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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dawn Vail, individually and as Trustee for North Dakota Workforce Safety & Insurance, Plaintiff-Appellant, vs. S/L Services, Inc., Defendant-Appellee.	**SUPREME COURT NO. 20170011** Civil No. 4:14-cv-008-CSM

UPON REQUESTS FOR ANSWERS TO CERTIFIED QUESTIONS
AND ORDER DATED JANUARY 10, 2017
U.S. DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA,
NORTHWESTERN DIVISION

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Is S/L Services liable to Dawn Vail, who received full benefits from WSI, for double recovery under N.D.C.C. § 65-04-33 where S/L Services paid all premiums owed to WSI for the policy period in which the injury occurred?

[¶2] Must Vail show that S/L Services made a knowingly false statement to WSI before holding S/L Services responsible for violating Title 65?

STATEMENT OF THE CASE

[¶3] This is a suit filed for personal injuries in North Dakota Federal District Court by Dawn Vail against her former employer S/L Services, Inc. Vail was classified and treated as an independent contractor throughout her employment until she was injured and filed for WSI benefits. She received those benefits upon WSI's determination that she was an employee. S/L opposed this classification but complied with WSI's determination, paying premiums owed for past years to make up for Vail and others similarly situated.

[¶4] Even though she received full WSI benefits, Vail now seeks double recovery in this action under N.D.C.C. §§ 65-09-01 and 65-04-33(2), on the theories that S/L Services either failed to procure coverage or willfully misrepresented its payroll to WSI.

[¶5] S/L Services moved for summary judgment in the federal action on two grounds: (1) Vail's claims fail as a matter of law since S/L Services is in compliance with WSI and has paid all premiums owed dating back to the period when Vail was employed; and (2) S/L Services should be dismissed because, as a matter of law, S/L Services did not willfully misrepresent its payroll to WSI.

[¶6] Following oral argument, the Federal District Court certified the following seven questions to this Court:

1) Given the facts this court has stated should be assumed as true (including that S/L Services treated Vail as an independent contractor prior to her accident and opposed her claim for benefits on the grounds she was not an employee but later paid a premium based on her wages for the premium period in which she was injured), can either the treatment of Vail as an independent contractor or S/L Services' opposition to her claim for benefits on the grounds she was not an employee constitute a failure to secure coverage in violation of § 65-04-33(2) if done willfully within the meaning of that section?

2) Given the facts that this court has stated should be assumed as true (including that S/L Services did not include Vail's wages in its payroll report for the August 2012-August 2013 premium period but that WSI nevertheless calculated the premium for that period using Vail's wages and S/L Services paid that premium), can the failure

on the part of S/L Services to include Vail's wages in the August 2012 – 2013 premium period constitute a misrepresentation of payroll in violation of § 65-04-33(2) if it was done willfully within the meaning of that section?

3) Given the facts that this court has stated should be assumed as true (including that S/L Services failed to include in its wage report for the August 2012 – August 2013 premium period the wages of some six or seven welder's helpers who were similarly situated to Vail and whose wages were not included in WSI's calculation and billing for that premium period but were later included in a subsequent billing by WSI following a 2014 audit and paid by S/L Services at that time), can the failure on the part of S/L Services to include the wages of these other welder's helpers in the August 2012 – August 2013 wage report constitute a violation of § 65-04-33(2), if it was done willfully within the meaning of that section, and can Vail rely upon that alone to support a claim that S/L Services has lost its immunity from a common law suit for damages for her workplace injury?

4) In order to prove a violation of § 65-04-33(2), is Vail required to demonstrate that S/L Services knew at the time it engaged in the conduct that Vail claims amounts to a violation that she or any of the other workers similarly situate were employees as a matter of law and entitled to workers' compensation coverage?

5) In proving a violation of § 65-04-33(2), can Vail satisfy the statute's scienter requirement if she proves that S/L Services acted in reckless disregard of the fact that she and any other workers similarly situated were employees as a matter of law and entitled to worker's compensation coverage at the time it engaged in the prohibited conduct?

6) In proving a violation of § 65-04-33(2), can Vail satisfy its scienter requirement by proving only that S/L Services intentionally, and not inadvertently, committed an act prohibited by the statute and not prove any other state-of-mind, including that S/L Services had knowledge of the relevant obligations imposed on an employer under the worker's compensation laws, that S/L Services knew that Vail was an employee as a matter of law, that S/L Services intended to deceive WSI or otherwise violate the law, or that S/L Services acted in reckless disregard of the law's requirements or that Vail was an employee as a matter of law?

