ORIGINAL (e-filed)

20080275

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Industrial Contractors Inc.,	
Appellant	
-vs-	
Workforce Safety and Insurance and Francis H. Rogstad,	Supreme Ct. No. 20080275 Burleigh Co. No. 08-C-1496
Appellees	

BRIEF OF APPELLEE – FRANCIS H. ROGSTAD

APPEAL FROM DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE GAIL HAGERTY, PRESIDING

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STATEMENT OF THE FACTS

[¶1] This is an appeal from the District Court from a decision issued by Workforce Safety & Insurance which affirmed WSI's order which concluded ICI had not complied with the notice requirements of N.D.C.C. Section 65-05-28.2(5) regarding its election of preferred medical provider.

[¶2] In its notice of appeal ICI raised three specifications of error. The first was that the agency order is not in accordance with the law, specifically WSI's interpretation of N.D.C.C. 65-05-28.2, and its application of the employer notice requirements therein, is arbitrary, capricious and unreasonable. (Appendix page 55)

[¶3] The other two specifications of error are that the findings of fact are not supported by a preponderance of the evidence and the findings of fact do not sufficiently address the evidence presented to the agency on behalf of the employer - appellant. (Appendix page 55 and 56)

[¶4] The last two finding of specifications of error are apparently abandoned by ICI on this appeal and the other issues raised on appeal do not fall within specifications of error number one.

[¶5] The final order of WSI adopting the recommended findings of fact and conclusions of law and order by the ALJ followed a hearing held on August 14, 2006 which was then continued to allow the testimony of an employee of ICI, Ron Stenberg, Safety Director and for the briefing of the issues.

[¶6] ICI was not represented by counsel at the hearing and made no arguments or raised any issues but rather relied on the position and arguments

taken by WSI. The Administrative Hearing was an appeal from an order of WSI issued on March 2, 2007 which provided that Rogstad would receive workers compensation benefits for the injury of both forearms, left shoulder, left elbow and right chest "on an non-aggravation basis during the acute phase," April 3, 2006 through June 3, 2006 and on a "50% aggravation basis beginning June 4, 2006 through October 11, 2006 but thereafter WSI would not pay any further benefits whatsoever for his medical treatment by medical providers who were not designated by his employer. The order stated Rogstad failed to obtain medical care and treatment from the preferred medical provider selected by his employee as he was required to do in accordance with the provisions of N.D.C.C. Section 65-05-28.2. (Appendix page 36)

[¶7] Of the three issues specified for the hearing the relevant issue to this appeal was "whether ICI has complied with the requirements of N.D.C.C. Section 65-05-28.2(5) for the selection of a preferred provider and, if so whether Rogstad failed to complied with NDCC Section 65-05-28.2 for his medical treatment, resulting in the denial of benefits for his left shoulder as of October 12, 2006."

[¶8] Following the hearing WSI issued a final order adopting the recommended findings of fact, conclusions of law and order of the ALJ which found that by a greater weight of the evidence of record showed that ICI failed to comply with the requirements of N.D.C.C. Section 65-05-28.1(5) for the display of its notice of the selection of preferred medical providers of medical treatment of work injuries, as well as the requirements of the statue for the use

of selected preferred providers, and that Rogstad may make an initial selection of a provider of medical treatment and that the order issued on March 2. 2007 denying Rogstad benefits for the treatment of his work related injury of his left shoulder after October 11, 2006 is vacated and set aside. (CR Page 295) (Appendix page 18 and 19)

[¶9] On appeal to the District Court, the Court in its order noted regarding N.D.C.C. Section 65-05-28.2(5) that the language in the statue indicated that the selection of a preferred medical is invalid if one of two separate conditions exists:

1. Employer fails to give a written notice to the employee; or
2. Employer fails to properly post notice.

[¶10] The court affirmed WSI's findings that ICI did not reasonably inform its employees by notice that had been anticipated by the statue and that even if ICI did post its notice at a sufficient number of places it still does not meet the requirements of the statue of providing the necessary statutory information in its posting.

[¶11] The court concluded that "WSI's findings are reasonably based on the weight of the entire evidence in the record. Because ICI failed to promptly post notice at the Leland Oaks Power Plant, ICI's selection of a preferred provider is invalidated under Subsection 5 of N.D.C.C. Section 65-05-28.2. Therefore, Rogstad was free to make the initial selection of a medical provider."(Appendix page 58 – 64)

I. STANDARD OF REVIEW.

[¶12] On appeal from the District Court the Supreme Court reviews the decision of the administrative agency in the same manner as the District Court reviewed the decision of the agency given respect to the analysis of the review by the District Court.

[¶13] The Supreme Court must affirm the order of an administrative agency unless any of the following are present:

1. The Order is not in accordance with the law;
2. The Order is in violation of the constitutional rights of the Appellant;
3. The provision of this chapter have not complied within proceedings for the agency;
4. The rules of procedure of the agency have not afforded the Appellant a fair hearing;
5. The findings of fact made by the agency are not supported by the preponderance of the evidence;
6. The conclusions of law and order of the agency are not supported by its findings of fact;
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the Appellant; and
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rational for not adopting any

contrary recommendations by the hearing officer or an administrative law judge.

