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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota by and through Workforce Safety and Insurance, Appellant, vs. Badger Roustabouts, LLC, Appellee.	Supreme Court No. 20210022 Civil No. 08-2020-CV-01732

BRIEF OF APPELLEE

Appeal from November 20, 2020, Order Affirming ALJ's Decision and Judgment
Entered January 12, 2021
Burleigh County District Court
South Central Judicial District
The Honorable Bruce Romanick

Supreme Court No. 20210022
Burleigh County No. 08-2020-CV-01732

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court correctly affirmed the ALJ's May 1, 2020, decision where the ALJ concluded Badger met its burden of proof under N.D.C.C. § 65-01-03 by determining, based upon evidence presented at the hearing, the "right to control" common law test under N.D. Admin. R. 92-01-02-49 favored an independent contractor relationship.

[¶2] Whether the District Court correctly concluded the comparison between Quandt and other Badger workers that opted to be classified as employees is irrelevant because determination of a worker's status must be based on application of the common law test factors.

[¶3] Whether the District Court correctly awarded attorney's fees under N.D.C.C. § 28-32-50.

STATEMENT OF THE CASE

[¶4] This is an appeal from the decision of the Honorable Administrative Law Judge Lynn C. Jordheim regarding whether Badger misclassified roustabout worker Thomas Quandt when Badger designated Quandt as an independent contractor.

[¶5] This case originates from WSI's Notice of Decision – Employer Status, finding Thomas Quandt an employee of Badger. *See App.* at p. 16 ("Notice of Decision"). Badger requested reconsideration of WSI's initial decision. Reconsideration was denied. Id. at p. 17 ("WSI Order, dated April 15, 2019"). Badger subsequently requested a hearing, which was heard by ALJ Jordheim for a final determination of employment status. At the hearing, WSI testified it did not consider the individual questionnaires sent to Badger and Quandt because they were unfavorable. Rather, WSI exclusively relied on the statutory presumption of employee status. After hearing testimony of multiple witnesses and the introduction of multiple exhibits, the ALJ analyzed the twenty factors enumerated in N.D. Admin. Code § 92-01-02-49(1)(a). The ALJ found the sum of the factors weighed in favor or employment status. *See App.* at p. 37 (Findings of Fact, Conclusions of Law and Order, dated May 1, 2020). ALJ Jordheim did not find a single factor that supported WSI's decision. WSI subsequently appealed that decision to this Court.

STATEMENT OF THE FACTS

[¶6] On In 2018, Badger hired a company, Wisconsin Roustabouts, to perform roustabout work under Badger's Master Service Agreement with Continental Resources. *See* Index ## 77 at Bates 105, 119. Wisconsin Roustabouts is owned by Thomas Quandt. *Id.* at Bates 119.

[¶7] On October 8, 2018, WSI issued its Notice of Decision – Employer Status to Badger and Thomas Quandt ("Quandt"). *See* Index # 30. The Notice of Decision was based solely upon the statutory presumption that workers are presumed employees. *See Admin. Hr'g Tr. Volume I*, at 87:8-13; *See* N.D.C.C. § 65-01-03. Prior to issuing the notice of decision, WSI ignored the individual questionnaires because they did not support WSI's predetermined conclusion of an employer-employee relationship. *See id.*, *Cote Testimony*, at 86:12-16.

[¶8] Badger requested reconsideration of the decision which was denied. *See App.* at pp. 17-22, *Order of North Dakota Workforce Safety and Insurance* ("Order of WSI"). The Order of WSI was signed by Barry Schumacher, Chief of Employment Services for WSI. *See id.*; *See Admin. Hr'g Tr. Volume II*, at 260:2-3. Mr. Schumacher did not know Thomas Quandt involvement in this matter or his relationship to Badger. *Id.* at 262:1-11 (Schumacher stating "is [Quandt] the individual that is in question in regard to the independent contractor determination?"). Despite signing the Order of WSI, Schumacher was "not familiar, not familiar at all" with its contents. *Id.* at 262:19-21.

