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[1] James Higginbotham, Appellant, hereby petitions for rehearing of the Court's opinion in this matter dated July 17, 2014. This Petition is made pursuant to N.D.R.App.P. 40.

[2] The Court was mistaken in its determination that the provisions of N.D.C.C. Section 65-05-10(3) do not apply to the statewide vocational rehabilitation plan WSI identified as appropriate for the Appellant (Higginbotham v. WSI, 2014 ND 147 par. 10). The determination of whether temporary partial disability benefits are available is not limited to situations in which none of the rehabilitation options under N.D.C.C. Section 65-05.1-01(6) apply. Pursuant to N.D.C.C. Section 65-05-08(8), WSI must award disability benefits if the loss of earning capacity exceeds ten percent. Pursuant to N.D.C.C. Section 65-05.1-01(3), a vocational rehabilitation plan is intended to return the disabled worker to substantial gainful employment, which is defined as the lesser of ninety percent of the worker's pre-injury wage or sixty-six and two-thirds of the average weekly wage in the state on the date the vocational consultant's report is issued. Thus, a determination of whether a vocational rehabilitation plan provides a realistic opportunity for a disabled worker to return to substantial gainful employment requires expert opinion under the provisions of N.D.C.C. Section 65-05-10(3). In the instant case, it is irrelevant that WSI determined that the vocational rehabilitation options it selected for Mr. Higginbotham provided an opportunity for substantial gainful employment, thus obviating the need for temporary partial disability benefits. It is the analysis, not merely the result, which requires expert opinion.

[3] Furthermore, in the instant case the vocational consultant provided opinions as to the appropriateness of each of the various

identified job goals (Appellant's App. pp. 44-45 (Finding of Fact 15)); the availability of modifications to each of the job goals (Appellant's App. p. 45 (Finding of Fact 16)); Mr. Higginbotham's physical ability to perform each of the job goals (Appellant's App. p. 45 (Finding of Fact 18)); the anticipated wage of each of the job goals (Appellant's App. p. 46 (Finding of Fact 20)); the labor market for each of the job goals (Appellant's App. pp. 46, 47 (Findings of Fact 21 and 25)); the intellectual demands of each of the job goals (Appellant's App. pp. 47-48 (Finding of Fact 26)); and whether Mr. Higginbotham had the education, experience and marketable skills to perform each of the job goals (Appellant's App. p. 48 (Finding of Fact 27)). Clearly, all of the foregoing opinions are those of an expert, rather than those of a lay witness providing testimony based on her sensory perceptions. See: N.D.R.Ev. 701 and 702).

[4] The Court was also mistaken in its determination that Mr. Higginbotham's argument that he could not afford to relocate or commute to perform the identified statewide job goals was speculative and not ripe for review (Higginbotham v. Workforce Safety & Insurance, 2014 ND 147 par. 11). This Court has already held that in determining the viability of a vocational rehabilitation plan, WSI does not have to consider the results of a disabled worker's work search. That is established law. Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56 (N.D. 1996). Furthermore, the Court appears to be under the mistaken impression that a later work search or work trial, which is unsuccessful simply because the disabled worker cannot afford to either commute or relocate, would somehow require WSI to revisit the appropriateness of a statewide plan and the worker's entitlement to

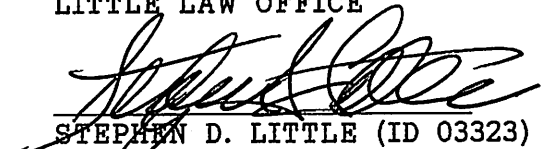
additional disability benefits. In truth, once a disabled worker's disability benefits have been discontinued, there are only two ways to reinstate those benefits: a reapplication pursuant to N.D.C.C. Section 65-05-08(1) or a showing under N.D.C.C. Section 65-05.1-04(4) that a good faith work search or work trial was unsuccessful due to the work injury. There is simply no statutory provision which allows for consideration of the financial appropriateness of a vocational rehabilitation plan after that plan has become final. Finally, in passing, one must wonder how Mr. Higginbotham's argument that he cannot afford to commute or relocate for low-wage jobs is any more speculative than WSI's argument that there is a viable labor market for a 71 year-old pipefitter with light/sedentary work restrictions (App. p. 36).

[5] Finally, the Court was mistaken in concluding that, "(T)here was no evidence Higginbotham suffered from PTSD at the time of WSI's development of the vocational rehabilitation plan" (Higginbotham v. Workforce Safety & Insurance, 2014 ND 147 par. 13). Mr. Higginbotham testified that he was diagnosed with PTSD in 1989 (App. p. 78 (Hearing Transcript p. 104, ll 13-19)). The Court criticized Mr. Higginbotham for failing "to give a complete account of his preexisting conditions" Id. It was WSI's burden, not Mr. Higginbotham's, to prove the appropriateness of its vocational rehabilitation plan. Paul v. North Dakota Workers Compensation Bureau, 2002 N.D. 96; 644 N.W.2d 884, 888. WSI did not consider Mr. Higginbotham's service-related PTSD and made no determination of whether that condition still existed or functionally limited his return to work at any of the identified job goals.

[6] For each of the foregoing reasons, Mr. Higginbotham requests rehearing of this matter.

Respectfully submitted this 25th day of July, 2014.

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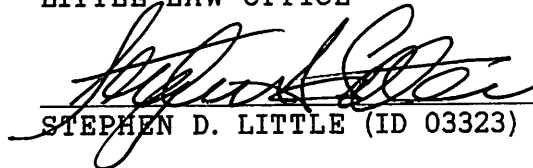
CERTIFICATE OF SERVICE

I, Stephen D. Little, certify that on the 25th day of July, 2014, a true and correct copy of the Appellant's Petition for Rehearing with an attached Certificate of Service were mailed to the following:

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