

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Brendel Construction, Inc.

Appellee,

v.

North Dakota Workforce Safety and
Insurance,

Appellant.

Supreme Court
Docket No. 20210229Burleigh County
Civil No. 2019-CV-03721

**APPEAL FROM DISTRICT COURT JUDGMENT AND ORDER AFFIRMING
 HEARING OFFICER'S DECISION, BURLEIGH COUNTY DISTRICT COURT,
 SOUTH CENTRAL JUDICIAL DISTRICT, THE HONORABLE PAMELA NESVIG**

**BRIEF OF APPELLEE
 ORAL ARGUMENT REQUESTED**

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STATEMENT OF THE ISSUES

[1] Whether the ALJ correctly concluded the only employees identified were attributed to the Frias account.

[2] Whether the ALJ was correct as a matter of law in determining there was no evidence to establish any separate employee of Alvidrez pursuant to N.D.C.C. § 65-04-26.2.

[3] Whether the ALJ was correct as a matter of law in determining there was no reliable payroll information for the Alvidrez account even if WSI had identified specific employees pursuant to N.D.C.C. § 65-04-19.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE

[5] On August 8, 2018, North Dakota Workforce Safety & Insurance (“WSI”) issued an Order finding Brendel Construction and Randy Brendel liable for the unpaid premiums and noncompliance penalties assessed against Daniel Alvidrez and Alfredo Frias as the general contractor. (WSI’s Appx. 25-37) Mr. Brendel demanded a hearing, and the matter was heard on July 10, 2019, before Administrative Law Judge Hope L. Hogan, presiding. (WSI’s Appx. 38-39, C.R. 24a-24b, 545-611) WSI Safety Consultant Bonnie Dowhaniuk and Compliance Specialist Sara Cote testified, as did Mr. Brendel and his secretary/bookkeeper Becky Meuchel. (*Id.*) The parties submitted post-hearing briefs and ALJ Hope L. Hogan issued Findings of Fact, Conclusions of Law and Order on October 17, 2019. (WSI’s Appx. 40-55)

[6] 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. (WSI's Appx. 56-57)

[7] 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." (WSI's Appx. 58-59) 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.*)

[8] On November 19, 2019, ALJ Hogan filed her Order Denying Brendel Construction's Request for Reconsideration. (WSI's Appx. 60-64) On November 27, 2019, Brendel Construction filed a Notice of Appeal and Specification of Error to the district court. (*See* WSI's Appx. 3, Docket ID # 1,2.) 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's Appx. 65-67) Brendel Construction filed a motion to dismiss WSI's cross-appeal on December 19, 2019, which was granted by the Honorable Pamela Nesvig. (*See* WSI's Appx. 3 Docket ID #6-12)

[9] Brendel appealed to this Court on June 17, 2020. (*See* WSI's App. 10, Docket ID #287) WSI filed an appeal to this Court from the dismissal of its Cross-Appeal by the district court. (*See* WSI's Appx. 10, Docket ID #285) In *Brendel Construction, Inc. v. Workforce Safety and Insurance*, 2021 ND 3, 953 N.W.2d 612, this Court affirmed the ALJ's decision regarding uninsured subcontractor Alfredo Frias and Brendel's personal liability and reversed and remanded WSI's cross-appeal regarding subcontractor Alvidrez. Following briefing to the district court

regarding WSI's cross-appeal on remand, the court entered its Order Affirming Hearing Officer's Decision on June 10, 2021. (WSI's Appx. 68-75) Order for Judgment and Judgment were entered July 9, 2021. (WSI's Appx. 76-77) WSI's appeal to this Court followed. (WSI's Appx. 81-84)

STATEMENT OF THE FACTS

[10] In January 2009, Randy Brendel notified WSI that he had incorporated his business and the corporation's name was Brendel Construction, Inc. (WSI's Appx. 25) Brendel Construction was wholly owned by Randy Brendel and is a licensed roofing contractor. (*Id.*) There is no question Mr. Brendel paid required workers compensation premiums for his employees, whether roofers or office staff. In 2016, Mr. Brendel employed nine roofers, two of whom received wages more than WSI's wage cap. (WSI's Appx. 52) A hailstorm in 2016 caused Mr. Brendel to have more business than he could handle, so he assigned a portion of his workload to subcontractors. (WSI's Appx. 42) Mr. Brendel testified that subcontractors were more motivated to show up and actually get the work done because they were paid by the project.

