

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES CITED	ii
I. ISSUE PRESENTED.	1
Has WSI sustained its burden to identify the first appropriate rehabilitation plan?	
II. STATEMENT OF THE CASE	1
III. STATEMENT OF THE FACTS.	3
IV. LAW AND ARGUMENT.	3
V. CONCLUSION.	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES CITED

CASES	PAGE
<u>Bishop v. N.D. Workforce Safety & Insurance,</u> 2012 N.D. 217, para. 9; 823 N.W.2d 257 <i>citing</i> <u>Shotbolt v. WSI,</u> 2010 N.D. 13 para. 19, 777 N.W.2d 853.	9
<u>Genter v. WSI,</u> 2006 N.D. 237 para. 14, 724 N.W.2d 132. . .	9
<u>Lawrence v. N.D. Workers' Comp.,</u> 2000 ND 60, 608 N.W.2d 254.	9
<u>Paul v. North Dakota Workers Compensation Bureau,</u> 2002 N.D. 664 N.W.2d 884, 888	8
<u>Svedberg v. N.D. Workers Compensation Bureau,</u> 1999 N.D. 181, 579 N.W.2d 323.	8, 9
STATUTES	
N.D.C.C. Section 65-05.1-01(2).	8
N.D.C.C. Section 65-05-10(3).	9

I. ISSUE PRESENTED

[1] Has WSI sustained its burden to identify the first appropriate rehabilitation plan?

II. STATEMENT OF THE CASE

[2] James Higginbotham filed a claim for workers compensation benefits on May 17, 2010 (Appendix 18 (hereafter App.)) Mr. Higginbotham suffered injuries to his left shoulder and left knee (Id.). Workforce Safety & Insurance (WSI) accepted Mr. Higginbotham's claim on June 8, 2010 (App. 19).

[3] On May 11, 2012, WSI issued an order denying further disability and rehabilitation benefits, finding that Mr. Higginbotham could return to work statewide as a cashier, telephone sales representative, gaming dealer or greeter (App. 20-22). Mr. Higginbotham demanded an administrative hearing, contending that he could not reasonably commute or relocate in order to pursue the job goals identified by WSI (App. 23). WSI's Order was based on a Vocational Consultant's Report prepared by its employee, Kim Hornberger (App. 25-33).

[4] Both Ms. Hornberger and Mr. Higginbotham testified at the formal hearing, held on May 2, 2013 before Administrative Law Judge Rosellen M. Sand (App. 53-105). At the hearing, WSI's counsel stipulated that Ms. Hornberger was not an expert in the field of vocational rehabilitation. "She's just somebody who prepared this voc rehab plan" (App. 63 [Hearing Transcript p. 42, ll. 21-22]. Of the four job goals identified in the VCR, only the telephone sales representative position would not have to be modified in order to comply with Mr. Higginbotham's physical restrictions (App. 56-57 [HT p. 16, l. 21 - p. 18,

l. 18]). Ms. Hornberger was unsure of the statewide labor market for someone with Mr. Higginbotham's restrictions (App. 62-63 [HT p. 40, l. 11 - p. 41, l. 4]).

[5] Ms. Hornberger agreed that there was no viable local labor market for Mr. Higginbotham who, with his wife Barb, lived in Hazen (App. 65 [HT p. 51, ll. 7-16]). Under the statewide vocational plan proposed, Mr. Higginbotham would either have to commute at least 70 miles twice daily or relocate (App. 65 [HT p. 51, l. 17 - p. 52, l. 77]). Ms. Hornberger did not know if Mr. Higginbotham could physically tolerate a 70-mile daily commute (App. 65 [HT. p. 52, ll. 13-16]); she did not know if Mr. Higginbotham could afford to relocate (App. 66 [HT. p. 53, ll. 8-10]); and she did not consider Mrs. Higginbotham's ability to find a job elsewhere to replace the job she already had in Hazen (App. 66 [HT p. 53, ll. 4-7]).

