20110135

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Industrial Contractors Inc.,	)	
	)	Supreme Court Case No. 20110135
Appellant,	)	
	)	Burleigh County Case No. 11-C-274
-vs-	)	
	)	
Workforce Safety and Insurance,	)	
	)	
Appellee,	)	
	)	
and	)	
	)	
James Higginbotham,	)	
	)	
Claimant and Appellee.	)	

INDUSTRIAL CONTRACTORS INC. vs. WORKFORCE SAFETY AND INSURANCE AND JAMES HIGGINBOTHAM

APPELLANT INDUSTRIAL CONTRACTORS INC.'S APPEAL FROM THE AMENDED ORDER GRANTING MOTION TO DISMISS DATED 3/31/11 AND THE JUDGMENT DATED 4/26/11

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court erred in dismissing Industrial Contractor Inc.'s appeal of the administrative agency to the district court for lack of jurisdiction?

Whether the district court erred in denying as moot Industrial Contractor Inc.'s motion for Change of Venue and to Amend Service to Reflect Morton County or to Alternatively Enlarge Time for Service and Filing of Appeal?

STATEMENT OF THE CASE

This matter involves an appeal from an administrative agency decision. The administrative law judge's Order was issued on December 31, 2010. Industrial Contractors Inc. ("ICI"), the employer, timely filed a Notice of Appeal and Specifications of Error dated January 27, 2011. (Certified Record (CR) at index 2 and Appendix (App. at 1.)) The caption correctly noted that the matter was being appealed to the South Central Judicial District but captioned the matter "Burleigh County" rather than "Morton County."

On February 16, 2011, ICI submitted a motion for Change of Venue and to Amend Service to Reflect Morton County or to Alternatively Enlarge Time for Service and Filing of Appeal. (CR at index 5 & 6.) ICI did not concede that the employer, in a case like this, cannot appeal to the county where the administrative hearing occurred and where the modified work was being performed, but filed its motion to avoid claimant's anticipated Motion to Dismiss.

On February 28, 2011, the claimant filed a Motion to Dismiss relying exclusively on *Basin Electric Power Coop. v. N.D. Worker's Compensation Bureau*, 541 N.W.2d 685 (N.D. 1996). (CR at index 10.) Workforce Safety and Insurance did not take a position on ICI's motion or the claimant's motion. The District Court dismissed the appeal for lack of jurisdiction due to the claimed error in venue and denied the employer's motions as moot. (CR at index 18 & App. at 3.) This appeal ensued.

STATEMENT OF THE FACTS

James Higginbotham ("Higginbotham") submitted a claim for worker's compensation benefits asserting he injured his left shoulder on May 14, 2010, while working for ICI at the Heskett Station Mine, approximately two miles north of Mandan. (App. at 5.)

Workforce Safety and Insurance accepted the claim, but issued a Notice of Intention to Discontinue Disability Benefits as ICI had modified work available for Higginbotham. (App. at 4.) The modified work consisted of painting tool boxes using a roller and a paint brush in his right hand, the non-injured arm. (App. at 10.) After initially arguing he could not work at all, Higginbotham eventually "accepted" the modified position and agreed to return to the ICI shop to perform the modified duties. (App. at 10.) The ICI shop is located in Bismarck, North Dakota, in Burleigh County. (App. at 10.) On his first day in the modified position, after a few hours, Higginbotham indicated that he could not physically perform the modified job and left the Bismarck job site. Higginbotham did not return to work or inquire as to other modified jobs available. (App. at 10.)

WSI continued with its order denying further disability benefits. Higginbotham contested WSI's decision. The parties stipulated to the hearing being held in Bismarck. Following an administrative hearing, the administrative law judge, Rosellen Sand, issued Findings of Fact, Conclusions of Law, and Order reversing WSI's decision concluding that the modified job exceeded Higginbotham's restrictions. (App. at 4-15.) The ALJ determined as a matter of law, incorrectly, that

Higginbotham was not required to make a good faith work effort. (App. at 13.) ICI disagreed with ALJ Sand's order and sought judicial review of the decision by filing a notice of appeal. (CR at index 2 and App. at 1.)

On January 27, 2011, ICI appealed the order asserting:

> The employer had appropriate modified work available within the claimant's work restrictions. The claimant attempted to manipulate doctors' opinions precluding him from work at all. When doctors maintained his ability to continue working with restrictions, the claimant failed to make the good faith work trial. The claimant, because of his failure to make a good faith effort to perform modified work provided, within his restrictions, or seek or inquire regarding additional work, is not entitled to disability benefits.

Notice of Appeal and Specification of Error. (CR at index 2 and App. at 1.)

