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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Marqus Welch Appellant and Cross-Appellee, vs. Workforce Safety and Insurance Fund, Appellee and Cross-Appellant and Stern Drywall, Inc. Respondent.	)	Supreme Court No. 20160316 Burleigh Co. No. 2015-CV-02934

APPEAL FROM ORDER, DATED JULY 26, ORDER FOR JUDGMENT, DATED AUGUST 10, 2016, JUDGMENT, DATED AUGUST 10, 2016, AND NOTICE OF ENTRY OF JUDGMENT, DATED AUGUST 11, 2016

THE DISTRICT COURT OF BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DAVID REICH, PRESIDING

BRIEF OF APPELLEE AND CROSS-APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the ALJ correctly determined Welch was not entitled to disability benefits after July 18, 2014;

II. Whether the ALJ misapplied the law in determining that Mr. Welch's false statements were not willful;

III. Whether the ALJ's findings that Mr. Welch's false statements were not willful are supported by the evidence; and

IV. Whether the ALJ erred in reversing WSI's December 16, 2014, Order.

I. STATEMENT OF THE CASE

[¶ 1] This is an appeal from the district court's *Judgment* dated August 10, 2016, affirming the administrative law judge's October 9, 2015, *Findings of Fact, Conclusions of Law and Final Order* ("*ALJ's Decision*"). Appellant's Appendix ("App.") at 154. On April 6, 2013, Marqus Welch ("Welch") suffered a work-related injury to his left knee while working for Stern Drywall, Inc. Id. at 21 (Finding 3), 49. He received medical and disability benefits from WSI. Id. (Finding 4). On September 9, 2014, WSI issued an administrative order ("disability benefits order") finding Welch was not entitled to disability benefits after July 18, 2014, because he had been released to work without restrictions and was able to return to his pre-injury occupation. Id. at 58. On December 16, 2014, WSI issued an administrative order ("fraud order") finding Welch was not entitled to any further benefits after December 16, 2014 and must repay WSI $33,289.15 because he committed fraud. Id. at 64-72. Welch requested an administrative hearing on both orders. Id. at 63, see also Doc ID# 23 (ROA 69 at p. 66).

[¶ 2] A consolidated administrative hearing was held on the two orders on July 9, 2015. App. at 98. The ALJ affirmed the disability benefits order and reversed the fraud order. Id. at 33. Welch and WSI requested reconsideration, which was denied. Id. at 41-44. Welch appealed to the district court, and WSI cross-appealed. Id. at 12; Appellee's Appendix ("Appellee's App.") at 1. The district court affirmed the *ALJ's Decision.* App. at 152. *Judgment* was entered on August 10, 2016, with *Notice of Entry of Judgment* following on August 11, 2016. Id. at 154-55. Welch appealed on September 23, 2016. Id. at 156. WSI cross-appealed on September 29, 2016. Appellee App. at 26-27. WSI requests the *Judgment*

be affirmed with respect to the disability benefits order and reversed with respect to the fraud order.

II. STATEMENT OF THE FACTS

A. Relevant Facts Related to Fraud Order.

[¶ 3] Welch injured his left knee on April 6, 2013, while working for Stern Drywall, Inc. as a carpenter. App. at 21(Finding 3). His claim was accepted and WSI paid him disability and medical benefits. Id. (Finding 4). Welch received disability benefits continuously from April 6, 2013, through July 18, 2014. Doc ID# 23 (ROA 36 at 1-14); App. at 117 (80:12-25). As required by N.D.C.C. § 65-05-08(3), Welch had to report work activities and income to WSI. This is done on a form commonly called a FL214. App. at 118 (81:15-20). With one exception, the FL214 forms submitted by Welch from June 20, 2013, through August 7, 2014, indicated he had not done any type of work, whether for pay or not, and that he had not received money from any source other than WSI. Appellee's App. at 2-3; 5-15. On the form dated 4/3/14, Welch answered "yes", but he spoke with his claims adjuster, Paula Heupel-Moe, on the date it was sent (4/3/14), and indicated he made an error by checking "yes". Id. at 11; App. at 118-19 (84:14-85:14). In that conversation, he also indicated he had not worked since his injury. Id.

[¶ 4] Each FL214 form specifically indicated the questions must be answered "before any further wage-loss benefits may be paid." See, e.g., Appellee's App. at 2-3; 5-15. The form provides numerous warnings indicating that Welch was required to report any type of work activity, any money received, and that failure to do so accurately could result in penalties, including loss of all benefits and repayment of benefits. Id. By signing the forms, Welch declared his statements about no work activity (whether for pay or not)

and no receipt of money were "complete, true, and accurate." Id.

