

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Huffman, Inc. d/b/a Huffco Services,)	
)	
Appellant,)	Supreme Court Case No. 20140348
)	
vs.)	
)	
North Dakota Workforce Safety and)	
Insurance,)	
)	
Appellee.)	
_____)	

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BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE

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APPEAL FROM JUDGMENT ENTERED AUGUST 8, 2014 WITH
NOTICE OF ENTRY OF JUDGMENT SERVED AUGUST 11, 2014 AND
ORDER AFFIRMING ADMINISTRATIVE DECISION DATED AUGUST 8, 2014
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DAVID REICH

+++++

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STATEMENT OF THE ISSUE

[1] Appellant challenges the determination of the Administrative Law Judge that its drivers were employees. On review of such a decision, the issue presented is whether a reasoning mind could have concluded that finding was proven by the weight of the evidence in the record.

STATEMENT OF THE CASE

[2] On April 12, 2012, Workforce Safety and Insurance (“WSI”) issued a Notice of Decision-Employer Status to Appellant in which it concluded Appellant was an employer of certain individuals identified therein. (App.¹ 15) Appellant, through counsel from Colorado, requested reconsideration. (App. 17-23) On July 18, 2012, WSI issued an Order Establishing Employer and Employee Status. (App. 23.1-23.13) Appellant submitted a request for rehearing from that Order. (C.R.² 42-43) The matter was set on for hearing to be held April 3, 2013, before Administrative Law Judge Janet Demarais Seaworth (“ALJ Seaworth”) on whether Appellant was an employer of individuals identified in WSI’s Order and liable for workers’ compensation premiums. (C.R. 44-47) An administrative hearing was held April 3-4, 2013. (App. 37-158)

[3] On May 31, 2013, ALJ Seaworth issued Findings of Fact, Conclusions of Law and Order affirming WSI’s Order dated July 18, 2012, but reversing it to the extent it provided that an employer/employee relationship existed between Huffco Services and Andrew Alvarado, Shane Bruck and Jean Jean-Louis. (App. 24-33) Huffman/Huffco submitted a petition for reconsideration on June 27, 2013. (C.R. 229-230) WSI

¹ “App.” refers to the Appendix of Appellant filed in connection with this appeal followed by the page number within that Appendix.

² “C.R.” refers to the Certificate of Record on Appeal to District Court dated October 17, 2013, and filed pursuant to N.D.C.C. § 28-32-44.

submitted a response to Huffman's petition for reconsideration. (C.R. 231-232) On July 24, 2013, ALJ Seaworth issued an Order Denying Petition for Reconsideration. (App. 34-36)

[4] On August 21, 2013, Appellant filed a Notice of Appeal and Specification of Error with the District Court, Burleigh County. (App. 8-10) On July 22, 2014, the District Court, the Honorable David Reich, issued an Order affirming the May 31, 2013, Order of ALJ Seaworth. (App. 159-164) Order for Judgment and Judgment were filed August 8, 2014. (App. 165-166) Notice of Entry of Judgment was served August 11, 2014. (App. 167) On October 2, 2014, an appeal was taken to this Court. (App. 168)

STATEMENT OF FACTS

[5] On March 25, 2011, Huffman, Inc./Huffco Services submitted an Application for Insurance coverage with WSI. (C.R. 1, 54-57) Huffman/Huffco reported that their operations in North Dakota began on January 1, 2011. (C.R. 56) They reported their business type was oilfield services (water hauling) and that they had two employees, one administrative assistant and one area supervisor. (C.R. 55-62) WSI's notation on the application reflect that coverage was bound effective 3/25/2011 through 3/31/2012. (C.R. 58) A premium billing was issued for that payroll period. (C.R. 95)

[6] On March 30, 2011, WSI received a First Report of Injury from Johnny Cupps for a date of injury February 25, 2011, listing Huffman/Huffco as the employer. (C.R. 1-6) Correspondence was sent to Huffman/Huffco that reflected there was no coverage in place for the date of injury and WSI requested completion of noncompliance payroll reports. (C.R. 2-7; 11-12) On April 5, 2011, WSI's underwriting department discussed the application for coverage with Amy Huffman. (C.R. 1) On that same date,

a letter was generated requesting actual payroll expended within North Dakota for the period prior to 3/25/2011. (C.R. 11) A payroll report for the period 10/1/2010 to 3/24/2011 was completed by Huffman/Huffco in May of 2011. (C.R. 89-92) That payroll report identified three employees, Mindi Burns, Joey Cupps and Johnny Cupps. (C.R. 91) Total employees reported by Huffman/Huffco, including noncompliance payroll reports, were five employees, two classified as clerical/office employees and three classified as professional/business reps. (C.R. 94) Adjusted premium billing was issued in May of 2011 based on the additional reported employees, together with noncompliance penalty and premium. (C.R. 97)

