

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Shane Jarvis, Appellant, vs. State of North Dakota, by and through Workforce Safety and Insurance, Appellee.	Supreme Court No.: 20190218 Burleigh County District Court Civil No.: 08-2019-CV-01062
---	---

**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

APPEAL FROM DISTRICT COURT JUDGMENT DATED JUNE 27, 2019
BURLEIGH COUNTY DISTRICT COURT
CIVIL NO.: 08-2019-CV-01062
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE BRUCE A. ROMANICK

Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544
janderson@nilleslaw.com
ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

Paragraph No.

I.	STATEMENT OF THE ISSUES.....	1
II.	STATEMENT OF THE CASE.....	2
III.	STATEMENT OF FACTS	4
IV.	LAW AND ARGUMENT	7
	A. The District Court properly dismissed the appeal for lack of subject matter jurisdiction	7
V.	CONCLUSION.....	15

TABLE OF AUTHORITIES

STATE CASES

Paragraph No.

<u>Basin Electric Power Coop v. ND Workers Comp.,</u> 541 N.W.2d 685 (N.D. 1996)	11
<u>Benson v. Workforce Safety and Insurance,</u> 2003 ND 193, 672 N.W.2d 640	9
<u>Lowe v. North Dakota Workforce Safety and Insurance,</u> 2017 ND 4, 891 N.W.2d 778	14
<u>MacDonald v. Commission on Medical Competency,</u> 492 N.W.2d 94 (N.D. 1992)	7
<u>Meier v. North Dakota Department of Human Services,</u> 2012 ND 134, 818 N.W.2d 774	8
<u>Opp v. N.D. Dep't of Transportation,</u> 2017 ND 101, 892 N.W.2d 891	12,13
<u>Pederson v. North Dakota Workers Comp. Bureau,</u> 534 N.W.2d 809 (N.D. 1995)	7

Statutes:

N.D.C.C. § 28-32	7,9
N.D.C.C. § 28-32-39	8
N.D.C.C. § 28-32-42	8,14
N.D.C.C. § 28-32-42(1)	14
N.D.C.C. § 65-01-16(9)	7
N.D.C.C. § 65-10	7
N.D.C.C. § 65-10-01	7

Rules

N.D.R.Civ.P. 6	12
----------------------	----

STATEMENT OF THE ISSUE

[1] Whether the District Court properly dismissed Appellant's appeal from a December 31, 2018, decision of an administrative law judge for lack of subject matter jurisdiction when the notice of appeal was served and filed more than 30 days after issuance of that decision.

STATEMENT OF THE CASE

[2] On October 4, 2018, a consolidated hearing was held in a claim of Appellant Shane Jarvis ("Jarvis") relating to two Orders issued by Workforce Safety and Insurance ("WSI") dated July 26, 2016 and March 2, 2018. That hearing was held before Administrative Law Judge Janet Seaworth ("ALJ Seaworth"). (Appx.¹ 3) On December 31, 2018, ALJ Seaworth issued Findings of Facts, Conclusion of Law and Order that affirmed WSI's Orders. (Appx. 3-15)

[3] In March of 2019, Jarvis sent appeal documents to ALJ Seaworth and counsel for WSI. (Appx. 16, 19) ALJ Seaworth communicated with WSI counsel for WSI relating to the documents she received. (Appx. 17-18) On April 15, 2019, the Clerk of this Court sent correspondence to Jarvis regarding his attempt to file the appeal with the court and forwarding the documents to Burleigh County, North Dakota. (Appx. 21) On April 17, 2019, the appeal documents submitted by Jarvis were filed in the District Court, Burleigh County. (Docket Sheet, Appendix of Jarvis at Page 1, Index Entry #1) On June 11, 2019, the District Court entered an Order of Dismissal for Lack of Subject Matter Jurisdiction. (Appx. 22) Judgment was entered June 27, 2019. (Appx. 23) This appeal followed. (Appx. 24)

¹ "Appx." refers to the Appendix filed by WSI in connection with this appeal.