[¶ 5] Despite these warnings, Welch submitted numerous FL214 forms indicating no money was received and no work activity was performed, including in the late summer and fall of 2013. See, e.g., Appellee's App. at 5-6. Yet, during this time, he set up his company, MDW Construction, in North Dakota and began performing work under that name. App. at 23-24 (Findings 18-30). The evidence indicated Welch opened a bank account for MDW Construction on July 30, 2013, and registered that trade name with the North Dakota Secretary of State. Id. (Findings 20-21). Welch was the only authorized signatory on the bank account. Id. (Finding 20). On July 28, Welch signed a document, which was a bid for services from MDW Construction to Quest Development to perform subcontractor work. Id. (Finding 18); see also Appellee's App. at 19. As a result of its fraud investigation, WSI discovered MDW Construction/Welch had received and deposited checks totaling $10,000 for work performed in August 2013 for Quest Development and Oahu Restaurant. App. at 25 (Finding 34). All of the deposited checks into the account were endorsed by Welch. Id.; see also Appellee's App. at 16-18.

[¶ 6] Ray Kottsick was the supervisor for Quest Development for a strip mall project near Walmart in north Bismarck in the summer of 2013. App. at 108 (41:23-42:9). He testified Welch stopped by Quest's job trailer several times looking for work on the project. Id. (42:10-23). Quest hired MDW Construction/Welch to perform work installing and painting doors and trim. Id. (43:3-12). Kottsick observed the work performed by MDW Construction. Id. (43:19-44:5). He described there were two people working on the project, Welch and his helper, Dante. Id. (44:7-15). He observed Welch on-site, performing the work and Dante helping with the heavier labor. Id. When the work was

completed, a check dated August 31, 2013, for $7,500 was paid to "MDW Construction, Marqus Welch, 423 West Century Ave. Apt. 203." Id. at 109 (48:13-24); see also Appellee's App. at 17. The check was endorsed by Welch and deposited on September 10, 2013 (eight days before Welch submitted an FL214 form indicating he had not received any money or performed any work). Appellee's App. at 5 and 17. The invoice for this work is on letterhead of MDW Construction with Marqus Welch's name immediately below, and is signed by Welch. Appellee's App. at 19.

[¶ 7] Tony Anderson of Oahu Restaurant also testified. He described that Oahu opened in October 2013. App. at 106 (36:21-25). In the months leading up to the opening, a build-out project was being performed on the restaurant. Id. at 107 (37:12-16). He described that Oahu hired a construction supervisor, who hired the workers, but that Oahu issued the checks. Id. (37:17-39:15). He indicated that three checks were written to MDW Construction by Oahu for: $1,250 on 9/3/13; $650 on 9/10/13; and $700 on 9/9/13. Id. (38:22-39:2). Anderson testified these checks would have been issued shortly following completion of the work performed. Id. (39:11-15). These checks were all endorsed by Marqus Welch and deposited on September 4 and September 10, 2013, as reflected by the information in the bank statements. Appellee's App. at 16-18.

[¶ 8] Despite receiving and depositing checks totaling over $10,000 within approximately two weeks of submitting an FL214 on September 18, 2013, and despite the specific warnings and disclosures on the form, Welch did not disclose any of this information to WSI. Appellee's App. at 5; see also App. at 25(Finding 36); 27 (Findings 54, 56, 61, and 64); 28 (Findings 65 and 68); and 29 (Finding 72). Further, Welch continued to deny in phone conversations with his adjuster and in disclosures to his

vocational case manager that he had done any work or received any money since he was injured. App. at 119 (85:85:8-14); & 125 (111:18-23).

[¶ 9] Welch's testimony at the hearing was that he did not report the money because it was for his brother, Dante Monk. Id. at 132 (138:12-139:8). Welch testified Monk would go to Walmart and send his "old lady" money whenever she needed it using a debit card. Id. at 136 (156:3-12). He also testified he paid his brother about $3,000 at the end of September 2013. Id. Yet, there is no indication in the bank records of payment to Monk, and Welch was the only signatory on the account. See generally Doc ID# 22 at ROA 71. Further, Monk lived with Welch during the time he was in North Dakota. App. at 136 (156:15-19).

