ORIGINAL

20050143

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lanis Toso, Appellant, vs. Workforce Safety and Insurance, Appellee.	Supreme Court No. 20050143

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BRIEF OF APPELLEE WORKFORCE SAFETY AND INSURANCE

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**APPEAL FROM ORDER AFFIRMING DECISION OF
WORKFORCE SAFETY AND INSURANCE DATED
DECEMBER 15, 2004, AND JUDGMENT ENTERED MARCH 1, 2005
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN C. IRBY**

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STATEMENT OF THE ISSUES

1. Whether the District Court should have summarily affirmed the decision of Workforce Safety and Insurance because Appellant failed to file the required Specifications of Error with the District Court.

2. Whether WSI's subrogation statute, N.D.C.C. § 65-01-09, applies to Appellant's settlement in his third party medical malpractice claim.

STATEMENT OF THE CASE/STATEMENT OF FACTS

On September 3, 1999, Lanny A. Toso ("Toso") filed a claim for workers compensation benefits in connection with an alleged injury which occurred August 25, 1999, to his left heel while employed by Concrete Sectional Culvert, Grand Forks, North Dakota, as a semi driver. (C.R. 1[1]) On September 21, 1999, WSI accepted the claim and awarded Toso the associated benefits. (C.R. 4) Disability benefits were discontinued effective May 21, 2001, when Toso returned to work. (C.R. 5-6) Toso had continuously received disability benefits from his date of injury, August 25, 1999, to May 21, 2001, for a total of $38,886.86. (C.R. 13) Toso also received $18,367.42 in medical expense benefits paid on his behalf for treatment related to the left heel injury. (C.R. 14-32) Compensation and medical benefits totaling $57,254.28 were paid by WSI related to Toso's work injury. (C.R. 32)

In June of 2001, Toso commenced a third party action against Orthopaedic Associates and Jeffrey P. Stavenger, M.D., as defendants, alleging negligence in the treatment of Toso's work-related left heel injury. (C.R. 33) The defendants submitted an

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[1] "C.R. refers to the Certificate of Record on Appeal to District Court dated October 11, 2004, filed pursuant to N.D.C.C. § 28-32-44.

Answer to Toso's Complaint denying they were negligent or that any negligence was the proximate cause of or contributed to any injury to Toso. (C.R. 36) The case was set for a jury trial on December 9, 2003. (C.R. 37b)

In October of 2003 counsel for Toso wrote to WSI relating to application of WSI's subrogation interest in the third party action. (C.R. 38-39) Toso's counsel also sought an agreement in advance as to "what percentage of the medical expenses might be due to the negligence and what percentage of the disability due to the negligence" in the event of a recovery by Toso in the action. (C.R. 39) In-house counsel for WSI responded that WSI was unable to make such an agreement, based on its interpretation of the subrogation statute. (C.R. 50-51)

On December 29, 2003, WSI was notified that Toso's third party claim had been settled for the sum of $82,500. (C.R. 55) In the malpractice action, Toso took the position that the medical expense would have been incurred because of the work injury and were not recoverable in the malpractice action and that further that no claim for temporary total disability could have been asserted. Toso further contended that at most an increased "permanent disability" [presumably permanent partial impairment] was due to the malpractice. WSI took no position on these issues given its interpretation and application of N.D.C.C. § 65-01-09.