[¶9] On January 30, 2020, a hearing was conducted via telephone. *See App.* at pp. 38-56. The central issue before the ALJ was whether Quandt and other similarly situated individuals are employees of Badger. At the hearing, fifty-five (55) exhibits totaling one hundred eighty (180) were received into evidence. The ALJ heard testimony from five

witnesses. *Id.* A sixth witness was unavailable for the hearing; his deposition transcript was received into evidence upon stipulation by the parties.

[¶10] On May 1, 2020, ALJ Jordheim issued the Findings of Fact, Conclusions of Law and Order reversing WSI's determination of employee status. *See Id.*

[¶11] Badger provides roustabout services to Continental Resources, Inc., pursuant to a Master Service Agreement. *See App.* at 40. Roustabouts perform non-technical labor at the drilling site. *See id.*

[¶12] Roustabouts generally work 6:00 a.m. to 6:00 p.m or 6:00 p.m. to 6:00 a.m. Badger's workers would work two weeks on, two weeks off. *Id.* Roustabouts are managed by the "company man" on the drill-site. *Id.* The "company man" works for Continental and is not affiliated with Badger. *Id.*

[¶13] When Continental needs a roustabout, it contacts Badger. *Id.* at 41. Sometimes Continental requests a certain roustabout. *See id.* If a certain roustabout is not requested, Badger picks a roustabout. *Id.* Roustabouts must perform their work to the satisfaction Continental. *Id.*

[¶14] Continental can direct Badger to pay more than the established day rate. *Id.*

[¶15] Badger's workers were given the option of being an employee or independent contractor. If a worker chose to be an employee taxes would be withheld from the paycheck, Badger provided liability insurance, employees could participate in a 401(k) plan, and they were eligible for workers compensation benefits. *See Admin. Hr'g Tr. Volume II,* at 165:17-167:12.

[¶16] If a worker chose to be an independent contractor no taxes were withheld from their pay, no insurance was provided, no workers compensation benefits were provided, and

they were not eligible to participate in the 401(k) plan. *Id.* at 202:15-19; 221:6-15. Independent contractors were required to provide their own liability insurance. *Id.* at 166:23-25.

[¶17] Badger's roustabouts were free to work for other companies, including competitors. *App.* at p. 41. Badger's roustabouts can also decline work if they have not begun a hitch. *See id.* Badger is effectively a middle-man that lines up roustabouts to work when Continental requests a roustabout. Continental sets the rate of pay. *Id.*

[¶18] Most employees are not skilled enough to work the day shift like a subcontractor. *See Admin. Hr'g Tr. Volume II*, at 168:19-22.

[¶19] Quandt chose when to work and Badger could not force Quant to work. *Id.* at 171:19-23.

[¶20] Continental sets the rate of pay for subcontractors, called a day rate. *Id.* at 172:21-24. Continental dictates when the work will be performed and who will perform it. *Id.* at 179:24.

STANDARD OF REVIEW

[¶21] A district court's "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 v. N.D. Workforce Safety & Ins.*, 2012 ND 217, ¶ 6, 823 N.W.2d 257. "Whether a worker is an independent contractor or an employee is a mixed question of fact and law." *Matter of BKU Enterprises, Inc.*, 513 N.W.2d 382, 387 (N.D. 1994). In 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.*

"Whether an employer has retained the right to direct and control the services performed by workers is a finding of fact." *Id.*

[¶22] On appeal, the court examines the agency's decision and looks to the record compiled by the agency. *Sunderland v. N.D. Workmen's Comp. Bureau*, 370 N.W.2d 549, 552 (N.D. 1985). Three questions arise in reviewing an administrative agency's decision:

> 1. Are the findings of fact supported by a preponderance of the evidence?
> 2. Are the conclusions of law sustained by the findings of fact?
> 3. Is the agency's decision supported by the conclusions of law?

Id. (citing N.D.C.C. § 28-32-19).