[11] Daniel Alvidrez presented himself to Mr. Brendel as a licensed, insured, and experienced roofer who, with his partner who was never identified and whom Mr. Brendel never met, would be able to help Mr. Brendel fulfill his customers' needs. (WSI's Appx. 42-43) Mr. Brendel gave Mr. Alvidrez a small roofing project and, when he performed it satisfactorily, began giving Mr. Alvidrez larger projects requiring additional roofers. (*Id.*) Alvidrez would then hire his own employees to perform the jobs. (*Id.*) Mr. Brendel made all payments to Mr. Alvidrez and never met, hired, or paid any of the workers associated with Mr. Alvidrez. (*Id.*) Mr. Alvidrez worked for Mr. Brendel for a few months in 2016 and again in 2017. (*Id.*)

[12] Alfredo Frias approached Brendel Construction looking for work as a roofer in 2016. (WSI's Appx. 43) Brendel Construction kept Mr. Frias's application and W-9 form on file in

accordance with its usual business practice. (*Id.*) If additional work became available, Brendel Construction would then be able to contact Mr. Frias immediately; the paperwork having already been completed. Mr. Frias also listed Brendel Construction as an additional insured on a Certificate of Insurance. (*Id.*) Mr. Brendel denied ever meeting Mr. Frias or hiring him in any capacity. There is no evidence of any payment of any kind from Randy Brendel or Brendel Construction to Alfredo Frias.

[13] On October 12, 2016, OSHA performed an inspection at 2260 Lacorte Loop in Bismarck. The OSHA inspector interviewed someone claiming to be Alfredo Frias and identified four workers. The Safety Narrative states, in part, as follows:

According to the inspection No. 985952, Alfredo Frias stated that his name and his company was changed from Daniel Roofing to Alfredo Alvidrez Frias. CSHO did not have sufficient information to support the information that Daniel Roofing and Alfredo Alvidrez Frias are the same person. Mr. Frias did not answered [sic] the call and he changed his phone number.

(WSI's Appx. 47)

[14] OSHA subsequently performed inspections on three more Bismarck roofing jobs in which Alfredo Frias represented himself as the subcontractor responsible for a crew of workers. The Safety Narrative for an April 7, 2017, inspection reflects:

According to Inspection #985952, Alfredo Alvidrez Frias stated that his name and his company were changed from Daniel Roofing to Alfredo Alvidrez Frias. Daniel Alvidrez was cited in Nebraska (6-2013 OIA 910481) and Colorado (9-2010 IMIS 314659772). During this inspection, Mr. Frias introduced himself . . . as Daniel and his employees called Mr. Frias, Daniel. His identification card shows Alfredo Frias.

(WSI's Appx. 46-47)

[15] Brendel Construction was the general contractor for each of the roofing projects in which someone claiming to be Alfredo Frias represented himself to OSHA as the subcontractor in charge. In each case, Brendel had subcontracted the work to Daniel Alvidrez. (WSI's Appx. 47) Frustrated

with Mr. Alvidrez's apparent inability to provide a safe workplace and avoid OSHA censure, Mr. Brendel terminated their working arrangement after the April 7, 2017, OSHA inspection. (WSI's Appx. 25) Although Mr. Alvidrez worked locally thereafter, he never worked for Randy Brendel again.

[16] Brendel did acknowledge hiring Alvidrez as a subcontractor. He also acknowledged making payments to Alvidrez. Information supplied by Brendel to WSI for Alvidrez listed an address of 2408 Dancy Drive, Fort Worth, Texas. In addition, Alvidrez provided a certificate of insurance that also listed his address as 2408 Dancy Drive, Fort Worth, Texas. (WSI's Appx. 43) Thus, Frias and Alvidrez had the same business address.

