

THE SUPREME COURT

STATE OF NORTH DAKOTA

NORTH DAKOTA WORKFORCE)	COUNTY OF MERCER
SAFETY AND INSURANCE FUND,)	
)	SUPREME COURT NO: 20200067
Appellant,)	CIVIL NO: 29-2019-CV-00197
vs.)	
)	APPELLEE’S BRIEF TO
GREGORY BEAM,)	THE NORTH DAKOTA
)	SUPREME COURT
Appellee,)	
)	
And)	
)	
GAGNON, INC.,)	
)	
Respondent.)	

ORAL ARGUMENTS REQUESTED

**APPEAL FROM DISTRICT COURT JUDGMENT DATED JANUARY 13, 2020,
AND JANUARY 10, 2020, ORDER REVERSING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND FINAL ORDER OF ADMINISTRATIVE LAW
JUDGE LYNN C. JORDHEIM DATED JULY 15, 2019**

**MERCER COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BRUCE ROMANICK**

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I. STATEMENT OF ISSUE

1] Did WSI correctly determine that the first appropriate rehabilitation option for Gregory Beam was to return to the same occupation, any employer, under N.D.C.C. Section 65-05.1-01(4)?

II. STATEMENT OF THE CASE

2] Gregory Beam filed a workers compensation claim on May 20, 2016, alleging that he had suffered an injury to his “whole body” earlier that day when the steel floor gave way beneath his feet (SUPP APP 4). Mr. Beam was working at the Coyote Power Station near Beulah for Gagnon, Inc. WSI accepted Mr. Beam’s claim on June 13, 2016, determining that he had suffered a strain of his neck muscles, fascia and tendons; an abrasion of his low back and pelvis, and crushing injuries to his right elbow and knee (SUPP APP 5).

3] On April 17, 2018, as part of WSI’s vocational rehabilitation process, Mr. Beam underwent a Functional Capacity Evaluation with a physical therapist. The purpose of the evaluation was to determine Mr. Beam’s ability to return to work as a sheetmetal worker. Mr. Beam was determined capable of performing light level work, but not capable of returning to sheetmetal work, based on a job description submitted by Gagnon, Inc. (SUPP APP 6-12). Deficits included decreased tolerances to climbing, kneeling, crawling and squatting (SUPP APP 13).

4] On June 18, 2018, Mr. Beam underwent a second Functional Capacity Evaluation with a second physical therapist (APP 64-71). No job demands were provided, and the physical therapist could not compare Mr. Beam's functional ability with specific job demands (APP 64). The second FCE found Mr. Beam capable of performing medium level work but noted that his ability to climb ladders or kneel was limited to occasional, his ability to climb stairs was untested, and he was unable to crouch or crawl (APP 65).

5] On October 12, 2018, WSI issued a Notice of Vocational Case Management Report – Option B which informed Mr. Beam that, although he was not able to return to work as a union sheetmetal worker for his employer-of-injury, Gagnon, Inc., he nevertheless was able to work as a sheetmetal worker for any other employer, and he would no longer be entitled to disability benefits after November 5, 2018 (APP 14). Mr. Beam requested that WSI reconsider its decision (APP 15) and WSI issued an Order Denying Further Disability Benefits after November 5, 2018 (APP 16-20).

6] WSI's Order was heard on June 20, 2019 by Administrative Law Judge Lynn Jordheim. ALJ Jordheim issued Findings of Fact, Conclusions of Law and Order affirming WSI's denial of further disability benefits (APP 22-30). Mr. Beam petitioned for reconsideration and, when that was denied (APP 35-36), he appealed to the District Court. The Honorable Bruce Romanick, District Judge, reversed ALJ Jordheim's decision, finding that it was not supported by the greater weight of the evidence of record (App 39-49).

III. STATEMENT OF FACTS

7] Greg Beam was a union sheetmetal worker with a high school diploma and 32 years of experience as an industrial sheetmetal worker when, on May 20, 2016, the steel floor he was standing on collapsed, causing him to fall and injuring his right knee, pelvis, left buttocks, low back, right elbow and neck (SUPP APP 4, SUPP APP 5). He described his work that day as follows:

We were installing approximately four by eight sheets of corrugated on approximately a five-foot deck, which would be the top of the boiler. And we were – we were putting metal back on, insulation back on to the boiler. . . So the – the boiler itself was like five stories high they considered it, and/or five decks high, and we were on – during this accident I believe we were on the five and a half floor of which would be the side of the boiler (SUPP APP 14 -H.T., pg.28).

