

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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**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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STATEMENT OF THE ISSUES

[1] Whether the District Court erred in reversing the Findings of Fact, Conclusions of Law and Order of the ALJ because the scope of appeal is limited by the Specifications of Error filed by the appealing party in the District Court, and Appellee did not specify as error the ALJ's Finding of Fact that the occupation of sheet metal worker as defined in the Dictionary of Occupational Titles.

[2] Whether the District Court erred in reversing the Findings of Fact, Conclusions of Law and Order of Administrative Law Judge of the ALJ because under the proper scope of review the ALJ could reasonably conclude the first appropriate rehabilitation option under N.D.C.C. § 65-05.1-01(4) was Option B, return to the same occupation.

REQUEST FOR ORAL ARGUMENT

[3] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellant Workforce Safety and Insurance ("WSI") requests oral argument. This appeal involves questions relating to the proper standard for reviewing administrative appeals as outlined by the Specifications of Error filed by an appellant. The appeal also involves the proper analysis of the decision of the administrative law judge on a vocational rehabilitation determination who heard and considered the evidence at the hearing. It is believed that oral argument will assist the Supreme Court in considering the arguments advanced by the parties.

STATEMENT OF THE CASE

[4] On May 20, 2016, Appellee Gregory Beam (“Beam”) submitted a claim for benefits with WSI alleging an injury to his “whole body.” (C.R. ¹ 1) WSI accepted his claim for benefits on June 13, 2016. (C.R. 2) In September of 2017, Beam’s claim was referred for vocational services. (C.R. 37)

[5] On November 15, 2018, WSI issued an Order denying further vocational rehabilitation benefits because the first appropriate rehabilitation option was return to the same occupation, any employer under N.D.C.C. § 65-05.1-01(4). (Appx. 16-20) Beam requested rehearing. (Appx. 21) An administrative hearing was held June 20, 2019. (C.R. 19, 237)

[6] On July 15, 2019, ALJ Lynn Jordheim (“ALJ Jordheim”) issued Findings of Fact, Conclusions of Law and Order affirming WSI’s November 15, 2018, Order. (Appx. 22-30) Beam requested reconsideration. (Appx. 31-32) WSI responded to that Request for Reconsideration. (Appx. 33-34) On August 2, 2019, ALJ Jordheim issued a Denial of Petition for Reconsideration. (Appx. 35-36)

[7] On August 22, 2019, Beam filed an appeal of ALJ Jordheim’s decision with the District Court, Mercer County. (Appx. 3, 37-38) In the Specification of Error filed by Beam in that appeal, he asserted that Findings of Fact, 9, 10, 11, 14, 15, 16, 17 and 18 were “incorrect” and that Conclusion of Law 3 was also “incorrect.” (Appx. 37) On January 10, 2020 the District Court, the Honorable Bruce Romanick, issued an Order reversing the decision of ALJ Jordheim. (Appx. 39-49) Judgment was entered January 13, 2020. (Appx. 50) On March 5, 2020, WSI filed this appeal. (Appx. 51-53)

¹ “C.R.” refers to the Certificate of Record on Appeal to District Court dated September 30, 2019, filed pursuant to N.D.C.C. § 28-32-44.

STATEMENT OF FACTS

[8] Beam sustained injuries on May 20, 2016, when a steel form he was working on gave way under his feet. (C.R. 1) He submitted a claim for his injuries to WSI. (C.R. 1) On the First Report of Injury form Beam did not identify his occupation, job title or duties. (C.R. 1) On June 13, 2016, WSI accepted the claim for strain of his neck, crushing injury to his elbow, abrasion of his low back and pelvis, and a crushing injury to his right knee. (C.R. 2)

[9] WSI initiated vocational rehabilitation services on the claim in September of 2017. (C.R. 37) Jamie Sigman was initially assigned to work on the claim. (C.R. 37; 240-241) Sigman prepared the Initial Rehabilitation Consultation Report. (C.R. 41-45) In that report it reflected Beam was performing sheet metal work through a Union at the time of his injury. (C.R. 42) The report identified two job descriptions under the Dictionary of Occupational Titles (“DOT”) and Standard Occupational Classification (“SOC”) relating to Beam’s employment. (C.R. 42) Vocational case managers when working through the vocational process rely upon the information in the DOT and SOC for identifying information relating to occupations. (C.R. 242) A job title may be different in the occupation classifications within the DOT or SOC. (C.R. 242) The occupations identified by the vocational case manager reflected the physical demands were medium under the DOT. (Appx. 42)