[¶23] The court does not make independent findings of fact or substitute its judgment for that of the agency. *Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979). "Our determination of whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the record." *Id.*

[¶24] "The central question in determining whether an individual is an employee or independent contractor is: Who is in control?" *Myers-Weigel Funeral Home v. Job Ins. Div. of Job Serv.*, 1998 ND 87, ¶ 9, 578 N.W.2d 125. An agency order must be affirmed unless error of a specifically listed type is present. *See id.*

[¶25] When examining conflicting testimony, it is the referee's job to weigh the evidence. *Lovgren v. Job Serv.*, 515 N.W.2d 143, 145 (N.D. 1994). Upon review, the appellate court simply determines whether a reasoning mind could have determined whether the factual conclusions were proved by the weight of the evidence. *Spectrum Care LLC v. Stevick*, 2006 ND 155, ¶ 11, 718 N.W.2d 593. It is well settled that in reviewing the findings of an administrative agency, the court must exercise restraint; rather than making independent

findings of fact or substituting its judgment for that of the agency's. *In re Claim of Griffin*, 466 N.W.2d 148, 149 (N.D. 1991).

LAW AND ARGUMENT

I. The District Court correctly affirmed the ALJ's May 1, 2020, decision where the ALJ concluded Badger met its burden of proof under N.D.C.C. § 65-01-03 by determining, based upon evidence presented at the hearing, the "right to control" common law test under N.D. Admin. R. 92-01-02-49 favored an independent contractor relationship.

[¶26] WSI asserts the ALJ erred in its legal analysis by not distinguishing between services performed by employees and services performed by independent contractors. *See* Appellant's Brief at ¶ 31. Specifically, WSI asserts the ALJ erred in his analysis of *every factor* under the right to control test. *See generally* Appellant's Brief. Badger submits WSI's analysis of the evidence is flawed because WSI focuses almost exclusively on the relationship between Quandt and other employees rather than Quandt and the right-to-control test factors. *See id.* at ¶¶ 32-38. WSI ignores the ALJ's analysis of those factors and blindly points to the relationship between Quandt and other employees. It is notable that WSI fails to cite the ALJ's Order. *See generally* Appellant's Brief. Badger submits the ALJ correctly determined the greater weight of the evidence supports his finding that Quandt was an independent contractor.

[¶27] In determining whether a person is an independent contractor or employee, the primary test is the "right to control" test. *In re Claim of Griffin*, 466 N.W.2d 148, 150 (N.D. 1991). The right to control test is codified in N.D. Admin. Code § 92-01-02-49(1)(a).

[¶28] Section 65-01-03, N.D.C.C., provides "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 common-law test referred to in N.D.C.C. § 65-01-03 is outlined in N.D. Admin. Code § 92- 01-02-49. This provision of the Administrative Code further provides factors 3, 6, 15, 16, 17, 18, 19, and 20 **must be given more weight** in determining whether an employer-employee relationship exists. N.D. Admin. Code § 92-01-02-49(2) (emphasis added).

Factor 3 - Integration

[¶29] WSI asserts the ALJ's misapplied the law in concluding factor 3 weighed in favor of an independent contractor relationship. *See* Appellant's Brief at ¶ 32. WSI claims that Quandt was not truly independent because the contract with Badger directed Quandt to follow the instruction of the "company man." *See id.* at ¶ 34. WSI is wrong. If an employer is concerned merely with the result of the work performed and has no control over the details of its doing, the person doing the work is an independent contractor. *Mutual Life Ins. Co. of New York v. State*, 71 N.D. 78, 298 N.W. 773, 776 (1941). The testimony is clear that Continental's "company man" controlled and directed the work performed by the roustabouts. Index # 13, at 179:24.

[¶30] The ALJ properly concluded the evidence of the first weighted factor—integration—favors a determination of independent contractor status. The ALJ found WSI's own analysis actually favored a determination that Quandt was an independent contractor. *See App.* at pp. 38-56, ¶ 28; *See App.* at pp. 17-18, ("Order of WSI"). Specifically, the ALJ stated "Ms. Cote gave no cogent explanation for why she concluded the weighted factor of integration in this case did not favor a determination that Mr. Quandt was an independent contractor." *App.* at p. 46, ¶ 28. Further, the ALJ found that Badger did not train the roustabouts; did not set the work schedule; and Quandt was not integral to

its operations. *Id.* at ¶ 29; *see also Admin. Hr'g Tr., Volume II* at 171:19-23, 172:21-24; 178:19-20; 179:24.