[17] WSI moved forward to calculate premium amounts for Frias and Alvidrez. WSI reviewed OSHA reports regarding the number of employees on various projects. WSI never spoke with Frias or Alvidrez. The OSHA report referenced Frias as the subcontractor on these projects. (WSI's C.R. 153-160, 209-213, 561-565) No OSHA reports identify Alvidrez as a subcontractor. However, each of these reports included Alvidrez and Frias address of 2408 Dancy Drive, Fort Worth, Texas. WSI took all the employees identified in the OSHA reports and attributed them to the Frias account.

[18] WSI did not submit any evidence whatsoever to identify any employee that performed any work on any Alvidrez project separate from those attributed to Frias. Instead, WSI simply used documentation of financial payments that were made to Alvidrez (recall no payments were made to Frias) and arbitrarily divided the total payments made by WSI's wage cap and unilaterally assumed there were that number of employees working for Alvidrez separate and distinct from Frias. (WSI's Appx. 52-53)

[19] After hearing all the evidence, ALJ Hogan found:

3. Brendel is an employer subject to the provisions of Section 65-04-26.2. The greater weight of the evidence establishes that Brendel hired a subcontractor to complete roofing projects at the following locations: 2260 Lacorte Loop, Bismarck, North Dakota; 3614 North 19th Street, Bismarck, North Dakota; 135th Street, Bismarck, North Dakota; and 1321 Braman Avenue, Bismarck, North Dakota. The OSHA reports prove employees were completing the work at these sites.

4. The OSHA report from October 12, 2016, for the property located at: 2260 Lacourte Loop, Bismarck, North Dakota indicates four employees were working at the job site. WSI attributed those employees to Frias account as he was documented, by OSHA, as the subcontractor. Because the statute requires the general contractor to be liable for the individuals employed by a subcontractor, Brendel is liable for the 2016 premiums for these workers.

5. For 2017, two of the three OSHA reports indicate nine employees were working at those job sites. The other OSHA report from 2017 indicates there were five employees at the site. Based on these reports, WSI attributed nine employees to Frias account as he was documents, by OSHA, as the subcontractor. Because the statute requires the general contractor to be liable for the individuals employed by a subcontractor, Brendel is liable for the 2017 premiums for these workers.

6. When payroll information for the subcontractor or independent contractor is not available, WSI is permitted to “calculate premium using the wage cap in effect per employee reported in the previous payroll report, using information obtained through the organization’s investigative process, or using data obtained from job service North Dakota.” N.D.C.C. § 65-04-19(3). WSI did not have payroll information for the Frias account. It was permissible for WSI to calculate the premium using the wage cap.

7. The greater weight of the evidence does not support a finding that Brendel is liable for the unpaid premiums attributed to the Alvidrez account. Brendel admits he hired Alvidrez and there is evidence that Alvidrez was paid by Brendel. However, there is no evidence to establish how many “individuals,” or employees, were working for Alvidrez. There is also no evidence that Alvidrez and Frias had separate crews working at the job sites identified in the OSHA reports. The only evidence regarding the number of employees or their identities, working for Alvidrez and Frias is the OSHA reports. Those employees have been attributed to the Frias account. Absent evidence there were other employees working for Alvidrez at those job sites, Brendel should not be liable for the unpaid premiums attributed to the Alvidrez account.

8. The greater weight of the evidence does not establish reliable payroll information for the Alvidrez account. WSI calculated the unpaid premiums attributed to Alvidrez based on the amount Brendel paid Alvidrez. WSI had no other information to base a premium calculation. Unlike the Frias account, WSI has no information regarding the individuals working for Alvidrez. However, there is no evidence that the total sum paid by Brendel to Alvidrez was wages. Without further information, the possibility that some of that amount included overhead and owner’s draw or owner’s wages cannot be ruled out. Even if there was evidence

establishing Alvidrez had his own crew working on Brendel projects, the 1099 amount does not establish the payroll information necessary to calculate the premium.

(WSI's Appx, 51-53, emphasis added)

[20] Brendel appealed to the district court regarding the ALJ's determination of liability for the premiums due on the Alfredo Frias account. (See WSI's Appx. 10, Docket ID #287) WSI the cross-appealed to the district court. (WSI's Appx. 65) The district court affirmed the ALJ's decision and Brendel appealed to this Court on that issue. (WSI's Appx. 68-67) This Court remanded back to the district court for further proceedings. (See WSI's Appx. Docket ID #315) On June 10, 2021, the district court affirmed the ALJ's Order. (WSI's Appx. 68-75) This appeal followed. (WSI's Appx. 81-82)

LAW AND ARGUMENT

I. THE ALJ CORRECTLY CONCLUDED THE GREATER WEIGHT OF THE EVIDENCE DID NOT SUPPORT A FINDING THAT BRENDEL WAS LIABLE FOR UNPAID PREMIUMS ATTRIBUTED TO THE ALVIDREZ ACCOUNT.