Because of the settlement, no formal adjudication was made by the Court on whether and to what extent the medical expenses, disability benefits or "permanent disability" was referable to the work injury or greater due to the alleged malpractice. Likewise, WSI did not make any independent determination as to these issues. Based on WSI's interpretation of the subrogation statute, N.D.C.C. § 65-01-09, WSI applied the

statute to the entire amount of the settlement. On January 9, 2004, WSI issued its Subrogation order, outlining its subrogation claim pursuant to N.D.C.C. § 65-01-09 with respect to the settlement as follows:

WSI's Subrogation Interest	**$41,250.00**
Less WSI's share of attorney fees at 25%	$10,312.50
Less WSI's share of approved costs at 50%	$ 921.24
Reimbursement to WSI & Credit to Employer's Account	**$30,016.26**

(C.R. 82) Toso requested reconsideration from WSI's Order of January 9, 2004. (C.R. 88)

Toso and WSI agreed to submit the dispute concerning application of WSI's subrogation claim under N.D.C.C. § 65-01-09 to the ALJ based upon the stipulated exhibits and written briefs (C.R. 96). Briefs were submitted (C.R. 99, 116, 126), and oral argument held June 28, 2004. (C.R. 112; 151) Again, no adjudication was made as to the factual issues relating to the effect of the alleged medical malpractice on the medical, disability or permanent impairment. The sole issue for the ALJ to determine was whether N.D.C.C. § 65-01-09 was properly applied to the settlement proceeds in Toso's third party claim.

On July 27 2004, ALJ Sand issued recommended findings of fact, conclusions of law and recommended order. (Appx.[2] p. 3) ALJ Sand concluded that Toso failed to prove WSI's subrogation interest pursuant to N.D.C.C. § 65-01-09 was improperly applied to his claim, and recommended WSI's Order be affirmed. (Appx. 7) On August 13, 2004, WSI issued its Final Order, adopting the recommended decision of ALJ Sand. (Appx. 2)

[2] "Appx." refers to Employee-Appellant's Appendix.

On September 10, 2004, Toso filed a "Notice of Appeal" from WSI's Final Order to the District Court. (Appx. 1, District Court Docket #1) After briefing and oral argument, the District Court, the Honorable John C. Irby, issued its Order Affirming Decision of Workforce Safety and Insurance on December 15, 2004. (Appx. p. 8) Judgment was entered March 1, 2005. (Appx. p. 9) This appeal followed. (Appx. p. 11)

LAW AND ARGUMENT

A. THE DISTRICT COURT SHOULD HAVE SUMMARILY AFFIRMED WSI'S DECISION.

N.D.C.C. § 28-32-42 outlines the procedures for taking an appeal from a final agency decision to the District Court. The appeal is perfected by filing a notice of appeal and specifications of error "specifying the grounds on which the appeal is taken . . . ." N.D.C.C. § 28-32-42(4).

On September 10, 2004, Toso filed a "Notice of Appeal" with the District Court. (Appx. 1, District Court Docket #1) However, no separate "Specifications of Error" were filed. See Appx. 1, Cass County District Court Docket. Rather, within the "Notice of Appeal" Toso stated that: "[t]he decision or determination is not in accordance with the law pursuant to N.D.C.C. § 65-01-09" and "[t]he findings of fact made by the agency are not supported by a preponderance of the evidence" and "[t]he conclusions and decision of the agency are not supported by its findings of fact pursuant to N.D.C.C. § 28-32-19."

N.D.C.C. § 28-32-19(5) requires the District Court to remand the order if it finds that the order is not supported by a preponderance of the evidence." Toso did not, however, identify which findings were not supported by the evidence or otherwise outline in what respects WSI's decision was not supported by a preponderance of the evidence.

Likewise, Toso did not identify how the decision was not in accordance with the law or how the conclusions and decision were not supported by the findings.

In Vetter v. North Dakota Workers Compensation Bureau, 554 N.W.2d 451 (N.D. 1996), this Court considered the specificity requirement of N.D.C.C. § 28-32-15(4), the predecessor to N.D.C.C. § 28-32-42. The purpose of the specificity requirement is to alert the other party and the Court as to "what matters are truly at issue." Vetter, 554 N.W.2d at 453. "A district court should not have to 'comb the record,' . . . to discover the issues in an appeal from an administrative agency decision." Id., quoting Naumann v. North Dakota Workers Compensation Bureau, 545 N.W.2d 184, 187 (N.D. 1996). This Court went on to hold:

> The time has come to compel compliance with the specificity requirement of § 28-32-15(4), N.D.C.C. Summary affirmance of an administrative agency decision is appropriate if an appellant's specifications of error "fail to specifically identify any error with any particularity."