[6] Actually, Mr. Higginbotham, who periodically had to sell his possessions simply to make ends meet (App. 72 [HT p. 80, ll. 4-24]), could not afford to relocate (App. 71 [HT p. 76, ll. 16-24]). Furthermore, it would actually have cost him more to commute to any one of WSI's entry level jobs than he would have earned at that job (App. 66 [HT p. 56, ll. 4-13]).

[7] Mr. Higginbotham also had some preexisting medical conditions which Ms. Hornberger failed to consider in developing the VCR. Most notably, having served as a Sergeant in the Marine Corps during the Viet Nam War, where he had been wounded in a rocket attack, Mr. Higginbotham had been diagnosed with severe post traumatic stress disorder (PTSD) (App. 71 [HT p. 73, ll. 21-23]); (App. 76 [HT p.

94, ll 11-15]). Ms. Hornberger did not believe that she had to consider Mr. Higginbotham's preexisting medical conditions in developing the VCR (App. 62 [HT p. 42, ll 1-6]).

[8] Mr. Higginbotham's administrative hearing was held on May 2, 2013 (App. 53-103). Following that hearing, ALJ Sand issued Findings of Fact, Conclusions of Law, and Final Order on May 24, 2013 (App. 39-52). ALJ Sand affirmed WSI's Order and denied Mr. Higginbotham further disability benefits. He appealed to this District Court. The District Court, the Honorable Donald Jorgenson presiding, affirmed ALJ Sand's decision on October 31, 2013 (App. 106-107), and Mr. Higginbotham has appealed to this Court (App. 112).

III. STATEMENT OF THE FACTS

[9] James Higginbotham was a 71 year-old pipefitter/welder working for Industrial Contractors, Inc. when, on May 14, 2010, he tripped over a valve and fell, injuring his left shoulder and left knee (App. 18). Mr. Higginbotham was diagnosed with a left shoulder rotator cuff tear and underwent surgery with Dr. Alexander Kindy on September 1, 2010 (App. 24).

[10] A functional capacity evaluation performed on August 23-24, 2011, demonstrated that Mr. Higginbotham could no longer perform the physical demands required of a pipefitter as a result of his work-related torn rotator cuff (App. 34-38).

IV. LAW AND ARGUMENT

[11] WSI has not sustained its burden to identify the first appropriate rehabilitation option.

[12] Mr. Higginbotham has appealed the following Findings of Fact and Conclusions of Law:

FINDING OF FACT

15. Ms. Hornberger examined several job goals to determine if they were a good fit for Mr. Higginbotham. She asked Dr. Kindy whether considering the results of the FCE the following positions were within Mr. Higginbotham's physical capabilities: cashier; telephone sales representative; gaming dealer; greeter; security guard; stock clerk and order filer; combined food preparation and serving worker, including fast food; and food preparation worker. Dr. Kindy approved cashier, telephone sales representative, gaming dealer and greeter as physically appropriate. Dr. Kindy did not approve security guard; stock clerks and order filers; combined food preparation and serving workers, including fast food; or food preparation worker as physically appropriate. In preparing the VCR Ms. Hornberger did not specifically consider Mr. Higginbotham's pre-existing PTSD, right shoulder rotator cuff injury, his DDD, or his DJD. She did consider the coronary artery disease and she noted that prior to his left shoulder injury he was able to work as a welder and pipefitter without difficulty. As the physical requirements for work as a welder and pipefitter are greater than work Mr. Higginbotham was released to do, Ms. Hornberger concluded his preexisting conditions did not affect his ability to do the less physically strenuous positions.

16. Ms. Hornberger also asked Mr. Churchill to review the positions of cashier, telephone sales representative, security guard, assembly worker; and stock clerks and order filers. Mr. Churchill approved cashier telephone sales representative, security guard, assembly worker, stock clerks and order filers with a limitation on waist to overhead lifting and reaching above shoulder height. However he noted the best job would be telephone sales representative because the critical demands matched Mr. Higginbotham's FCE results. He also noted that the positions of cashier, security guard and stock clerk and order filer would have to be modified to accommodate Mr. Higginbotham's FCE results. He noted the assembler position was the least appropriate because it did not match Mr. Higginbotham's FCE results. Ms. Hornberger acknowledged that the jobs identified might have to be modified for Mr. Higginbotham to do them, but also noted that was not true of every position in a category and stated that some would not need modifications. She could not state how many that would be however.