[¶ 10] On December 16, 2014, WSI issued its fraud order. App. at 64-72. WSI found Welch willfully and intentionally made false statements and failed to fully report his income and work activities. Id. at 71. As a result, WSI continued paying Welch temporary total disability benefits. Id. WSI ordered all benefits were terminated after December 16, 2014, and that Welch must repay $33,289.15.

B. Relevant Facts Related to Disability Benefits Issue.

[¶ 11] Welch had surgery on his knee on January 29, 2014. Doc ID# 26 at ROA 90 (p. 464). Following his surgery, he continued to treat with his orthopedic surgeon's office and remained on restrictions. On June 9, 2014, PA Ciavarella indicated Welch was not yet ready to return to his normal job duties and imposed a 25-pound lifting restriction at waist level. Id. at p. 537. Ciavarella indicated she would have Welch follow up with Occupational Health in about a month to discuss further work restrictions. Id.

[¶ 12] Welch then attended physical therapy in Arkansas until he was seen by Dr. Blanchard at Sanford Health Occupational Medicine on June 24, 2014. Appellee's App. At 20-22. Dr. Blanchard's note includes a detailed history and physical examination. Id. at 20-21. Dr. Blanchard indicated, "MMI reached. May need fitness for duty testing prior to return to work at your company's discretion. Additional time was spent reviewing the workability testing. Workability testing has been reviewed in full and work status was guided by these findings. I discussed job duties with the patient." Id. at 22. The recommended work status was "Regular Duty." Id. at 21. Dr. Blanchard's note does not indicate any physical restrictions.

[¶ 13] Welch saw Dr. Blanchard again on July 14, 2014. Appellee's App. At 23-25. Dr. Blanchard's note indicates "I discussed with Marqus that his examination is unchanged. He does have some disuse atrophy and he will have pain as he starts to use his leg. He is encouraged to go to work. I feel he is safe to return to work based on my exam today and the workability he had last visit." Id. At 24. His recommended work status continued to be "Regular Duty." Id. Welch then saw Dr. Blanchard again on August 29 and September 5, 2014, requesting a second opinion. App. at 81, 85. He was referred to Dr. O'Regan, with a continued recommended status of "Regular Duty." Id.

[¶ 14] On September 15, 2014, Welch saw Dr. O'Regan. Id. at p. 89. Dr. O'Regan did not impose any physical restrictions, and indicated "that [Welch's] best chance to improve his knee and get his function back is to try to work and uses [sic] knee [a]s much as possible to rehabilitate it." Id. at 90. In his follow-up with Dr. Blanchard on September 29, the medical note indicates, "Marqus was denied an FCA by WSI. He has seen Dr. O'Regan for a second orthopedic opinion. There is no further surgery required and Dr.

O'Regan has suggested that he can return to work. Marqus is not pleased with this." Id. at 91.4. His work status remained at "Regular Duty" and he was discharged from care to return to work as tolerated. Id. at 91.5.

[¶ 15] Welch had also been proceeding through vocational rehabilitation. On August 28, 2014, a *Vocational Case Manager's Report* ("VCR") was issued by WSI. App. at 77-80. The VCR concluded the first appropriate rehabilitation was return to the same occupation, any employer, based on his release to return to regular duty. Id. On September 9, 2014, WSI issued the disability benefits order. Id. at 57-59. WSI ordered Welch was not entitled to disability or vocational rehabilitation benefits beyond July 18, 2014. Id. at 59. The order found the first vocational rehabilitation option is return to the same occupation, any employer, and that Welch had been released to work without restrictions effective June 24, 2014. Id. at 58-59.

III. APPLICABLE LAW AND ARGUMENT

A. Standard of Review

[¶ 16] The standard of review is set forth in N.D.C.C. § 28-32-46, and provides a court shall affirm an ALJ's Order 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 law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

The court does not substitute its judgment for that of the agency and "it is the province of the ALJ to resolve conflicts of evidence and weigh the credibility of witnesses." Landrum v. WSI, 2011 ND 108, ¶ 11, 798 N.W.2d 669. The appellate court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." Id. Issues of law are fully reviewable. Bachmeier v. N.D. Workers Comp. Bur., 2003 ND 63, ¶ 10, 660 N.W.2d 217.

