

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 13, 2019
STATE OF NORTH DAKOTA

Plains Trucking, LLC,

Petitioner,

vs.

Richard Hagar, Judge of the District Court,
North Central Judicial District, Darian Songer
Bail; Missouri Basin Well Service, Inc. d/b/a
MBI Energy Services,

Respondents.

SUPREME COURT NO. 20190022

Civil No. 51-2016-CV-00916

APPEAL FROM THE DISTRICT COURT DATED SEPTEMBER 27, 2018
WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE RICHARD HAGAR

**PETITIONER'S BRIEF IN OPPOSITION TO
RESPONDENT'S CROSS PETITION FOR SUPERVISORY WRIT**

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STATEMENT OF ISSUES

¶1 Whether the trial court correctly determined that WSI's determination that Songer Bail was an employee of Plains Trucking was res judicata on that issue.

STATEMENT OF THE CASE

¶2 Plains Trucking submitted a Petition for Supervisory Writ on January 15, 2019. The statement of the case outlined and included in that Petition is incorporated by reference.

¶3 The respondents submitted a brief in opposition to the Petitioner's Petition for Supervisory Writ but also filed a "cross petition" for supervisory writ. The trial court concluded that WSI's determination that Songer Bail was an employee of Plains Trucking and not an independent contractor was res judicata on that issue and granted summary judgment for Plains Trucking. (See Docket ID #67.) The respondents have "cross petitioned" on that issue.

STATEMENT OF FACTS

¶4 Plains Trucking was Darian Songer Bail's (hereinafter "Songer Bail") employer at the time of the incident. Songer Bail was injured while cleaning a crude-oil tanker trailer owned by MBI on March 27, 2013, when he introduced a non-safety light source to the tanker and an explosion resulted. Songer Bail's co-worker, Trevor Davis, was inside the tanker at the time and died as a result of the explosion. On or about April 12, 2013, Songer Bail submitted the First Report of Injury to WSI identifying Plains Trucking as his employer and seeking workers compensation benefits. (see Docket ID #37). By letter dated May 14, 2013, WSI sent Notice of Decision Accepting Claim and Awarding Benefits (hereinafter, "Notice of Decision") to Songer Bail. (See Docket ID #38.) The Notice of Decision provided as follows:

- * An application for workers' compensation benefits was filed in connection with an injury on [03/27/2013].
- * On the above injury date, the injured worker was employed by

[Plains Trucking].

- * Medical records indicate that the medical condition relates to the work injury on the above injury date.
- * The evidence shows the injured worker sustained an injury by accident arising out of and in the course of employment.

The Notice further provided as follows:

If you feel this decision is incorrect, please write to your claims adjuster within 30 days of the date on this notice to request consideration. Please explain why you think the decision is wrong and what you think the correct decision should be. Also enclose any additional information for WSI to consider. The request for reconsideration must be in writing from you, not your physician. If a request for reconsideration is not received within 30 days, this decision will be final. **If you agree with this decision, nothing more is required.**

Songer Bail accepted the payment from WSI and did not request reconsideration within 30 days of the Notice.

¶5 The final Notice of Decision from WSI is a determination that Songer Bail was an employee of Plains Trucking. This is consistent with the representation that was made to WSI by Songer Bail in his application for benefits that is signed under a strict fraud warning. Furthermore, Songer Bail accepted disability benefits of \$25,289.72 from WSI to compensate him for lost work time. (Docket ID #41) (App. at 44-45). WSI also paid Songer Bail's medical bills of more than \$205,180.47 (WSI paid its negotiated rate of \$77,838.86 to satisfy these billings) (Docket ID #41) (App. at 46-67).

LAW AND ARGUMENT

I. The District Court Correctly Concluded that WSI's Determination That Songer Bail was an Employee of Plains Trucking was Res Judicata.

¶6 Songer Bail commenced the instant civil action after having submitted an application to Workforce Safety and Insurance representing that he was an employee; after having received the notice of decision of Workforce Safety and Insurance determining that

he was a covered employee entitled to Workers Compensation; and after having received more than \$230,000 in total benefits. (See Docket ID #4) (App. at 44-45). The Notice of Decision dated May 14, 2013, to Songer Bail, which clearly indicates WSI's determination that he was a covered employee, provides as follows:

If you feel this decision is incorrect, please write to your claims adjuster within 30 days of the date on this notice to request consideration. Please explain why you think the decision is wrong and what you think the correct decision should be. Also enclose any additional information for WSI to consider. The request for reconsideration must be in writing from you, not your physician. If a request for reconsideration is not received within 30 days, this decision will be final. **If you agree with this decision, nothing more is required.**

As is clearly stated in the Notice of Decision, the decision of WSI is final if a written request for reconsideration is not filed within 30 days. N.D.C.C. § 65-01-16(4), provides as follows:

A party has thirty days from the day the notice of decision was mailed by the organization in which to file a written request for reconsideration. The employer is not required to file the request through an attorney. The request must state the reason for disagreement with the organization's decision and the desired outcome. The request may be accompanied by additional evidence not previously submitted to the organization. The organization shall reconsider the matter by informal internal review of the information of record. **Absent a timely and sufficient request for reconsideration, the notice of decision is final and may not be reheard or appealed. Emphasis added.**

¶7 It is undisputed that Songer Bail did not challenge or request reconsideration of the Notice of Decision during the 30 days in which he was required to provide a written request. Indeed, to this very date he has never challenged that determination administratively. Accordingly, the decision of WSI was final and not appealable.

