

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Higginbotham,)	Supreme Court Case No.: 2014 0019
)	Civil No.: 30-2013-CV-00537
Appellant,)	
)	
vs.)	
)	
North Dakota Workforce Safety and)	
Insurance Fund,)	
)	
Appellee,)	
)	
and)	
)	
Industrial Contractors, Inc.)	
)	
Respondent.)	
_____)	

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

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**APPEAL FROM DISTRICT COURT JUDGMENT ENTERED
DECEMBER 3, 2013, WITH NOTICE OF ENTRY OF JUDGMENT
SERVED DECEMBER 4, 2013, AND ORDER AFFIRMING
ADMINISTRATIVE DECISION DATED OCTOBER 31, 2013
COUNTY OF MORTON
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD J. JORGENSEN**

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STATEMENT OF THE ISSUE

[1] Whether ALJ Sand/WSI could have reasonably concluded, based on the weight of the evidence, that WSI correctly determined the first appropriate rehabilitation option for claimant James Higginbotham to be a return to an occupation within the statewide job pool pursuant to N.D.C.C. § 65-05.1-01(4)(f)?

STATEMENT OF THE CASE

[2] James Higginbotham (“Higginbotham”) filed a First Report of Injury on May 17, 2010, claiming a work injury to his left shoulder and left knee, while working as a pipefitter and welder for Respondent Industrial Contractors, Inc. (App.¹18) On June 8, 2010, WSI issued its Notice of Decision Accepting Claim and Awarding Benefits for a sprain/strain of the rotator cuff and a contusion to the knee. (App.19)

[3] WSI initiated vocational rehabilitation services for Higginbotham on October 26, 2011. (App.24) On April 13, 2012, Vocational Case Manager Kim Hornberger submitted a Vocational Consultant’s Report to WSI. (App.25-33) Ms. Hornberger determined that option (f) under N.D.C.C. § 65-05.1-01(4) was the first appropriate rehabilitation that would provide Higginbotham with a reasonable opportunity to obtain substantial gainful employment. (App.32)

[4] On April 19, 2012, WSI issued its Notice of Intention to Discontinue/Reduce Benefits, advising Higginbotham that his vocational plan had been approved. (C.R.²15) On May 3, 2012, WSI received a letter from Higginbotham’s attorney, Stephen Little, requesting reconsideration of its Notice of Intention to Discontinue/Reduce Benefits. (C.R.17)

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

² “C.R” refers to the Certified Record filed with the District Court on August 6, 2013.

[5] WSI denied Higginbotham's reconsideration request and issued its Order Denying Further Disability and Rehabilitation Benefits on May 11, 2012. (App.20-22) Higginbotham demanded a formal evidentiary hearing (App.23) that was held on May 2, 2013, with ALJ Rosellen Sand presiding. (App.53³) On May 24, 2012, ALJ Sand issued her Findings of Fact, Conclusions of Law and Final Order, which affirmed WSI's order denying further disability and vocational rehabilitation benefits. (App.39-52) ALJ Sand concluded that WSI had proved that option (f)—return to work in the statewide job pool—gave Higginbotham a reasonable opportunity to obtain substantial gainful employment. (App.50-51(Conclusion of Law #8))

[6] Higginbotham appealed ALJ Sand's final order to the Morton County District Court on June 21, 2013. (App.13-14) District Court Judge Donald Jorgensen issued an Order Affirming Administrative Decision on October 31, 2013. (App.106-107) Judgment was entered on December 3, 2013, and Notice of Entry of Judgment was filed on December 4, 2013. (App.109-110) Higginbotham filed his Notice of Appeal to the North Dakota Supreme Court on January 21, 2014. (App.112)

STATEMENT OF FACTS

[7] Higginbotham filed an application for workers' compensation benefits in connection with an injury to his left shoulder and left knee sustained on May 14, 2010, while working as a pipefitter for Industrial Contractors, Inc. (App.18) WSI accepted liability for a sprain/strain injury to Higginbotham's left rotator cuff and a contusion to his left knee. (App.19) At the time of the injury, Higginbotham was 71 years of age and drawing social security retirement benefits. (App.53 at 83-84)

³ "App.53" is the transcript of the administrative hearing held May 2, 2013. Citations to the transcript will be to "App.53 followed by the page within the transcript.