STATEMENT OF FACTS

[4] On December 31, 2018, ALJ Seaworth issued Findings of Facts, Conclusions of Law and Order that affirmed two Orders that had been issued by WSI from which Jarvis had requested rehearing. (Appx. 3-15) Attached to ALJ Seaworth's Order was Notice with directions on how to appeal the decision. (Appx. 15)

[5] In March of 2019, documents were received by counsel for WSI relating to an "appeal" of the December 31, 2018, decision of ALJ Seaworth. (Appx. 19-20) ALJ Seaworth also received the appeal documents and communicated with counsel for WSI. (Appx. 17-18) Counsel for WSI notified Jarvis that the attempted appeal was untimely because it was taken more than 30 days after issuance of the ALJ decision. (Appx. 19-20) Jarvis had sent his appeal documents to this Court, which were then forwarded to the District Court, Burleigh County. (Appx. 21) The appeal documents were ultimately filed with the Burleigh County District Court on April 17, 2019. (Docket Sheet, Appendix of Jarvis at Page 1, Index Entry #1)

[6] WSI filed a Motion to Dismiss for Lack of Jurisdiction. (Docket Sheet, Appendix of Jarvis at Page 1, Entry ## 8-17) The District Court issued an Order of Dismissal for Lack of Subject Matter Jurisdiction on June 11, 2019. (Appx. 22) Judgment was subsequently entered. (Appx. 23), Jarvis has now appealed to this Court.

LAW AND ARGUMENT

A. THE DISTRICT COURT PROPERLY DISMISSED THE APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION.

[7] For a District Court to have subject matter jurisdiction over an administrative appeal, the appellant must satisfy the statutory requirements for perfecting the appeal. Pederson v. North Dakota Workers Comp. Bureau, 534 N.W.2d 809, 810

(N.D. 1995); citing MacDonald v. Commission on Medical Competency, 492 N.W.2d 94, 96 (N.D. 1992). Appeals to a District Court from a post-hearing administrative order in a workers compensation proceeding are governed by N.D.C.C. § 65-10 and N.D.C.C. § 28-32. See N.D.C.C. § 65-01-16(9); N.D.C.C. § 65-10-01.

[8] Under N.D.C.C. § 28-32-42, an administrative appeal must be taken within thirty days after notice of the appealable order has been given. N.D.C.C. § 28-32-42 states as follows: “[a]ny party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39.” An appellant must meet the statutory requirements for perfecting an administrative appeal in order for the District Court to obtain subject matter jurisdiction over the appeal. Meier v. North Dakota Department of Human Services, 2012 ND 134 ¶ 4, 818 N.W.2d 774.

[9] This Court addressed the necessity to comply with the procedures in N.D.C.C. § 28-32 in Benson v. Workforce Safety and Insurance, 2003 ND 193, 672 N.W.2d 640. In Benson, the claimant attempted to appeal an order of WSI, but failed to properly serve the appeal documents. Id. at ¶ 3. This Court in Benson stated as follows:

Appeals to the district court from decisions of an administrative agency are statutory in nature and are not matters of original jurisdiction, but rather involve the exercise of appellant jurisdiction conferred by statute. McArthur v. North Dakota Workers Comp. Bureau, 1997 ND 105, ¶ 9, 564 N.W.2d 655; Transystems Servs. V. North Dakota Workers Comp. Bureau, 550 N.W.2d 66, 67 (N.D. 1996); Boyko v. North Dakota’s Workmen’s Comp. Bureau, 409 N.W.2d 638, 641 (N.D. 1987). The statutory requirements for filing a notice of appeal from an administrative agency order are jurisdictional. Boyko, at 641. For the district court to acquire subject matter jurisdiction over an appeal from a decision of an administrative agency, the appellant must satisfy the statutory requirements for perfecting the appeal.

Pederson v. North Dakota Workers Comp. Bureau, 534 N.W.2d 809, 810 (N.D. 1995).

An appeal from a decision of WSI must be taken in accordance with N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act. N.D.C.C. § 65-10-01. The appeal must be taken within thirty days after notice of WSI's order has been given. N.D.C.C. § 28-32-42(1). To perfect an appeal, the appellant must serve a notice of appeal upon WSI, the attorney general or an assistant attorney general, and all parties to the proceeding.

Id. at ¶¶ 5-6.

