

THE SUPREME COURT
STATE OF NORTH DAKOTA

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|----------------------------|---|-----------------------------|
| Marqus Welch |) | BURLEIGH COUNTY |
| |) | SUPREME COURT NO.: 20160316 |
| |) | |
| |) | CIVIL NO.: 08-2015-CV-02934 |
| |) | |
| Appellant, |) | |
| and Cross-Appellee |) | |
| vs. |) | APPELLANT'S BRIEF |
| |) | NORTH DAKOTA SUPREME COURT |
| |) | |
| NORTH DAKOTA |) | |
| Workforce Safety Insurance |) | |
| Fund, |) | |
| |) | |
| Appellee, |) | |
| and Cross-Appellant |) | |
| |) | |
| and |) | |
| |) | |
| Stern Drywall, Inc., |) | |
| |) | |
| Respondent. |) | |
| |) | |

.....
APPEAL FROM DISTRICT COURT JUDGMENT ENTERED JULY 26, 2016, WITH
NOTICE OF ENTRY OF JUDGMENT SERVED AUGUST 11, 2016, AND ORDER
AFFIRMING ADMINISTRATIVE DECISION DATED AUGUST 10, 2016.

COUNTY OF BURLEIGH
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DAVID E. REICH

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I. Issue Presented

[1] Does the greater weight of the evidence show that Marqus Welch was able to return to work regular duty as a journeyman carpenter as of June 24, 2014?

II. Statement of the Case

[2] Marqus Welch was working for Stern Drywall, Inc. (Stern) when, on April 6, 2013, he slipped and fell while working on a roof (Appendix (App) 45). Stern filed a First Report of Injury on April 8, 2013 (Id). Workforce Safety & Insurance (WSI) issued a Notice of Decision Accepting Claim and Awarding Benefits for Mr. Welch's left knee injury on April 26, 2013 (App 49). WSI then issued a Notice of Decision accepting liability for tears of Mr. Welch's left knee medial meniscus and lateral meniscus on August 13, 2013 (App 50).

[3] On June 27, 2014, WSI issued a Notice of Intention to Discontinue/Reduce Benefits indicating that Mr. Welch's disability benefits would be discontinued effective July 18, 2014, because Dr. Joel Blanchard had released him to return to work (App 51). Mr. Welch requested that someone at WSI visit his job site to see what his work actually entailed; he noted Dr. Blanchard's prognosis of continued left knee pain for up to six years; and he noted his inability to perform his full range

of work and the reality that "no one is going to pay me to get better on the job site" (App 52-54).

[4] On September 9, 2014, WSI issued an Order denying disability benefits after July 18, 2014 (App 57). WSI's Order was premised on a Vocational Case Manager's Report finding that Mr. Welch's first appropriate rehabilitation option was to return to the same occupation, any employer (App 77). On October 29, 2014, Mr. Welch demanded a formal hearing (App 63). A formal administrative hearing was held on July 9, 2015, before John I. Allen, Administrative Law Judge (App 98). ALJ Allen issued Findings of Fact, Conclusions of Law and Order dated October 9, 2015 (App 20). Both Mr. Welch and WSI petitioned for reconsideration (App 36-38). ALJ Allen issued a Reconsideration Order on November 28, 2015 (App 41).

[5] Mr. Welch appealed ALJ Allen's Findings of Fact, Conclusions of Law and Order and Reconsideration Order on December 22, 2015 (App 12). The Honorable David E. Reich, District Judge, issued an Order dated July 26, 2016, affirming ALJ Allen's decision (App 144). The Judgment and Order for Judgment were entered on August 10, 2016 (App 153-154). Mr. Welch has now appealed to this Court.

III. Statement of Facts

[6] Marqus Welch was working as a journeyman carpenter when, on April 6, 2013, he slipped and fell while working on a roof, injuring his left knee (App 45). Mr. Welch was placed on sedentary restrictions on April 8, 2013, which his employer could not or would not accommodate (App 48). Workforce Safety and Insurance accepted Mr. Welch's left knee claim on April 26, 2013 (App 49) and recognized that he had torn his medial and lateral meniscus (App 50).

[7] WSI issued a Notice of Intention to Discontinue/Reduce disability benefits which asserted that Mr. Welch had been released to return to work regular duty on June 24, 2014 (App 51). In fact, Dr. David O' Regan, the consulting orthopedic surgeon to whom Mr. Welch was referred, merely checked a box on a form prepared by WSI (App 55). There was no indication that Dr. O'Regan or any other medical provider was aware of Mr. Welch's actual job demands or that he had any objective medical findings to support his checked response. Dr. O'Regan did not note the crepitus and patellar grind and abnormal range of motion he had found in Mr. Welch's left knee (App 89-90) nor did he note Dr. Joel Blanchard's finding of lower left leg atrophy (App 85-87) or Dr. Krissindra Klop's and Dr. Blanchard's findings that Mr. Welch's activities, such as walking, aggravated his left knee pain (App 85-87; 91.1-91.3).