Vetter, 554 N.W.2d at 454, citing Maginn v. North Dakota Workers Compensation Bureau, 550 N.W.2d 412, 417 (Sandstrom, J., concurring) and Held v. North Dakota Workers Compensation Bureau, 540 N.W.2d 166, 171 (Sandstrom J., concurring), emphasis supplied.

In Vetter, the appellant's specification of error was set forth as follows: "This appeal is taken upon the grounds that the decision by the Bureau is not in accordance with the law; that certain Findings of Fact made by the Bureau are not supported by a preponderance of the evidence; and that the Conclusions of Law made by the Bureau are not supported by its Findings of Fact." Vetter, 554 N.W.2d at 453. Because of past tolerance of "unilluminating specifications of error", however, the Court in Vetter determined that compliance with the Court's decision would be prospective:

> Any party filing a specification of errors in an appeal from an administrative agency decision after today must comply with the requirement of § 28-32-15(4), N.D.C.C., by filing reasonably specific specifications of error calculated to identify what matters are truly at issue with sufficient specificity to fairly apprise the agency, other parties, and the court of the particular errors claimed.

Vetter, 554 N.W.2d at 454.

In this case, no specifications of error were even filed by Toso. Furthermore, the language that Toso "specifies" as error is even more lacking than that which was condemned by this Court in Vetter. See also Dean v. North Dakota Workers Compensation Bureau, 554 N.W.2d 455 (N.D. 1996). The language in Toso's Notice of Appeal is simply a boilerplate recitation of the standard of review found in N.D.C.C. § 28-32-46, and "could apply to any administrative agency appeal." Held, 540 N.W.2d at 171, J. Sandstrom, concurring. Unquestionably, therefore, Toso failed to meet the specificity requirement of N.D.C.C. § 28-32-42(4), as outlined in Vetter. Given that Vetter has been the law as established by this Court for over 8 years, the Vetter disposition is called for, that being "summary affirmance" of the Bureau's decision. Vetter, 554 N.W.2d at 454.

Since Vetter, the specificity requirement has been applied to other administrative appeals. See Dettler v. Sprynczynatyk, 2004 ND 54, 676 N.W.2d 799; Sonsth v. Sprynczynatyk, 2003 ND 90, 663 N.W.2d 161. The District Court failed to enforce the specificity requirement of N.D.C.C. § 28-32-42(4) and summarily affirm WSI's decision. This Court should correct that error and do so, as it said it would do henceforth in Vetter. Id.; see Downing v. North Dakota Workers Compensation Bureau, 2003 ND 2, 660 N.W.2d 232 (summarily affirming district court dismissal of administrative appeal for failure to satisfy specificity requirement).

B. SCOPE OF REVIEW AND STANDARD FOR STATUTORY CONSTRUCTION.

If the Court fails to enforce the Vetter requirement and considers the arguments of Toso, WSI submits the following as its substantive response to Toso's appeal.

On appeal, this Court reviews the decision of WSI, not the District Court. Zander v. Workforce Safety and Insurance, 2003 ND 193 ¶ 6, 672 N.W.2d 668. The District Court's decision, however, is entitled to respect. Id., citing Paul v. North Dakota Workers Compensation Bureau, 2002 ND 96 ¶ 6, 664 N.W.2d 884. This Court exercises a limited review in appeals of WSI decisions. Elshaug v. Workforce Safety and Insurance, 2003 ND 177 ¶ 12, 671 N.W.2d 789. WSI's decision must be affirmed unless its "findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, or its 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. "Questions of law, including the interpretation of a statute, are fully reviewable on appeal." Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290.