[10] Here, the thirty day appeal period was triggered on December 31, 2018, when ALJ Seaworth served her Findings of Fact, Conclusion of Law and Order. (Appx. 3-15) Thirty days after December 31, 2018, was January 30, 2019. Therefore, for the District Court to acquire jurisdiction to hear the appeal, Jarvis was required to **serve and file** the appeal documents no later than January 30, 2019. Jarvis' Notice of Appeal was not filed with the District Court until April 17, 2019. The Affidavit of Service submitted by Jarvis reflects that he "served" his appeal documents on ALJ Janet Seaworth in March of 2019. (Appx. 16) There is no Affidavit of Service relating to service of the documents on counsel for WSI, but WSI's counsel did receive the documents in March of 2019. (Appx. 19-20) Therefore, the attempted appeal by Jarvis was untimely because it was neither served nor filed within 30 days of December 31, 2018. Therefore, the District Court lacked jurisdiction to consider his appeal.

[11] Jarvis apparently mistakenly "filed" his appeal with ALJ Seaworth and this Court. (Appx. 16, 21) However, this is of no consequence and he cannot correct the error and/or the Court cannot enlarge the time within which to file the administrative appeal. In Basin Electric Power Coop v. ND Workers Comp., 541 N.W.2d 685 (N.D. 1996) the administrative appeal was filed in the wrong county, and the claimant sought to transfer

venue. The claimant argued that the court could extend the deadline to “file” the appeal under the Rules of Civil Procedure. This Court rejected that argument, stating as follows:

Courts construing the federal rule, upon which our rule is based, and similar state procedural rules, have held Rule 6(b) is limited to matters that arise under the rule of civil procedure or by order of the court, and not to periods of time which are definitely fixed by statute. See eg., United States v. Easement and Right-of-Way, 386 F.2d 769 (6th Cir. 1967), cert. denied sub nom. Skaggs v. United States, 390 U.S. 947, 88 S.Ct. 1034, 19 L.Ed.2d 1136 (1968); Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App. 1978); 4A Wright & Mille, Federal Practice and Procedure Civil 2d 1165 (1987). Rule 6(b) did not authorize the district court to enlarge the 30-day time limit to take an appeal under N.D.C.C. § 28-32-15(1).

Id. at 690. Here, even when Jarvis filed his documents with this Court, his appeal was untimely because it was long after the 30 day period within which to file an appeal. The statute and notice provided with ALJ Seaworth’s Order specifically detailed the procedures for perfecting an appeal and that an appeal **must** be done within thirty days of the notice of the Order.

[12] Similarly, in Opp v. N.D. Dep’t of Transportation, 2017 ND 101, 892 N.W.2d 891, this Court reviewed the timelines of an administrative appeal and whether the District Court could extend that time. The appellant appealed two judgments from the North Dakota Department of Transportation revoking his driving privileges and disqualifying him from operating a commercial motor vehicle for one year. Id. at ¶ 1. An administrative hearing took place on both issues on November, 24, 2015. Id. at ¶ 3. On November 30, 2015, the hearing officer served appellant by mail with a written decision and notice of decision to revoke his driving privileges. Id. On December 17, 2015, the Department served appellant by mail with notice of a reciprocal decision disqualifying him from operating a commercial vehicle for one year. Id. Appellant served notices of appeal from each decision on the Department within the required timeframe for appealing. Id. However, **he failed to**

file either appeal with the district court within the required timeframe for appealing.

Id. The Department moved to dismiss the appeals to the district court on grounds they were not timely and the court lacked subject matter jurisdiction. Id. at ¶ 4. Appellant moved for additional time on appeal under N.D.R.Civ.P. 6, which allows an extension of time for excusable neglect. Id.

[13] In Opp, this Court held that appellant's time for appeal **began from the date as shown by the hearing officer's decision on each matter**, which was November 30, 2015 and December 17, 2015, respectively. Opp, 2017 ND 101, ¶ 11, 892 N.W.2d 891. This Court reasoned as follows:

Here, the Department mailed the decision under N.D.C.C. § 39-20-05 to Opp on November 30, 2015, and Opp served a notice of appeal on the Department on December 7, 2015, but did not file his notice of appeal with the district court until January 12, 2016. The Department mailed its decision on Opp's commercial driving privileges to him on December 17, 2015, and served the Department with his notice of appeal on December 23, 2015, but did not file his notice of appeal with the district court until January 12, 2016. Opp served the Department with a notice of appeal within seven days after each decision. *See* N.D.C.C. § 1-02-15 (statutory provision or computing time); N.D.R.Civ.P. 6(a) (computing time under rules of procedure). However, Opp did not file his notice of appeal with the district court for either decision within seven days. We conclude Opp failed to file his notices of appeal with the court within seven days for either decision, and his appeals were untimely.