[21] In reviewing an administrative agency's factual findings, a court may not make independent findings of fact or substitute its judgment for the agency's findings; rather, a court must determine only whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record. *Davenport v. Workforce Safety & Ins. Fund*, 2013 ND 118, ¶ 11, 833 N.W.2d 500. When reviewing an appeal from an independent ALJ's final order, similar deference is given to the ALJ's factual findings because the ALJ had the opportunity to observe witnesses and the responsibility to assess the credibility of witnesses and resolve conflicts in the evidence. *Id.* Similar deference is not given to an independent ALJ's legal conclusions, however, and a court fully reviews an ALJ's legal conclusions on questions of law,

including the interpretation of a statute. *Id.* Under N.D.C.C. § 28-32-39(1), an administrative agency “shall make and state concisely and explicitly its findings of fact.” We have said an agency’s findings are adequate if they enable a reviewing court to understand the agency’s decision. *Pleinis v. N.D. Workers Comp. Bureau*, 472 N.W.2d 459, 462 (N.D. 1991); *F.O.E. Aerie v. N.D. Workers Comp. Bureau*, 464 N.W.2d 197, 199-200 (N.D. 1990). In this case, there is ample competent evidence that supports the ALJ’s findings, which is not contrary to the manifest weight of the evidence. As a result, the ALJ’s decision must be affirmed.

A. THE ALJ CORRECTLY CONCLUDED THE ONLY EMPLOYEES IDENTIFIED WERE ATTRIBUTED TO THE FRIAS ACCOUNT.

[22] The ALJ reviewed the OSHA reports reflecting employees on Brendel’s various projects. The ALJ specifically noted “WSI attributed those employees to Frias’ account as he was documented, by OSHA, as the subcontractor.” The ALJ further noted “the other OSHA report from 2017 indicates there were five employees at the site. Based on these reports, WSI attributed nine employees to Frias’ account as he was documented, by OSHA, as the subcontractor.” Importantly, the ALJ then noted the “greater weight of the evidence does not support a finding that Brendel is liable for the unpaid premiums attributed to the Alvidrez account.” The ALJ specifically recognized Brendel’s acknowledgement that he hired Alvidrez and made payments to him. Indeed, the ALJ then found, “however, there is no evidence to establish how many ‘individuals’ or employees, were working for Alvidrez. **There is also no evidence that Alvidrez and Frias had separate crews working at the job sites identified in the OSHA reports.**” The ALJ held that the only evidence regarding the number of employees or their identities “working for Alvidrez and Frias is the OSHA reports.” The ALJ recognized, “those employees have been attributed to the Frias account. Absent evidence there were other employees working for Alvidrez at those job sites, Brendel should not be liable for the unpaid premiums attributed to the

Alvidrez account.” There was no evidence of any other employees working at the job sites except those attributed to the Frias account. Thus, the ALJ’s factual finding should be affirmed.

B. THE ALJ CORRECTLY CONCLUDED THERE WAS NO EVIDENCE TO ESTABLISH ANY SEPARATE EMPLOYEE OF ALVIDREZ.

[23] N.D.C.C. § 65-04-26.2, which recently passed into law, addresses a general contractor’s liability for subcontractors and independent contractors for workers compensation premiums for their employees if the subcontractor or independent contractor does not pay WSI premiums.

N.D.C.C. § 65-04-26.2. General contractor liability for subcontractors and independent contractors.

1. An individual employed by a subcontractor or by an independent contractor operating under an agreement with a general contractor is deemed to be an employee of the general contractor and any subcontractor that supplied work to the subcontractor or independent contractor. A general contractor and a subcontractor are liable for payment of premium and any applicable penalty for an employee of a subcontractor or independent contractor that does not secure required coverage or pay the premium owing. The general contractor and a subcontractor are liable for payment of this premium and penalty under the subcontractor or independent contractor pays this premium and penalty. The liability imposed on a general contractor and a subcontractor under this section for the payment of premium and penalties under this title which are not paid by a subcontractor or independent contractor is limited to work performed under that general contractor.