"The primary objective of statutory construction is to ascertain the intent of the legislature." Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶ 11, 602 N.W.2d 704, 708; Ash v. Traynor, 2000 ND 75 ¶ 6, 609 N.W.2d 96, 98. In doing so, the Court must first look to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Ash, ¶ 6, 609 N.W.2d at 98; Goodleft v. Gullickson, 556 N.W.2d 303, 306 (N.D. 1996). Statutes are construed "as a whole to harmonize and give meaning to each word and phrase." Witcher, ¶ 11, 602 N.W.2d at 78; Ash, ¶ 6, 609 N.W.2d at 99. In addition, "[t]he practical application of a statute by

the agency enforcing it is entitled to some weight in construing the statute, especially where the agency interpretation does not contradict clear and unambiguous statutory language." Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992); see also Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989); Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469 (N.D. 1992).

A statute is ambiguous when it is "susceptible to differing but rational meanings." Ash ¶ 6, 609 N.W.2d at 96, citing Werlinger v. Champion Healthcare Corp., 1999 ND 173 ¶ 44, 598 N.W.2d 820. "Although courts may resort to extrinsic aids to interpret a statute if it is ambiguous," it must "look first to the statutory language, and if the language is clear and unambiguous, the legislative intent is presumed clear." McDowell v. Gille, 2001 ND 91 ¶ 11, 626 N.W.2d 666, 671. As this Court has reaffirmed on numerous occasions:

> When a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442 N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). See also Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 19, 584 N.W.2d 530, 535 (J. VandeWalle, dissenting).

C. WSI'S DECISION APPLYING N.D.C.C. § 65-01-09 SHOULD BE AFFIRMED.

WSI's subrogation interest is provided for in N.D.C.C. § 65-01-09, which provides:

> **Injury through negligence of third person – Option of employee – Fund subrogated when claim filed.** When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person. The fund is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The organization's subrogation interest may not be reduced by settlement, compromise, or judgment. . . .

(Emphasis supplied.) This Court has had several opportunities to review the application of N.D.C.C. § 65-01-09 to third party recoveries. In doing so, it has repeatedly stated "65-01-09 is clear when it states that the Bureau's subrogation rights apply 'to the extent of fifty percent of the damages recovered.'" State by Workmen's Compensation Bureau v. Clary, 389 N.W.2d 347, 351 (N.D. 1986); Waith v. Workmen's Compensation Bureau, 409 N.W.2d 94, 96 (N.D. 1987).

Toso contends that WSI's subrogation claim should be limited to the damages which are recoverable in a medical malpractice action. However, it must be kept in mind that in this case, there was no formal adjudication of the extent to which the alleged medical malpractice caused or contributed to the medical expenses, disability or permanent impairment. All of Toso's arguments in his Brief are based upon what he was arguing in the action. WSI took the position that there was no need to look into the specific effect of the alleged medical malpractice on these facts based upon the plain

language and application of N.D.C.C. § 65-01-09. As such, the terms of the settlement by Toso as to any allocation on damages is not binding on WSI. See Westendorf v. Stasson, 330 N.W.2d 699, 702 (Minn. 1983)(noting allocation of settlement proceeds not binding on health insurer's subrogation claim).[3]

In Clary, the injured employee brought a third party action for negligence, which ultimately was tried to a jury. Id. at 347. The jury apportioned fault 60 percent to the third party tort-feasor, 15 percent to Clary's employer and 25 percent to Clary. Id. Clary contended that WSI's subrogation interest should be reduced by an additional 25 percent for Clary's negligence as found by the jury. Id. at 348. Specifically, Clary argued that N.D.C.C. § 65-01-09 was "impliedly amended by the adoption of the doctrine of comparative negligence." Id. at 349. In considering this argument, the Supreme Court stated:

> We said in Layman v. Braunschweigische Maschinenbauanstalt, 343 N.W.2d at 344, "that the exclusive remedy provisions of our workmen's compensation statutes operate to foreclose an employer's liability for contribution to a third-party tort-feasor." While Layman concerned contribution to a third-party tort-feasor, which is not an issue in the case at hand, it does support the same general rule, as do the statutes above, that the Workmen's Compensation Act is a distinct body of law separate from common law and other statutory tort-law provisions. See, Section 65-04-28, N.D.C.C. . . .