[10] On June 28, 2018, Beam underwent a functional capacity evaluation. (Appx. 64-71) The results reflected that it was an “accurate representation of Gregory Beam’s functional abilities.” (Appx. 72) Beam was found able to work at a medium physical demand level according to the U. S. Department of Labor. (Appx. 64) That

physical demand level requires exerting 20 to 50 pounds of force occasionally and/or 10 to 25 pounds of force frequently and/or greater than negligible up to 10 pounds of force constantly to move objects. (C.R. 219) The therapist noted the following regarding vocational/job history for Beam: “Beam was employed by Gagnon, Inc. as Sheetmetal Journeyman (for 0 years/1 months) on a contract from Sheetmetal Local 359. He has worked as a sheetmetal worker/NVAC installer journeyman for 34 years. A Job Description was received, but had limited physical function requirements. Information Regarding Job Description was obtained from the dictionary of occupational titles.” (Appx. 66)

[11] On July 10, 2018, Beam saw Dr. Kelly regarding a review of the results of the FCE. (C.R. 120) The medical note from that visit reflects that Beam had reached maximum medical improvement as to his knee. (C.R. 121) The note also documented that the “only restrictions . . . 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.” (C.R. 121) The medical case manager reported to the vocational case manager that Dr. Kelly had approved the results of the FCE. (C.R. 56) WSI wrote several letters to Dr. Kelly regarding the results of the FCE to confirm his agreement and determine whether he had any recommended changes. (C.R. 58, 60) Dr. Kelly ultimately responded on September 5, 2018, that he agreed the results of the FCE were an accurate reflection of Beam’s functional capabilities and he had no recommended changes to the FCE. (Appx. 72)

[12] In September of 2018, vocational services were transferred to Zanthia Hegle-Price. (C.R. 62, 63, 240-241) Hegle-Price conducted a staffing to review potential

job goals. (C.R. 66, 241) In the staffing, all the information on Beam's work history, transferrable skills, education, physical capabilities and limitations are reviewed to determine what jobs he may be capable of performing, including the pre-injury position and pre-injury occupation. (C.R. 241) After the staffing, Hegle-Price put together correspondence to Dr. Kelly outlining several job goals, including his pre-injury position based on the job description provided by the employer as well as information from the DOT for the preinjury position and occupation. (C.R. 67-73; 80-86; 241) Dr. Kelly did not approve the pre-injury machinist position. (C.R. 67-68, 80-86) However, Dr. Kelly did agree that Beam could perform the occupation of sheet metal worker. (C.R. 241; Appx. 74)

[13] Upon receipt of the responses by Dr. Kelly concerning the job goals, Hegle-Price requested a vocational triage meeting to review the claim, the FCE and responses regarding the job goals. (C.R. 75, 241) The result of that triage meeting was that the most appropriate vocational option was option B, as the occupation of sheet metal worker was within Beam's physical capabilities and the treating provider approved the occupation. (C.R. 75, 242) Hegle-Price then proceeded to prepare her vocational report. (C.R. 242; Appx. 54-63)

[14] At the administrative hearing, Hegle-Price testified that in terms of the physical demands of the occupation that was identified (sheet metal worker) it came from the DOT. (C.R. 242) Hegle-Price testified that in the DOT there are different job titles that fit within an occupation, but may have different skills and abilities or capabilities that are necessary. (C.R. 242) Machinist, for example, the position that Beam was performing at the time of his injury, falls within the "occupation" of sheet metal worker. (C.R. 80-86,

242) Hegle-Price further testified that there is variability between sheet metal worker jobs, with some having a higher physical demand. (C.R. 242) Hegle-Price further testified that she is aware that the Department of Labor does review the information that is published in the DOT. (C.R. 243) She also confirmed that the information from the DOT is also accepted and relied upon in Social Security determinations. (C.R. 244)

[15] After considering the testimony at the hearing and the documentary exhibits, ALJ Jordheim issued Findings of Fact, Conclusions of Law and Order on July 15, 2019. (Appx. 22-29) ALJ Jordheim determined that WSI had met its burden of proving the first appropriate vocational rehabilitation option for Beam under N.D.C.C. § 65-05.1-01(4) was option (b), return to the same occupation, any employer. (Appx. 27)