[8] WSI initiated vocational rehabilitation services on October 26, 2011. (App.24) Higginbotham participated in a functional capacity evaluation (FCE) on August 23-24, 2011. (App.34-38) The FCE results correlated best with the upper aspects of the light work category, which required exerting 20 lbs. of force occasionally, with 10 lbs. of force frequently. Higginbotham's waist to overhead lifting capabilities, however, fell within the sedentary category. (App.36) Dr. Alexandre Kindy, Higginbotham's treating physician for his compensable injury, agreed that the FCE was an accurate representation of Higginbotham's current physical abilities. (C.R.136)

[9] On November 4, 2011, vocational case manager Kim Hornberger sent a letter to Steve Churchill, the physical therapist who performed the FCE. The letter asked Mr. Churchill to "complete a job match with Mr. Higginbotham's capabilities shown during the FCE" and presented the following job goals: cashier, telephone sales representative, security guard, assembly worker and stock clerk/inventory clerk. (C.R.145)

[10] Mr. Churchill responded to Ms. Higginbotham's request on November 7, 2011. He reported that the job of telephone sales representative was the best match for Higginbotham's work strengths. He found the assembly worker least appropriate for Higginbotham. Mr. Churchill also found the job goals of cashier, security guard and stock clerk would have to be modified so as to avoid any waist-to-overhead lifting greater than 10 pounds occasionally, and reaching at or above shoulder height greater than the occasional category. (C.R.149)

[11] Ms. Hornberger provided the additional job goal of Food Preparation & Serving Workers to Mr. Churchill in her letter dated December 14, 2011. (C.R.151) Mr.

Churchill found the job goal was appropriate so long as the position could be modified to avoid waist-to-overhead lifting more than 10 pounds occasionally and more than occasional reaching at or above shoulder height. (C.R.153)

[12] Ms. Hornberger also wrote Dr. Alexandre Kindy on December 14, 2011, and presented the job goals of cashier, telephone sales representative, security guard, stock clerk, food preparation & serving worker for his approval as within Higginbotham's physical capabilities. (C.R.62-65) Dr. Kindy approved of cashier and telephone sales representative but rejected security guard, stock clerk, food preparation & serving worker. (Id.) Dr. Kindy subsequently also approved the job goals of gaming dealer and greeter. (C.R.72)

[13] Ms. Hornberger submitted her vocational consultant's report to WSI on April 13, 2012. (App.25-33) In the report, she concluded that option (f), return to an occupation in the statewide job pool which is suited to Higginbotham's education, experience and marketable skills, was the first appropriate rehabilitation option. The job goals identified were cashier, telephone sales representative, gaming dealer and greeter. The expected weekly income was \$332, which exceeded the income test found in N.D.C.C. § 65-05.1-01(3). (App.25-36)

[14] On April 19, 2012, WSI issued its Notice of Intention to Discontinue/Reduce Benefits. The Notice advised Higginbotham that his vocational rehabilitation plan had been approved. The Notice further advised that Higginbotham had to "make a good faith work search for jobs that have been identified or other positions within your physical capabilities[,] and "[j]ob logs should be submitted to WSI outlining your work search efforts." (C.R.15)

[15] Higginbotham requested reconsideration on May 3, 2012, through his attorney, Stephen Little. Mr. Little advised WSI that “Mr. Higginbotham is physically incapable of commuting to and performing the jobs identified. He is unable to relocate. There is no viable labor market for someone with Mr. Higginbotham’s age, education, work history and restrictions. He has no retained earnings capacity and remains entitled to full disability benefits.” (C.R.17)

[16] WSI issued its Order Denying Further Disability and Rehabilitation Benefits on May 11, 2012. (App.20-22) The Order concluded that option (f), which is return to an occupation suited to Higginbotham’s education, experience and marketable skills within the statewide job pool, was the first appropriate rehabilitation option pursuant to N.D.C.C. § 65-05.1-01(4). (App.21) Higginbotham requested a formal hearing on July 20, 2012, again maintaining that “he is physically unable to commute outside his local labor market and cannot reasonably relocate.” (App.23)

[17] The administrative hearing was held on May 2, 2013, with ALJ Sand presiding. (App.53) On May 24, 2013, she issued her Findings of Fact, Conclusions of Law and Final Order affirming WSI’s Order Denying Further Disability and Rehabilitation Benefits. (App.39-52) ALJ Sand concluded that WSI had proved by a greater weight of the evidence that option (f) return to work in the statewide job pool gave Higginbotham a reasonable opportunity of finding substantial gainful employment. (App.49-50(Conclusion of Law #8))

LAW AND ARGUMENT

1. Standard of Review and Burden of Proof

[18] This Court exercises a limited review in administrative appeals. Elshaug v. Workforce Safety & Ins., 2003 ND 177 ¶ 12, 671 N.W.2d at 789. This Court reviews the decision of WSI, not the District Court. Zander v. Workforce Safety and Insurance, 2003 ND 193, ¶ 6, 672 N.W.2d 668. WSI's Final Order must be affirmed unless its findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law or its decision is not in accordance with the law. N.D.C.C. §§ 28-32-46 and 28-32-49. Questions of law, including the interpretation of a statute, are full reviewable on appeal from an administrative decision. Bachmeier v. N.D. Workers Comp. Bureau, 2003 ND 63, ¶ 10, 660 N.W.2d 217.