...

3. If the organization is unable to obtain complete and reliable payroll information for a subcontractor or independent contractor, the organization may calculate premium using the available payroll information of the subcontractor or independent contractor for work performed under the liable general contractor or a subcontractor as permitted in section 65-04-19.

...

[24] N.D.C.C. § 65-04-26.2 specifically notes that “an individual employed” by an independent contractor or subcontractor working under an agreement with the general contractor is deemed to be an employee of that general contractor. The statute further provides that the general contractor and subcontractor are both liable for payment of that premium “for an employee of a subcontractor or independent contractor that does not secure coverage.” Unquestionably, there must be a specific individual or employee identified to trigger potential liability. WSI’s argument that WSI can take

total payments made from a general contractor to a subcontractor and assume the existence of phantom employees from those payments, is misplaced. WSI never introduced any evidence to identify any employees of Alvidrez separate and distinct from Frias.

[25] WSI did not provide any evidence of specific employees working for Alvidrez. Indeed, the ALJ's findings of fact note the same address between Alvidrez and Frias. Moreover, the ALJ found there was absolutely no evidence Alvidrez and Frias had separate crews working at the job sites. Lastly, the ALJ found the employees who were identified were attributed to the Frias account. It is apparent Frias was Alvidrez's partner, and the employees attributed to the Frias' account were the same employees Alvidrez paid. Therefore, the ALJ's finding is supported by the evidence.

C. THE ALJ CORRECTLY CONCLUDED THERE WAS NO RELIABLE PAYROLL INFORMATION FOR ALVIDREZ ACCOUNT EVEN IF WSI HAD IDENTIFIED SPECIFIC EMPLOYEES.

[26] As N.D.C.C. § 65-04-26.2 states above, if an organization is unable to obtain complete and reliable payroll information for a subcontractor or independent contractor, the organization may calculate premium using the available payroll information of the subcontractor or independent contractor for work performed under the general contractor or subcontractor as permitted in N.D.C.C. § 65-04-19.

[27] N.D.C.C. § 65-04-19 provides that if the organization does not receive payroll report or does not receive reliable and accurate payroll information, "the organization may calculate premium using the wage cap in effect per employee reported in the previous payroll report, using information obtained through the organization's investigative process, or using data obtained from job service North Dakota."

[28] N.D.C.C. § 65-04-19 specifically notes that to use the "wage cap," it must be used "per employee reported in the previous payroll report." In this instance, WSI took total payments from

Brendel to Alvidrez and divided that number by the wage cap. It then arbitrarily created phantom employees out of thin air on the projects. Nothing in the statutes allow this kind of convoluted logic and approach. Further, the ALJ noted there was absolutely no evidence supporting the total sum Brendel paid Alvidrez was wages. (*See* WSI's Appx., Docket ID #20 at Conclusion of Law 8) The ALJ concluded that, without further information, the possibility that some of that amount included overhead and owner's draw or owner's wages cannot be ruled out. (*Id.*) Even if there was evidence establishing Alvidrez had his own crew working on Brendel projects, the 1099 amount does not establish the payroll information necessary to calculate the premium. (*Id.*)

[29] In other words, the ALJ concluded WSI did not provide evidence to establish Alvidrez had any separate or unique employees on site. Further, the ALJ concluded even if WSI were to provide such evidence (which it did not), the total payments made to Alvidrez do not establish reliable payroll information necessary to calculate assumed premium. Therefore, this finding should be affirmed.

CONCLUSION

[30] For the reasons outlined above, the Appellee respectfully requests this Court affirm the ALJ's Order finding the greater weight of the evidence does not support a finding that Brendel is liable for unpaid premiums attributed to the Alvidrez account.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for appellee Brendel Construction, Inc., and as the author of this brief, certifies that it is in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of pages in the above Brief totals 12.

Dated this 21st day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of October, 2021, I served the Brief of Appellee via electronic mail upon the following:

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