Finally Dr. O'Regan failed to note that both Drs. Blanchard and Klop recommended that Mr. Welch undergo a functional capacity evaluation (FCE) to determine his capability to work (Id). Mr. Welch responded that he could not return to regular duty as a journeyman carpenter (App 54).

[8] Although Dr. Blanchard first suggested on September 5, 2014, that a Functional Capacity Evaluation (FCE) be performed to determine Mr. Welch's physical abilities (App 85-87), WSI's refusal to authorize the FCE (App 139; Hearing Transcript (HT) p. 168, ll. 10-12) resulted in it not being administered until December 17, 2014 (App 92). The FCE indicated that Mr. Welch could perform medium level work (App 92) (exerting 20 to 50 pounds of force occasionally according to the U.S. Department of Labor's Dictionary of Occupational Titles) and could only squat or kneel occasionally as well as walk for eleven minutes and stand for forty minutes at any one time. He had been carrying a 90-115 pound wall and wearing a 50-pound tool belt on a pitched roof when he was injured, which was typical work for a journeyman carpenter (App 129; HT p. 128, ll. 12-18). The FCE found that Mr. Welch had no inappropriate pain behaviors or symptom magnification and had provided a valid depiction of his true abilities.

[9] Dr. Blanchard noted on September 29, 2014 that Mr. Welch could only return to work as tolerated (App 91.5) without

mentioning that he had already tried returning to work but had been unable to tolerate it (App 89). Mr. Welch confirmed that he could not climb ladders or work on pitched roofs following his work injury (App 130; HT p. 130 l. 24 - p. 132 l. 9). After WSI terminated his disability benefits, Mr. Welch tried returning to work in a modified journeyman carpenter position but was terminated because he was unable to meet the employer's expectations (App 131; HT p. 135 l. 20 - p. 136 l. 8).

[10] WSI then issued its order denying further disability benefits after July 18, 2014, indicating that Mr. Welch could return to work as a journeyman carpenter with no restrictions (App 57). Mr. Welch demanded a formal hearing (App 63). WSI then issued a second order, this time accusing Mr. Welch of committing fraud by working for pay while receiving disability benefits (App 64). The two orders were consolidated and considered at one hearing before Administrative Law Judge (ALJ) John I. Allen.

[11] At the consolidated hearing, ALJ Allen reviewed a number of exhibits. WSI's Order denying further disability benefits was based on a vocational rehabilitation plan pursuant to N.D.C.C. Section 65-05.1-01(4) indicating that WSI had the burden of proving that Mr. Welch could perform the required duties of a journeyman carpenter. See: Holtz v. North Dakota Workers Compensation Bureau, 479 NW 2D 469 (N.D. 1992); Held v.

North Dakota Workers Compensation Bureau, 540 N.W.2d 166 (N.D. 1995). The release to return to work relied on by WSI simply advised Mr. Welch to use a commonsense approach (App 79). A workability report dated June 24, 2014 indicated that Mr. Welch had to use support when standing and climbing stairs and needed to rest after walking 50 feet (App 79). Dr. Blanchard noted on July 14, 2014 that, when Mr. Welch tried carrying 35 pounds, it caused left leg swelling, pain and bruising (App 79). Mr. Welch confirmed that, following his work injury, he could only walk 20-30 feet, could not walk on uneven ground and could not climb ladders or work on pitched roofs (App 130; HT p. 130 l. 12-p. 132 l. 9).

IV. Law and Argument

[12] WSI's Order denying further disability benefits was premised on its approval of a vocational rehabilitation plan which found that Mr. Welch could return to work regular duty as a journeyman carpenter (App 57). The burden of proving the efficacy of the vocational rehabilitation plan and Mr. Welch's ability to work regular duty as a journeyman carpenter lies squarely with WSI. See: Paul v. N.D. Workers Compensation Bureau, 2002 N.D. 96, 644 N.W.2d 884. The only evidence of the physical demands of journeyman carpenters was provided by Marqus Welch: the ability to wear a 50-pound tool belt while lifting objects weighing approximately 100 pounds, climbing ladders and

working on uneven surfaces (App 129; HT p. 128 ll. 12-18). There was no evidence to contradict that offered by Mr. Welch. Furthermore, Mr. Welch, who had begun working as a journeyman carpenter straight out of high school, was clearly in the best position to have an opinion of the physical demands of that job (App 128; HT 124 ll. 2-9). Not only did that job require Mr. Welch to lift heavy objects (at least as defined by the Department of Labor's Dictionary of Occupational Titles), it also required him to climb ladders and work on uneven surfaces. After all, Marqus Welch had been hurt doing just that: wearing 50 pounds of tools and safety equipment while carrying a 100 pound wall on a pitched roof (App 129; HT p. 128 ll. 12-18; App 130; HT p. 129 l. 7).