[7] In March of 2012, WSI conducted a six month audit of Huffman/Huffco's account. (C.R. 13, 273) The information supplied by Huffman/Huffco was that of six employees. (C.R. 274) Alfred Archer was identified as a driver/supervisor; John Bruce was identified as a supervisor; Joey Cupps was identified as an administrative assistant; Johnny Cupps was identified as a supervisor/driver; Donald Daugherty was identified as a mechanic; and Sarah Rismon was identified as office. (App. 75) Archer was employed from May through June of 2011; Bruce was hired as of July 2011; Joey Cupps was employed from October 23, 2010 to May 21, 2011; John Cupps was employed from July 19, 2010 through May 14, 2011; Daugherty was employed from June 1, 2011 through June 11, 2011; and Sarah Rismon was employed from July 18, 2011 through September 16, 2011. (Id.) During the course of the audit Huffman/Huffco also provided WSI with a report identifying additional workers as independent contractors. (C.R. 88; App. 75-76) This information was forwarded on for further investigation by WSI and a determination made as to independent contractor versus employee status. (App. 76)

[8] A Worker Relationship questionnaire was completed by Huffman/Huffco in connection with WSI's investigation of employee status. (C.R. 63-72) That questionnaire asks whether any other government agency has ruled on the status of the workers, and if so, to attach a copy of the ruling. (C.R. 68) To that question, Huffman/Huffco responded "No." (Id.) A listing of identified drivers and a mechanic, which Huffman/Huffco issued 1099's to for the period June 2010, through September 27, 2011, was also produced. (C.R. 73) Huffman/Huffco also produced copies of forms completed by drivers entitled "Declaration of Independent Contractor Status Form". (C.R. 74)

[9] On April 12, 2012, WSI issued a Notice of Decision-Employer Status to Huffman, Inc. d/b/a Huffco Services which identified Huffman/Huffco as employer of the following individuals: Andrew Alvarado, Mamoudou Bah, J. Adam Bruce, Shane Bruck, Diego Cerna, Carl Cupps, Laura Duncan, Siegfried Engel, Mughetto Holley, Jean Jean-Louis, Chris Jones, Chad Kent, Elizabeth Koutchak, Paul McVay, Nephi Miller, Perry Miller, Michael O'Neil, Michael Pursel, Pacer Topnotes, Michael Waage, Mike wright and any similarly situated workers. (App. 15) An attorney from Grand Junction, Colorado, submitted a request for reconsideration from WSI's Notice of Decision. (App. 17-23) WSI then issued its Order Establishing Employer and Employee Status. (App. 23.1-23.13)

[10] An administrative hearing was scheduled for April 3, 2013, and continued to April 4, 2013. (C.R. 44; App. 37) The issue specified for hearing was: "Whether Huffco, Inc. is an employer of the following individuals and therefore liable for workers' compensation premiums pursuant to N.D.C.C. § 65-04-04: Andrew Alvarado,

Mamoudou Bah, J. Adam Bruce, Shane Bruck, Diego Cerna, Carl Cupps, Laura Duncan, Siegfried Engel, Mughetto Holley, Jean Jean-Louis, Chris Jones, Chad Kent, Elizabeth Koutchak, Paul Mcvay, Nephi Miller, Perry Miller, Michael O'Neil, Michael Pursel, Pacer Topnotes, Michael Waage, Mike Wright. (C.R. 44) At the administrative hearing, a number of individuals that were the subject of WSI's Order testified. Their testimony supports the ALJ's decision that the drivers of Huffco's trucks were employees.

[11] **Nephi Miller** (App. 56) Miller worked as a truck driver exclusively for Huffco, beginning in May of 2011 until September of 2011. (App. 57, 59; C.R. 128) Miller drove Huffco's trucks that were marked with "Huffco Services." (C.R. 257) Huffco paid for all expenses associated with using the truck. (App. 58) Miller incurred no expenses of his own. (App. 58) He was paid at the rate of \$25.00 per hour, which was set by Huffco, and received paychecks every two weeks. (App. 58-59) Huffco furnished him with a place to live in North Dakota, without charge. (App. 58) Huffco provided an H2S monitor for the work performed. (C.R. 257) Any tools that were required such as H2S monitors and hardhats, Huffco also paid for. (App. 58) Huffco dispatched him to where he was to transport water, and provided him with transportation from where he lived to the truck he was to drive. (App. 58) Huffco also provided transportation back to where he was living after he completed his work day. (App. 59) Miller was dispatched by the Huffco foreman as to where to go to haul water. (App. 58-59) Miller completed paperwork/invoices that were signed by a "company man" and then turned in to Huffco "with the rest of our paperwork." (App. 59)

[12] **J. Adam Bruce** (App. 60) Bruce began working with Huffco in May of 2011. (App. 61) When he began working for Huffco he filled out "a bunch of

paperwork.” (App. 62) When Bruce began working for Huffco he ran a service truck and did mechanic work. (App. 60-61) John Cupps, Joey Cupps and Shannon Cupps were working at Huffco’s office when he began a relationship with Huffco. (App. 61) Huffco treated him as an independent contractor. (App. 61) Bruce worked exclusively for Huffco when he performed the mechanic and service work, using their tools and equipment, including a service truck. (App. 61) Bruce came to North Dakota specifically to work for Huffco and did not intend to provide mechanic work for any other entity. (App. 61) Bruce was paid by the hour for the mechanic work he performed. (App. 61-62) Bruce was authorized to drive the Huffco service truck. (App. 61) Eventually, Bruce took on more and more responsibilities, and then he became an employee of Huffco. (App. 62) This was after John, Joey and Shannon Cupps left their employment with Huffco. (App. 62)

[13] When Bruce took on more responsibilities, that included “making sure everybody went to the locations they needed to be in” and also “drive tests . . . [to] make sure they knew how to drive a truck and safe.” (App. 62) The driving tests were for new hires. (App. 62) Drivers that were hired drove Huffco trucks. (App. 63) He also was responsible to “make sure everybody went to the locations they needed to be in.” (App. 62)