8] Mr. Beam consulted with Dr. Lawrence J. Kelly, an orthopedic surgeon, for his right knee injury (Id.). Dr. Kelly noted that Orthovisc injections “have taken the edge off his most severe pain” but that Mr. Beam continued to have problems (SUPP APP 15). Dr. Kelly went on to note: “Positive mechanical symptoms and patient is unable to kneel, or squat as required for his job and had pain with flexion of the knee for stairs or ladders.” (Id.). Pertinent findings included clicking, locking, pain with movement and stiffness (Id.). On November 27, 2017, Dr. Kelly explained to WSI’s Nurse Case Manager that Mr. Beam would never be able to return to full duty as a sheetmetal worker (SUPP APP 16). On January 29, 2018, Dr. Kelly noted, “catching, aching pain, giving way, grinding, popping, sharp pain, chronic and improving Slightly with regards to range of motion as he continues to work with exercise” (SUPP APP 17). Dr. Kelly noted that such episodes of pain occurred daily whenever Mr. Beam sat too long or engaged in any activity using his right knee, including simply arising from a chair (Id.).

9] Dr. Kelly noted on June 28, 2018, that:

Patient continues to have symptoms consistent with posttraumatic osteoarthritis of the right knee especially the patellofemoral articulation. His bent knee activities squatting and kneeling stairs putting are directly limited to the bone to bone contact noted on radiographs as well as physical exam. It is hopeful that the Visco supplementation will help decrease the symptoms to allow routine activities of daily living to be more comfortable and functional so that he may maintain ideal body weight with an exercise program, maintain as much quadriceps strength as possible. I did discuss with the patient that I think he is surgical outcome to the patellofemoral joint has specific limitations of complete pain relief and certainly return to his previous work level. Arthroscopic, arthroplasty even patellectomy surgical discussions covered. I believe the severity of the arthritis in the knee would limit his tolerance to the functional evaluation and appreciate that it may have increased soreness about the knee but likely did no damage. His back certainly plays a significant role in limiting his function as well. Plan to proceed with Visco supplementation next week. Long-term plans for his knee certainly would incorporate supportive care including repeat multiple injections potential corticosteroid injections physical therapy anti-inflammatories and consideration for arthroplasty or surgical intervention (SUPP APP 18).

10] Dr. Kelly performed a series of Visco injections on Mr. Beam's right knee, resulting in a gradual improvement. Dr. Kelly noted on July 10, 2018 that:

With regards to the patient's right knee from his injury from May 20, 2016 we discussed the functional capacity evaluation. The knee does have limits with regards to range of motion and certainly strength. He continues to work on that aspect with steady of persistent exercises. I discussed that I think he's reached maximal medical improvement and his stationary at this stage with regards to the knee. However think his knee injury is related to the fall with posttraumatic arthritis being the resulting issue. Discussed that would recommend supportive care for the patient and this should include repeating Visco supplementation injection series potentially every 6 months but hopefully more longevity as he's experienced before would allow us to do them 80 on an annual basis. Intermittent steroid a corticosteroid injection for acute flare 2-3 times a year (a rare basis. With a flare potentially 16 visits of physical therapy to recondition the quadriceps or use modalities to help settle down the irritation. Although I would not prefer he be on anti-inflammatories on a daily basis prescriptions for intermittent anti-inflammatories as well should be included. 3-4 physician visits to follow-up on the knee annually with a long-term concern and consideration for posttraumatic arthritis incorporating knee arthroplasty. I don't see a major

for arthroscopic procedures within the knee. We did discuss antiquated procedure such as patellectomy. Also discussed light work for even sedentary position that allows frequent positioning changes is reasonable. The bent knee sitting for a solid 8 hours not recommended but if he is allowed to at least get up and move around just a little bit would make the comfort of even a sedentary job reasonable. The only restrictions are placed on the knee is no kneeling squatting and certainly for safety issues would not allow him to go up scaffolds or ladders. Otherwise no specific weight restrictions to the right lower extremity. All questions answered. Follow-up as needed for discomfort. Contact the office for any problems or concerns (SUPP APP 19).

IV. LAW AND ARGUMENT

11] Greg Beam was a sheetmetal worker for 32 years before his career was cut short by an industrial accident. Mr. Beam described his work that day as climbing five storeys to install four-by-eight-foot sheets of corrugated metal on the top of a boiler (SUPP APP 14-H.T.p. 28-29). When asked why he had not simply returned to the kind of work he had done for many years, Mr. Beam said, “My – what I do and it’s – and it’s not anything different than what I was basically doing for Gagnon in North Dakota. In doing that job I had to be able to crawl, kneel, squat, climb ladders, climb scaffolding, climb you know, the stairwells, move material, carry material, basically all – my whole body, my whole body, you know, the ergonomics that my whole body needs to be in tip top shape.” (SUPP APP 20-H.T. p. 30).