Clary, 389 N.W.2d at 350 (emphasis supplied).

Toso's principal arguments and focus relate to application of "general" subrogation principles, rather than the language of N.D.C.C. § 65-01-09 and the Supreme Court's prior interpretation of the same. In light of the Supreme Court's decision in

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[3] If the Court determines that WSI's application of N.D.C.C. § 65-01-09 is incorrect and there must be an actual analysis of the effect of the alleged medical malpractice, WSI should in the first instance be permitted to make that determination. See N.D.C.C. § 65-05-03.

Clary, Toso's arguments based on general subrogation principles should be rejected. As the Court emphasized in Clary, workers compensation law and therefore N.D.C.C. § 65-01-09 stands alone as it pertains to rights of recovery in other aspects of the law. It is a "distinct body of law separate from common law and other statutory tort-law provisions." Id. Therefore, simply because in a malpractice action the recovery is limited does not affect WSI's subrogation interest. See also N.D.C.C. § 1-01-06 (providing "there is no common law in any case where the law is declared by the code); Kavadas v. North Dakota Workers Compensation Bureau, 466 N.W.2d 839 (N.D. Ct. App. 1991) (stating nothing in N.D.C.C. § 65-01-09 permits reduction of WSI's subrogation rights because claimant is unable to recover full damages from all tortfeasors).

The incorrectness of the construction urged by Toso is further illustrated by the fact that N.D.C.C. § 65-01-09 does not apply on a strict application of the type of benefits paid to the type of benefits recovered. Even in standard personal injury third party claim against an alleged tort-feasor, the injured employee may recover damages which are not part of the benefits paid by WSI. For example, in such a claim an injured worker may recover for items which are not compensated under workers compensation law. See N.D.C.C. § 32-03.2-04 (providing for recovery of noneconomic damages arising from pain, suffering inconvenience, mental anguish, emotional distress, fear of injury, humiliation and other nonpecuniary damage). In such instances, the legislature did not provide that WSI's subrogation under N.D.C.C. § 65-01-09 be applied only to damages for medical expense, disability, vocational rehabilitation or permanent impairment that may have been recovered in the third party action. Instead, the legislature "unambiguously provided that WSI be 'subrogated to the rights of the injured employee

or the employee's dependents to the extent of fifty percent of the damages recovered ... "" N.D.C.C. § 65-01-09.

WSI's application in this case is further supported by the Supreme Court's decision in Waith, 409 N.W.2d 94. In Waith, employees of UND were injured in an automobile accident involving a school district bus. Id. at 95. All of the employees filed a third party action against the school district. Id. As a political subdivision, however, liability was statutorily limited to $500,000. Id. The claimants, therefore, entered into a stipulation agreement regarding liability and the extent of damages for each claimant. Id. The damage award approved by the Court resulted in each claimant receiving approximately 68 percent of the total damages actually incurred by them. Id. The claimants then argued that WSI's reimbursement should also be reduced by 68 percent, reflecting the percentage recovery by the claimants. Id. Rejecting that argument, the Supreme Court stated:

> The claimants assert that this case is distinguishable from the facts in Clary and Kelsh because in this case the claimants received a reduced recovery through application of a statutory liability limit protecting the defendant whereas the reduced recoveries in those cases were attributable to the recipients' contributory negligence. While the factual distinction is correctly stated by the claimants, we do not agree that the distinction requires a different application of Section 65-01-09, N.D.C.C., or a different result in this case. As we indicated in Clary, the statute unambiguously provides that the Bureau's subrogation rights apply "to the extent of fifty percent of the damages recovered." The provision neither permits nor requires the Bureau's subrogation interest to be further reduced when the recipient's recovery from the third-party tortfeasor does not constitute a total recovery of the damages sustained by the recipient. The reason that a recipient secures only a partial recovery against the third-party tortfeasor is immaterial to the application of the Bureau's subrogation rights under Section 65-01-09, N.D.C.C.