7) Can S/L Services avoid a finding of a violation of § 65-04-33(2) if it can be demonstrated that, at the time it engaged in the conduct that is alleged to have constituted a violation, it believed in good faith that Vail or other similarly situated workers were not employers as a matter of law, even though that belief was mistaken?

STATEMENT OF THE FACTS

[¶7] This is an action centered on Plaintiff's injury suffered on a construction site near Watford City, North Dakota on May 25, 2013 and S/L Services' classification of the Plaintiff as an independent contractor during that time. (Appendix of Appellant 3, Pl. Complaint, ECF No. 1). S/L Services is a roustabout company based in Montana with operations extending into western North Dakota. The Plaintiff, Dawn Vail, was serving as a welders' helper at the time of her accident on a construction site owned by Hiland Partners. (Appellant App. 323, Vail Dep. 32:16-25).

[¶8] S/L Services was founded and incorporated in 2006 as a Montana corporation. (Appellant App., 125, Shandy Dep. 8:12-19; 57:7-11). In 2007, S/L Services began doing work in North Dakota. At that time, S/L Services applied through Montana workers' compensation for extraterritorial coverage to cover its employees working in North Dakota. (Appellant App., 35, Becker Dep. 26:8–28:3; 65:5-12). It wasn't until 2012 that S/L Services was informed by its insurance agent that it needed North Dakota workers compensation insurance for its North Dakota employees. (Appellant App., 125, Shandy Dep. 66:20–67:17). Subsequently, S/L Services sent its first estimate of the number of its employees to WSI and received a Certificate of Premium Payment covering September 10, 2012 through November 14, 2013. (Appendix of Appellee, 1). S/L Services' estimate did not include welders' helpers as employees.

[¶9] It was around this time that the owner of the jobsite, Hiland Partners, and S/L Services confronted a problem with the payment of welders on Hiland projects. (App. of Appellant, 125, Shandy Dep. 36:8–37:23; and 205, Whiteman Dep. 29:5–30:20). The crux of the problem was that Hiland paid its subcontractors monthly but the welders union wanted to be paid more frequently. (Id.). S/L Services was in a position to turn

their payroll over more frequently, so Hiland requested that S/L Services pay welders and welders' helpers as S/L Services' independent contractors and float this payment until the end of the month, when Hiland would pay S/L Services. (Id.). Hiland treated welders and welders' helpers as independent contractors before switching over the payroll to S/L Services.

[¶10] Around this time, Steve Basse came to work as a welder on the Hiland Project. (Appellant App., 205, Whiteman Dep. 32:6–33:2). Basse brought his own welder's helper, Dawn Vail, with him to the worksite. (Id., 33:7-14). Vail and Basse both signed W-9s and were treated as independent contractors up to and at the time of Vail's injury. S/L Services treated all of the other welders and welders' helpers on its payroll as independent contractors. (Appellant App., 35, Becker Dep. 53:9).

[¶11] Vail was injured on May 25, 2013. Following her injury, Vail filed for WSI benefits on May 28, 2013. S/L Services disputed Vail's application, stating that she was an independent contractor and not an employee. (Appellant App., 35, Becker Dep. 29:5). S/L Services returned WSI's first report of injury on June 5, 2013 with the notation that Vail was a subcontractor. (Id.). In response to WSI's request for more information, S/L Services returned a questionnaire regarding Vail's classification to WSI on June 13, 2013. (Appellant App., 425). Despite S/L Services' objections, WSI determined that Vail was an employee via a July 10, 2013 decision and awarded her benefits. In that order, WSI required S/L Services to pay premiums for the period during which Vail was employed. (Appellant App., 431). S/L Services mistakenly didn't include Vail and some of the other welders' helpers on its August, 2013 payroll estimate. WSI noted this mistake, corrected the estimate, and issued a charge that S/L Services paid, totaling

$26,737.23. (Appellee App., 2, March 7, 2016 Aff. of Steven Belka). The premium WSI charged S/L Services included the payroll for Dawn Vail and all welders' helpers. (Id.).