[14] **Mughetto Holley** (App. 63) Holley also drove water truck for Huffco, beginning in approximately September of 2011. (App. 64-65) Holley did not own his own trucking business when he came to work for Huffco. (App. 65) He drove equipment owned by Huffco. (App. 65) Holley received \$15.00 an hour for training, \$25.00 per hour for drive time and \$10.00 an hour for nonbillable time. (App. 65) The

training time related to showing Holley locations of the disposal site and the rules and regulations associated with how to go through the disposal. (App. 65) This training was provided by Adam Bruce, who worked for Huffco. (App. 65) Huffco paid for the fuel, maintenance, and other supplies for the truck that he drove for Huffco. (App. 65) Housing was provided by Huffco, a trailer in Ross, North Dakota, free of charge. (App. 66) Holley drove for no other company during the time he drove for Huffco. (C.R. 66)

[15] **Christopher Jones** (App. 67) Jones worked as a driver for Huffco between April and September 2011. (App. 67) Jones testified he filled out paperwork that Huffco required when he began working. (App. 68) Jones was expecting taxes and child support out of his paychecks. (App. 68) He did not own his own trucking business or have his own truck. (App. 69) Jones considered “Adam” who worked for Huffco to be his boss. (App. 69) Jones was provided housing through Huffco, free of charge. (App. 69) Jones was given a driving test when he began working for Huffco, and also rode along with another driver (Nephi Miller) to learn to operate the pump on the trailer and how to hook up at the disposal site. (App. 69-70) Jones was paid during this training, at a lesser rate. (App. 70) Jones drove Huffco’s trucks, with Huffco responsible for all fuel, service and licensing of the truck. (App. 70) This was the first time Jones had ever been treated as an independent contractor. (App. 70) Jones did not come to Huffco and ask to be an independent contractor; Huffco told him he was going to be a contractor driving their trucks. (App. 70) This was done when Jones filled out paperwork the first day he came to Huffco. (App. 70) Jones believed he was an employee of Huffco because he was running their equipment, living in their housing, following their guidelines, doing their assignments, and used company vehicles to run back and forth to

where he was living. (App. 70-71) Jones was never charged by Huffco for any expenses. (App. 71) Jones was provided transportation to work and back to the housing unit through Huffco. (App. 71)

[16] **Joey Cupps** (App. 78) Joey Cupps worked for Huffco beginning in October of 2010 through April 2011 as an office assistant. (App. 78-79) Joey was responsible for getting documents for the DOT and Huffco signed. (App. 79) The Huffco packet included an independent contractor agreement that Huffco required to be signed. (App. 79) Joey was not provided any instructions from Huffco as to why the drivers had to sign the documents, only that Huffco said it was required for them to apply. (App. 82) Huffco owned the trucks that were driven by the drivers. (App. 80) All the trucks had Huffco markings on them. (App. 80) No expenses associated with fuel or anything else for the trucks was deducted from drivers' paychecks. (App. 80) Drivers were paid \$25.00 per hour, a price that was set by Huffco. (App. 80) Huffco supplied an H2S monitor for each truck. (App. 81) Huffco eventually arranged for housing for drivers, including trailers and purchasing a house in Ross, North Dakota. (App. 81) Drivers were not charged to live in the housing. (App. 81) Drivers were transported to the Huffco trucks by a Huffco employee in a Huffco vehicle. (App. 81-82) There were no costs associated with the drivers utilizing the Huffco vehicles. (App. 82)

[17] **John Cupps** (App. 89) John worked for Huffco between 2010 and 2011. (App. 89) Originally, he worked as a driver, and then became area manager. (App. 89) As a driver, John was treated as an independent contractor, as area manager he became an employee. (App. 91) Sometimes even after John became area manager he would also drive truck, at which time he would be paid as an independent contractor. (App. 91) John

did not own his own truck at that time. (App. 89) When he worked as a driver, he drove Huffco's trucks. (App. 89) He had no expenses associated with driving Huffco's truck. (App. 89) He was paid \$25.00 per hour. (App. 89) Huffco supplied H2S monitors. (App. 90) Drivers are dispatched to haul water out of whatever locations was required. (App. 89) When John moved to the area manager position, he implemented a training procedure. (App. 90) Prior to doing so he consulted with Amy Huffman. (App. 90) Drivers were paid for the training period. (App. 90) The training involved how to perform the disposal work, including use of control boards and filling out paperwork. (App. 98) Drivers could not refuse to haul the loads. (App. 90) John hauled trailers that were purchased by Huffco to a lot in Stanley. (App. 92) The trailers were for use by drivers as housing. (App. 92) If Huffco trucks sustained damage, Huffco paid for the repairs. (App. 90) Nothing was charged back to the driver of the truck. (App. 90) When John dispatched trucks, he made the determination of which drivers went to what locations. (App. 91-92)