[¶14] The court must exercise restraint in deciding whether WSI's findings of fact are supported by the preponderance of the evidence and do not make independent findings or substitute as of judgment for that of WSI. Swenson v. Workforce Safety and Insurance Fund, 2007 ND 149, 738 NW 2nd 892, N.D.C.C. Section 28-32-46.

LAW AND ARGUMENT

[¶15] ICI contends that the central question on appeal involves an interpretation of law and that is whether WSI correctly interpreted the law governing an employer's selection of a preferred provider to treat employees with compensable injuries. Its other issue is whether WSI failed to consider the administrative regulations governing an employer's use of a preferred provider. (ICI's brief page 8 and 12)

[¶16] Neither of these issues was raised at the administrative hearing because they were not relevant to the issue of whether ICI complied with the notice requirements of N.D.C.C. Section 65-05-28.2(5) for the selection of preferred provider and if so whether Rogstad failed to comply with Section 65-05-28.2 for his medical treatment.

[¶17] Thus the issue is whether ICI gave notice as required by statue to Rogstad of its selection of preferred medical provider and the requirements of

the statue regarding information to be provided to the employee regarding the use of a preferred medical provider.

[¶18] ICI's argument was not advanced by ICI at the administrative hearing nor is it set forth as a specification of error on its notice of appeal. (Appendix page 49 and 56)

[¶19] Failure to raise an issue at the administrative hearing and in the specifications of error prevents this court from addressing those issues on appeal. Hopfauf v. North Dakota Workers Compensation Bureau, 575 NW 2nd 436 (1998).

[¶20] Even if ICI has preserved the issue on appeal of whether ICI was a participant in the risk management program and whether it had complied with the administrative regulations for its selection of a preferred provider it is not relevant to the issue of whether ICI gave proper notice under the statue of its designation of preferred medical providers.

[¶21] ICI relied on WSI to argue that appropriate notice was given under the statue and ICI and WSI lost on that issue.

[¶22] ICI cannot now argue that it did what WSI told it to do and therefore should be relieved of its burden of giving appropriate notice under the statue to its workers.

[¶23] ICI is attempting to use the preferred provider statue to deny workers compensation benefits to Rogstad. Workers Compensation Act is remedial legislation and is to be construed liberally to afford relief and avoid forfeiture with a view of obtaining those benefits to all who currently fall within its

provisions. Ash v. Traynor, 2000 ND 75, 609 NW 2nd 96, Schiek v. ND Workers Compensation Bureau, 2001 ND 166, 634 NW 2nd 493.

[¶24] There is no dispute that ICI did not list any information regarding the requirements or the consequences of the preferred medical provider statue.

[¶25] ICI does not challenge Finding of Fact 24 by WSI that Ron Stenberg, the Safety Director acknowledged in the documentation provided upon initial hiring of its employees, there was no advice or instruction provided for the completion and signing of the designated medical requirement forms or the significance of the form except "if there's questions".

[¶26] ICI does not challenge the Finding of Fact number 26 that found that a copy of the postings that ICI contended was posted at the work sites providing a listing of names and locations of various medical providers did not provide any other information or advice regarding requirements for obtaining medical treatment of a work related injury. (CR pages 287 – 289)

[¶27] In Conclusion of the Law number 4 WSI found that considering the evidence in its entirety and in context the greater weight of the evidence shows that notice of ICI's selection of preferred medical provider and medical treatment of work injuries was not displayed in a temporary facility which ICI provided for Rogstad and its co-workers and more equally important, there is no evidence of record that a notice which ICI displayed anywhere to inform employees of its selection of preferred providers of medical treatment of work related injuries also provided information of the requirements of the statue for use of the selected preferred providers, significantly and specifically, that the

statue requires that WSI "may not pay for treatment for a provider who is not a preferred provider unless a referral is made by the preferred provider." ICI's advice to its employees to contact there supervisor for assistance does not comply with the requirements of the plain language of the statue. (CR page 293) (Appendix page 51 and 52)

[¶28] Conclusion of Law number 5 stated that ICI failed to properly display notice of a selection of a preferred provider of medical treatment of work injuries as required by statue, Rogstad, may make an initial selection of a medical provider as he did for the treatment on the injury of his left shoulder which he sustained on April 3, 2006.

[¶29] ICI has challenged none of these finding of fact or conclusions of law on this appeal.

[¶30] ICI also does not contend that WSI improperly interpreted the notice requirements of N.D.C.C. Section 65-05-28.1(5).

[¶31] ICI's advanced no issue on appeal that would justify a reversal of the decision of the District Court affirming the final decision of WSI.

CONCLUSION

[¶32] ICI asserts in its brief that the central question on appeal involves an interpretation of the law governing an employer's selection of a preferred provider to treat employees with compensable work injuries N.D.C.C. Section 65-05-28.1. However, the issue at the Administrative Hearing was whether ICI complied with the notice requirements of N.D.C.C. Section 65-05-28.1.

ICI has advanced no argument on appeal that would justify a reversal of the decision that ICI did not comply with the notice requirements of N.D.C.C. Section 65-25-28.1.

[¶33] The District Court affirming the final decision of WSI should be affirmed.

Dated this 21 day of January, 2009.

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Appellees	)	
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

I, Jeanie Nagel, hereby certify that on the 21st day of January, 2009, I served the APPELLEE – FRANCIS H. ROGSTADS' BRIEF; upon the following by emailing a true and correct copy to the following email address:

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Dated this 21st day of January, 2009.

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