[¶12] Subsequently, Vail brought this lawsuit against S/L Services in U.S. District Court despite receiving full benefits for her injuries. S/L Services moved for summary judgment on two grounds: 1) S/L Services was in full compliance with WSI at all times and was therefore immune from Vail's lawsuit; and 2) there was no evidence that S/L Services willfully misrepresented their payroll within the meaning of the statute. Through that Motion, the Federal Court certified seven questions to this Court, touching on different aspects of the grounds upon which S/L Services requested dismissal.

[¶13] S/L Services believes it is entitled to summary judgment on both grounds proffered to the U.S. District Court under the clear interpretation of the statutes in question. Title 65 is meant as the sole remedy for employees hurt in the course of their employment. It guarantees that employees will be covered and all employers in compliance with Title 65 are covered by statutory immunity. A complying employer should be immune from suit, even it were later determined to be wrong on a point of law such as classifying independent contractors.

LAW AND ARGUMENT

[¶14] The U.S. District Court certified two categories of questions. The first three questions concern whether S/L Services may be sued by Dawn Vail under N.D.C.C. § 65-04-33 according to the facts the Court assumed to be true for purposes of this analysis. The final four questions relate to the scienter requirement for holding S/L Services liable for purported misrepresentations to WSI. Each of the seven questions certified to this Court involve statutory interpretation of clear language within Title 65. In interpreting statutes, we first look at the language and give words their plain, ordinary, and commonly

understood meaning." Carlson v. GMR Transp., Inc., 2015 ND 121, ¶ 6 863 N.W.2d 514 (citing N.D.C.C. § 1-02-02). "We construe statutes as a whole and harmonize them to give meaning to related provisions, and interpret them in context to give meaning and effect to each word, phrase, and sentence." Id. (citation omitted). These statutory interpretations are issues of law for the Court to decide. Id.

[¶15] S/L Services is immune from suit under these circumstances because they acted in good faith upon what was merely a mistaken understanding of North Dakota law according to a later WSI determination. They did not intentionally misrepresent facts to WSI, and thus cannot be held responsible under the first three questions posed.

[¶16] Moreover, Vail must prove that S/L Services knew the law – knew that welders' helpers were employees and not independent contractors – in order to maintain her action. The legislature intended N.D.C.C. § 65-04-33 to mirror the punitive section related to employees in § 65-05-33. There are a plethora of cases interpreting that statute, including the list of four elements that must be proven to sustain an employees' liability. Those same elements, including knowingly false information and materiality, should be applied to § 65-04-33. The case law makes clear that an employer must have knowledge of objective facts and misrepresent those facts to WSI to be liable for willful misrepresentation or willful failure to procure coverage.

I. S/L Services, Having Paid all Premiums Owed and Having Estimated its Payroll in Good Faith, was in Full Compliance with Title 65 at all Relevant Times; They are therefore Immune from a Lawsuit By its Employee.

[¶17] Under N.D.C.C. § 65-04-28, "employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the

premiums paid into the fund." See Carlson v. GMR Transp., Inc., 2015 ND 121, ¶ 12, 863 N.W.2d 514; see also Smith v. Vestal, 494 N.W.2d 370, 373 (N.D. 1992). S/L Services estimated their payroll for the purposes of paying a premium to WSI and procuring workers' compensation coverage. WSI accepted this estimate in 2012 and issued a certificate of premium payment; S/L Services thereby procured insurance under the statute.

[¶18] S/L Services' estimate did not include welders' helpers as employees, since S/L Services understood them to be independent contractors. But once WSI determined that Vail was an employee and issued an invoice for further payment for that period, S/L Services paid the premiums owed – both past and present. S/L Services owes no further payment to WSI, for any period, including most importantly that period in which Vail was injured, November, 2012 – September, 2013.

[¶19] It's undisputed that S/L Services obtained WSI benefits for its North Dakota employees by paying premiums beginning in 2012. Prior to Vail's injury, S/L Services estimated its payroll, paid a premium based upon this estimate, and obtained a certificate of premium payment. Given these undisputed facts, Dawn Vail may not maintain an action under either purported violation of § 65-04-33. Accordingly, the answers to the first two questions of the Federal Court should be "No."

[¶20] First, S/L Services procured insurance for its employees as of August, 2012, meaning no factual basis supports Vail's action under the claim that S/L Services willfully failed to procure insurance. Second, S/L Services cannot have willfully misrepresented that welder's helpers were independent contractors unless it knew, as a matter of law, that such was the case.

