

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

**Workforce Safety & Insurance and
Bobcat Company/Ingersoll Rand,**

Appellees,

vs.

Cynthia Auck

Appellant.

SUPREME COURT NO. 20100330

**FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT**

DEC 13 2010

STATE OF NORTH DAKOTA

**APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH CIVIL NO. 08-09-C-00302/001
SUPREME COURT CIVIL NO. 20100330
THE HONORABLE DONALD L. JORGENSEN, PRESIDING**

APPELLEE BOBCAT COMPANY'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
TABLE OF CASES	iv
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.....	1
I. Whether the district court abused its discretion in holding that Workforce Safety and Insurance acted with substantial justification in denying death benefits to Appellant Cynthia Auck, thus precluding an award of attorney fees and costs to Ms. Auck under N.D.C.C. § 28-32- 50.	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	1
LAW AND ARGUMENT	3
I. Standard of review.	3
II. The district court’s denial of Ms. Auck’s petition for attorney fees and costs under N.D.C.C. § 28-32-50 is not an abuse of its discretion.....	3
III. Ms. Auck’s arguments do not demonstrate that WSI acted without substantial justification.	5
CONCLUSION.....	6

TABLE OF AUTHORITIES

<u>North Dakota Century Code</u>	<u>Page</u>
§ 28-32-50.....	ii, 1, 3, 4, 5, 6

TABLE OF CASES

<u>Workforce Safety and Ins. v. Auck</u> 2010 ND 126, 785 N.W.2d 186	1, 2, 3, 4, 5, 6
<u>Dutton v. Workforce Safety & Ins.</u> 2010 ND 99,783 N.W.2d 278	3, 4
<u>Tedford v. Workforce Safety & Ins.</u> 2007 ND 142, 738 N.W.2d 29	3, 6
<u>Usry v. Theusch</u> 521 N.W.2d 918, 919 (N.D. 1994)	3, 6
<u>State v. Daulton</u> 518 N.W.2d 719, 724 (N.D. 1994)	3
<u>Rojas v. Workforce Safety and Ins.</u> 2006 ND 221, 723 N.W.2d 403	4
<u>Christianson v. North Dakota Worker's Compensation Bureau</u> 470 N.W.2d 613 (N.D. 1991)	4
<u>Schmalz v. North Dakota Worker's Compensation Bureau</u> 449 N.W.2d 817 (ND. 1989)	4
<u>Kroh v. North Dakota Worker's Compensation Bureau</u> 425 N.W.2d 890 (ND. 1988)	4
<u>Grace v. North Dakota Workmen's Compensation Bureau</u> 395 N.W.2d 576 (ND. 1986)	4
<u>Nelson v. North Dakota Workmen's Compensation Bureau</u> 316 N.W.2d 790 (ND. 1982)	4
<u>Granske v. North Dakota Workmen's Compensation Bureau</u> 355 N.W.2d 800 (ND. 1984)	4
<u>Lamplighter Lounge, Inc. v. State ex rel. Heitkamp</u> 523 N.W.2d 73, 75 (N.D. 1994)	6

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. Whether the district court abused its discretion in holding that Workforce Safety and Insurance acted with substantial justification in denying death benefits to Appellant Cynthia Auck, thus precluding an award of attorney fees and costs to Ms. Auck under N.D.C.C. § 28-32-50.

STATEMENT OF THE CASE

By order dated July 2, 2010, the North Dakota Supreme Court granted death benefits to Appellant Cynthia Auck (“Ms. Auck”) by affirming the district court’s order which, in turn, affirmed the administrative law judge’s (“ALJ”) order reversing Workforce Safety and Insurance’s (“WSI”) denial of death benefits. See Workforce Safety and Ins. v. Auck, 2010 ND 126 ¶1, 785 N.W.2d 186. On July 14, 2010, Ms. Auck filed a petition with the district court seeking attorney fees and costs pursuant to N.D.C.C. § 28-32-50. (App. p. 50). Appellees Bobcat Company¹ (“Bobcat”) and WSI responded in opposition to Ms. Auck’s petition. (App. p. 60,62). After briefing by the parties, Ms. Auck’s petition was heard before the district court on August 23, 2010. (Doc. 60). On September 1, 2010, the district court issued an order denying Ms. Auck’s petition. (App. p. 52). On September 7, 2010, entry of the district court’s order was noticed. (App. p. 78). On October 4, 2010, Ms. Auck filed a notice of appeal to the North Dakota Supreme Court. (App. p. 60).

