

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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|-----------------------------------|---|----------------------------|
| Brendel Construction, Inc. |) | |
| |) | |
| Appellant and Cross-Appellee, |) | Supreme Court |
| |) | Docket No. 20200161 |
| v. |) | |
| |) | Burleigh County |
| North Dakota Workforce Safety and |) | Civil No. 08-2019-CV-03721 |
| Insurance, |) | |
| |) | |
| Appellee and Cross-Appellant. |) | |

ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, INDEX #20 AND ORDER DENYING CLAIMANT'S REQUEST FOR RECONSIDERATION, INDEX #24 AND ORDER FOR JUDGMENT, BY THE HONORABLE PAM NESVIG, DISTRICT COURT JUDGE, INDEX #281 AND JUDGMENT, INDEX #282, ENTERED ON APRIL 21, 2020.

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE

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STATEMENT OF THE ISSUES ON CROSS-APPEAL

[1] Whether the district court erred in dismissing the cross-appeal filed by Workforce Safety and Insurance on the basis that it was untimely filed.

STATEMENT OF THE CASE

[2] The Court is well versed in the statement of the case as the parties thoroughly briefed this section in Appellant's Brief to the North Dakota Supreme Court and Brief of Appellee and Cross-Appellant. The additional statements of the case will be outlined that relate to the issues raised on WSI's Cross-Appeal.

[3] On October 17, 2019, Administrative Law Judge Hope Hogan (hereinafter "ALJ Hogan") issued Findings of Fact, Conclusions of Law, and Final Order. (App. 79-94). On November 4, 2019, Brendel Construction filed a Petition for Reconsideration which asserted Findings of Fact numbers three (3), eighteen (18), and nineteen (19), and Conclusions of Law numbers three (3), four (4), five (5), six (6), and nine (9) were in error. (App. 95-96).

[4] On November 5, 2019, WSI sent a letter to ALJ Hogan opposing Brendel Construction's Petition for Reconsideration and stated that ALJ Hogan's "decision is in accordance with the law and in accordance with the evidence based on [her] weighing of the same, including the credibility of the witnesses." (App. 98-99). Other than the letter opposing the Petition for Reconsideration, WSI did not argue that ALJ Hogan should reconsider any other finding or conclusion nor did WSI file any separate motion. *Id.*

[5] On November 19, 2019, ALJ Hogan filed her Order Denying Brendel Construction's Request for Reconsideration. (WSI App. 71-76). On November 27, 2019, Brendel Construction filed a Notice of Appeal and Specification of Error to the district court. (Appx. 13-14). WSI filed their Notice of Cross-Appeal and Specification of Error on December 5, 2019, arguing errors in ALJ Hogan's Finding of Fact numbers two (2) and four (4), and Conclusions of Law number seven (7). (WSI App. 79-81). Brendel

Construction filed a motion to dismiss WSI's cross-appeal on December 19, 2019 arguing that WSI had not complied with the requirements of N.D.C.C. § 28-32-42 in filing its cross-appeal. (WSI App. 82-117).

[6] WSI opposed the motion to dismiss arguing that before the thirty (30) day time limit was up, Brendel Construction filed a Petition for Reconsideration and, therefore, the final order was still pending. (WSI App. 119). WSI further argued that had it filed its Notice of Appeal thirty (30) days after ALJ Hogan's decision, it would have divested ALJ Hogan of jurisdiction to decide the Petition for Reconsideration because ALJ Hogan had not yet "disposed of" the Petition for Reconsideration filed by Brendel Construction. *Id.*

[7] On January 30, 2020, the Honorable Pamela Nesvig granted Brendel Construction's motion to dismiss WSI appeal. (WSI App. 117-128). The district court explained in its Order that while a petition for reconsideration is not a prerequisite to filing an appeal to the district court, it does not exempt WSI from the required time limits. (WSI App. 121). Because WSI's Specification of Error addressed different issues than Brendel Construction's Request for Reconsideration, and WSI responded to Brendel Construction's request, in the form of a letter, seemingly agreeing with the ALJ's findings, the "errors" WSI tried to address in the cross-appeal, would have still been considered "final" as ALJ Hogan would not have reconsidered those issues at that time. *Id.* Since the order was a final order, and WSI opposed Brendel Construction's Petition for Reconsideration stating ALJ Hogan's "decision is in accordance with the law and in accordance with the evidence based on [her] weighing of the same," the district court found WSI's cross-appeal to be untimely and therefore dismissed it as the district court lacked subject matter jurisdiction. *Id.*

[8] WSI filed its appeal to this Court from the dismissal of its Cross-Appeal by the district court. (WSI App. 126-129).

STATEMENT OF THE FACTS

[9] The facts are outlined in Appellant's Brief to the North Dakota Supreme Court.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN DISMISSING WSI'S CROSS-APPEAL BECAUSE IT WAS UNTIMELY.