A. S/L Services Procured Insurance within the Meaning of N.D.C.C. § 65-04-33 and Paid All Premiums Owed; Therefore it is in Compliance With Title 65 and Immune from Vail's Suit.

[¶21] Vail argues that S/L Services is culpable for failing to procure coverage for welder's helpers even though Vail cannot dispute that S/L Services procured coverage for those it thought were employees at the time. As the trial court noted in Carlson v. GMR Transport., and this court noted with approval, that section of § 65-04-33(1) is reserved for those employers that fail to pay the premiums and procure WSI coverage at all. See 2015 ND 121 at ¶ 16-17 ("[that section] addresses the situation where the employer has employees but is not participating in the system, is not paying premiums.").

[¶22] The facts in Gepner v. Fujicolor Processing, Inc., 2001 ND 207, 637 N.W.2d 681 shed light on what it means to violate the statute by failing to procure insurance. Gepner's employer, Fujicolor, was headquartered in South Dakota but employed Gepner in North Dakota. Id. at ¶ 6. Fujicolor never applied for, nor gained, worker's compensation insurance in North Dakota; thus Gepner could maintain her claim for civil tort damages against her employer. Id. at ¶ 7. In this case, S/L Services indisputably applied for, and obtained, WSI insurance before employing Dawn Vail. Since S/L Services did not fail to procure insurance, as Fujicolor did in Gepner, it cannot be held liable for double recovery under that theory.

[¶23] S/L Services procured WSI coverage beginning in 2012. This initial premium was paid upon S/L Services' estimate that did not include welder's helpers. However, once WSI determined that Dawn Vail was an employee, S/L Services paid the premiums it owed. Once WSI informed S/L Services that all welder's helpers were to be included as employees, S/L Services again paid the premium owed. Between its 2013 and 2014

premiums, S/L Services paid all premiums owed, for each year, even dating back to 2012, for all welder's helpers they employed.

[¶24] This is a matter of plain statutory interpretation. It's undisputed that S/L Services paid its premium for the relevant time period and therefore subsection (1) of § 65-04-33 is clearly inapplicable in this case. S/L Services is, and has been, in compliance with Title 65. Accordingly, S/L Services is not liable for double recovery under the facts assumed by the Federal District Court in questions one through three.

B. Title 65 Requires an Estimate Only, Not Exact Precision; Thus S/L Services was Not in Violation of 65-04-33 Merely Because WSI Later Determined that Welder's Helpers Were Employees.

[¶25] Vail argues that as a matter of law, S/L Services is liable for double recovery merely because it was mistaken per WSI's decision. This cannot be supported based on the clear statutory construction of Chapter 65-04. As this court noted in Carlson v. GMR Transp., "Section 65-04-33(1), N.D.C.C. speaks in terms of annual notifications of an employer's 'estimated payroll expenditure for the coming twelve-month period.'" 2015 ND 121, at ¶ 17. It's presumed then that WSI requires only an estimate, which Black's Law defines as "a rough or approximate calculation." Id. (citing Black's Law Dictionary, (10th ed., 2010)).

[¶26] Under the plain reading of § 65-04-33(2), it would be unreasonable to require exact precision from every employer, such that any determination that an estimate was incorrect purports liability for double recovery. That has never been the requirement held by this Court. It would be just as unreasonable to import liability based merely on the ultimate finding by an administrative agency that an employer made a mistake of law on an issue as complex as differentiating independent contractor from employee.

[¶27] There are many areas of law that require a court to compare and contrast the different factors to determine employment status. In each case, that determination is a mixed issue of fact and law. Matter of BKU Enterprises, Inc., 513 N.W.2d 382, 387 (N.D. 1994). There are twenty factors that a court will weigh before making a determination of employee or independent contractor. See Id. (listing each of the twenty factors). "When reviewing a mixed question of fact and law, 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." Id.

[¶28] Vail posits that an employer who incorrectly interprets how an administrative agency like WSI may ultimately view a welder's helper, or any other part of the labor force, bears the risk of per se double recovery. Vail's position is untenable given that allowing double recovery is a measure reserved for those rare occasions when the legislature deems it appropriate. The legislature's intent for this punitive measure is clear given its scarcity in North Dakota law and the common law principal that a claimant receives only what she actually lost as compensation for a tort. The legislature clearly intended that only those employers who knowingly commit fraud upon WSI be liable for double recovery.