18. Based upon the information she received from Mr. Churchill and Dr. Kindy, Ms. Hornberger concluded that the cashier, telephone sales representative, gaming dealer and greeter were physically appropriate for Mr. Higginbotham.
20. Ms. Hornberger researched the market and determined that the cashier (paying an anticipated wage of \$8.97 per hour); the telephone sales representative (paying an anticipated wage of \$8.68 per hour); the gaming dealer (paying an anticipated wage of \$7.75 per hour) and the greeter (paying an anticipated wage of \$7.75 per hour) all met the income test.
21. Ms. Hornberger reviewed historical openings as compiled by Job Service North Dakota, the 2011 edition of the "Wages for North Dakota Jobs" publication., and America's CareerOneStop to determine the number of jobs likely to be available for the positions identified in the VCR and in some cases talked to prospective employers. There was no information on the historical openings or wages for any of the jobs locally (within 35 miles of Mr. Higginbotham's residence).
25. The greeter position was not listed in the 2011 historical openings and no local or statewide wage was available for 2011. On March 30, 2012, there were no openings locally and only 3 openings statewide for a greeter. No local or statewide wage was available. Ms. Hornberger apparently did not consult the CareerOneStop resource but she did make contacts with Sam's Club and Wal-Mart. There are 11 such stores statewide and they informed her that there were jobs as greeters available periodically and the typical wage was the state minimum wage of \$7.75. Though Ms. Hornberger concluded there was a viable state labor market for greeters, the information provided does not support that conclusion, and I find the preponderance of the evidence shows that there is not a viable job market for greeters in North Dakota.
26. Based upon the DOT Ms. Hornberger concluded the telephone sales representative (paying \$347.20 per week); the gaming dealer (at minimum wage of \$7.75 per hour and paying \$310.00 per week); the greeter (at minimum wage of \$7.75 per hour and paying \$310.00 per week), and cashier (paying \$358.80 per week) were all physically, educationally, vocationally and intellectually appropriate for Mr. Higginbotham. She also noted that each were at a lower DOT skill level than Mr. Higginbotham's job as a pipefitter.

27. The VCR was issued on April 13, 2012 and concluded that option f, return to an occupation in the statewide job pool which is suited to Mr. Higginbotham's education, experience and marketable skills was the appropriate option. The expected income was \$332 per week which exceeds 90% of his pre-injury income of \$227 per week. The jobs identified in the VCR were cashier, telephone sales representative, gaming dealer, and greeter.

CONCLUSIONS OF LAW

2. The VCR in this case identified four different job possibilities that were within Mr. Higginbotham's functional capacity, education, experience and his transferable skills as demonstrated by the FCE and his prior work experience. Though Ms. Hornberger did not expressly consider Mr. Higginbotham's pre-existing conditions, the evidence that Mr. Higginbotham was able to work successfully at a much more strenuous job with those preexisting conditions is convincing evidence that the pre-existing conditions would not keep him from working at a less strenuous position. The evidence of Mr. Higginbotham's pre-existing PTSD is more troublesome. Other than an incident in 1989 however, Mr. Higginbotham worked for many, many years with no medical documentation of any manifestation of that condition. It may be that he would not fit well in a service position that had close contact with the public but that is his opinion and not the opinion of any medical professional. The preponderance of the evidence shows that the job goals identified were appropriate physically and mentally.
3. Because Mr. Higginbotham's wage at the time of his injury was determined on a yearly basis even though he only worked sporadically, his wage was less than the state or federal minimum wage. In that circumstance every job exceeds his wage at the time of his injury. Here the income test is met because the expected wage was \$332.00 per week which exceeded Mr. Higginbotham's wage of \$227 per week. Here the preponderance of the evidence shows the VCR on its face meets the financial component of the statutory requirement for 'substantial gainful employment.' N.D.C.C. [section] 65-05.1-01(3).
4. Totaling all of the jobs identified there was evidence of more than 600 jobs available annually in the four categories for which Mr. Higginbotham's medical condition allowed him to work. He is not limited to only those four occupations but could also pursue other jobs that did not exceed his work restrictions. The VCR on its face provides sufficient job numbers to give Mr. Higginbotham a reasonable opportunity to obtain employment in North Dakota. Considering all of the evidence of record I conclude that while there may not be a reasonable chance of Mr. Higginbotham finding work in the