12] When asked to explain why he did not simply kneel or climb ladders occasionally as the June 18, 2018 FCE had allowed, Mr. Beam replied, “Well, it don’t exactly work that way. I’m a sheetmetal working (sic) journeyman installer. I’m equivalent and equal to anybody else out there. And they look at me to be able to install and put the product in just like anybody else. Right now I’m limited with my medical right now.” (Id.). Asked how much ladder climbing or kneeling is required of sheetmetal workers, Mr. Beam said,

“That’s every day. That’s – yeah, that’s pretty much a job task that’s expected of you to be able to do at any given time or any given day of installing, you know, in this industry.”

(SUPP APP 20- H.T. p. 31).

13] Zanthia Hagel-Price, the vocational rehabilitation consultant WSI assigned to Mr. Beam’s claim, testified that .Dr. Kelly had approved Mr. Beam’s return to work as a sheetmetal worker based on the physical demands of the position, as described by the Dictionary of Occupational Titles (APP 73-79; SUPP APP 21-H.T. pp. 16-17). Mr. Hagel-Price testified that some sheetmetal positions may be more physically demanding than the “medium” lifting demand listed by the DOT and that some positions may be less demanding (SUPP APP 22- H.T. p. 20). She admitted that she had not contacted a single employer to determine the current, actual, physical demands of an actual sheetmetal worker (SUPP APP 23- H.T. p. 23). Ms. Hagel-Price was not sufficiently familiar with the DOT to understand the Definition Trailer, particularly the Date of Last Update (DLU) which provides the date when a particular job description was last updated (SUPP APP 23- H.T. p. 25). The DOT job description for sheetmetal worker was last updated in 1988 (SUPP APP 24).

14] Ms. Hagel-Price’s letter to Dr. Kelly with his “check-a-box” response (APP 73-79), her Vocational Case Manager’s Report (APP 54-56), WSI’s Order Denying Further Disability Benefits (APP 16-20) and the ALJ’s Findings of Fact, Conclusions of Law and Order (APP 22-30) are all predicated on the DOT’s thirty-year-old job description of a sheetmetal worker. Dr. Kelly did not approve Mr. Beam’s return to a machinist position because, according to the DOT, it required only occasional kneeling (APP 74). Dr. Kelly approved Mr. Beam’s return to a sheetmetal worker position based on the lack of a kneeling

requirement in the 1988 job description (Id.). Both job description required crouching, something not recommended under the FCE.

15] It is WSI's burden to prove the appropriateness of its rehabilitation plan. Paul v. N.D. Workers Comp. Bureau, 2002 ND 96; 644 N.W.2d 884. WSI's vocational rehabilitation process is intended to provide actual rehabilitation with a realistic opportunity to return to work, not merely theoretical rehabilitation on paper only. Bishop v. WSI, 2012 ND 217; 823 NW2d 257. In the instant case, the only evidence of the actual physical demands of a sheetmetal worker was that offered by Mr. Beam at hearing. WSI produced no contradictory evidence, either because the agency and its vocational expert had not bothered to look for it or because it did not exist. Simply put, the FCE approved by Dr. Kelly, restricted Mr. Beam to occasional climbing, occasional kneeling, and no crawling or crouching (APP 65). Mr. Beam's trade as a union sheetmetal worker required climbing ladders and scaffolding, crouching, crawling and kneeling on a daily as-needed basis (SUPP APP 20-H.T. pp. 30-31).

16] Rather than rely on Mr. Beam's thirty-two years of experience, conduct an ergonomic assessment of the position or contact any employers to determine the actual physical demands of a sheetmetal worker, WSI chose to rely on a thirty-year-old, one paragraph job description. That is the very definition of paper rehabilitation. Mr. Beam testified that the work he did for Gagnon, Inc. was no different than his general work as a sheetmetal worker for other employers (SUPP APP 20- H.T. p. 30). That testimony was unrefuted. Dr. Kelly refused to release Mr. Beam to return to work as a machinist because the DOT said that a machinist was required to kneel occasionally (APP 74). Dr. Kelly did not think that Mr. Beam "will tolerate the potential kneeling" (Id.). Mr. Beam testified that

kneeling, climbing ladders, squatting/crouching and crawling were routine and necessary for a sheetmetal worker (SUPP APP 20. p. 30-31). Again, Mr. Beam's testimony was unrefuted.