[¶29] The facts presented by the Federal Court in the first three certified questions do not give rise to liability because the law does not require that employers must be perfect in their estimate provided to WSI. It's the very nature of providing an estimate that one aspect or another may, in fact, be incorrect. Incorrectness or inadvertence alone does not give rise to liability for double recovery. An employer must not be in compliance with Title 65 and they must have either entirely failed to provide insurance coverage or

willfully misrepresented their payroll. The Answers from this Court to the first three questions should be "No."

II. 'Willful Misrepresentation' Under N.D.C.C. § 65-04-33 Requires Evidence of Knowledge of Objective Facts and Intentionally Making a Knowingly False Statement to WSI.

[¶30] The Federal Court's final set of questions concern the "scienter" requirement under N.D.C.C. § 65-04-33. For several reasons, the answers should necessitate evidence that an employer knew the information they provided to WSI was false. In this case, the dispute is over the classification of welders' helpers as independent contractors. As a matter of law, this dispute shouldn't give rise to liability under the willful misrepresentation subsection of § 65-04-33 because the differentiation of employee/independent contractor is a complicated issue of fact and law that an employer cannot be required to know for certain.

[¶31] Case law interpreting this phrase, or those similar, have found that a "willful misrepresentation" is akin to fraud. Title 65 already contains a remarkably similar statutory provision governing the representations of employees-turned-claimants for benefits. This Court has applied four elements to determine whether an employee has made a willful misrepresentation. Those cases provide a guide here.

A. Classification of Independent Contractor Versus Employee Cannot be the Basis for Finding Willful Misrepresentation Without Indication that Employer Knew That Laborers Were Employees and Represented Otherwise.

[¶32] Willful misrepresentation requires knowledge that the facts presented to WSI were false at the time they were provided. In order for conduct to be "willful," the conduct must be engaged in intentionally and not inadvertently. Dean v. North Dakota Workers Comp. Bureau, 1997 ND 165, ¶ 15, 567 N.W.2d 626. In order to prove willful

misrepresentation, a party "must prove the claimant's state of mind was purposeful in making the false statement." Forbes v. Workforce Safety & Ins. Fund, 2006 ND 208, ¶ 17, 722 N.W.2d 536 (citing Hausauer v. North Dakota Workers Comp. Bureau, 1997 ND 243, ¶ 14, 572 N.W.2d 426 (interpreting the meaning of the same phrase in the context of an employee's entitlement to benefits despite a misrepresentation to WSI)).

[¶33] Federal case law provides further direction, as courts have analyzed similar phrases as those used in § 65-04-33. In those cases, "willful misrepresentation" is synonymous with "voluntary and deliberate activity" with "knowledge of the falsity of a representation." 3B Am. Jur. 2d Aliens and Citizens § 1417; see also Parlak v. Holder, 578 F.3d 457, 463-64 (6th Cir. 2009) (alien applying for citizenship made willful misrepresentations by representing that he had no prior arrests or convictions on application); Emokah v. Mukasey, 523 F.3d 110, 116-17 (2d Cir. 2008) (alien applying for visa was not merely negligent, but made willful, deliberately false, misrepresentations by giving a false name on her application and representing that she was married); Espinoza-Espinoza v. Immigration Naturalization Serv., 554 F.2d 921, 925 (9th Cir. 1977) (petitioner for visa made willful misrepresentations within meaning of the statute when he falsely claimed to be married to an American citizen on his application). There must be evidence that an applicant knew that information was false at the time of the statement in order to infer a willful misrepresentation. See Parlak, 578 F.3d at 463-64. Importantly, mere inadvertence, or even negligence, are not enough to meet the standard. Using these definitions as a guide, an employer is in violation of N.D.C.C § 65-04-33 only if it deliberately misrepresented its payroll to WSI with knowledge that the information provided was false.

[¶34] Vail parses the terms "willfully" and "misrepresented" as if each word exists in a vacuum but the rules of statutory construction require us to read the entire statute in harmony where possible to insure against a ludicrous result. Willful, taken alone, means nothing more than "intentional, not inadvertent." However, "willful" is not the operative word. "Misrepresent" is the article within the phrase that gives meaning to the whole. According to Merriam Webster, "to misrepresent" means "to give a false or misleading account of the nature of." Black's Law Dictionary agrees, defining a "misrepresentation" as "The act of making a false or misleading assertion about something, usually with the intent to deceive." Black's Law Dictionary (10th ed. 2014). These ordinary definitions follow the case law.