B. The ALJ's Decision on the Fraud Order Should be Reversed.

[¶ 17] WSI had the burden of proof by a preponderance of the evidence on the fraud issues. See Hausauer v. N.D. Workers Comp. Bur., 1997 ND 243, ¶ 13, 572 N.W.2d 426. The most relevant statutes related to the fraud order are N.D.C.C. §§ 65-05-33 and 65-05-08(3). While this Court has evaluated fraud situations several times, the cases most similar to the present case appear to be Snyder v. N.D. Workers Comp. Bur., 2001 ND 38, 622 N.W.2d 712, and Fettig v. WSI, 2007 ND 23, 728 N.W.2d 301. As most relevant, those cases indicate the following applicable law:

> Section 65-05-33, N.D.C.C., authorizes the Bureau to use administrative proceedings to recoup benefits paid to a claimant based upon a false claim or statements and to require a claimant to forfeit future benefits for that injury. To trigger the statutory consequences of N.D.C.C. § 65-05-33, for a false claim or statement, the Bureau must prove a claimant willfully made a material false claim or statement in connection with a claim or application under Title 65, N.D.C.C. To be willful, conduct must be engaged in intentionally, not inadvertently. If an injured employee has willfully made a false statement in connection with a claim, we additionally require the Bureau to prove the false statement is material. If the Bureau seeks reimbursement for benefits paid, the level of materiality required is proof by the Bureau that the false claim or false statement caused the benefits to be paid in error. A false claim or false statement is sufficiently material for forfeiture of future benefits if it is a statement which could have misled the Bureau or medical experts in a determination of the claim.

Snyder at ¶ 16 (internal quotations and citations omitted); see also Fettig, at ¶¶ 12-13.

> [¶ 18] This Court has recognized:
>
> A failure to report income is, by the very nature of the violation, material to the Bureau's ability to determine claimant's entitlement to benefits and to calculate the amount of benefits. By failing to report income a claimant impedes the Bureau's process of determining eligibility.
>
> . . . .
>
> When the claimant's wrongful concealment of income impedes the Bureau's proof of materiality of the nondisclosure for reimbursement purposes, fairness dictates the claimant, not the Bureau, suffer the consequences.

Snyder at ¶ 17 (quoting Unser v. N.D. Workers Comp. Bur., 1999 ND 129, ¶¶ 18, 22, 598 N.W.2d 89). "A state of mind can rarely be proven directly and must usually be inferred from conduct and circumstantial evidence." Fettig at ¶ 13.

[¶ 19] The ALJ determined Welch made a false statement to WSI and failed to report work activities to WSI in connection with his claim. App. at 32. However, he found the statements were not willful. Id. In reaching this conclusion, the ALJ misapplied the law and made erroneous findings. The ALJ's analysis regarding this issue was as follows:

> Item two required that WSI prove that the false statement was willfully made by Welch. "Willfully" has been defined as conduct engaged in intentionally and not inadvertently. Fettig at ¶ 13. WSI must prove Welch's state of mind was purposeful in making the false statement. Id. A state of mind can rarely be proven directly and must usually be inferred from conduct and circumstantial evidence. Id. After a review of the totality of the evidence in this case, WSI failed to meet its burden of proof on item 2. This involved a short period of time from approximately June, 2013 to October, 2013, when Monk was in North Dakota. There have been no such incidents since that time period. It was reasonable for Welch to assume that assisting his brother, while it may be considered "working", given the circumstances of this case was simply helping a family member. It was also reasonable for Welch to assume that if any money received through his company that went directly to Monk, was not his income to report to WSI if he did not receive any of it. Welch may have indirectly receive[d] the benefits of some of that income because Monk may have assisted in paying for living expenses. It was reasonable to assume that this would not be considered income to Welch. If Welch would have obtained a different roommate to share the living expenses, that would not be considered reportable. Welch could have also considered this sharing of expenses to be a gift from Monk. The totality of the circumstances do not show that Welch purposively tried to defraud WSI to maintain his benefits. There were no tax records of any sort in the record to show Welch claimed this as income. There was no evidence to contradict that the money from Quest and Oahu that went through MDW Construction account all went to Monk. There was evidence that supported both positions in this case; however, the burden is on WSI and based upon all the evidence WSI failed to meet that burden.

Id. at 32-33.

[¶ 20] The ALJ misapplied the law by focusing on whether there were other reasons Welch may not have thought that he had to report this income and work activity versus whether he intentionally did not report it. Welch was aware of the requirement to report his income and work activities to WSI in order to receive disability payments. Yet, beginning July 2013, he solicited, and at the very least assisted with projects being operated under MDW Construction/Marqus Welch. Payments were made to his company, and the checks were signed by him. The checks were deposited in an account on which he was the sole signatory. He was the person with access to and control of the money. No evidence

was presented of any payment to his brother, Dante Monk. The type of work being performed was the type Welch, a journeyman carpenter, had spent his life performing. Welch received payments totaling $10,000 that were deposited in the account on September 4 and 10, 2013. On September 18, 2013, he reported to WSI that he had not engaged in "any type of work, whether for pay or not" during the last 12 months. Appellee's App. at 5. He also reported that he had not "received money from any source other than WSI" in the last 12 months. Id.

