its burden of proof. In short, the findings of fact as a whole address Bishop’s physical, mental, neuropsychological, and cognitive abilities to return to the workforce. These issues were considered by ALJ Seaworth and in light of all of the evidence, she reasonably concluded that Bishop was not totally disabled and is capable of returning to an occupation within the local job pool which is suited to her education, experience, and marketable skills.

[60] WSI must consider the injured worker’s work injuries and pre-existing conditions in assessing her functional limitations during the vocational rehabilitation process. Svedberg, 1999 ND 181, ¶14. In Genter v. Workforce Safety & Ins. Fund, 2006 ND 237, 724 N.W.2d 132, this Court held that WSI acted reasonably when it assessed the limitations imposed by the Claimant’s hearing loss without establishing a medical assessment team. Id. ¶ 19. In Genter, the evidence supporting claimant’s ability to work despite his hearing loss included claimant’s own description of his hearing loss, the observations of others regarding his hearing impairment, and his ability to work as a deputy sheriff for many years despite his hearing loss. Id.

[61] This case is not so different from Genter. Bishop had a head injury in 2004 and returned to work driving truck until she was reinjured in September 2008. By December 2008, she was also able to return to work driving truck. The only reason she was taken off work in February 2009 was because of her physical complaints. During the

rehabilitation process, truck driving could not be considered because it has a medium level classification and Bishop has a light duty release. (CR 80) WSI did not ignore Bishop's psychiatric conditions or cognitive impairments. These issues were specifically mentioned in the VCR under "other concerns" and addressed at length by ALJ Seaworth. The record contains evidence from which a reasonable person could conclude that Bishop has the cognitive ability to participate in the workforce, including her average range of intelligence, neuropsychological test results, transitional work period, successful mastering of the computer skills courses, and approval of the medical professionals. Moreover, it was Bishop's physical conditions that caused her to be restricted from driving in February 2009, not psychiatric conditions or cognitive impairments, and her psychiatric conditions, including impulse control, are stabilized through medication.

CONCLUSION

[62] For the foregoing reasons, WSI respectfully requests that the Court **affirm** the Final Order dated April 22, 2011.

DATED this 14th day of May, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Workforce Safety and Insurance, and the author of the Brief of Appellant Workforce Safety and Insurance hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,137 from the portion of the brief entitled “Statement of Facts” through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 14th day of May, 2012.

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