Waith, 409 N.W.2d at 96 (emphasis supplied).

Contrary to Toso's contentions in his brief, this case is not controlled by the Court's decision in Ness v. North Dakota Workmen's Compensation Bureau, 313 N.W.2d 781 (N.D. 1981). In Ness, the subrogation rights of WSI were not limited based upon the action or type of damages recovered. Rather, the limitation on WSI's recovery related to application of the statute of limitations applicable to the claim. This is significantly different from what is claimed by Toso here – a limitation on WSI's recovery based upon the action being brought and the damages recoverable in that action. As set forth above, the Supreme Court has consistently interpreted N.D.C.C. § 65-01-09 as "unambiguously" providing for recovery of 50 percent of "damages recovered." See Clary, 389 N.W.2d at 351; Waith, 409 N.W.2d at 96.

Obviously, Toso does not like the result of application of WSI's statutory subrogation rights under N.D.C.C. § 65-01-09. However, the application is as mandated by the plain language of the statute. As this Court has indicated, "[c]hanges in the workmen's compensation statutes are appropriately left to the legislature." Clary, 389 N.W.2d at 351; Waith, 409 N.W.2d at 97 (stating changes in subrogation right of recovery a matter for legislative consideration). Therefore, the Court should not legislate a result not contemplated by the plain language of the statute and apply N.D.C.C. § 65-01-09 as it "unambiguously states" to the extent of 50 percent of the amount recovered by Toso. See id.; see also Hoerr v. Northfield Foundry and Mach. Co., 376 N.W.2d 323, 334 (N.D. 1985)(stating changes in subrogation principles in workers compensation statutes matter for legislature); Haider, 423 N.W.2d at 495; Lembke v. Unke, 171 N.W.2d 837, 853 (N.D. 1969).

D. APPELLANT'S PUBLIC POLICY ARGUMENT WAS NOT RAISED BELOW AND THUS CANNOT BE CONSIDERED ON APPEAL.

For the first time in the appeal to this Court, Toso raises a "public policy" argument. See Appellant's Brief at p. 16. Failure to raise this issue below, precludes judicial review on appeal. See Shark v. U. S. West Communications, Inc., 545 N.W.2d 194, 199 (N.D. 1996); Symington v. North Dakota Workers Compensation Bureau, 545 N.W.2d 806, 810 (N.D. 1996); Bieber v. North Dakota Department of Transportation, 509 N.W.2d 64, 68 (N.D. 1993). Accordingly, this Court should not address these matters. See id.

CONCLUSION

WSI respectfully requests the Court summarily affirm its Order of August 13, 2004. Alternatively, WSI requests that this Court affirm the decision of the District Court, concluding that N.D.C.C. § 65-01-09 was properly applied to Toso's claim.

DATED this 1st day of July, 2005.

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STATE OF NORTH DAKOTA)
)
COUNTY OF CASS)

AFFIDAVIT OF SERVICE

RE: Workforce Safety and Insurance re: Lanny Toso
Claim No. 1999 603,939
OAH No. 20040105
Supreme Court No. 20050143

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

BRIEF OF APPELLEE WORKFORCE SAFETY AND INSURANCE

on the following persons:

Reed K. Mackenzie
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by depositing in the United States Post Office at Fargo, North Dakota, on July 6, 2005, at 5:00 P.M. 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.

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

Jennifer R. Werhan

SUBSCRIBED AND SWORN TO Before me on July 6, 2005.

(SEAL) BRENDA JO BRUNELLE
Notary Public
State of North Dakota
My Commission Expires June 18, 2011

Notary Public