[19] This Court must exercise restraint in determining whether the administrative decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Elshaug, 2003 ND 177, ¶ 12, 671 N.W.2d at 790; Lucier v. North Dakota Workers Comp. Bureau, 556 N.W.2d 56, 69 (N.D. 1996). In reviewing WSI's findings of fact, this Court determines only whether a reasoning mind reasonably could have determined the factual conclusions reached were proved by the weight of the evidence from the entire record. Bruder v. N.D. Workforce Safety and Ins., 2009 ND 23, ¶ 7, 761 N.W.2d 588.

[20] WSI has the burden to establish that a rehabilitation plan is appropriate. Paul v. Workers Comp. Bureau, 2002 ND 96, ¶ 8, 644 N.W.2d 884. Under N.D.C.C. § 65-05.1-01(3), the goal of vocational rehabilitation is to return a disabled employee to substantial

gainful employment, which means bona fide work for remuneration that is reasonably attainable in light of the individual's injury, functional capacities, education, previous occupation, experience, and transferrable skills, and which meets an income test.

[21] A rehabilitation plan is appropriate if it satisfies the requirements of N.D.C.C. § 65-05.1 and gives the claimant a reasonable opportunity to obtain employment. Lucier v. North Dakota Workers Comp. Bureau, 556 N.W.2d 56,59 (N.D. 1996) A rehabilitation plan, however, need not guarantee a claimant a job, or a predetermined weekly wage. Held v. North Dakota Workers Comp. Bureau, 540 N.W.2d 155, 169-170 (N.D. 1995).

[22] The selection of a vocational rehabilitation plan should not be reversed if there is evidence from which a reasoning mind could have reasonably concluded that the rehabilitation plan would return the injured worker to substantial gainful employment which was reasonably attainable in light of the injury and which would substantially rehabilitate his earning capacity. Thompson v. North Dakota Workers Comp. Bureau, 490 N.W.2d 248, 255 (N.D. 1992).

2. ALJ Sand's Decision that WSI Correctly Determined Option (f) to be the First Appropriate Rehabilitation Option under N.D.C.C. § 65-05.1-01(4) is Supported by the Evidence in the Record as a Whole.

[23] Administrative Law Judge Sand concluded that WSI had demonstrated by the greater weight of the evidence that option (f) was the first appropriate rehabilitation option under § 65-05.1-01(4) that would provide Higginbotham with a reasonable opportunity of obtaining substantial gainful employment. (App.50(Conclusion of Law #8)) The ALJ's conclusion finds ample support in the hearing record.

[24] At the time of the work injury, Higginbotham was working as a pipefitter for Industrial Contractor's, Inc. ("ICI") (App.25) ICI had hired him through his union for a job at the Heskett power plant that was to last from May 12 to May 19, 2010. (App.53 at 103-104) His hourly wage was \$34.61. (App.53 at 68) Higginbotham lived near Hazen, North Dakota, with his wife. (App.53 at 65-66)

[25] Higginbotham went as far as 8th grade in school but did obtain his GED. (App.53 at 67) He served in the United States Marine Corps from 1960 to 1965, reaching the rank of Sergeant (E-5). (Id. at 67, 94) Higginbotham attended technical college for high-pressure steam welding. He also received a degree as a gunsmith. (Id. at 67)

[26] Following surgery to his left shoulder, Higginbotham was not physically able to return to his previous employment as a pipefitter. A Functional Capacities Evaluation (FCE) demonstrated that Higginbotham's physical capabilities fell into the light work category for 8 hours per day, 40 hours per week, but sedentary for waist-to-overhead lifting. (App.34-38) Dr. Alexandre Kindy confirmed the FCE was an accurate reflection of Higginbotham's physical capabilities. (C.R.62)