¶8 Songer Bail attempts to belatedly change his mind and now argue that he was an independent contractor of Plains Trucking at the time of the incident instead of an employee. (Docket ID #1, Complaint ¶ 14.) However, the issue of Songer Bail's status as an employee of Plains Trucking was addressed in WSI's Notice of Decision, which became final when no written request for reconsideration was made to WSI within the thirty days following the Notice of Decision. "[A]n unappealed WSI decision is res judicata unless WSI reopens the claim[.]" Drayton v. Workforce Safety & Ins., 2008 ND 178, ¶ 14, 756 N.W.2d 320 and *see* Carlson v. GMR Transp., Inc., 2015 ND 121, ¶ 19, 863 N.W.2d 514. In other words, WSI is the agency charged with making the determination as to a worker's status as an employee or independent contractor and that determination is final. There is no issue of material fact as to Songer Bail's status as an employee of Plains Trucking. Accordingly, the District Court correctly determined that WSI's determination that Songer Bail was an employee of Plains Trucking was res judicata.

¶9 In Westman v. Dessellier, the Court held that "[t]he decisions of administrative agencies, including those of the Bureau, may be res judicata even though administrative agencies are not courts." 459 N.W.2d 545, 547 (N.D. 1990) (citing Vanover v. Kansas City Life Ins. Co., 438 N.W.2d 524 (N.D. 1989); Lass v. North Dakota Workmen's Comp. Bureau, 415 N.W.2d 796 (N.D. 1987)). A prior decision of the Bureau is res judicata as to the same issues in a suit at law to recover for the same injury, whether the effect is to defeat the suit or to defeat a defense to the suit. Id. at 547. Here, the decision of WSI that Songer Bail was an employee at the time of incident is res judicata and, consequently, the suit should be prohibited as Songer Bail is bound by WSI's determination.

¶10 Songer Bail belatedly argues that the WSI decision is not res judicata because no formal evidentiary hearing was conducted. The reason no hearing was conducted is no party contested the decision of WSI. Indeed, Songer Bail himself filed the claim and then received notice of the acceptance of that claim. That Notice of Decision clearly and unequivocally advised him of his right to challenge the acceptance of the claim. He did not do so in the 30-day time frame. Indeed, he has never to this date challenged or attempted to change the WSI administrative decision accepting the claim. Instead, he has received benefits in excess of \$230,000.

¶11 There is a presumption that workers are employees rather than independent contractors. See Section 92-01-02-49 N.D. Admin. Code. In addition, Songer Bail filed a claim asserting he was an employee of Plains Trucking. (See Docket ID #17.) Plains Trucking did not dispute that Songer Bail was an employee. WSI issued a Notice of Decision accepting the claim and paying benefits to Songer Bail. (Docket ID #38.) No party has ever challenged, disputed or contested that finding with WSI. The determination of employment status, for purposes of determining workers compensation coverage, is an agency decision. If a party is allowed to file a claim for benefits (and accept benefits) and then years later argue in a civil tort case that he is actually an independent contractor the protections of the exclusive remedy provision would be wholly illusory. A party could always claim that there are some facts in dispute regarding whether he believed an individual is in fact an employee or an independent contractor (See 20 factor test outlined in section 92-01-02-49, N.D. Admin. Code, used by WSI to analyze this issue). Thus, any motion for summary judgment filed by an immune employer could be denied finding there were “disputed facts” and, as a result, every employer would have to go through the time

and costs of defending a civil action through trial before getting redress in this Court. Such a result would render the exclusive remedy protection effectively meaningless.

CONCLUSION

¶12 The trial court correctly concluded that WSI's determination that Songer Bail was an employee of Plains Trucking was res judicata. In addition, Songer Bail has failed to establish why this Court should issue a supervisory write against the trial court on this particular issue.

Dated this 13th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

¶13 The undersigned, as attorneys for the Petitioner in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that 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 certificate of compliance totals 1665.

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CERTIFICATE OF SERVICE

[¶34] I hereby certify that a true and correct copy of the **PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S CROSS PETITION FOR SUPERVISOR WRIT** was on the 13th day of February, 2019, served as follows:

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