The pertinent findings made by ALJ Jordheim that support this Conclusion are as follows:

9. On September 21, 2018, Ms. Hegle-Price again wrote to Dr. Kelly, including with her a copy of the FCE and job descriptions from the Dictionary of Occupational Titles (DOT) of several positions for which WSI believed Mr. Beam was qualified and could be performed with his physical limitations. Among the occupations were “machinist” and “sheet metal worker”. Ms. Hegle-Price asked Dr. Kelly to reply indicating whether he agreed that Mr. Beam could work within the occupations of machinist and sheet metal worker, given his physical capabilities

10. The occupational description for “machinist” that Ms. Hegle-Price sent to Dr. Kelly, as taken from the DOT, included among its physical requirements, “occasional stooping, kneeling and crouching.” The occupational description for “sheet metal worker” that she provided, also from the DOT, included “frequent stooping”, but made no mention of “kneeling.”

11. Dr. Kelly replied on September 27, 2018, indicating that he did not approve of the occupation of machinist for Mr. Beam with the notation “I don’t think the knee will tolerate the potential kneeling.” Dr. Kelly did approve the occupation of sheet metal worker without further comment.

12. On October 3, 2016 (sic), Ms. Hegle-Price completed a Vocational Case Manager's Report in which she determined that the first appropriate rehabilitation option for Mr. Beam under N.D.C.C. § 65-05.1-01(4) was option (b), return to the same occupation with any employer.

13. The job description for "machinist" provided by Gagnon, Inc. does not match what Mr. Beam said that he has done all of his career, including when working for Gagnon. Nor does the DOT description provided to Dr. Kelly by WSI. There is no evidence in the record that Mr. Beam was ever involved in producing precision parts and instruments. The preponderance of the evidence establishes that Mr. Beam's occupation was that of "sheet metal worker" as defined in the DOT.

14. The preponderance of the evidence establishes that Dr. Kelly did not approve of Mr. Beam returning to an occupation that requires kneeling or climbing ladders. Neither of those physical requirements is listed in the DOT definition of "sheet metal worker", and Dr. Kelly did approve of Mr. Beam returning to the position of "sheet metal worker" as defined by the DOT.

15. The preponderance of the evidence establishes that Mr. Beam possesses the skills to perform the occupation of "sheet metal worker" as defined in the DOT.

16. Although Mr. Beam credibly testified that many of his sheet metal jobs have required kneeling, the preponderance of the evidence establishes that "kneeling" is not a common requirement of the position of sheet metal worker, as defined in the DOT.

17. The preponderance of the evidence establishes that Mr. Beam is physically capable of returning to his pre-injury occupation of sheet metal worker, as defined in the DOT, although not with his employer at the time of injury because that particular position required too much kneeling.

18. The preponderance of the evidence establishes that the first appropriate rehabilitation option for Mr. Beam is to return to the occupation of sheet metal worker, but not with Gannon, Inc.

(Appx. 25-26)

[16] Beam submitted a short petition for reconsideration to the ALJ. (Appx. 31)

In that Petition he asserted Findings 9, 10, 11, 14, 15, 16, 17 and 18 (set forth above) were

“incorrect.” Beam also asserted the Conclusion of Law # 3 was “incorrect” which concluded WSI had met its burden to establish the first appropriate rehabilitation option. (Appx. 31) WSI responded to that Petition for Reconsideration. (Appx. 33-34) ALJ Jordheim denied the Petition for Reconsideration. (Appx. 35-36)

[17] On August 22, 2019, Beam served and filed a Notice of Appeal and Specification of Issue to the District Court, Mercer County from ALJ Jordheim’s decision. (Appx. 37-38) In the Specification of Error, Beam asserted the same Findings of Fact referenced in his petition for reconsideration were “incorrect.” (Id.) Specifically, Beam asserted Findings 9, 10, 11, 14, 15, 16, 17 and 18 were “incorrect.” (Id.) He also again asserted Conclusions of Law #3 was “incorrect.” (Id.)

[18] On January 10, 2020, the District Court issued an Order reversing the decision of ALJ Jordheim. (Appx. 39-49) This appeal followed.