[¶31] WSI's analysis of this factor is incorrect because WSI misconstrues the right to control test by focusing on the similarities between Quandt and other workers rather than on the factors themselves. WSI does not dispute the overwhelming testimony regarding this factor. Instead, they focus on the testimony of Blacksmith and Weidner. Accordingly, Badger submits the ALJ's determination regarding Factor 3 is correct and should not be overturned.

Factor 6 – Continuing Relationship

[¶32] WSI asserts the ALJ erred in concluding this factor is neutral. *See Appellant's Brief*, at ¶ 39. The ALJ concluded:

> The second weighted factor asks whether there is a continuing relationship between Badger and Mr. Quandt. The paities did have a written Master Subcontract Agreement (MSA), which provided that it was for a term of one year. The MSA does not obligate Mr. Quandt to work any particular hitches. The MSA has a non-exclusivity clause, which says Subcontractor (Mr. Quandt) may contract with any company or competitor. Since 2012, there were times when Mr. Quandt worked for Badger, there were times he was in Wisconsin doing unrelated work, and there were times when he worked for another company providing the same services in North Dakota that Badger provides. The relationship between Mr. Quandt and Badger is neutral as to the question whether he is an employee or independent contractor.

See App. at pp. 482-83, at ¶ 30.

[¶33] Quandt described his relationship with Badger as "off and on." *Admin. Hr'g Tr., Volume II* at 232:14-17. Accordingly, the evidence supports that, at best, this factor is neutral.

Factors 15 and 16 – Realization of Profit or Loss

[¶34] WSI asserts the ALJ misapplied the law with regard to its analysis of this factor. *See* Appellant's Brief at ¶ 42. The ALJ concluded:

> [t]he record does not establish that either Badger or Mr. Quandt have significant investments in their businesses. The significant investments are made by Continental Oil, for whom Mr. Quandt actually performs the services. This factor essentially asks the question whether Mr. Quandt relies upon the investment of Badger to perform his work. The answer is that he does not rely on Badger or its resources to get the work done. This third weighted factor favors a determination that Mr. Quandt is an independent contractor.

App. at pp. 47, ¶ 31.

[¶35] The testimony supports the ALJ's conclusion. Badger did not provide housing, tools or equipment to Quandt. *See Admin. Hr'g Tr. Volume II*, at 182:8-9 (no tools provided); 185:1-16 (no housing, per diem, food, fuel, or expenses were paid by Badger to Quandt). Further, WSI testified the factors it analyzed and incorporated into the WSI Order indicate an independent contractor relationship. *See Admin. Hr'g Tr. Volume I*, at 124:1 – 125:25; *App.* at p. 17-25.

[¶36] Quandt testified he had the ability to suffer a loss, as well as a profit. *Admin. Hr'g Tr. Volume II*, at 231:23 – 232:3. Testimony from WSI agreed. *Admin. Hr'g Tr. Volume I*, at 124:1 – 125:25; *App.* at p. 18-19. Quandt further testified that he alone would be responsible for replacing equipment, such as a front loader, if he damaged it. Accordingly, the testimony supports the ALJ's decision that Factors 15 and 16 weigh in favor of an independent contractor relationship.

Factors 17 and 18 – Ability to work with more than one firm at a time and making services available to the general public

[¶37] WSI asserts the ALJ erred as a matter of law regarding these factors. *See Appellant's Brief* at ¶ 42. The ALJ found that Quandt is expressly permitted to make his

services available to the general public. Quandt just chooses not to work for other people, but he has that option. *App.* at p. 48, ¶¶ 33-34.