[10] The crux of WSI's cross-appeal is whether the period of time for filing a notice of appeal is terminated as to all parties by a timely filed motion for reconsideration by one party. Section 28-32-40 of the North Dakota Century Code governs petitions for reconsideration before an administrative agency. This section states in relevant part:

Any party before an administrative agency who is aggrieved by the final order of the agency, including the administrative agency when the hearing officer is not the agency head or one or more members of the agency head, *within fifteen days after notice has been given* as required by section 28-32-39, *may file a petition for reconsideration* with the agency. Filing of the petition is not a prerequisite for seeking judicial review.

N.D.C.C. § 28-32-40(1) (emphasis added).

[11] Appeals from a determination of an agency is governed by section 28-32-42 of the North Dakota Century Code which states in relevant part:

Any party to any proceeding heard by *an* administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39. If a reconsideration has been requested as provided in section 28-32-40, *the party may appeal within thirty days after notice of the final determination upon reconsideration has been given* as required by sections 28-32- 39 and 28-32-40.

N.D.C.C. § 28-32-42(1) (emphasis added).

[12] It is clear and unambiguous that pursuant to § 28-32-42(1), the period of time for filing a notice of appeal is terminated only for the party who filed the motion for reconsideration and is *not* tolled or terminated for the non-moving party. (See WSI App. 121) (Judge Nesvig finding that a petition for reconsideration is not a prerequisite to filing an appeal to the district court, *it does not preclude* WSI from the required time limits).

[13] ALJ Hogan issued her final order on October 17, 2019. Thus, WSI had thirty days or until November 16, 2019 to file its Notice of Cross-Appeal and Specifications of Error. WSI filed its Notice 49 days later on December 5, 2019.

[14] WSI's position that the period of time for WSI to file a notice of appeal was tolled is unfounded. Several state courts, including North Dakota, have applied the general rule that a motion to reconsider an order disposing of a time-tolling motion does not extend the time to file a notice of appeal. *Larson v. Larson*, 2002 ND 196 ¶ 10, 653 N.W.2d 869 (2002) (citing to *Henderson v. Koveleski*, 717 So.2d 803, 806 (Ala.Civ.App.1998); *Dunlap v. Cassia Mem'l Hosp.*, 134 Idaho 233, 999 P.2d 888, 891 (2000); *Calloway v. State*, 500 N.E.2d 1196, 1198 (Ind.1986)); *See also* 5 Am.Jur.2d *Appellate Review* § 310 (1995).

[15] WSI next argues that had it filed its Notice of Appeal prior to the determination of Brendel Construction's Petition for Reconsideration, it would have divested the ALJ of jurisdiction to decide Brendel Construction's Petition for Reconsideration. Brendel Construction does not dispute that the ALJ loses jurisdiction over a matter once an appeal is filed in that matter. However, as held by Judge Nesvig, WSI's Specification of Error addressed different issues than Brendel Construction's Request for Reconsideration. Thus, the "errors" challenged by WSI would have still been considered final as ALJ Hogan would

not have reconsidered those issues at that time. Accordingly, WSI's timely filing of its Notice of Appeal would not have divested the ALJ's jurisdiction.

[16] Moreover, it is axiomatic that "[a] *complete* resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final *unless and until* it is stayed, modified, or reversed," and in the absence of a stay, "orders are entitled to have administrative operation and effect during the disposition of the proceedings." *Inwards v. North Dakota Workforce Safety & Ins.*, 2014 ND 163, ¶ 26, 851 N.W.2d 963 (2014)(citing to *Ecee, Inc. v. Federal Power Comm'n*, 526 F.2d 1270, 1274 (5th Cir.1976); *see also Panhandle E. Pipe Line Co. v. Utilicorp United Inc.*, 928 F.Supp. 466, 470 (D.Del.1996)). WSI could have timely filed its appeal and subsequently requested the district court to temporarily remand the case to the ALJ for the limited purpose of consideration and disposition of the pending motion for reconsideration. Any timely appeal before the district court would have been stayed.

CONCLUSION

[17] For the reasons stated, Appellant – Cross Appellee Brendel Construction, Inc. respectfully request the Court the affirm the dismissal of WSI's Cross-Appeal to the district court.

Dated this 16th Day of September, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 2020, I served the Reply Brief of Appellant and Cross- Appellee via electronic mail upon the following:

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for appellee Reply Brief of Appellant and Cross-Appellee Brendel Construction, Inc., and as the author of this brief, certifies that it is in compliance with Rule 32, N.D.R. App. P., and that the above brief was prepared with proportional type face and that the total number of words, excluding words in the table of contents and table of authorities, total 1433.

Dated this 16th Day of September, 2020.

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CORRECTED CERTIFICATE OF SERVICE

I certify that on the 17th day of September, 2020, I served the Reply Brief of Appellant and Cross- Appellee via electronic mail upon the following:

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The undersigned, as attorney for appellee Reply Brief of Appellant and Cross-Appellee Brendel Construction, Inc., and as the author of this brief, certifies that it is in compliance with Rule 32, N.D.R. App. P., and that the above brief was prepared with proportional type face and that the total number of words, excluding words in the table of contents and table of authorities, total 1433.

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