[18] **Shannon Cupps** (App. 98) Shannon began working for Huffco as a driver after he answered an advertisement for truck drivers. (App. 99) Shannon was paid an hourly wage for truck driving, and was paid every two weeks. (App. 99) Shannon also performed maintenance work for which he was paid a salary. (App. 99) Shannon drove Huffco's trucks when he was a driver. (App. 100) He had no expenses associated with operating the Huffco truck. (App. 100) Huffco supplied an H2S monitor. (App. 100) Huffco supervisors would direct him where to go for loads to haul. (C.R. App. 100) Shannon drove exclusively for Huffco, and no other companies. (App. 100) Shannon is aware that other drivers lived in a camper supplied by Huffco. (App. 101) Shannon was

directed by Amy Huffman to pick up a camper that had been purchased by Huffco for “housing for their employees.” (App. 101) Shannon or his brother John provided transportation, in a Huffco vehicle, for other drivers to the Huffco trucks. (App. 101) Shannon, along with his brother, also provided training to other drivers. (App. 101) That training included making sure they knew how to operate the truck, including how everything worked on a water truck and what to do at each location. (App. 101) While performing mechanic work, Shannon used tools that were purchased and provided by Huffco. (App. 104) Shannon Cupps’ name never appeared on any listing supplied by Huffco relating to employees or claimed independent contractors. (App. 114)

[19] **Diego Cerna** (App. 104) Cerna was hired to drive truck for Huffco, using their equipment. (App. 105) Cerna came to North Dakota to work for Huffco. (App. 104) He did not own his own truck. (App. 105) Eventually, Cerna lived in a camper/trailer that was purchased and set up by Huffco. (App. 105) He paid no rent to stay in the Huffco camper. (App. 105) Cerna was provided training by John and Shannon Cupps on how to operate the equipment, operate the water disposal and “everything that is involved on the trucking side up here in the oilfield.” (App. 106) Cerna was paid for the training period. (App. 106) After training, he received \$25.00 per hour for driving. (App. 106) Huffco paid for all gasoline, insurance and maintenance on the vehicle. (App. 105) Cerna worked exclusively for Huffco. (App. 106-107) Cerna was terminated from his employment by Huffco. (App. 107) The termination was because he was looking for other work. (App. 107) Cerna believed he was an employee, not an independent contractor, while working for Huffco. (App. 108) Cerna explained this belief as follows: “They said where the trucks were going all the times and they

were the one looking for the work for the trucks, so we didn't have any say in what we were going to do with the trucks or nothing. We always had a supervisor – an immediate supervisor to tell us where to go.” (App. 108)

[20] **Paul McVay** (App. 110) McVay worked for Huffco for a few months in 2011 as a truck driver. (App. 110) McVay drove Huffco's truck. (App. 110) Initially McVay stayed with Shannon Cupps, but later lived in a trailer purchased by Huffco. (App. 110) Huffco paid for the fuel and maintenance on the vehicle. (App. 111) McVay was paid by the hour for driving. (App. 310) Huffco provided transportation to and from the truck. (App. 310)

LAW AND ARGUMENT

A. SCOPE OF REVIEW.

[21] The scope of review of an independent administrative law judge decision is set out in N.D.C.C. § 28-32-46. Bishop v. North Dakota Workforce Safety and Insurance, 2012 ND 217, 823 N.W.2d 257. “When an independent ALJ issues final findings of fact, conclusions of law and order under N.D.C.C. § 65-02-22.1, courts apply the same deferential standard of review to the ALJ's factual findings as used for agency decisions.” Bishop, 2012 ND 217 ¶ 5, 823 N.W.2d 257, citing Sloan v. North Dakota Workforce Safety and Insurance, 2011 ND 194 ¶ 5, 804 N.W.2d 184, Auck v. North Dakota Workforce Safety and Insurance, 2010 ND 126 ¶ 9, 785 N.W.2d 186. However, no deference is given to an ALJ's legal conclusions. Bishop, 2012 ND 217 ¶ 6, 823 N.W.2d 257; Sloan, 2011 ND 194 ¶ 5, 804 N.W.2d 184; Auck, 2010 ND 126 ¶9. 785 N.W.2d 186.

[22] The question of whether a worker is an employee or independent contractor is a mixed question of law and fact. Workforce Safety and Insurance v. Larry's On Site Welding, 2014 ND 81 ¶14, 845 N.W.2d 310; Matter of BKU Enterprises, Inc., 513 N.W.2d 382, 387 (N.D. 1994); Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 830 (N.D. 1992); Midwest Property Recovery, Inc. v. Job Service North Dakota, 475 N.W.2d 918, 922 (N.D. 1991). In reviewing a mixed question of law and fact, “the underlying predicate facts are treated as findings of fact, and the conclusion whether those facts meet the legal standard is a question of law.” Larry's On Site Welding, 2014 ND 81 ¶14; BKU Enterprises, Inc., 513 N.W.2d at 387.

[23] In deciding whether the ALJ's decision is supported by a preponderance of the evidence, the Court determines “whether a reasoning mind could have determined the factual conclusions reached were proven by the weight of the evidence from the entire record.” Larry's On Site Welding, 2014 ND 81 ¶ 13. However, the Court must exercise restraint in determining whether the ALJ'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 ALJ. Bruder v. Workforce Safety and Insurance, 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 (N.D. 1988); Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). 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).

[24] To the extent the arguments ask this Court to reconsider/reweigh that evidence and come to an opposite conclusion, this Court cannot do. See Stewart v. North

Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI's decision is supported by the evidence). 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). This Court cannot substitute its judgment for that of the [ALJ]. S. & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). As this Court has recognized, ALJ Seaworth was in the best position to decide this issue, and this Court should defer to her findings.