[¶38] The only testimony regarding making services available to the general public supports a determination in favor of independent contractor status. Judd Sturm testified Quandt was able to work at any firm he wanted so long as it did not interfere with the hitch he pledged to complete with Badger. *Admin. Hr'g Tr. Volume II*, at 186:15-19. It is not dispositive that Quandt did not exercise his ability to work for a different company during his off hitch.

[¶39] Sturm further testified that Quandt advertised on facebook and with a decal on his vehicle. *Admin. Hr'g Tr. Volume II*, at 183. In his questionnaire, Quandt stated he advertised his services. Quandt's statement was also incorporated into WSI's Order. *Admin. Hr'g Tr. Volume I*, at 126:9-13; *App.* at p. 19 ("The Worker indicated he does represent himself to the public as being in business to perform the same or similar services"). Accordingly, the testimonial and documentary evidence supports the ALJ's decision and the ALJ did not err as a matter of law.

Factors 19 and 20 – Right of Dismissal and Right to Terminate.

[¶40] WSI asserts the ALJ erred in its analysis of these factors. WSI provides no explanation for how the ALJ erred, just that it disagrees with the ALJ's outcome. *See Appellant's Brief* at ¶¶ 50-52. The ALJ concluded Badger had to go through a process set-out in the contract to terminate it and Quandt had the ability to cure any default. *See App.* at p. 48, ¶ 35. The ALJ further concluded all parties ability to terminate their relationship is expressly stated in their written contract. *See id.* at ¶ 36.

[¶41] WSI's Order provides that Quandt and Badger do not have the right to terminate without incurring breach of contract. *See App.* at p. 19 ("The Firm and the Worker indicated the firm may not be discharged and the Worker may not terminate services without incurring a liability for breach of contract"). Quandt and Sturm both testified they could not sever the relationship without incurring liability for breach of contract. *Admin. Hr'g Tr. Volume I*, at 126:11-22. Accordingly, the ALJ did not err because the greater weight of the evidence establishes these factors indicate an independent contractor relationship.

Factor 1 – Instructions

[¶42] WSI asserts the ALJ's analysis of this factor, and its conclusion are wrong. *See Appellant's Brief* at ¶ 53. WSI contends the ALJ failed to consider the contractual requirement in the agreement between Badger and Quandt that Quandt is to follow the directions of the company man. *See id.* WSI supports its position by citing non-binding authority. Notably, what binding North Dakota law says is the opposite of what WSI argues.

[¶43] If an employer is concerned merely with the result of the work performed and has no control over the details of its doing, the person doing the work is an independent contractor. *Mutual Life Ins. Co. of New York v. State*, 71 N.D. 78, 298 N.W. 773, 776 (1941). The testimony received in this case makes clear that Continental's "company man" controlled and directed the work performed by the roustabouts. *Admin. Hr'g Tr. Volume II*, at 179:24. Finally, WSI's own analysis of this factor supports a finding of independent contractor status. *See App.* at p. 19; *Admin. Hr'g Tr. Volume I*, pp. 123-126. Accordingly, the ALJ did not err in its analysis of this factor.

Factor 2 – Training

[¶44] WSI again confuses the legal analysis required by asserting the ALJ erred by looking at the factors and "right to control test" rather than looking at the relationship of workers classified as employees. The evidence and testimony is undisputed that Badger provided no training to Quandt. It was elicited in testimony, stated in the employer and employee questionnaires, and WSI admitted in testimony and its Order that this factor favors an independent contractor relationship. No further analysis is needed. *See App.* at p. 19; *see generally Admin. Hr'g Tr. Volume I,* at pp. 123-126.

Factors 4 – Services Rendered Personally; Factor 5 – Hiring, Supervising and Paying Assistants.

[¶45] The services Quandt performed were for Continental. Continental was the beneficiary of the work performed by Quandt. Quandt also testified he was able to hire help if he needed it. Accordingly, the ALJ did not err.