local job market. option (f) presents a reasonable opportunity for Mr. Higginbotham to find work in North Dakota.

7. Likewise whether Mr. Higginbotham will or will not be able to afford to take a job because of its location is also not decided. Though there is case law that would support an argument that an injured worker can refuse to take a job under circumstances that would cause a reasonably prudent person to refuse to do so, Mr. Higginbotham has not yet been offered a position. See, e.g., Lawrence v. N.D. Workers' Comp., 2000 ND 60, 608 N.W.2d 254. (Injured worker justified in refusing a job if 'a reasonably prudent person would refuse the offer under the same or similar circumstances.' [para.] 27.) It may be that with a good faith work search Mr. Higginbotham will find a job that does not involve the travel he is concerned about. Until that fact situation is presented however, it would only be speculative for me to make a determination that there is no possible circumstance where Mr. Higginbotham would find a suitable job in a suitable location.
8. WSI having demonstrated by the greater weight of the evidence that option (f) return to work in the statewide job pool which is suited to the employee's education, experience, and marketable skills will give Mr. Higginbotham a reasonable opportunity of finding employment, the April 13, vocational rehabilitation plan and WSI's May 11, 2012, order approving a rehabilitation plan and denying further disability benefits must be affirmed.

[13] As noted, only the telephone sales representative position was within Mr. Higginbotham's physical restrictions. All of the other identified positions required modification. In point of fact, Mr. Higginbotham could perform any job, including his usual work as a pipefitter/welder, if it were suitably modified. Consequently, Dr. Kindy's approval of the Functional Capacity Evaluation is irrelevant. Furthermore, Ms. Hornberger's implied conclusion that Mr. Higginbotham's ability to work as a pipefitter necessarily meant that he could work at a lighter job such as a telephone salesperson is irrelevant, as well Ms. Hornberger was not even considered by WSI to be a vocational expert and certainly made no claim of medical expertise.

The physical demands of the job goals identified by Ms. Hornberger and approved by WSI are not lighter than Mr. Higginbotham's usual job, they are different. For instance, how would his severe PTSD affect his ability to deal with upset or angry customers as a telephone sales representative? No one knows because it was never considered. WSI had the burden of proving the appropriateness of the selected job goals, yet the agency never asked for a single medical opinion about anything except his left shoulder. See: Paul v. North Dakota Workers Compensation Bureau, 664 N.W.2d 884, 888 (N.D. 2002). Under this Court's decision in Svedberg v. N.D. Workers Compensation Bureau, 1999 N.D. 181, 579 N.W.2d 323), WSI must consider both Mr. Higginbotham's work injury as well as any preexisting conditions.

[14] In short, the person who prepared the vocational plan, Kim Hornberger, was not an expert. No medical expert was asked to determine the effect of Mr. Higginbotham's preexisting conditions on his ability to competitively perform the jobs identified by Ms. Hornberger. There was no evidence of any labor market, statewide or local, for a person of Mr. Higginbotham's state of health and age. There was no evidence that the vocational plan identified by Ms. Hornberger was practical and affordable for Mr. Higginbotham or any other reasonable person in his position. The purpose of WSI's vocational rehabilitation benefit is to assist not only Jim Higginbotham but also his wife Barb in the adjustments required by his injury. See: N.D.C.C. Section 65-05.1-01(2). Ms. Hornberger admittedly failed to consider Mrs. Higginbotham's ability to replace her wages if forced to relocate. There was no expert evidence that Mr. Higginbotham, at age 71, could learn

the skills necessary to compete at any of the jobs identified. Certainly, the fact that he had learned how to weld when he was a much younger man provides no support.