[27] Ms. Hornberger had Higginbotham complete a career assessment inventory and the TABE (Test of Adult Basic Education) test. Higginbotham had a reading grade equivalency of 7.4; math grade equivalency of 7.5 and language grade equivalency of 5.0. (App.27) He testified at the administrative hearing that he did not test well so his actual abilities would exceed his TABE scores. (App.53 at 96) Higginbotham also possessed basic computer skills, including internet knowledge. (App.28)

[28] Ms. Hornberger researched various job goals and asked Dr. Kindy to consider whether the following positions would be physically appropriate for Higginbotham: cashier, telephone sales representative, gaming dealer, greeter, security guard, stock clerk and order filer, food preparation and serving worker (including fast food) and food preparation worker. Dr. Kindy approved only cashier, telephone sales representative, gaming dealer and greeter as jobs within Higginbotham's physical capabilities. (C.R.62-69,72-74)

[29] Ms. Hornberger next researched the positions of cashier, telephone sales representatives, gaming dealer and greeter to determine whether they met the income test and whether there was a viable local or state-wide labor market for each.

[30] She determined that the cashier position was entry level with training provided by the employer. Although there was not a viable local labor market, there were 110 openings statewide on the day of her research, with an anticipated wage of \$8.97 per hour, or a weekly wage of \$358.80. (App.28)

[31] Telephone sales representative was also an entry level position with training provided by the employer. There was no viable local labor market for the position, but Ms. Hornberger's research showed 31 openings statewide with an anticipated hourly wage of \$8.68 or a weekly wage of \$347.20. (App.29-30)

[32] Like cashier and telephone sales representative, gaming dealer was an entry level position with training provided by the employer. There was no viable local labor market for the position; however, statewide there were 8 openings with an anticipated hourly wage of \$7.75 or a weekly wage of \$310. (App.30-31)

[33] Ms. Hornberger found there was not a viable local job market for the greeter position, but she noted 3 statewide openings as of March 30, 2012, with an anticipated wage of \$7.75 per hour. She contacted four employers statewide and learned that openings were available periodically on a part-time and full-time basis. (App.31-32)

[34] Following her labor market research, Ms. Hornberger concluded there was a feasible statewide job market for the positions of cashier, telephone sales representative, gaming dealer and greeter. In her final order, ALJ Sand found that the evidence supported a statewide labor market for cashier, telephone sales representative and gaming dealer. She disagreed with Ms. Hornberger regarding the greeter position and found “the preponderance of evidence shows that there is not a viable job market for greeters in North Dakota.” (App.47(Finding of Fact #25)) Nonetheless, ALJ Sand concluded that “[t]he VCR on its face provides sufficient job numbers to give Mr. Higginbotham a reasonable opportunity to obtain employment in North Dakota.” (App.49)

[35] Ms. Hornberger also explained in the VCR why she had rejected priority options (a) through (e), which is required by § 65-05.1-02.1(1)(a). She found that Higginbotham’s pre-injury position (option (a)) with ICI as a pipefitter and welder was beyond his physical capabilities. Also, his pre-injury occupation as a pipefitter and welder (option (b)) was beyond his physical capabilities. ICI was not able to provide a modified position (option (c)) for Higginbotham that was within his physical capabilities. Higginbotham had not secured modified or alternative employment (option (d)). Finally, as noted above, Ms. Hornberger was unable to identify a viable local labor market (option (e)) for the job goals identified for Higginbotham. (App.32)

A. That Kim Hornberger was not offered as an “expert” vocational rehabilitation consultant did not invalidate Higginbotham’s vocational plan.

[36] Higginbotham suggests that WSI’s vocational rehabilitation plan is invalid because Ms. Hornberger, was not offered as an “expert witness” at the administrative hearing. He argues that WSI’s Order Denying Further Disability and Rehabilitation Benefits 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.’” (Appellant’s Brief at 9) He goes on to claim that “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.” (Id.)

[37] As authority Higginbotham cites to N.D.C.C. § 65-05-10(3), which is a subsection to § 65-05-10, the statute that provides the formula for calculating an injured worker’s award of partial disability benefit based on a retained earnings capacity. Because Higginbotham has appealed from an order denying him further disability and rehabilitation benefits, and not from an order awarding him partial disability benefits, § 65-05-10(3) does not apply.

[38] WSI’s Order Denying Further Disability and Rehabilitation Benefits is based on the selection of a vocational plan under Chapter 65-05.1 that will return him to “substantial gainful employment with a minimum of retraining, as soon as possible after an injury occurs.” N.D.C.C. § 65-05.1-01(3). Sections 65-05.1-02 and 65-05.1-02.1 provide that WSI has the responsibility to appoint one or more vocational consultants,

whose job it is to “review all records, statements, and other pertinent information and prepare a report to both WSI and the injured worker.”