[¶ 21] A review of Welch's bank records where the payments were deposited does not show evidence of any payment to Monk. Doc ID# 23 at ROA 71. Yet, the ALJ concluded Welch's failure to report this work and income was not made intentionally because Welch intended the money to go to Monk. However, this analysis does not show the failure to report was inadvertent and misapplied the law. Under the ALJ's reasoning, any post-hac justification for not reporting what the law requires would allow Welch to avoid the consequences of his fraudulent conduct. Thus, under the ALJ's reasoning, the reporting requirements of N.D.C.C. § 65-05-08(3) are obliterated.

[¶ 22] The applicable law required Welch to report the activities and he knew of these requirements. Yet, he did not report the work and money received to WSI at any time, and continued to deny the receipt of money and performance of work through the hearing. While state of mind can rarely be proven by direct evidence, the justifications relied upon by the ALJ were not supported by the evidence or the applicable law. The bank records disclosed no payments to Monk, Monk was living with Welch at the time the money was deposited, Welch procured the work through his construction company, the payments were made to Welch's construction company, Welch endorsed the checks, and

Welch was the only signatory on the account where the checks were deposited. The ALJ's decision that Welch did not intentionally fail to disclose this information to WSI is unsupportable under the law and the evidence. As a result, the ALJ's decision on the fraud order should be reversed and remanded for the ALJ to address the repayment ordered by WSI.[1]

C. The ALJ's Decision on the Disability Benefits Order Should be Affirmed.

[¶ 23] Payment of disability benefits is governed by N.D.C.C. § 65-05-08. As relevant, it "is the burden of the employee to show that the inability to obtain employment or to earn as much as the employee earned at the time of the injury is due to physical limitation related to the injury, and that any wage loss claimed is the result of the compensable injury." N.D.C.C. § 65-05-08(6) (emphasis added). An injured worker's doctor must certify the period of disability and the extent of the injured worker's abilities and restrictions. N.D.C.C. § 65-05-08.1(1). A doctor must include the medical basis for certifying disability, whether the employee is totally disabled or partially disabled, and the expected length of and reason for disability. N.D.C.C. § 65-05-8.1(2). The injured employee must ensure that the required reports for any period of disability are filed. N.D.C.C. § 65-05-08.3(4).

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[1] The issues at the administrative hearing also included whether Welch must repay WSI benefits paid as a result of his fraud. As a result of the ALJ's decision, he did not reach the issue of repayment. Therefore, the case must be remanded for the ALJ to address the repayment issue.

[¶ 24] At the hearing, the parties had different views of WSI's underlying order. WSI's underlying administrative order concluded Welch had not met his burden of establishing ongoing disability pursuant to N.D.C.C. §§ 65-05-08(6) and 65-05-08.1. App. at 57-59. In addition, the order concluded the first appropriate rehabilitation option is return to the same occupation, any employer pursuant to N.D.C.C. ch. 65-05.1. Id. WSI ordered he was not entitled to additional vocational rehabilitation benefits, or disability benefits beyond July 18, 2014, unless he meets the requirements of N.D.C.C. § 65-05-08(1). Id. Welch's position was that this underlying order was solely a vocational rehabilitation order. However, that is not the case. The result of the underlying order is correct if either of WSI's reasons are independently valid because, under either reason, disability benefits are discontinued and subject to N.D.C.C. § 65-05-08(1). In his brief, Welch continues to ignore that he was not placed on any physical restrictions after June 24, 2014, and therefore, disability benefits were not payable pursuant to N.D.C.C. § 65-05-08(6).