[15] WSI's Order Denying Further Disability and Rehabilitation Benefits (App. 20-22) had to be legally predicated on Mr. Higginbotham's earnings capacity as "established by expert vocational evidence of a capacity to earn in the statewide job pool where the injured worker lives." See: N.D.C.C. Section 65-05-10(3). This is not simply a matter of credibility. WSI is required by statute to use expert opinion to determine Mr. Higginbotham's earnings capacity which, in turn, is based on labor market and Mr. Higginbotham's skill set, functional capacity, education, experience and marketable skills.

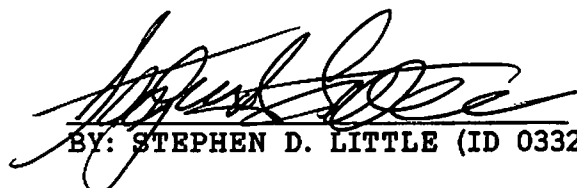
[16] This Court has said repeatedly that, "The legislature intended for workers to be provided with actual rehabilitation, with a realistic opportunity to return to work, and not merely a theoretical rehabilitation on paper." Bishop v. N.D. Workforce Safety & Insurance, 2012 N.D. 217, para. 9; 823 N.W.2d 257 citing Shotbolt v. WSI, 2010 N.D. 13 para. 19, 777 N.W.2d 853; Genter v. WSI, 2006 N.D. 237 para. 14, 724 N.W.2d 132; Svedberg, supra at para. 17. Given Mr. Higginbotham's preexisting conditions, which Ms. Hornberger wrongly believed she did not have to take into account, his age, and long but narrow work history, and the fact that he could not afford to either commute, because it would cost more than he would earn, or relocate, how does the rehabilitation plan adopted by WSI provide him with a realistic opportunity to return to work? No reasonable person would accept the vocational plan adopted by WSI. See: Lawrence v. N.D. Workers Comp. Bureau, 2000 N.D. 60 para. 25; 608 N.W.2d 254.

V. CONCLUSION

[17] Jim Higginbotham is not looking for guaranteed employment, just the realistic possibility of a job he can perform, both physically and mentally, and which makes financial sense, given his circumstances. The vocational plan concocted by Kim Hornberger and adopted by WSI fails that test. Mr. Higginbotham is entitled to reinstatement of his disability benefits until WSI can provide him with the sort of actual rehabilitation this Court says is required.

Respectfully submitted this 27th day of February, 2014.

LITTLE LAW OFFICE



BY: STEPHEN D. LITTLE (ID 03323)

ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501
(701) 222-1761
littlelaw@btinet.net

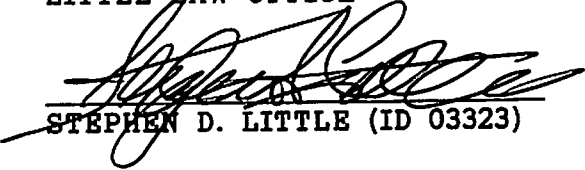
CERTIFICATE OF SERVICE

I, Stephen D. Little, certify that on the 27th day of February, 2014, a true and correct copy of the Appellant's Brief with an attached Certificate of Service and an Appendix were mailed to the following:

MR DOUGLAS W GIGLER
SPECIAL ASSISTANT ATTORNEY GENERAL
PO BOX 2626
FARGO ND 58108-2626 - dgigler@nilleslaw.com

MR LAWRENCE KING
ZUGER KIRMIS & SMITH
PO BOX 1695
BISMARCK ND 58502-1695 - lking@zkslaw.com

LITTLE LAW OFFICE


STEPHEN D. LITTLE (ID 03323)

ATTORNEY FOR THE APPELLANT
2718 GATEWAY AVENUE SUITE 302
BISMARCK ND 58501
(701) 222-1761
littlelaw@btinet.net