

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

<p>Gregory Beam,</p> <p style="text-align: right;">Appellee,</p> <p style="text-align: center;">vs.</p> <p>North Dakota Workforce Safety and Insurance,</p> <p style="text-align: right;">Appellant,</p> <p style="text-align: center;">and</p> <p>Gagnon, Inc.,</p> <p style="text-align: right;">Respondent.</p>	<p>Supreme Court No.: 20200067 Mercer County District Court Civil No.: 29-2019-CV-00197</p> <p style="text-align: center;">ORAL ARGUMENT REQUESTED</p>
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**REPLY BRIEF OF APPELLANT NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

**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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LAW AND ARGUMENT

[1] Appellee makes reference to and provides the Court with one page of a functional capacity evaluation performed in April of 2018. See Supp. Appx. 13. However, the record reflects in that functional capacity evaluation the therapist confirmed that Appellee demonstrated self-limiting performance throughout testing. (C.R. 203) Therefore, the “results of [that] evaluation can be considered to be the minimum representation of Gregory Beam’s functional abilities.” (C.R. 203, emphasis supplied). In contrast, in the functional capacity evaluation of June 18, 2018, that formed the basis of the final vocational determination “Beam demonstrated consistent performance throughout the testing” and as a result the evaluation “can be considered to be an accurate representation of Gregory Beam’s functional abilities.” (C.R. 212) That evaluation reflected he was capable of performing at a medium level of physical demands. (C.R. 212) That physical demand level that was confirmed by the therapist was based on the United States Department of Labor, Dictionary of Occupational Titles. (C.R. 219)

[2] Furthermore, Appellee’s arguments that it is of no legal significance that he did not specify Finding of Fact #13 as erroneous must be rejected. In that Finding of Fact, the ALJ specifically found that the “preponderance of the evidence establishes that Mr. Beam’s occupation was that of “sheet metal worker”, as defined in the DOT.” (Appx. 26) That Finding forms the basis of the ALJ’s determination that the first appropriate rehabilitation option was return to the same occupation – the occupation of sheet metal worker as defined in the DOT. It was that occupation that was in fact approved by the treating physician. (Appx. 74)

[3] While the jobs held by Beam as a union sheet metal worker may have required kneeling, based on the evidence presented, as the ALJ found, it was not a common requirement of sheet metal worker under the Dictionary of Occupational Titles. (Finding of Fact # 16, Appx. 26) As explained by the vocational case manager, an occupational classification within the Dictionary of Occupational Titles can vary depending on actual job performed – some may have a higher demand level, others may have a lesser demand level. (C.R. 242) As the vocational case manager further testified, she also uses the Standard Occupational Classification (“SOC”) information together with the Dictionary of Occupational Titles to determine the skills and demands required for jobs that fall under the umbrella occupation of “sheet metal worker.” (C.R. 242)

[4] The Dictionary of Occupational Titles was utilized by the physical therapist to determine the physical demands Beam was capable of working under. It is an accepted authority used by WSI’s vocational case manager to determine the demands of occupations. It is used and accepted by the United States Government in Social Security determinations. Based on the evidence, Beam could have held jobs within the occupation of sheet metal worker that required kneeling, or even possibly had lower or higher physical demands based on variability under the category of the occupation of sheet metal worker. However, it was for the ALJ to reconcile that testimony and the evidence, weigh the same and make findings on the issue. It is not the function of the District Court to reweigh that evidence or substitute its judgment for that of the ALJ. Roepelle v. Workforce Safety and Insurance, 2008 ND 98 ¶ 9, 748 N.W.2d 722. That is what the District Court did in this case.

[5] In addition, by failing to specify Finding of Fact #13, that Beam's occupation was that of sheet metal worker – as defined in the Dictionary of Occupational Titles – the District Court cannot decide that Finding to be in error. Appellee cited no legal authority to refute the citations by WSI in its Brief to this Court on that issue.

CONCLUSION

[6] For the foregoing reasons, and as fully outlined in WSI's Brief to this Court, the District Court's decision reversing the Findings of Fact, Conclusions of Law and Order of the ALJ in this case must be reversed.

DATED this 12th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Reply Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals six (6).

DATED this 12th day of June, 2020.

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Supreme Court No. 20200067

**Mercer Co. District Court
Civil No.: 29-2019-CV-00197**

**AFFIDAVIT OF ELECTRONIC
SERVICE**

STATE OF NORTH DAKOTA)

)ss.

COUNTY OF CASS)

Melany J. Strendin, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that she served the attached:

1. Reply Brief of Appellant North Dakota Workforce Safety and Insurance.

on the following persons:

**Gagnon, Inc.
Attn: Safety Department
2315 Hampden Ave.
St. Paul, MN 55114**

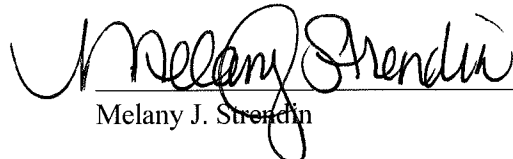
by depositing in the United States Post Office at Fargo, North Dakota, on June 12, 2020, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address, and furthermore upon:

Stephen D. Little

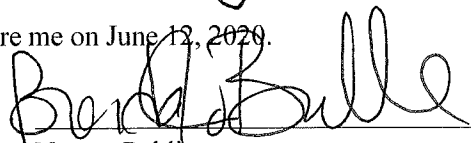
littlelaw@littlelawnd.com

VIA E-MAIL to each person above named at the above e-mail address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.


Melany J. Strendin

SUBSCRIBED AND SWORN to before me on June 12, 2020.


Brenda Jo Brunelle
Notary Public