LAW AND ARGUMENT

A. BURDEN OF PROOF AND SCOPE OF REVIEW ON APPEAL.

[19] A claimant bears the burden of establishing the right to benefits from the Workers Compensation Fund. Unser v. North Dakota Workers Compensation Bureau, 1999 ND 129 ¶ 22, 598 N.W.2d 89; N.D.C.C. § 65-01-11. However, WSI has the burden of establishing that a rehabilitation plan provides an injured worker with a reasonable opportunity for substantial gainful employment. Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96 ¶ 8, 644 N.W.2d 884. “A rehabilitation plan is appropriate when it meets the requirements of N.D.C.C. ch. 65-05.1 and gives the claimant a reasonable opportunity to obtain employment.” Shotbolt v. Workforce Safety and Insurance, 2012 ND 13 ¶ 19, 777 N.W.2d 853, citing Paul, 2002 ND 96, ¶ 8, 644

N.W.2d 884; Lucier v. North Dakota Workers Comp. Bur., 556 N.W.2d 56, 59 (N.D. 1996).

[20] On appeal, this Court reviews the decision of the ALJ. Paul, 2002 ND 96 ¶ 6, 644 N.W.2d 884. When an administrative agency requests designation of an administrative law judge from the Office of Administrative Hearings to issue a final decision, judicial review of the ALJ's factual findings is the same as used for agency decisions. Workforce Safety & Insurance v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186; North Dakota Securities Commissioner v. Juran and Moody, Inc., 2000 ND 136 ¶ 27, 613 N.W.2d 503. This is a limited, deferential standard of review. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186; Bruder v. Workforce Safety and Insurance, 2009 ND 23 ¶ 6, 761 N.W.2d at 588; Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d at 789. The ALJ's decision must be affirmed unless the "findings of fact are not supported by a preponderance of the evidence, [the] conclusions of law are not supported by [the] findings of fact, [the] decision is not supported by [the] conclusions of law, or [the] decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. The Court must exercise restraint in determining whether WSI's decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Bruder, 2009 ND 23 ¶ 7, 671 N.W.2d at 790; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier, 556 N.W.2d at 69. The Court need determine "only whether or not a reasoning mind could have decided the agency's findings were proven by the weight of the evidence from the entire record." Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. A

preponderance of the evidence is defined as “evidence more worthy of belief,” or “the greater weight of the evidence,” or “testimony that brings the greater conviction of the truth.” Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

B. THE DISTRICT COURT ERRED IN REVERSING THE ALJ DECISION BECAUSE THE ALJ COULD REASONABLY CONCLUDE THAT THE FIRST APPROPRIATE REHABILITATION OPTION WAS RETURN TO THE OCCUPATION OF SHEET METAL WORKER, WHICH WAS AN UNDISPUTED FINDING ON APPEAL.

[21] A party appealing a decision of an administrative law judge must file a notice of appeal and specification of error. N.D.C.C. § 28-32-42(4). The specification of error must be “reasonably specific” to detail the matters at issue and to alert the agency and court of the particular errors claimed. Midthun v. North Dakota Workforce Safety and Insurance, 2009 ND 22 ¶ 7, 761 N.W.2d 572. If a party does not “enumerate an issue in their specifications of error,” this Court will not consider that issue on appeal. Id.

[22] In Johnson v. North Dakota Workforce Safety and Insurance, 2010 ND 198 ¶ 15, 789 N.W.2d 565, the district court reversed an ALJ decision concerning whether the claimant must meet the requirements of N.D.C.C. § 65-05-08. However, the specifications of error filed by the claimant in district court did not challenge the ALJ’s findings of fact on the issue. Id. This Court held that “[b]ecause the scope of the appeal is limited to the specifications of error, the district court erred in deciding any findings of fact were in error.” Id. ¶ 16.

[23] At the administrative hearing, the issue for the ALJ was whether the first appropriate rehabilitation option under N.D.C.C. § 65-05.1-01(4) was return to the same occupation. (C.R. 19, 238; Appx. 23) In Finding of Fact # 13, the ALJ 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) This is not one of the Findings of Fact challenged as in “error” by Beam in either his petition for reconsideration submitted to the ALJ or in his specifications of error to this Court. (Appx. 31-32; 37-38) Under the rationale in Johnson, because this was not a challenged finding of fact, the scope of the review in the district court must take that finding as correct and review whether the ALJ could reasonably conclude that the first appropriate rehabilitation option was return to the occupation of sheet metal worker as defined in the DOT.