Id. at ¶ 4. The decision makes quite clear that it is the date that notice is provided of a decision, **not the date of receipt of that decision**, which governs when the clock starts to run to file an administrative appeal.

[14] The District Court cannot enlarge the thirty day time limit to undertake an appeal under N.D.C.C. § 28-32-42. Jarvis untimely served his appeal documents and did not file his notice of appeal until April 17, 2019, which was more than thirty days after notice of the Findings of Fact, Conclusions of Law and Order of ALJ Seaworth was

issued. Therefore, the District Court lacked subject matter jurisdiction to hear the appeal. The District Court properly dismissed the appeal when it issued its Order on June 11, 2019. See Lowe v. North Dakota Workforce Safety and Insurance, 2017 ND 4, 891 N.W.2d 778 (affirming dismissal of appeal where appellant failed to serve notice of appeal on WSI “within thirty days after notice of the order was given as required by N.D.C.C. § 28-32-42(1)”). This Court should affirm that decision.

CONCLUSION

[15] The District Court properly dismissed the appeal filed by Jarvis from the December 31, 2018, Findings of Fact, Conclusions of Law and Order of ALJ Seaworth. Accordingly, this Court must affirm that decision.

DATED this 30th day of October, 2019.

/s/ Jacqueline S. Anderson
Jacqueline S. Anderson (ND #05322)
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108-2626
T/N: 701-237-5544
janderson@nilleslaw.com

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 Appellate Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of pages in the above Brief totals 10.

DATED this 30th day of October, 2019.

/s/ Jacqueline S. Anderson

Jacqueline S. Anderson, ID # 05322
Special Assistant Attorney General
for Workforce Safety and Insurance
201 North 5th Street, Ste. 1800
PO Box 2626
Fargo, ND 58108
T/N: 701-237-5544
janderson@nilleslaw.com

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

Shane Jarvis,

Appellant,

vs.

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

Appellee.

Supreme Court No. 20190218
Burleigh County District Court
Civil No.: 08-2019-CV-01062

**AFFIDAVIT OF ELECTRONIC
SERVICE**

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

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

**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

**APPENDIX OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

on the following persons:


**Shane Jarvis
187 E. Foote Street
Buffalo, WY 82834**

by depositing in the United States Post Office at Fargo, North Dakota, on October 23, 2019, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address, and furthermore, upon:

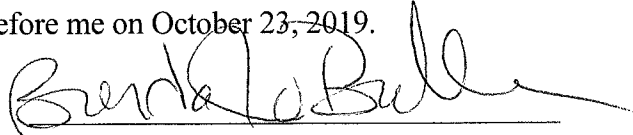
Shanejarvis1020@gmail.com

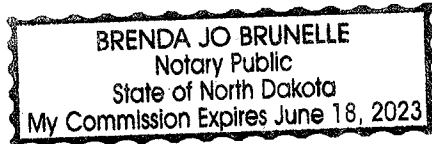
VIA E-MAIL to each person above named at the above e-mail address.

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


Melany J. Strendin

SUBSCRIBED AND SWORN to before me on October 23, 2019.


Notary Public



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

Shane Jarvis, <div style="text-align: right;">Appellant,</div> <div style="text-align: center;">vs.</div> State of North Dakota, by and through Workforce Safety and Insurance, <div style="text-align: right;">Appellee.</div>	Supreme Court No. 20190218 Burleigh County District Court Civil No.: 08-2019-CV-01062 AFFIDAVIT OF ELECTRONIC SERVICE
--	---

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

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

**BRIEF OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

**APPENDIX OF APPELLEE NORTH DAKOTA
WORKFORCE SAFETY AND INSURANCE**

on the following persons:


**Shane Jarvis
187 E. Foote Street
Buffalo, WY 82834**

by depositing in the United States Post Office at Fargo, North Dakota, on October 30, 2019, a true and correct copy thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address, and furthermore, upon:

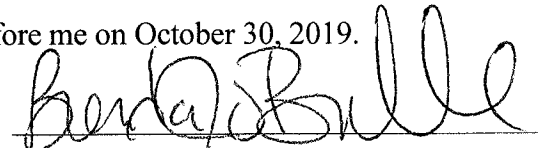
Shanejarvis1020@gmail.com

VIA E-MAIL to each person above named at the above e-mail address.

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


Melany J. Strendin

SUBSCRIBED AND SWORN to before me on October 30, 2019.


Notary Public