[¶35] In Carlson v. GMR Transp., Inc., 2015 ND 121, 863 N.W.2d 514, the Court confronted, for the third time, a set of facts nearly identical to those in the case now before this Court. Carlson, a truck driver for GMR, was hauling freight when he was injured. Id. at ¶ 2. Carlson filed for WSI benefits, to which GMR responded that he was an independent contractor. Id. WSI determined that Carlson was an employee and entitled to benefits and in response, GMR requested reconsideration through its South Dakota lawyer, who was not licensed to practice in North Dakota. Id.

[¶36] WSI reversed its decision based on the additional information GMR provided, but Carlson's appeal was successful when he established that GMR's attorney hadn't complied with pro hac requirements and therefore the reconsideration request was void. Id. at ¶ 4 (citing Carlson v. Workforce Safety and Ins., 2009 ND 87, 765 N.W.2d 691 ("Carlson I"). Upon remand, WSI attempted to reverse its course and find, again, that

Carlson was not an employee. But again, Carlson was successful on appeal in Carlson v. Workforce Safety and Ins., 2012 ND 203, 821 N.W.2d 760 ("Carlson II"). Id. at ¶ 5.

[¶37] On the third time Carlson appealed to this Court, he argued that not only was he entitled to benefits, but that he was entitled to bring a tort action against his former employer because they had failed to procure insurance and had willfully misrepresented its payroll in violation of N.D.C.C. § 65-04-33. Carlson v. GMR, 2015 ND 121 at ¶ 6. The trial court dismissed Carlson's lawsuit and this Court affirmed the decision, holding that GMR was immune from suit since "reasonable persons could only conclude that GMR did not willfully misrepresent the amount of its payroll..." Id. at ¶ 20.

[¶38] Under the Court's analysis in Carlson, an employer is not per se liable for double recovery to its employees merely because its classification was later deemed incorrect by WSI. This decision makes sense, given the challenging point of law that classifying independent contractors versus employees presents. Employers should not be held to an impossible standard; if there's a good faith dispute over a point of law like independent contractor/employee, then employers should not be liable under § 65-04-33 for merely being incorrect according to WSI's later determination. An employer who presents that its workers are independent contractors, and actually treats them as independent contractors, should not lose statutory immunity from suit.

[¶39] S/L Services presented its payroll in good faith and relied on reasonable factors when it determined welders' helpers were independent contractors. S/L Services conducted its business in the same fashion as others in the industry. (App. of Appellant, 205, Whiteman Dep. 28:18–29:12; 33:3-24; 37:14-38:14; 59:3-20). While S/L Services' representatives did not fully understand the intricacies of the Workforce Safety and

Insurance Act, it relied on its past experience, peers in the industry, and its insurance agent for direction. (App. of Appellant, 35, Becker Dep. 26:1–25; 61:13–62:6; and 125, Shandy Dep. 27:16–28:4; 63:5–64:9; and 205, Whiteman Dep. 28:18–29:12; 33:3-24; 37:14-38:14; 59:3-20).

[¶40] As a matter of law, a subjective determination later ruled incorrect by WSI should not give rise to liability without more to prove that an employer knowingly provided false information. Importantly, S/L Services actually treated welder's helpers as independent contractors. This is not a case where the employer represented one thing to WSI and did another in practice. It's undisputed in this case that S/L Services paid welder's helpers a greater wage, did not withhold taxes, paid per diem, and did not pay overtime.

[¶41] S/L Services did not knowingly misrepresent its payroll. To do so within the meaning of N.D.C.C. § 65-04-33 requires knowledge of an objective fact or a prior ruling of law as applied specifically to welders' helpers and S/L Services. Accordingly, this Court should answer "Yes" to the Federal Court's Fourth and Seventh Questions, and "No" to the Fifth and Sixth Questions.

B. N.D.C.C. § 65-04-33(2) Should Follow the Meaning and Effect the Same Phrases Have in N.D.C.C. § 65-05-33 for Employee Misrepresentations

[¶42] While there are few cases interpreting the meaning and effect of the willful misrepresentation violation enumerated in 65-04-33, the same cannot be said for its mirror image found in N.D.C.C. § 65-05-33, which governs employees' culpability for their willful misrepresentations. Precedent established by this Court under that provision is further instructive of how 65-04-33 should be interpreted and the scienter required of an employer before they become liable for double recovery.