STATEMENT OF THE FACTS

Ms. Auck is the surviving spouse of Richard Auck, a former employee of Bobcat. Auck, 2010 ND 126 at ¶ 2. (App. p. 39). She filed a claim for death benefits

¹ Bobcat Company is the registered trade name for Clark Equipment Company, a Georgia corporation.

with WSI, claiming that unusual stress at Bobcat was at least 50% responsible for causing a cardiac arrest which resulted in her husband's death. Id. at ¶ 2. WSI denied Ms. Auck's claim and also denied her request for reconsideration. Id. Subsequently, Ms. Auck sought an independent review and requested an administrative hearing. Id. Administrative law judge Al Wahl was designated to conduct a hearing on her claim. Id. At the hearing, Ms. Auck's expert witness, Richard Auck's primary care physician, testified that stress was at least 50% of the cause of Mr. Auck's heart attack as compared to all other contributing factors. Id. at ¶ 3.

In contrast, WSI's expert witness, a cardiology specialist, testified that Mr. Auck had other risk factors (e.g. hypertension, high cholesterol, obesity, smoking, and family history of coronary disease), and the link between long-term stress and heart disease was controversial. Id. Bobcat's expert witness, a family medicine specialist, also agreed that Mr. Auck had other risk factors and that he was not aware of any study linking long-term stress and heart attacks. Id.

The ALJ concluded the "greater weight of the evidence" showed with reasonable medical certainty that unusual stress was at least 50% of the cause of the heart attack and awarded surviving spouse benefits to Ms. Auck. Id. at ¶ 4. WSI and Bobcat appealed the ALJ's decision to the district court and ultimately to the North Dakota Supreme Court. Id. at ¶ 1.

On July 2, 2010, the North Dakota Supreme Court affirmed the decision of the ALJ. Id. at ¶ 22. In its decision, the Court noted that "deference is given to the ALJ's factual findings." Id. at ¶ 9. The Court acknowledged that when the ALJ is confronted with a "battle of the experts," the ALJ, as fact-finder, may rely upon either

party's witness. Id. at ¶ 18. After evaluating the expert testimonies of both sides, this Court concluded that a "reasoning mind could reasonably have determined that the weight of the evidence from the record supported the ALJ's findings of fact." Id. at ¶ 21.

LAW AND ARGUMENT

I. Standard of review.

On appeal, the district court's decision concerning whether an administrative agency acted with substantial justification under N.D.C.C. § 28-32-50 is reviewed for an abuse of discretion. Dutton v. Workforce Safety & Ins., 2010 ND 99, ¶ 13, 783 N.W.2d 278, 282, citing Tedford v. Workforce Safety & Ins., 2007 ND 142, ¶ 26, 738 N.W.2d 29. The abuse of discretion standard is well established:

A trial court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable manner. A trial court acts in an arbitrary, unreasonable or unconscionable manner when its exercise of discretion is not 'the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination,' or, as alternatively stated, when it misinterprets or misapplies the law."

Usry v. Theusch, 521 N.W.2d 918, 919 (N.D. 1994) (quoting State v. Daulton, 518 N.W.2d 719, 724 (N.D. 1994)).

II. The district court's denial of Ms. Auck's petition for attorney fees and costs under N.D.C.C. § 28-32-50 is not an abuse of its discretion.

N.D.C.C. § 28-32-50 states, in pertinent part, that:

In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency . . . , the court must award the party not an administrative agency reasonable

attorney's fees and costs *if the court . . . determines that the administrative agency acted without substantial justification.*" [emphasis added].

WSI acted with "substantial justification" if a reasonable person could conclude that WSI's position is correct and has a reasonable basis in law and fact. Dutton v. Workforce Safety & Ins., 2010 ND 99 ¶ 15, 783 N.W.2d. 278. A finding that WSI acted without substantial justification is rare. Rojas v. Workforce Safety and Ins., 2006 ND 221 ¶17, 723 N.W.2d 403. N.D.C.C. § 28-32-50 "is only applicable in rare cases when WSI's actions lack substantial justification." Id.