Factor 7 – Set Hours of Work

[¶46] The ALJ concluded the hours are set by Continental, not Badger. WSI fails to cite any testimony rebutting that conclusion. With respect to briefing, this Court has often said "a party waives an issue by not providing supporting argument, and without supportive reasoning or citations to relevant authorities, an argument is without merit." *Olsrud v. Bismarck-Mandan Orchestral Ass'n*, 2007 ND 91, ¶ 25, 733 N.W.2d 256. Because WSI failed to cite any testimony or law related to this factor, their argument is without merit and the ALJ's decision must stand.

Factor 11 – Oral and Written Reports

[¶47] It is undisputed reports were not required. The analysis for this factor is simple: "A requirement that the person submit regular or written reports to the person or persons for whom the services are performed indicates control." N.D. Admin. Code 92-01-02-49. Here, there were no reports required, thus, there is no indication of control. Accordingly, the ALJ did not err.

Factor 13 – Payment of Business or Travelling Expenses; Factor 14 – Furnishing Tools and Materials.

[¶48] The ALJ concluded these factors weigh in favor of an independent contractor status. The testimony, employer-employee questionnaires, and WSI's Order state Badger did not furnish any tools or equipment to Quandt. *See Admin. Hr'g Tr. Volume II*, at 182:5-9; *App.* p. 19. Rather it was Continental who furnished the tools. Despite WSI's claims, the test is simply whether tools or equipment were furnished and whether business or traveling expenses were paid. Here, Badger did not provide tools and did not pay for business or traveling expenses. *See Admin. Hr'g Tr. Volume II*, at 185:1-16. WSI contends that *In re Claim of Griffin*, 466 N.W.2d 148, 149 (N.D. 1991), supports its position that the ALJ erred in its analysis because it did not distinguish between Badger's employees and Quandt. *In re Claim of Griffin* was reversed because the employer exercised a significant amount of control. As the Supreme Court noted in *Griffin*, the label placed on parties regarding their employment classification is of little importance. Accordingly, based upon the evidence, Badger may have had their "employees" wrongly classified.

[¶49] Nonetheless, the testimony and evidence is substantial and it favors an independent contractor status because Badger did not furnish tools and equipment, nor did it pay business expenses. Accordingly, the ALJ did not err.

II. Whether the District Court correctly concluded the comparison between Quandt and other Badger workers that opted to be classified as employees is irrelevant because determination of a worker's status must be based on application of the common law test factors.

[¶50] WSI asserts "[t]he testimony of admitted employees of Badger, Thomas Quandt and Judd Sturm reflect there was no material difference in the work performed at the site or benefits of the position whether Badger considered you an employee or independent contractor." *Appellant's Brief* at ¶ 63. Quandt and Sturm are not admitted employees of Badger. Based upon its own analysis in the WSI Order, WSI also does not believe Quandt and Sturm are employees. *See App*. at pp. 18-19 The evidence establishing Quandt is an independent contractor is incontrovertible. This is obvious in reading WSI's testimony at the hearing and reading its Order dated April 15, 2019. *Id*. The evidence so heavily favored Badger that the ALJ concluded WSI's sole basis for its determination that Quandt was an independent contractor was the statutory presumption of employee status. *App.* at p. 51, ¶ 50. The ALJ went further, stating WSI had no basis to make its initial decision because the facts questionnaire responses submitted by Badger and Quandt assert facts clearly sufficient to overcome the presumption. *Id.* "The accuracy of those responses has been confirmed by the testimony and other evidence presented at the hearing. The testimony of Sarah Cote made clear that WSI had no basis for distrusting or disregarding the information provided Mr. Quandt and Badger. **Furthermore, Cote agreed during cross examination that the evidence relating to most of the factors involved in the common law test in this case supported a determination that Mr. Quandt was an independent contractor of Badger, and not an employee.**" *Id.* at ¶ 50 (emphasis added). This Court should not sanction the dishonest and harassing conduct of WSI by allowing them to relitigate this

issue when they did not have the requisite basis for its initial decision—which is an extremely low bar.