[¶43] Under N.D.C.C. § 65-05-33, a person claiming benefits who "willfully files a false claim or makes a false statement" or "willfully misrepresents that person's physical condition" is guilty of a Class A misdemeanor and required to reimburse WSI for any benefits received. This Court interprets N.D.C.C. § 65-05-33 to require that WSI prove four elements in order to hold a person liable:

> " … the Bureau must prove: (1) there is a false claim or false statement; (2) the false claim or false statement is willfully made; and (3) the false claim or false statement is made in connection with any claim or application under this title. We additionally require the Bureau to prove the false statement is material."

Hausauer v. North Dakota Workers Comp. Bureau, 1997 ND 243, ¶ 12, 572 N.W.2d 426.

[¶44] There are numerous cases decided by this Court that provide instruction as to the meaning of "willful misrepresentation" and the necessary proof to create liability under § 65-05-33. See Hausauer (claimant failed to disclose history of two prior back injuries, both of which resulted in claims for WSI benefits, and was accordingly excluded from receiving benefits); Dean v. North Dakota Workers Comp. Bureau, 1997 ND 165, 567 N.W.2d 626 (WSI employee excluded from benefits for making willfully false statements about prior back injuries and chiropractic treatment received to same area of the spine involved in the subject claim for benefits); Vernon v. North Dakota Workers Comp. Bureau, 1999 ND 153, 598 N.W2d 139 (claimant found to have lied to doctors about physical condition; statements led to conclusion that claimant was permanently disabled, and meanwhile claimant's daily activities included aerobics classes, golf, and weightlifting); Forbes v. Workforce Safety and Ins. Fund, 2006 ND 208, 722 N.W.2d 536 (claimant found liable for return of all benefits received following WSI investigation that uncovered claimant had lied about debilitating pain while at the same time attending daily weightlifting and yoga classes). Each of these cases involves an employee giving

false information about their injury history; either prior injury history as in Hausauer and Dean, or history of ongoing medical issues purportedly relating to the work-related injury as in Forbes and Vernon.

[¶45] In order to prove the first two elements in these cases, WSI was required to show that the information provided was objectively false and that the employee intentionally gave that false information. The language of § 65-04-33 is clear and unambiguous and this language is not alone within Title 65. While this Court has not had many occasions to weigh what facts give rise to willful misrepresentation or the scienter required to prove culpability under Chapter 65-04, it has done so many times under 65-05. This Court should utilize precedent established under § 65-05-33 and implement the same analysis in cases involving alleged misrepresentations by an employer.

[¶46] An employer must have knowledge of a fact and intentionally provide a knowingly false statement. Accordingly, this Court should respond "Yes" to question four and "No" to questions five and six. While not necessary, given the burden of proof and the requirement that a statement must be knowingly false, this Court should nevertheless respond "Yes" to question seven, given that § 65-04-33 requires an estimate from employers only.

CONCLUSION

[¶47] S/L Services paid all premiums owed covering Dawn Vail. There can be no dispute that S/L Services procured insurance under the meaning of the law and therefore is not in violation of N.D.C.C. § 65-04-33. Further, and as a matter of law, S/L Services should not be liable for willful misrepresentation under these facts as the determination of Vail as an independent contractor or employee was in dispute and involved a subjective determination of intricate statutory and case law. S/L Services acted in good faith and did not willfully misrepresent Vail's status under the statute.

[¶48] For the foregoing reasons, S/L Services respectfully requests this Court enter the following answers to the U.S. District Court's certified questions:

As to Question 1, "No;"

As to Question 2, "No;"

As to Question 3, "No;"

As to Question 4, "Yes;"

As to Question 5, "No;"

As to Question 6, "No;" and

As to Question 7, "Yes."

Respectfully submitted March 17, 2017.

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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that on this 17th day of March, 2017, a true and correct copy of the Brief of Defendant-Appellee in the matter of Vail v. S/L Services, Inc. was served by electronic mail on Thomas J. Conlin and Stacy Deery Stennes at tom@conlinlawfirm.com and stacy@conlinlawfirm.com.

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