[13] Following his work injury, Dr. Blanchard released Mr. Welch to return to work using a "common sense" approach. Angela Abrams, the vocational case manager WSI assigned to Mr. Welch, did not know what Dr. Blanchard meant by the terms of the work release, did not know whether the work release addressed working on roofs or other uneven surfaces and did not know if accommodations would be necessary for Mr. Welch to return to work (App 126; HT p. 116 l. 24; App 127; HT p. 119 l. 3). In fact, there is no evidence that Dr. Blanchard was ever made aware of Mr. Welch's work demands before issuing his conditional work release.

[14] Mr. Welch never discussed his actual work duties with Dr. Blanchard. Instead, Dr. Blanchard's work release was based on information provided by WSI (App 139; HT p.166 l. 8-168 l. 1). Not only did Dr. Blanchard never release Mr. Welch to work regular duty at his actual job as a journeyman carpenter, when Mr. Welch tried performing less demanding work, it still resulted in leg pain, swelling and bruising (App 80.1). Finally, despite WSI's initial denial of Dr. Blanchard's request for an FCE (App 91.2), Mr. Welch soon underwent a formal evaluation which placed him at the medium activity level with additional restrictions on walking, standing, squatting and kneeling (App 92). There is no evidence of an intervening injury or even a change in Mr. Welch's left knee medical condition between WSI's Order denying further disability benefits and the December 17, 2014 FCE. Consequently, the greater weight of objective medical evidence clearly shows that Mr. Welch could not return to regular duty work as a journeyman carpenter. The ALJ disregarded the FCE results, finding:

The FCE performed by Harris & Renshaw was not persuasive. FCE's are self-limiting and usually require a medical provider's acceptance. In this case there was no verification by a medical provider and the FCE was not supported by the medical records (App 31).

As noted, the FCE included validity testing and concluded:

Overall, the data indicates consistent effort with no indication of inappropriate pain behaviors. The test is considered a valid depiction of his true abilities (App 92).

Furthermore, there is no factual or legal basis for requiring verification by a medical provider, presumably Dr. Blanchard or Dr. Klop. Although both doctors had recommended the FCE, the administration of it was delayed for several months because WSI had refused to pay for it. Neither doctor was ever asked to verify it, presumably because WSI had already terminated further disability and rehabilitation benefits. It was WSI's burden to prove that a return to unmodified work as a journeyman carpenter was the first appropriate rehabilitation option. See: N.D.C.C. § 65-05-01.1 (4) (6). The fact that WSI never accepted Mr. Welch's invitation to visit his job site and failed to ask either Dr. Blanchard or Dr. Klop if he or she agreed with the results of the FCE should not inure to the organization's benefit.

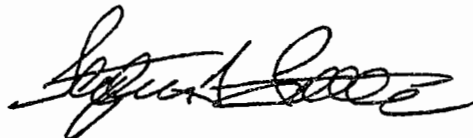
[15] Finally, the ALJ's comment that the FCE was not supported by the medical records was unfounded. Dr. Blanchard noted that Mr. Welch's return to modified work had aggravated his left knee condition (App 81-83). Dr. Klop confirmed that Mr. Welch's left knee pain was worsened by even modified work (App 91.1-91.3). Dr. Blanchard's release for Mr. Welch's return to work was conditional (App 91.4-91.5). There is nothing in the medical evidence which contradicts the FCE results.

IV. Conclusion

[16] Disability is defined as a loss of earnings capacity. See: N.D.C.C. Section 65-01-02(14). Clearly, Marqus Welch, who could not perform his regular duties as a journeyman carpenter, suffered a loss of earnings capacity and consequently remained disabled. WSI has failed in its burden to show that a return to unmodified work as a journeyman carpenter was the first appropriate rehabilitation option, and its Order to the contrary must be reversed.

Respectfully submitted this 2nd day of November, 2016.

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CERTIFICATE OF SERVICE

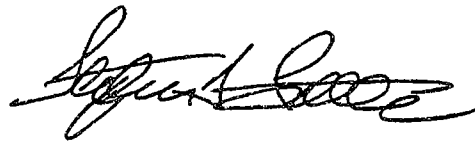
I, Stephen D. Little, hereby certify that on the 2nd day of November, 2016, a true and correct copy of the Appellant's Brief with an attached Certificate of Service and an Appendix were served via US Mail to the following:

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