[¶51] Finally, the North Dakota Supreme Court decision in *WSI v. Larry's On Site Welding*, 2014 ND 81, 845 N.W.2d 310, is highly instructive to this matter. Therein, the North Dakota Supreme Court upheld a district court judgment affirming an administrative law judge's order finding independent contractor status for individuals who subcontracted with *Larry's On-Site Welding* to perform welding services under its Master Services Agreements with various oil companies. *Id.* at ¶¶ 21-22. The North Dakota Supreme Court concluded that the administrative law judge's finding of independent contractor status for these welders was supported by the evidence. *Id.* at ¶ 22. That evidence was as follows:

> (factor 1) the rig foreman ... instructed the welders what work needed to be done at each specific oil rig; (factor 2) Snook was an established welder who required no training from Larry's; (factor 6) a continuing relationship did not exist between Snook and Larry's ... ; (factor 7) there was not a set work schedule as the work was perfom1ed when the drilling rigs needed it completed and was not set or established by Larry's; (factor 8) Snook was not a full time employee as his work was sporadic and reflected the nature of the work in the oil field; (factor 9) the welders did not work on set premises but instead worked from their own trucks; (factor 10) the drilling rig foreman dete1mined the work that needed to be done; (factor 11) Snook and the other welders provided written repo1ts primarily for pay purposes; (factor 14) the welders furnished their own welding tools and supplies; (factor 17) Snook worked for various other companies and came and went as he pleased; and (factor 18) Snook and the other welders made their services available for hire and tried to find additional work when they were not working with Larry's.

[¶52] *Id.* These facts are nearly identical Badger's circumstances, except more factors favor an independent relationship between Badger and Quandt. Accordingly, *Larry's On-site Welding* is instructive.

[¶53] WSI broadly asserts Badger did not rebut the presumption of employee status under N.D.C.C. § 65-01-03. The ALJ concluded, and the District Court confirmed, Badger

rebutted the statutory presumption that Quandt was an employee because the common law factors favor an independent contractor relationship. The ALJ's weighed the evidence and concluded not a single common law test factor weighed in favor of employment status.

[¶54] It is the ALJ's responsibility to weigh the credibility of the evidence. *WSI v. Auk*, 2010 ND 126, ¶ 14, 785 N.W.2d 186. Further, this Court has explained:

> An Administrative Law Judge hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of the 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.

Vogel v. Workforce Safety and Ins., 2005 ND 43, ¶ 6, 693 N.W.2d 8.

[¶55] WSI is essentially asking this Court to reweigh the evidence. This Court's analysis is limited to whether a reasoning mind could have determined whether the factual conclusions were proved by the weight of the evidence. *Spectrum Care LLC v. Stevick*, 2006 ND 155, ¶ 11, 718 N.W.2d 593. In reviewing the findings of an administrative agency, the court must exercise restraint; rather than making independent findings of fact or substituting its judgment for that of the agency's. *In re Claim of Griffin*, 466 N.W.2d 148, 149 (N.D. 1991).

[¶56] Confusingly, WSI does not explain the *how* or *why* the ALJ erred. Rather, WSI states the presumption cannot be rebutted because employees and independent contractors perform similar work and are paid a day rate. *See Appellant's Brief* at ¶ 64. The District Court correctly noted "the comparison between Quandt and other Badger workers that chose to be classified as employees is irrelevant. The determination must be based on the application of the common law test as the factors relate to Quandt." *App.* at p. 67, ¶ 14 (citing *Midwest Prop. Recovery, Inc. v. Job Serv. of N. Dakota*, 475 N.W.2d 918, 923 (N.D.

1991). As outlined above, the ALJ found more than half of the common law factors favored an independent contractor relationship. Significantly, the ALJ found the evidence did not support a finding that a single factor favored an employee relationship. Accordingly, the ALJ did not err.

III. The District did not err in awarding attorney's fees because WSI decision of employee status was not substantially justified.

[¶57] WSI asserts the District Court erred in awarding attorney's fees. WSI argues the District Court incorrectly applied N.D.C.C. § 28-32-50 and that its decision of employee status was substantially justified. Badger respectfully submits WSI's analysis is wrong.