[24] The district court improperly considered whether Finding of Fact #13 was in error in reversing the decision of the ALJ. Even though acknowledging that the DOT definition of “sheet metal worker” did not include “kneeling,” the court cited Beam’s testimony to the contrary as a basis for reversing the ALJ’s decision. (Appx. 48) This is legal error. Because this is not a challenged finding, the district court should have only evaluated whether the ALJ could reasonably conclude Beam could return to that occupation as defined in the DOT.

[25] On that issue, the ALJ correctly found that Dr. Kelly approved the occupation of sheet metal worker without comment. (Finding of Fact # 11, Appx. 25) The record supports that Finding. (Appx. 46) There was no medical evidence submitted to the contrary. Therefore, the district court’s decision is not in accordance with the law because it improperly failed to accord finality to the unchallenged finding of fact that Beam’s occupation was that of sheet metal worker under the DOT. Accordingly, because the district court applied an erroneous standard of reviewing the challenge to the ALJ decision, it must be reversed. See Johnson, 2010 ND 198 ¶ 23, 789 N.W.2d 565 (noting on the basis of “undisputed findings” the ALJ’s decision should be affirmed).

C. THE ALJ COULD REASONABLY CONCLUDE THAT THE FIRST APPROPRIATE REHABILITATION OPTION UNDER N.D.C.C. § 65-05.1-01(4) WAS OPTION B, RETURN TO THE SAME OCCUPATION.

[26] In order for a rehabilitation plan to be appropriate, the law does not require certainty as to the availability of a job or a particular wage. Held v. North Dakota Workers Compensation Bureau, 540 N.W.2d 166, 169 (N.D. 1995); Lucier, 556 N.W.2d at 60. Welch v. Workforce Safety and Insurance, 2017 ND 2010 ¶ 15, 900 N.W.2d 822. This is because “factors outside the rehabilitation process affect the ultimate hiring decision.” Held, 540 N.W.2d at 169.

[27] The evidence established that Beam was a union sheet metal worker. (C.R. 42, 244) Beam testified to his experience in the sheet metal jobs he held. (C.R. 244-245) Beam’s testimony was that the jobs he held required him to be able to kneel and occasionally climb ladders. (C.R. 244) The essence of Beam’s appeal was that WSI should not have relied on the description of sheet metal worker as outlined in the Dictionary of Occupational Titles because the Department of Labor had not updated that occupation since 1988. Beam contends that because the vocational case manager relied on that description as to the demands of that occupation, rather than job contacts of what Beam’s experience in the occupation, WSI’s decision should be reversed. The ALJ properly rejected Beam’s argument and could reasonably conclude that that Beam could return to the occupation of sheet metal worker.

[28] The description from the Dictionary of Occupational Titles at issue is outlined as follows:

804 TINSMITHS, COPPERSMITHS, AND SHEET METAL WORKERS

This group includes occupations concerned with laying out, cutting to size, bending or shaping, and soldering, brazing, riveting, or crimping sheet metal, such as copper, steel, aluminum, galvanized iron, and tinplate to fabricate or repair sheet metal items, such as gutters, hot and cold air vents, cabinets, and light tanks.

804-281-010 SHEET METAL WORKER (any industry) alternate titles: sheet-metal mechanic.