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 *12 to judge the credibility of witnesses." Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, ¶ 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).

Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8. See also Ingebretson v. Ingebretson, 2005 ND 41 ¶ 13, 693 N.W.2d 1 (stating "trier of fact can best evaluate testimony because it observes the demeanor and credibility of the witnesses" and appellate court does not substitute its judgment for the trier of fact when reasonable evidence supports the findings).

B. APPLICABLE LAW

[25] N.D.C.C. § 65-01-03 provides, in pertinent part:

Each individual who performs services for another for remuneration is presumed to be an employee of the person for which the services are

performed, unless it is proven that the individual is an independent contractor under the common-law test. The person that asserts that an individual is an independent contractor under the common-law test, rather than an employee, has the burden of proving that fact.

“In North Dakota, presumptions operate to shift both the burden of going forward with evidence and the burden of persuasion. Under this theory, referred to as the Morgan view of presumptions, the party against whom the presumption is directed bears the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” Sunderland v. North Dakota Workmen’s Compensation Bureau, 370 N.W.2d 549, 552 (N.D. 1985). Thus, the burden was on Huffman/Huffco to establish that the identified workers were independent contractors rather than employees. In determining this issue, this Court has stated that the label the parties place on the relationship is not determinative; rather, it is how the relationship between the parties actually operates which is important. Midwest Property Recovery, Inc., 475 N.W.2d at 923 (Emphasis supplied.). “The central question in determining whether an individual is an employee or independent contractor is: Who is in control?” Myers-Weigel Funeral Home d/b/a WBM, Inc. v. Job Service North Dakota, 1998 ND 87 ¶ 9, 578 N.W.2d 125.

[26] In 1991, the Legislature amended Section 52-01-01 and 65-01-03 to reflect that the “common law” test was to be applied. 1991 N.D. Sess. Laws ch. 533 §§ 1, 3. In doing so, it adopted the “common law” test for both Job Service and workers compensation determinations.³ The legislative history of that enactment is discussed in Midwest Property Recovery, Inc., 475 N.W.2d at 921 fn. 4, making it clear that the “common law test” is in fact the “right to control test.” See Myers-Weigel Funeral

³ The Department of Labor statute providing for making such determinations was not enacted until 1993.

Home, 1998 ND 87 ¶ 9, 578 N.W.2d 125, 127 (noting legislative history reflects that “right to control” test and “common law test” are one and the same).

[27] WSI promulgated N.D. Admin. R. 92-01-02-49 which sets forth the factors of the “common law test” for determination of employment status as to whether an individual performing service is an independent contractor or employee. Preliminary to outlining the factors to be considered, N.D. Admin. R. 92-01-02-49(1)(a) provides:

An employment relationship exists when the person for whom services are performed has the right to control and direct the individual person who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is a significant factor indicating that the person possessing that right is an employer. The right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, establish an employment relationship. Other factors indicating an employer-employee relationship, although not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the person who performs the services. The fact that the contract must be performed at a specific location such as building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the industry. If a person is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the person will likely be an independent contractor.

N.D. Admin. R. 92-01-02-49(2) states that greater weight is given to eight of the factors, those being integration, continuing relationship, significant investment, realization of profit or loss, working for more than one firm at a time, making service available to general public, right to dismissal and right to terminate.

C. **A REASONING MIND COULD CONCLUDE THAT THE FINDINGS OF FACT SET OUT BY THE ALJ WERE PROVED BY THE WEIGHT OF THE EVIDENCE.**

[28] Huffco's Brief (pages 5-10) contains a recitation of all of the Findings of Fact that it challenges on appeal: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19, 20, 23 and 24. It should be noted that in the Notice of Appeal, Huffco does not state it challenges Finding of Fact #3, but in its Brief it does include Finding of Fact #3 as one that it challenges. In addition, in the Notice of Appeal Huffco states Finding of Fact 21 is in error, but that is not included in the Findings of Fact set out in Huffco's Brief as being one that is challenged on appeal. Huffco challenges the Conclusion of Law where ALJ Seaworth concludes that the evidence evaluated in light of the factors set out in N.D. Admin. R. 92-01-02-49 demonstrated the individuals were employees and not independent contractors. Huffco then cites WSI's administrative rule on determination of employment (pages 10-15 of its brief).

[29] WSI never took the position at hearing that everyone performing services for Huffco was "similarly situated." WSI's position was that the drivers that were hired by Huffco were similarly situated, in other words, the terms of their relationship with the drivers were substantially the same and that relationship was that of employer-employee. The issue of whether the drivers were employees or independent contractors arose during an audit of the employer account by WSI. (Ex. p. 88)

[30] Huffco has cited testimony from some of the drivers who testified at the hearing who understood they were independent contractors, wanted to be independent contractors and understood the responsibilities associated with being an independent contractor, including responsibility for payment of taxes. However, there was also

testimony that reflected some did not come with the intent to be independent contractors, but were told that is what they were going to be when they completed paperwork, as well as the belief that although they were called independent contractors they felt they were in fact employees. (Christopher Jones (App. 70); Diego Cerna (App. 104)) Thus, contrary to what Huffco wants the Court to accept as fact, not all of the drivers wanted to be independent contractors. See Finding of Fact #21 (App. 224). It was up to the ALJ to resolve the conflicts in the evidence, and this Court cannot re-weigh the same to arrive at a different conclusion. See S & S Landscaping Co., 541 N.W.2d at 82. In addition, the label that either one party places or both parties agree to place on their relationship is not determinative. As noted above, it is how the relationship between the parties actually operates which is important. Midwest Property Recovery, Inc., 475 N.W.2d 918 at 923 (emphasis supplied.).