[¶58] Section 28-32-50, N.D.C.C., provides:

> 1. In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.
>
> 2. This section applies to an administrative or civil judicial proceeding brought by a party not an administrative agency against an administrative agency for judicial review of a final agency order, or for judicial review pursuant to this chapter of the legality of agency rulemaking action or a rule adopted by an agency as a result of the rulemaking action being appealed.

N.D.C.C. § 28-32-50.

[¶59] The genesis of this action is the Notice of Decision – Employer Status letter sent by WSI to Badger, concluding Quandt was an employee. *See App. 16.* Badger asked for reconsideration and was issued a "final order" determining Quandt to be an employee. *See App. 17.* Badger subsequently appealed by requesting a hearing for *judicial review* of WSI's final order. *Aggie Inv. GP v. Pub. Serv. Comm'n*, 470 N.W.2d 805, 813 (N.D. 1991)

(holding "the statute applies to a proceeding brought for judicial review of a final order or decision, or the legality of a rule"). This action was brought by Badger *for judicial review of a final agency order*. Therefore, the District Court did not err in applying N.D.C.C 28-32-50 and awarding attorney's fees.

[¶60] The District Court correctly determined WSI acted without substantial justification. "A position may be justified, despite being incorrect, so long as a reasonable person could think that it has a reasonable basis in law and fact." *Lamplighter Lounge v. State ex rel. Heitkamp*, 523 N.W.2d 73, (N.D. 1994). "The burden is on the agency to prove it acted with substantial justification." *Rojas v. Workforce Safety & Ins.*, 2006 ND 221, 723 N.W.2d 403.

[¶61] WSI was not substantially justified in its position that Quandt was an employee where its final agency order did not determine a single weighted factor favored employee status. *See App.* at pp. 17-19. Further, the ALJ found the answers to the initial questionnaires "clearly sufficient to overcome the presumption (of employee status)." *App.* at p. 51, ¶ 50. The ALJ further concluded:

> "WSI had no basis for distrusting or disregarding the information provided by Quandt and Badger. . . . [WSI] agreed during cross examination that the evidence relating to most of the factors involved in the common law test in this case supported a determination that Mr. Quandt was an independent contractor of Badger, not an employee."

Id. For these reasons, WSI's decision was not substantially justified.

[¶62] Pursuant to the ALJ's findings, the District Court held that WSI was not substantially justified in its position that Quandt was an employee. *See App.* at p. 69, ¶ 21. The District Court correctly held that "where more than half the factors listed favor independent contractor status, a reasonable person could not think a determination of

employee status is correct." *Id.* Accordingly, the District Court did not err in awarding attorney's fees and costs to Badger.

CONCLUSION

[¶63] For the reasons set forth herein, Badger Roustabouts, LLC, respectfully requests this Court AFFIRM the decision of the ALJ and the District Court. Badger further requests it be awarded its attorney's fees for this appeal because WSI was not substantially justified in its position determining Quandt to be an employee.

DATED May 3, 2021.

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ORAL ARGUMENT REQUESTED

[¶64] Oral argument would be helpful in this matter to fully examine the issues raised on appeal and to address any questions the Court may have regarding the record and the district court's underlying orders.

CERTIFICATE OF COMPLIANCE

I, Jonathon (Jack) F. Yunker, hereby certify that the above Brief of Appellee complies with the page limitation set forth under Rule 32(a)(8)(A) N.D.R.App.P. I further certify that the Brief of Appellee contains 23 pages.

DATED May 3, 2021.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota by and through Workforce Safety and Insurance, Appellant, vs. Badger Roustabouts, LLC, Appellee.	Supreme Court No. 20210022 Burleigh County No. 08-2020-CV-01732

CERTIFICATE OF SERVICE

[¶1] I, Jonathon Junker, hereby certify that on May 3, 2021, the following documents:

1. Brief of Appellee

were filed and served electronically through North Dakota Supreme Court E-Filing Portal and were served upon the following:

Jaqueline S. Anderson
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[¶2] DATED May 3, 2021.

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