[39] Section 65-05.1-02.1 mandates that the VCR identify the first appropriate rehabilitation option by following § 65-05.1-01(4), and contain findings of why a higher listed priority, if any, is not appropriate. Depending on which option is selected, the VCR must also identify jobs in the local or statewide job pool and the employee’s anticipated earnings from each job. If priority option (g) is found to be appropriate, the report must describe an appropriate retraining program, the anticipated employment opportunities and the employee’s anticipated earnings. (Id.)

[40] Nowhere in Chapter 65-05.1 is it mandated (or even mentioned) that “expert opinion” be used to develop a vocational consultant’s report containing the first appropriate rehabilitation option for an injured worker. Furthermore, Higginbotham does not claim or point to any evidence in the hearing record that Ms. Hornberger lacked the qualifications of a vocational consultant.

B. WSI was not required to consider Higginbotham’s pre-existing condition in developing his vocational rehabilitation plan because they were not functional limitations at the time of the work injury.

[41] Higginbotham also argues that his vocational plan is invalid because Ms. Hornberger did not take into consideration his claimed diagnosis of post-traumatic stress disorder (PTSD), which, according to Higginbotham, he received following his service in the Vietnam War. Other than his own hearing testimony and statements made to his doctor, there is no medical evidence in the record that Higginbotham has been diagnosed with PTSD. However, assuming for the sake of argument that Higginbotham does have a diagnosis of PTSD, WSI did not have to consider the condition in developing the

vocational plan because there was no evidence in the record it was limiting his functional capabilities at the time of his work injury.

[42] The North Dakota Supreme Court, in two cases, Holtz v. Workers Comp. Bureau, 479 N.W.2d 469 (N.D. 1992) and Svedberg v. N.D. Workers Comp. Bur., 1999 ND 181, 599 N.W.2d 232, established that WSI, in developing a vocational rehabilitation plan under § 65-05.1-01(4) has to consider all of an injured employee's functional limitations, whether work-related or not, present at the time of the work injury. WSI, however, does not have to consider functional limitations from non-work-related accidents that occurred after the claimant is no longer working.

[43] This Court determined that, “in the context of subsequent non-work-related injuries, such disabilities were not ‘medical limitations’ appropriate for consideration when assessing eligibility for disability benefits and developing a vocational rehabilitation plan under N.D.C.C. § 65-05.1-01(3).” Svedberg, supra at ¶ 11 (citing Holtz, supra at 470-471) In Svedberg, the Court noted the legislature in 1995 replaced the term “medical limitations” with “functional capacities” in § 65-05.1-01(3), which is now § 65-05.1-01(4) (substantial gainful employment means work which is reasonably attainable “in light of the individual’s injury **functional capacities**, education, previous occupation, experience, and transferrable skills[.]”) (emphasis added)

[44] In her decision, ALJ Sand stated that “[t]he 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 has close contact with the public but that is his opinion and not the opinion of any medical professional.” (C.R.211(Conclusion of Law #2))

[45] During his direct examination at the administrative hearing, Higginbotham testified as follows:

Q. (Mr. Little) I also mentioned post-traumatic stress disorder. Did you previously have PTSD?

A. (Higginbotham) Yeah.

Q. Is that from Vietnam?

A. Yeah.

Q. Have you even been diagnosed with PTSD?

A. Yeah. In the VA hospital in Florida, Dr. Fontaine (phonetic), on my final sum– discharge, they had me down with (Indiscernible) PTSD severe.

Q. Severe PTSD. Does your PTSD, does it affect your ability to interact with people?

A. No, unless somebody gets too aggressive and shoots their mouth off. But other than that, no, I don't have any problem, you know, with people.

(App.53 at 73-74) Higginbotham further admitted on cross-examination that the PTSD never prevented him from working. (App.53 at 91) Had there been a diagnosis of PTSD, WSI was not obligated to consider it when developing Higginbotham's vocational plan.

[46] In addition to the PTSD diagnosis, Higginbotham also claims that the vocational plan is invalid because Ms. Hornberger did not consider several other pre-existing conditions, including a right shoulder injury, degenerative disc and joint disease, heart disease and diabetes. Higginbotham confirmed, however, through his hearing testimony that none of those pre-existing conditions ever prevented him from working as a pipefitter or a welder. In fact, he admitted that the diabetes developed after the work

injury, and he was not claiming that the condition had any causal relationship to the work injury. (App.53 at 90-92)

C. WSI’s vocational plan identified “substantial gainful employment” reasonably attainable in light of Higginbotham’s injury, functional capabilities, education, previous occupation, experience and transferrable skills.