Plans, lays out, fabricates, assembles, installs, and repairs sheet metal parts, equipment, and products, utilizing knowledge of working characteristics of metallic and nonmetallic materials, machining, and layout techniques, using handtools, power tools, machines, and equipment: Reads and interprets blue-prints, sketches, or product specifications to determine sequence and methods of fabricating, assembling, and installing sheet metal products. Selects gauge and type of sheet metal, such as galvanized iron, copper, steel or aluminum or nonmetallic material, such as plastics or fiberglass, according to product specifications. Lays out and marks dimensions and reference lines on material, using scribes, dividers, squares, and rulers, applying knowledge of shop mathematics and layout techniques to develop and trace patterns of product or parts (SHEET-METAL LAYOUT WORKER) (any industry) 809.281-010) or using templates. Sets up and operates fabricating machines, such as shears, brakes, presses, forming rolls, and routers, to cut, bend, block and form, or straighten materials. Shapes metal material over anvil, block, or other form, using handtools and portable power tools. Welds, solders, bolts, rivets, screws, clips, caulks, or bonds component parts to assemble products, using handtools, power tools, and equipment. Installs assemblies in supportive framework according to blueprints, using handtools, power tools, and lifting and handling devices. Inspects, assemblies and installation for conformance to specifications, using measuring instruments, such as calipers, scales, dial indicators, gauges, and micrometers. Repairs and maintains sheet metal products. May operate computer-aided-drafting (CAD) equipment to develop scale drawings of product or system. May operate laser beam cutter [LASER-BEAM-MACHINE OPERATOR (WELDING) 815.682-010] OR PLASMA ARC CUTTER [arc cutter, plasma arc (WELDING) 816.364-010] TO CUT PATTERNS FROM SHEET METAL. May be designated by type of metal as Coppersmith (any industry); Tinsmith (any industry)p or according to type of activity as Fabricator, Special Items (any industry); Model according to type of activity as Fabricator, Special Items (any industry); Model Maker, Sheet-Metal (any industry); Product-Development Worker (any industry); Roofer,

Metal (construction); Sheet-Metal Installer (any industry); Sheet-Metal Worker, Maintenance (any industry); Shop Mechanic (any industry).
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(C.R. 220) Hegle-Price testified that in her experience as a vocational case manager, there is variability between jobs within an occupational classification from the DOT. (C.R. 242) However, as a vocational case manager, she relies upon the DOT and the SOC to identify the physical demands of the position and what skills are required for the occupation. (C.R. 242) In terms of the physical demand levels of occupations, the physical therapist that performed the Functional Capacities Evaluation on Beam also relied upon the DOT. (Appx. 71)

[29] In Finding of Fact #13, the ALJ found that Beam's occupation was that of "sheet metal worker" as defined in the DOT. (Appx. 26) As noted above, this is not one of the Findings of Fact that Beam challenged as "incorrect" in either his Petition for Reconsideration filed with the ALJ (Appx. 31-32) or in his Notice of Appeal and Specifications of Error filed in this appeal. (Appx. 37-38)

[30] In reviewing the decision of the ALJ regarding the vocational rehabilitation determination, this Court in Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8, stated that the Court should defer to the findings of the ALJ on credibility issues because:

[I]like a trial court judge, an administrative law judge "hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses," and is, therefore, "in a much better position to ascertain the true facts than an appellate court relying on a cold record" without "the advantage . . . of the innumerable intangible indicia that are so valuable to a trial judge." Guthmiller, at ¶ 7 (quoting Doyle v. Doyle, 52 N.D. 380, 389, 202 N.W. 860, 863 (1925)). Thus, "[w]e defer to the hearing officer's opportunity to judge the credibility of witnesses." Aamodt v. North Dakota Dep't of Transp., 2004 ND 13, ¶ 12, 682 N.W.2d 308. See

also Reynolds v. North Dakota Workmen's Comp. Bureau, 328 N.W.2d 247, 251 (N.D. 1982).

In this case, although the ALJ found that Beam testified credibly, his testimony about the physical requirements of the work he has done in the past as a sheet metal worker, the kneeling requirement was not identified in the DOT and was therefore not a common requirement for such position. (Finding of Fact #16, Appx. 26) However, Beam could not possibly know the physical demand requirements, including kneeling requirements, of every sheet metal worker position in the economy. This would be consistent with the testimony of the vocational case manager that there are differences within jobs identified in the occupation of sheet metal worker under the DOT. (C.R. 242) This does not make the DOT definition invalid or unusable. The DOT is a viable authority for determination of the requirements of occupations in the national economy. See e.g., Massachi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007)(noting that the Social Security Administration primarily relies on the Dictionary of Occupational Titles for information about the requirements of work in the national economy); Burns v. Barnhart, 312 F.3d 113, 123 (3rd Cir. 2002)(noting that the Social Security Administration has taken administrative notice of the reliability of information in the Dictionary of Occupational Titles).