[31] Huffco also argues that the ALJ failed to consider the determination of a Colorado insurance carrier that Huffco drivers in that state were independent contractors. In support of that contention, it cites to a North Dakota Department of Labor state form, which is not in evidence in the case. It then cites to N.D.C.C. § 65-04-22.1 which provides that if a valid identification number is made under an analysis by the North Dakota Department of Labor on the employment relationship issue, WSI may not require an employer to pay premiums.

[32] What is important to remember is that there was not determination made by the North Dakota Department of Labor under N.D.C.C. § 34-05-01.4 and thus neither the form, the facts outlined on the form, nor the cited statutory provision is applicable to this case. There was also no evidence presented that the analysis was the same as what is

required under North Dakota law. Even if this is another fact to consider in the entire analysis, it is only one fact, and the greater weight of the evidence as to the other factors, including the more weighted factors under N.D. Admin. R. 92-01-02-49, which Huffco did not even address in its brief, support the ALJ's conclusion otherwise. Furthermore, Huffco cites not one case or any part of WSI's administrative rule that supports that the ALJ must give any weight whatsoever to testimony (no documentation was submitted as evidence confirming the fact) that an out-of-state entity or attorney concluded that the relationship between Huffco and the workers at issue were independent contractors. In addition, when Huffco initially completed the Worker Relationship Questionnaire during WSI's investigation, it responded "No" to the question on whether any other government agency ruled on the status of the workers. (App. 68) Thus, the testimony from Amy Huffman concerning that issue at hearing was inconsistent with the response initially provided to WSI. (App. 247) The ALJ did find some of Amy Huffman's testimony to not be credible or accurate. (App. 25, 27)

[33] Huffco also asserts that the ALJ "went to great lengths to find that Huffco provided housing to its drivers" but that provision "is not included anywhere in the 20-part test used to determine whether an individual is an employee or an independent contractor." However, it appears odd that on the one hand, Huffco contends that the ALJ should have considered testimony on an issue that is not part of WSI's administrative rule on the 20 part test, but that the ALJ erred somehow in considering whether housing was supplied to the workers when it contends that was not part of the 20 part test. WSI, in fact, believes that the housing issue is encompassed by payment of business or travelling expenses (factor 13 under the 20 part test).

[34] In addition, Huffco's conclusory statement that the drivers received only minimal training required by the oil companies ignores disputed evidence on that issue, again which the ALJ was required to resolve in coming to her decision. See Findings of Fact #5 and #6 (App. 25-26). As the ALJ noted, Johnny Cupps testified, in consultation with Amy Huffman, the owner of Huffco, they implemented a training procedure for all new Huffco drivers. (App. 90) This was implemented due to high turnover and drivers damaging the equipment. (App. 90) The documentation supplied by Huffco also noted that payment was made at a different rate during "training." (C.R. 166, 170, 174, 182, 186, 190, 202) Drivers acknowledged they received training to include how to operate the equipment, operate the water disposal and every that was involved on the trucking side. (App. 62, 65, 69-70, 108) Thus the evidence on training was disputed, and in resolving that dispute, ALJ Seaworth concluded that Amy Huffman's testimony was "not accurate" and the evidence supported that Huffman/Huffco provided training to drivers. (App. 25) Because this finding is supported by the evidence, there is no basis for reversal of the ALJ's decision. Furthermore, this is but one factor, in the list of 20 under N.D. Admin. R. 92-01-02-49 that must be considered in determining whether the relationship is that of independent contractor or employee. Based upon the evidence presented at the hearing on this issue as outlined above, the ALJ could reasonably determine as she did. Accordingly, WSI's decision should be affirmed. See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93 ¶ 12, 576 N.W.2d 861.

[35] The ALJ addressed in Findings # 6, 7, 8, 9, 10, 11 and 12 issues pertaining to how the drivers received their assignments, Huffco's role in those assignment, how drivers were paid, what they submitted in order to get paid, and the control exerted by Huffco which

limited the ability of the drivers to work for other companies. These Findings demonstrate that the ALJ did in fact consider the issues that Huffco contends the ALJ ignored in the record. See Baker v. Barnard Construction Co., Inc., 860 F. Supp. 766, 771 (D.N.M. 1994)(noting: “A laborer on a construction site, who is told where and when to dig, does not exhibit characteristics of an independent contractor if the company does not actually tell him how to use a shovel” and “one would not say a secretary has independence consistent with independent contractor status simply because [the] supervisor does not actually tell him how to type.”).

[36] The drivers that worked for Huffco, even for a short period of time, drove exclusively for Huffco during the time they had that relationship. (App. 59, 100, 107). In fact, the drivers were not free to “come and go as they pleased” as Huffco asserts. They were using Huffco equipment and could not use that equipment to haul for anyone other than Huffco. See Stover Delivery Systems, Inc. v. Division of Employment Security, 11 S.W.3d 685, 693 (Mo. Ct. App. 1999)(noting that when schedules require substantially full time commitment it impliedly restricts workers ability to engage in other work, thus favoring employee status). Also, not a single driver testified they used the equipment, i.e., the truck, they “leased” from Huffco to drive for any other company. In fact, Amy Huffman specifically testified that the drivers could not use the truck purportedly leased under the agreement with Huffco to haul water for another company. (App. 53) See Finding of Fact #19, App. 27. Again, the ALJ’s findings encompass the facts and issues that Huffco asserts were “ignored.” Therefore, there is no basis for reversal or remand of the ALJ’s decision.