[47] Higginbotham also claims the vocational plan is not appropriate because “there is no evidence of any labor market, statewide or local, for a person of Mr. Higginbotham’s state of health and age.” Higginbotham does not elaborate on what he means by his “state of health” or how his age might adversely affect his ability to obtain employment in any of the job goals identified by Ms. Hornberger. Section 65-05.1-01(3) defines “substantial gainful employment” as “bona fide work . . . which is reasonably attainable in light of the individual’s injury, functional capabilities, education, previous occupation, experience, and transferrable skills[.]” The term “state of health” does not appear anywhere in the definition of “substantial gainful employment.” However, Higginbotham did undergo an FCE, and despite his age, was determined to be able to work in the upper light work category. Furthermore, the job goals identified by Ms. Hornberger were all approved by Dr. Kindy, who at the time was treating Higginbotham’s compensable shoulder injury. While not expressly required to do so, the vocational plan did take into consideration Higginbotham’s age and “state of health” in determining the first appropriate rehabilitation option.

[48] Higginbotham claims that WSI’s vocational plan was invalid because it was financially unreasonable for him to commute or relocate for any of the job goals identified in the vocational plan. He claims that WSI failed to consider whether he could afford to commute or relocate to obtain employment, and whether his wife’s income

could be replaced if he were forced to relocate. ALJ Sand acknowledged that Higginbotham raised the issue but she did not decide it because he had presented no evidence that he had actually been offered a position. (App.50(Conclusion of Law #7))

[49] Higginbotham argues that “[n]o reasonable person would accept the vocational plan adopted by WSI[,]” and relies on Lawrence v. N.D. Workers Comp. Bureau, 2000 ND 60, 608 N.W.2d 254. However, the issue in Lawrence was whether an injured worker was justified in refusing actual employment under N.D.C.C. § 65-05-08(7), which states “[i]f the employee voluntarily limits income or refuses to accept employment suitable to the employee’s capacity, offered to or procured for the employee, the employee is not entitled to any disability or vocational rehabilitation during the limitation of income or refusal to accept employment unless the organization determines the limitation or refusal is justified.”

[50] Lawrence is both legally and factually distinguishable from this matter. Here, the issue is the appropriateness of a vocational plan under § 65-05.1-01(4), so § 65-05-08(7) would have no application. Furthermore, in Lawrence, the injured worker refused to accept a modified, transitional job offer from his employer that would have required him to relocate to North Dakota from California. Lawrence, 2000 ND 60 at ¶¶ 4-7. The primary issue was whether the injured worker had “good cause” to refuse the job offer, applying an objective, reasonable person standard. Id. at ¶¶ 29-30. Here, as ALJ Sand correctly noted, there was no evidence of a job offer so whether it was reasonable for Higginbotham to accept the vocational rehabilitation plan was speculative.

CONCLUSION

[51] ALJ Sand's decision that WSI's option (f) vocational plan gave Higginbotham a reasonable opportunity for substantial gainful employment is supported by the evidence in the record as a whole. The job goals identified by Ms. Hornberger were within his physical capabilities, met the statutory income test, and provided a viable statewide job market. Accordingly, WSI respectfully requests that this Court **affirm** ALJ Sand's Final Order dated May 24, 2013.

Dated this 28th day of March, 2014.

/s/ Douglas W. Gigler

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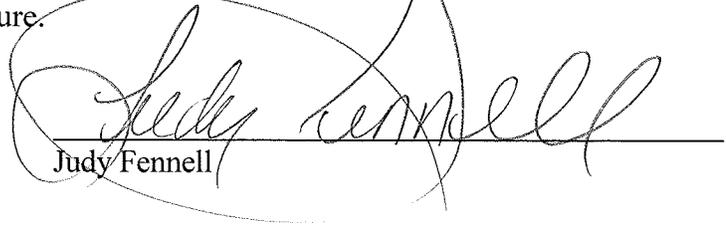
CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 4,319.

Dated this 28th day of March, 2014.

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To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Appellate Procedure.


Judy Fennell

SUBSCRIBED AND SWORN TO before me on March 28, 2014.

SEAL
BRENDA JO BRUNELLE
Notary Public
State of North Dakota
My Commission Expires June 18, 2017


Notary Public