17] The ALJ relied on the DOT's thirty-year-old job description instead of the unrefuted evidence of actual job demands (AFF 26-F of F 16, 17, 18). There is no legal authority for the ALJ's reliance. No statute or case law says that a DOT job description is presumptively correct or that the ALJ can disregard relevant evidence without explanation. This Court has cautioned WSI to provide actual rehabilitation with a realistic opportunity to return to work rather than theoretical, paper rehabilitation. Shotbolt v. Workforce Safety and Insurance, 2010 ND 13, 777 N.W.2d 853. Clearly, that was not done for Mr. Beam. WSI cannot ignore the actual demands of his job simply because a thirty-year-old job description says that they do not exist.

18] WSI has suggested to the Court that, by not specifying Finding of Fact 13 as erroneous, Mr. Beam somehow does not contend that the DOT's description of the physical demands of sheetmetal workers is outdated and does not reflect the demands of the job as practiced today. WSI's suggestion is without merit. The ALJ's only intent in Finding of Fact 13 was to clarify that Mr. Beam was a sheetmetal worker, not a machinist. Finding of Fact 13 does not state the physical demands of a sheetmetal worker, either expressly or impliedly, and the ALJ did not intend to do so in making that finding. Mr. Beam has always said that he was a sheetmetal worker, not a machinist, although both jobs require more kneeling and crouching than he can tolerate. The evidence clearly shows that Mr. Beam's job as a union sheetmetal worker required him to climb, squat, crouch and kneel on a daily, as-needed basis. He had to be in tip top shape. His work injury has left him with traumatic

bone-on-bone arthritis in his right knee, restricting his activities. The evidence shows that Dr. Kelly thought that Mr. Beam could tolerate a return to work in a sedentary job where he could change positions as needed. Dr. Kelly restricted him from any kneeling, squatting or climbing -- three things that Mr. Beam did on a daily basis as a sheetmetal worker.

V. CONCLUSION

19] The statutory goal of WSI's rehabilitation benefit is to return the injured worker, Greg Beam, to substantial gainful employment. "'Substantial gainful employment' means bona fide work, for remuneration, which is reasonably attainable in light of the individual's injury, functional capacities, education, previous occupation, experience, and transferable skills, and which offers an opportunity to restore the employee as soon as practicable and as nearly as possible to ninety percent of the employee's average weekly earnings at the time of injury, or to sixty-six and two-thirds percent of the average weekly wage in this state on the date the rehabilitation report is issued under N.D.C.C. Section 65-05.1-02.1, whichever is less." N.D.C.C. Section 65-05.1-01(3). WSI's use of a thirty-year-old job description cannot establish what work is reasonably attainable based on current, actual work demands. The statute demands a plan that is feasible and offers Mr. Beam a reasonable chance to return to work based on his current functional abilities, the current labor market, and current exertional and positional demands of the job goal selected by WSI. Relying on a thirty-year-old job description is just as misleading as relying on a thirty-year-old labor market.

20] Neither WSI nor the ALJ are required to rely on the Dictionary of Occupational Titles. They are required, however, to provide real vocational rehabilitation that gives Mr.

Beam a reasonable chance to return to work in the labor market which existed in 2018, not 1988. In the instant case, WSI has ignored the actual physical demands required of sheetmetal workers in favor of an out-of-date job description. The promise of workers compensation is sure and certain relief. N.D.C.C. Section 65-01-01. Pretending that Greg Beam can do a job he has proven himself unable to do is not sure and certain relief. WSI has not identified the first appropriate rehabilitation option. Mr. Beam asks that the Order of the District Court be affirmed. WSI has not shown that Mr. Beam can perform any sheetmetal worker job existing in the twenty-first century.

VI. REQUEST FOR ORAL ARGUMENT

21] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellee, Gregory Beam requests oral argument. Mr. Beam believes that oral argument could assist the Court in its deliberations and to answer any questions that may arise.

22] Dated this 1st day of June, 2020.

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VII.

CERTIFICATE OF COMPLIANCE

23] The undersigned, as attorney for the Appellee, Gregory Beam in the above-captioned matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that the total number of pages of the above brief does not exceed 38.

24] Dated this 1st day of June, 2020.

25]

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[1] I, Stephen D. Little, hereby certify that on this 1st day of June, 2020, a true and correct copy of the Appellee’s Brief and Certificate of Service was filed in the North Dakota Supreme Court E-Filing Portal and served to the following:

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[2]	Supreme Court of North Dakota	Ms. Jacqueline S. Anderson
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[3] Dated this 1st day of June, 2020.

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