This case is not one of those "rare" cases lacking substantial justification. Id. The district court correctly determined WSI's position was substantially justified. (App. p. 55). First, the district court concluded WSI "relied on relatively settled legal precedent to support its denial of [Ms.] Auck's claim," citing to Christianson v. North Dakota Worker's Compensation Bureau, 470 N.W.2d 613 (N.D. 1991); Schmalz v. North Dakota Worker's Compensation Bureau; 449 N.W.2d 817 (ND. 1989); Kroh v. North Dakota Worker's Compensation Bureau, 425 N.W.2d 890 (ND. 1988); Grace v. North Dakota Workmen's Compensation Bureau, 395 N.W.2d 576 (N.D. 1986); Nelson v. North Dakota Workmen's Compensation Bureau, 316 N.W.2d 790 (N.D. 1982); Granske v. North Dakota Workmen's Compensation Bureau, 355 N.W.2d 800 (ND. 1984). (App. p. 55). The district court also stated that the preceding North Dakota Supreme Court case law provided WSI with "reasonable legal support . . . [and] the legal precedent under the circumstances appeared to be relatively settled and supportive of WSI's position." (App. p. 55). Thus, WSI's position is substantially justified because it is supported by settled legal authority.

Second, the district court held that WSI had a factual basis for its position. The district court stated that “WSI’s expert testimony supported its position.” (App. p. 55). This conclusion is based upon WSI’s reliance on objective medical experts testifying that the link between heart disease and long-term stress was inconclusive and that Mr. Auck had multiple established risk factors for coronary disease (e.g. hypertension, high cholesterol, obesity, smoking, and family history). (App. p. 54-55).

III. Ms. Auck’s arguments do not demonstrate that WSI acted without substantial justification.

Contrary to Ms. Auck’s assertion on appeal, the North Dakota Supreme Court’s opinion in Workforce Safety and Insurance v. Cynthia Auck does not support her request for attorney fees under N.D.C.C. § 28-32-50. 2010 ND 126. (Appellant’s Brief p. 5-6). The Auck court did not criticize WSI’s reliance upon the expert witnesses in denying benefits as having no basis in fact or law. The Auck court did not hold that the expert witnesses’ opinions were completely unfounded or unworthy of belief. Rather, in affirming the benefits awarded to Ms. Auck, this court gave due deference to the factual findings of the ALJ and noted that when confronted with the battle of the experts, the ALJ could rely upon “either party’s witness.” Id. at ¶ 18 (emphasis added). The expert witnesses relied upon by WSI were reasonable and credible, and its action in reliance on these opinions was substantially justified.

Finally, Ms. Auck argues essentially that because WSI’s decision to deny benefits was reversed, the agency cannot sustain its burden of proving its actions were substantially justified. (Appellant’s Brief at 5). The fact that Ms. Auck ultimately

prevailed, however, does not necessarily mean that WSI acted without substantial justification. Even an agency's incorrect decision may be substantially justified if a reasonable person could think the position has a reasonable basis in law and in fact. Tedford, 2007 ND 142 ¶25, citing Lamplighter Lounge, Inc. v. State ex. rel. Heitkamp, 523 N.W.2d. 73,75 (N.D. 1994). Here, the same district court that earlier affirmed the ALJ's order reversing WSI's denial of Ms. Auck's death benefits also determined that WSI's action was substantially justified. (App. p. 30. 54-55) In its analysis under N.D.C.C. § 28-32-50, the district court reviewed the legal and factual basis of WSI's decision to deny benefits, concluding "a reasonable person could find that WSI's position was correct and reasonably supported in law and fact; therefore WSI's position was substantially justified." (App. p. 54-56). The September 1, 2010 order is not an abuse of the court's discretion. (App. p. 52). Rather, it is a reasoned and reasonable decision based on a rational mental process. Usry v. Theusch, 521 N.W.2d at 919.

CONCLUSION

For the above and foregoing reasons, Appellee Bobcat Company respectfully requests the North Dakota Supreme Court affirm the district court's September 1, 2010 order denying Ms. Auck's petition for attorney fees and costs pursuant to N.D.C.C. § 28-32-50.

Respectfully submitted this 13 day of December, 2010.

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