[31] In Brault v. Social Security Administration, 683 F.3d 443 (2nd Cir. 2012) there was a challenge to the determination of entitlement to social security disability benefits as not supported by the evidence. The vocational expert had relied upon the DIT. Id. at 445-446. The vocational expert had relied on their own expertise as well. Id. Regarding the DOT, that court explained:

He based that determination on his own expertise, as well as on the position descriptions in the *Dictionary of Occupational Titles* (the “DOT”), a United States Department of Labor publication. The DOT gives a job type a

specific code—for example, “295.467–026 Automobile Rental Clerk”—and establishes, among other things, the minimum skill level and physical exertion capacity required to perform that job. Because of the detailed information appended to each DOT code, the codes are useful for determining the type of work a disability applicant can perform. In fact, the DOT is so valued that a VE whose evidence conflicts with the DOT must provide a “reasonable explanation” to the ALJ for the conflict. *See* Social Security Ruling (SSR) 00–4p, *Policy Interpretation Ruling: Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions*, 2000 WL 1898704 (Dec. 4, 2000).

The appellate court rejected the appeal and did not find error in reliance on the DOT and there was substantial evidence to support the decision.

[32] There was but one vocational expert that testified at the hearing, that being WSI’s vocational rehabilitation consultant. Beam called no vocational experts to refute reliance on the DOT in assessing the physical demands of sheet metal workers. While Beam may have been assigned jobs where he was required to do kneeling as a sheet metal worker as he testified, that does not mean that all such jobs require kneeling or going up and down ladders. Because there is variability amongst employers, the vocational case manager reasonably relied upon the DOT description of the occupation. This occupation was approved by the treating physician as something that Beam could still do, based on the functional capacity evaluation. There was no other evidence presented that there are no such jobs available in the economy that Beam could not perform. “It is not the function of [this Court], however, to make independent findings or substitute their judgment for that of” the ALJ. Reopelle v. Workforce Safety and Insurance, 2008 ND 98 ¶ 9, 748 N.W.2d 722. A court that reweighs evidence violates the separation of powers. Power Fuels, Inc., 283 N.W.2d at 218-221 (N.D. 1979).

[33] Based on the evidence presented at the hearing the ALJ could reasonably conclude as he did in finding that Beam could return to the occupation of sheet metal worker. Accordingly, this Court must affirm the ALJ's decision. See Thompson v. North Dakota Workers' Comp. Bureau, 490 N.W.2d 248, 255 (N.D. 1992) (noting that WSI's selection of a vocational rehabilitation plan will not be reversed when there is "evidence from which a reasoning mind could have reasonably concluded that the rehabilitation plan would return [the injured worker] to substantial gainful employment which was reasonably attainable in light of [the] injury and which would substantially rehabilitate [his/her] earning capacity. . . .")

CONCLUSION

[34] Beam did not challenge on appeal that his occupation was that of sheet metal worker under the Dictionary of Occupational Titles. ALJ Jordheim, after considering the testimonial and documentary evidence, determined that WSI's vocational rehabilitation plan met the requirements of N.D.C.C. ch. 65-05.1 and provided Beam with a reasonable opportunity for substantial gainful employment. Quite simply, "[i]t is within [the ALJ's] province to weigh the credibility of the evidence presented." Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). Neither this Court nor the district court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). Based upon the evidence presented at the hearing on this issue as outlined above, ALJ Jordheim could reasonably determine as he did. Accordingly, the district court erred in reversing the decision of the ALJ. This Court must therefore affirm the decision of ALJ Jordheim. See Sprunk v. North Dakota Workers Compensation Bureau,

1998 ND 93 ¶ 12, 576 N.W.2d 861; Engebretson v. North Dakota Workers Compensation Bureau, 1999 ND 112 ¶ 22, 595 N.W.2d 312. See also Rooks v. North Dakota Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993)(noting appellate court does not substitute its judgment for that of WSI and determines only whether findings of fact adequately explain its decision).

DATED this 4th day of May, 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 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 23.

DATED this 4th day of May, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gregory Beam,

Appellee,

vs.

North Dakota Workforce Safety and Insurance,

Appellant,

vs.

Gagnon, Inc.,

Respondent.

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. Brief of Appellant North Dakota Workforce Safety and Insurance; and**
- 2. Appendix 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 May 4, 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

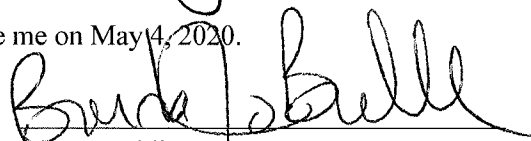
littlelaw@littlelawnd.com

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 May 4, 2020.


Notary Public

