

THE SUPREME COURT

STATE OF NORTH DAKOTA

<b>NORTH DAKOTA WORKFORCE</b>	)	<b>COUNTY OF MERCER</b>
<b>SAFETY AND INSURANCE FUND,</b>	)	
	)	<b>SUPREME COURT NO: 20200067</b>
<b>Appellant,</b>	)	<b>CIVIL NO: 29-2019-CV-00197</b>
<b>vs.</b>	)	
	)	<b>Appellee’s Petition For Rehearing</b>
<b>GREGORY BEAM,</b>	)	
	)	
<b>Appellee,</b>	)	
	)	
<b>And</b>	)	
	)	
<b>GAGNON, INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

[1] The Court’s opinion rests on two errors of law contained in paragraph 21. The Court stated: “Although Beam’s credible testimony indicated his pre-injury position required kneeling, Beam did not testify that all sheet metal worker jobs require kneeling. Nor did Beam testify how the physical requirements of a sheet metal worker had changed since 1988.”

[2] It is the stated goal of WSI’s vocational rehabilitation process to provide a reasonable opportunity for reemployment. This Court has ruled that WSI’s rehabilitation plan cannot not guarantee employment. Thompson v. North Dakota Workers Compensation Bureau, 490 N.W.2d 248 (N.D. 1992). Instead, a rehabilitation plan must give a claimant a reasonable opportunity to obtain employment. Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56 (N.D. 1996). It was and remains WSI’s burden to prove that it has chosen the first appropriate rehabilitation option. See: N.D.C.C. Section 65-05.1-01. It would place an impossible burden on Greg Beam to show the

physical demands of *all* sheet metal worker jobs. Mr. Beam relied on his decades of experience as a sheet metal worker, not on any expertise as a vocational rehabilitation consultant.

[3] WSI attempted to satisfy its burden to prove the appropriateness of its rehabilitation plan through the preparation of the Vocational Case Manager's Report (WSI Appx. 54-56) and the testimony of the Vocational Case Manager. There was no evidence of *any* sheet metal worker job that did not require routine kneeling, crouching and climbing ladders – all three of which were limited or prohibited by his June 18, 2018 Functional Capacity Evaluation (WSI Appx. 65). Mr. Beam's credible testimony regarding the everyday physical demands of sheet metal workers in 2018, when the Vocational Case Manager's Report was prepared, was uncontroverted. WSI relied entirely on the 1988 job description contained in the Dictionary of Occupational Titles. WSI failed in its burden of proving that Mr. Beam had a reasonable opportunity to return to work as a sheet metal worker, despite his proven inability to perform the kneeling, crouching and climbing required of the position in 2018.

[4] Dated this 4<sup>th</sup> day of August, 2020.

**LITTLE LAW OFFICE**

*/s/ Stephen D. Little*

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<b>NORTH DAKOTA WORKFORCE</b>	)	<b>COUNTY OF MERCER</b>
<b>SAFETY AND INSURANCE FUND,</b>	)	
	)	<b>SUPREME COURT NO: 20200067</b>
<b>Appellant,</b>	)	<b>CIVIL NO: 29-2019-CV-00197</b>
vs.	)	
	)	<b>CERTIFICATE OF SERVICE</b>
<b>GREGORY BEAM,</b>	)	
	)	
<b>Appellee,</b>	)	
	)	
<b>And</b>	)	
	)	
<b>GAGNON, INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

[1] I, Stephen D. Little, hereby certify that on this 4th day of August, 2020, a true and correct copy of the Appellee’s Petition for Rehearing and Certificate of Service were filed in the North Dakota Supreme Court E-Filing Portal and served to the following:

[2]	<b>Supreme Court of North Dakota</b>	<b>Ms. Jacqueline S. Anderson</b>
	<b>Office of The Clerk</b>	<b><u>JAnderson@nilleslaw.com</u></b>
	<b><u>supclerkofcourt@ndcourts.gov</u></b>	

**Gagnon, Inc.**  
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**2315 Hampden Ave.**  
**St. Paul, MN 55114**  
**Via- US Mail**

[3] Dated this 4th day of August, 2020.

**LITTLE LAW OFFICE**

*/s/ Stephen D. Little*

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