[37] Further, as to the issue of housing, the ALJ addressed this issue in Finding of Fact #14. (App. 25) As Huffco acknowledges, that issue was disputed. However, in

connection with that finding, the ALJ noted that Amy Huffman's testimony was not credible. Issues of credibility are uniquely within the province of the ALJ and cannot be disturbed by an appellate court. See Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8. Huffco cites nothing that would support that it was improper for ALJ Seaworth to consider this issue, and in fact, it certainly could be deemed relevant to the issue of Factor #13 relating to payment of business or travelling expenses. There was testimony that housing was an issue with the drivers. Diego Cerna testified that he in fact lived slept in Huffco's truck when he first came to North Dakota. (App. 105) Eventually, he was provided housing, free of charge, by Huffco. (App. 105) There was similar testimony, as the ALJ noted, from other witnesses. It certainly is pertinent to the analysis of the status of the drivers whether certain expenses that were associated with living and working in North Dakota were paid by Huffco. As factor 13 notes, if the person for whom services are performed pays the person's business or travelling expenses, or both, the person is an employee. To consider this evidence in coming to the ultimate conclusion as to whether the drivers were employees or independent contractors was not error, and the ALJ's finding in this regard, including the consideration of credibility issues pertaining to the same, is supported by the evidence and cannot be disturbed on appeal. See Davenport v. Workforce Safety and Insurance, 2013 ND 118 ¶ 11, 833 N.W.2d 500 (noting appellate court accords deference to the independent ALJ's factual findings because of opportunity to observe witnesses and resolve conflicts in evidence).

[38] On the integration factor, it is noted that when the success or continuation of a business depends to an appreciable degree upon the performance of certain services,

the persons who perform those services must necessarily be subject to a certain amount of control by the owner of the business.” N.D. Admin. R. 92-01-02-49(1)(a)(3). “The integration factor refers to whether a business could continue without the contribution of the services in question; as such, integral services are more likely to be subject to the business' control.” K & D Auto Body, Inc. v. Division of Employment Security, 171 S.W.3d 100, 107 (Mo. Ct. App. 2005), quoting National Heritage Enterprises v. Division of Employment Security, 164 S.W.2d 160, 168 (Mo. Ct. App. 2005). See also Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1537-38 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988)(stating integration focuses on whether the workers' services are a necessary component of the business.”). As ALJ Seaworth noted in Finding of Fact #4 (App. 25), Amy Huffman agreed that Huffco could not operate without office staff, mechanics and drivers. (App. 51) Huffco's main business was to provide water hauling for oil companies and obviously it could not provide those services without truck drivers. (App. 25) Thus, the drivers were fully integrated into Huffco's business.

[39] ALJ Seaworth found that the drivers had to provide their services personally, and could not hire assistants to drive the trucks. See Finding of Fact #6, App. 26. She also found that the drivers had a continuing relationship with Huffco, and did not work for other companies if they wished to remain working for Huffco. They were not free to turn down work for Huffco if they wished to remain employed by them. See Finding of Fact ## 7, 8, 9, 17 (App. 26, 28). These are factors under N.D. Admin. R. 92-01-02-49(1)(a)(4)(5)(6)(17). The testimony of the witnesses that were called support these facts found by ALJ Seaworth. (App. 57, 59, 100, 107)

[40] ALJ Seaworth found that all of the tools and equipment that were utilized by the drivers and other workers were owned and provided by Huffco. See Findings of Fact 13, 15, 16. (App. 27) The testimony was undisputed that the drivers all drove Huffco owned trucks with Huffco markings; that Huffco paid for all fuel, maintenance, insurance and other expenses associated with the trucks, and the drivers and other workers incurred no out-of-pocket expenses related to operation of these vehicles. (App. 58, 59, 61, 65, 66, 70, 80, 81, 89, 100, 106, 111) These are all facts that support a finding of employee status. N.D. Admin. R. 92-01-08-49(1)(a)(14)(15)(16).

[41] In Griffin v. North Dakota Workers Compensation Fund, 466 N.W.2d 148 (N.D. 1991), this Court specifically dealt with a review of a case relating to a truck driver relationship. In Griffin, previously there was an employee-employer relationship between the parties and then the relationship was purportedly changed and designated to be that of an independent contractor. However, the nature of how Griffin was treated did not change. Griffin obtained all of his work exclusively from the entity, did not turn down any loads, called in for assistance and direction, and drove equipment owned by the business. The Court noted that the driving work performed by Griffin was integral to the business. There was a written agreement defined the relationship as one of independent contractor. However, this Court stated: “A statement in a contract that the parties intend the relationship of independent contractor and not employee is ordinarily of little importance as against the factual rights and duties that the parties.” Griffin, 466 N.W.2d at 150-151 (emphasis supplied). Under these facts, which are strikingly similar to the facts in this case, this Court affirmed a decision that this was an employer-employee relationship.