[¶ 25] Regardless, the ALJ addressed both arguments raised by the parties in his decision. He determined:

> The ALJ considered both positions in this case and affirms WSI's position in both scenarios. WSI must select the first rehabilitation option pursuant to N.D.C.C. § 65-05.1-01, Subd. 4. WSI concluded that option (b) was the first appropriate option. In assessing the validity of a vocational rehabilitation plan, the question is whether the plan, at the time, gave the claimant a reasonable opportunity to obtain substantial gainful employment in the state. Svedberg v. North Dakota Workers Compensation Bureau, 1999 ND 181, 599 N.W.2d 323. Welch was release to work to perform regular duty by three different medical providers. Blanchard was aware of Welch's employment duties. Blanchard's opinion was supported by the record. Being able to return to work does not mean that Welch had returned to his previous physical condition that he was prior to the work injury. Welch may never reach that point. 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. WSI has correctly identified the first appropriate rehabilitation option to return Welch to substantial gainful employment. He is able to return to work as a journeyman carpenter. A rehabilitation plan cannot guarantee an injured worker a job upon completion. There are outside factors that ultimately affect hiring decisions. The governing statute does not require certainty. See, Held v. North Dakota Workers Comp., 540 N.W.2d 166 (ND 1995). Just as a rehabilitation plan cannot guarantee a job, neither can the rehabilitation plan guarantee a predetermined weekly wage. The rehabilitation statute requires only that the job market present opportunity for Welch to obtain the substantial gainful employment. Id.
>
> Pursuant to N.D.C.C., Subd. 6, Welch must prove the inability to obtain employment or to earn as much as he earned at the time of injury is due to physical limitations related to the injury, and that any wage loss claimed is the result of the compensable injury. No medical doctor has certified Welch's disability status. N.D.C.C. § 65-05-08.1, Subd. 1. Blanchard's opinion was credible and supported by the record. As indicated earlier, Welch was able to return to regular duty. The fact that he was not earning as much as at the time of the injury cannot be due to his physical limitation if he was able to return to work regular duty. The[re] must be other factors involved. Therefore, Welch was not entitled to additional vocational rehabilitation benefits and disability benefits after July 18, 2014.

App. at 31-32.

[¶ 26] The ALJ's decision on this issue correctly applied the law and is based on evidence described above. Welch's argument on appeal asks the Court to re-weigh the evidence, contrary to the standard of review. The medical reports releasing Welch are outlined above. Welch argues there is no indication Dr. Blanchard considered his job duties when releasing him. But, Welch saw Dr. Blanchard several times, including on June 24, 2014. Appellee's App. at 20-22. Dr. Blanchard's note includes a detailed history and physical examination. Id. at 20-21. Dr. Blanchard indicated, "MMI reached. May need fitness for duty testing prior to return to work at your company's discretion. Additional time was spent reviewing the workability testing. Workability testing has been reviewed in full and work status was guided by these findings. I discussed job duties with the

patient." Id. at 22 (emphasis added). The recommended work status was "Regular Duty." Id. at 21. Dr. Blanchard's note does not indicate any physical restrictions upon which Welch could support a claim for disability benefits. As indicated above, following this visit, Welch continued to see Dr. Blanchard and obtained a second opinion from Dr. O'Regan. He continued to be released to regular duty, and no physical limitations were identified upon which to support continued disability benefits. As a result, Welch's argument based on an FCE that was not approved or reviewed by any medical doctor and his comments about his work duties prior to the work injury are simply a request for the Court to reweigh the evidence.

[¶ 27] Further, and independently of the lack of physical restrictions, one of the vocational rehabilitation options is return to the same occupation, any employer. N.D.C.C. § 65-05.1-01(4)(b). This was the option selected in Mr. Welch's VCR. App. at 77-78. He was a journeyman carpenter and was released to regular duty. Under such a scenario, option (b) is the first appropriate rehabilitation option. As accurately explained by the ALJ, WSI's role is not that of a private employment agent, and neither a rehabilitation plan nor a vocational consultant can guarantee a claimant a particular job or a particular wage. See Lucier v. N.D. Workers Comp. Bur., 556 N.W.2d 56, 60 (N.D. 1996). Because Welch was released to regular duty as a journeyman carpenter, the plan provided him a reasonable opportunity to obtain substantial gainful employment. Accordingly, the ALJ's decision on the disability order followed the law and was based on a reasoned view of the evidence.

IV. CONCLUSION

[¶ 28] For the foregoing reasons, WSI requests the *Judgment* be reversed insofar as it upheld the ALJ's Decision on WSI's December 16, 2014, fraud order. WSI requests

the *Judgment* be affirmed insofar as it upheld the ALJ's decision on WSI's September 9, 2014, disability benefits order.

Dated this 13th day of December, 2016.

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CERTIFICATE OF SERVICE

[¶ 29] I hereby certify that a true and correct copy of the foregoing **APPELLEE'S BRIEF** was on the 13th day of December, 2016, and emailed to the following:

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By */s/ Mitchell D. Armstrong*
MITCHELL D. ARMSTRONG