[42] Likewise, ALJ Seaworth analyzed the documentation that Huffco required to be signed by the drivers and compared that with the testimony of the witnesses and concluded that the facts did not support an independent contractor status. See Findings of Fact #20, 21, 22. (App. 28-29) There was no risk of loss by these drivers based on the relationship between Huffco and the drivers. “A person who may realize a profit or suffer a loss as a result of the person’s services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the person who cannot is an employee. If the person is subject to a risk of economic loss due to significant investment or bona fide liability for expenses that indicates that the person is an independent contractor.” N.D. Admin. R. 92-01-02-49(1)(b)(16). The drivers, as set forth above, had no expenses associated with driving the trucks. All fuel, maintenance, insurance, licensing and other expenses were paid by Huffco, with no charge backs to the drivers. The drivers simply provided their driving services at an hourly rate paid by Huffco. There was no “bid” or “quote” process or payment “by the job. “Generally speaking, an independent contractor has the ability to make a profit or sustain a loss due to the ability to bid on projects at a flat rate and to complete projects as it sees fit.” Baker v. Flint Engineering & Const., Inc., 137 F.3d1436, 1444 (10th Cir. 1998).

[43] The last of weighed factors of N.D. Admin. R. 92-01-02-49(1)(b)(19) and (20) right to dismissal and right to terminate are significant factors in determining employment status. “The right to dismiss a person indicates that the person is an employee and the person possessing the right is an employer. An employer exercises control through the right of dismissal, which causes the person to obey the employer’s instruction. An independent contractor, on the other hand, cannot be fired without

liability for breach of contract ...” “The power to terminate is highly suggestive of the power to control.” Matter of BKU Enterprises, 513 N.W.2d at 388. ALJ Seaworth found that at least one worker was fired for looking for other work. See Finding of Fact #17 (App. 28). That worker was Diego Cerna. (App. 107)

[44] While this Court has recognized that the determination of employee status is not a “blind factoring of numerical quotients,” when certain factors are given greater importance under the analysis, one simply cannot ignore that of those given more weight under WSI’s administrative rule, the majority of those factors weigh in favor of employee status. See Matter of BKU Enterprises, Inc., 513 N.W.2d at 387 (noting that although factors may support a finding of independent contractor status, some factors may have greater importance than others). Although Huffco disagrees with the majority of the Findings of Fact made by ALJ Seaworth, it has not demonstrated through citation to law or facts that provide any basis for reversing her decision. ALJ Seaworth had the opportunity to hear, see and evaluate the testimony of all of the witnesses for credibility purposes. She compared that testimony to the documentary evidence to arrive at her findings of fact and conclusions of law on the relationship status of the drivers and other workers that Huffco called “independent contractors” and determined they were in fact employees. It was within her province to do so, and her findings should not be disturbed on appeal by this Court. Latraille 481 N.W.2d at 450. Based on the evidence, ALJ Seaworth could reasonably conclude as she did, and her decision should therefore be affirmed. See Curran v. Workforce Safety and Insurance, 2010 ND 227 ¶ 29, 791 N.W.2d 622.

CONCLUSION

[45] For the foregoing reasons WSI respectfully requests that this Court affirm the decision of the Burleigh County District court, which in turn affirmed ALJ Seaworth's Findings of Fact, Conclusions of Law and Order of May 31, 2013.

DATED this 10th day of December, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, 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 Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,818.

Dated this 10th day of December, 2014.

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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Huffman, Inc. d/b/a Huffco Services,

Appellant,

vs.

State of North Dakota by and through
Workforce Safety and Insurance,

Appellee.

Supreme Court Case No.: 20140348

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Sarah D. Iverson, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

1. Brief of Appellee North Dakota Workforce Safety and Insurance;

on the following person by electronic mail only on December 10, 2014:

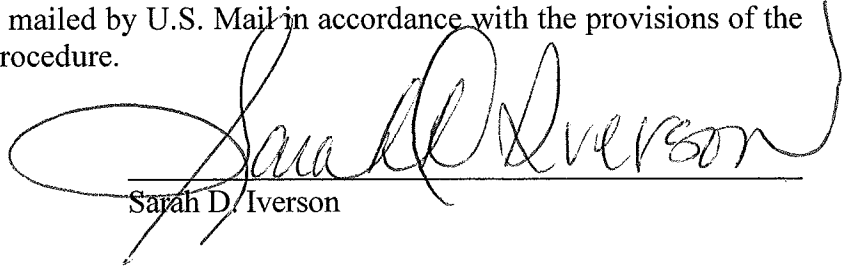
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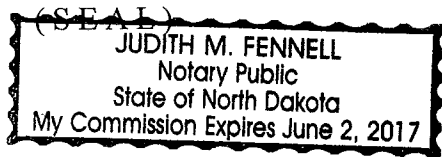
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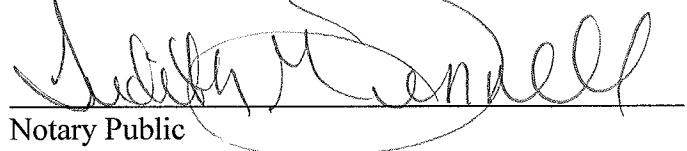
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Sarah D. Iverson

SUBSCRIBED AND SWORN TO before me on December 10, 2014.




Notary Public

cc.: Al Schmidt, ND WSI
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