LEGAL ARGUMENT

1. Ambiguities in Jurisdictional Statutes Must Be Construed in Favor of the Purpose of the Statute

The Administrative Agencies Practices Act provides:

> a. The appeal of an order may be taken to the District Court designated by law, and if none is designated, then to the District Court of the county in which the hearing or a part thereof was held. If the administrative proceeding was disposed of informally, or for some other reason no hearing was held, an appeal may be taken to the District Court of Burleigh County.

Section 28-32-42, N.D.C.C. (emphasis added).

As noted, the parties stipulated to the hearing being held in Bismarck. Thus, under the Administrative Agencies Practices Act, the appeal can be taken to the South Central Judicial District, Burleigh County. The Administrative Agencies Practices Act provides that an appeal in an administrative agency action can occur to the county where the hearing was held. *See* Section 28-32-42, N.D.C.C. Indeed,

the notice that accompanied the administrative law judge's order in this case specifically indicated that "appeals are governed by Chapters 28-32 and 65-10 of the North Dakota Century Code."

Appeals of worker's compensation administrative decisions are governed by Chapters 28-32 and 65-10 of the North Dakota Century Code. Section 65-10-01 provides:

> **65-10-01. Appeal from decision of organization.** If the final action of the organization denies the right of the clamant to participate at all in the fund on the ground that the injury was self-inflected, or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claim, or if the organization allows the claimant to participate in the fund to a lesser degree than that claimed by the claimant, if such allowance is less than the maximum allowance provided by this title, the claimant may appeal to the district court of the county wherein the injury was inflicted or of the county in which the claimant resides. An employer may also appeal a decision of the organization in any injury case or an organization decision issued under chapter 65-04, in the manner prescribed in this section. An appeal involving injuries allegedly covered by insurance provided under contracts with extraterritorial coverage shall be triable in the district court of Burleigh County. Any appeal under this section shall be taken in the manner provided in chapter 28-32. Any appeal to the district court shall be heard on the record, transmitted from the organization, and, in the discretion of the court, additional evidence may be presented pertaining to the questions of law involved in the appeal.

Section 65-10-01, N.D.C.C. (emphasis added).

Section 65-10-01 specifies that a claimant may appeal to the district court of the county wherein the injury was inflicted or of the county in which the claimant resides. In this case, the injury occurred in Morton County and the claimant resided in Mercer County. Thus, the claimant could appeal to either of those counties. The statute very specifically delineates the exact counties to which the claimant may

appeal. The statute goes on to indicate that "an employer may also appeal a decision of the organization in any injury case or an organization decision issued under Chapter 65-04, in the manner prescribed in this section." The section then specifies that an appeal taken under this section shall be taken in the manner provided in Chapter 28-32.

Thus, the statute indicates that the employer "may" appeal in accordance with that section, but does not require it to do so. Had the legislature intended to mandate that both claimants and employers must appeal to the county wherein the injury occurred or where the claimant resides, it could have very easily done so. The statute could have indicated "the claimant and employer may appeal to the district court of the county wherein the injury was inflicted or of the county in which the claimant resides." It does not. The word "may" ordinarily creates a directory, nonmandatory duty, and the Court will only construe the word "may" as "must" where the context or subject matter compels that construction. *North Dakota Commission on Medical Competency v. Racek*, 527 N.W.2d 262 (N.D. 1995). Since Section 65-10-01 provides an employer "may" appeal as outlined in that section, it does not mean it "must" appeal solely under that provision unless the context compels that interpretation.

The merits of this case involve whether or not the claimant should continue to receive disability benefits when the employer had modified work available. As outlined in the administrative law judge's decision, the issue addressed at the administrative hearing was whether or not the claimant refused "modified job offered

by his employer that was within his restriction...." (App. at 5.) In this case, when analyzing where it is appropriate for the employer to appeal, the focus, purpose, and location of the hearing is important. There can be no dispute that the Administrative Agencies Practices Act provides that an appeal of an order may be taken to the district court designated by law, and if none is designated, then to the district court of the county in which the hearing or a part thereof was held. Section 28-32-42(3)(a), N.D.C.C. In this case, the parties, including the claimant, ICI, and WSI all agreed that the hearing could be held in Bismarck. As noted, the modified duties, which form the crux of the dispute and the claim in this case, were offered and "attempted" in Bismarck, Burleigh County. In fact, the primary substantive dispute on appeal involves the employer's obligations and burden in providing modified work and a claimant's obligation to attempt that modified work. The ALJ, in her decision, suggested that there is no requirement that "an employee make a 'good faith' work effort." (App. at 12.) ICI strongly disagreed with that statement and seeks judicial review on the merits.

In many contexts this court has stressed that it is important to reach and address substantive issues instead of denying a party their day in court for technical reasons. The court has a long history of allowing a party its day in court and allowing a review of the substantive matters versus deciding the case on a procedural issue. *Federal Savings and Loan Ins. Corp. v. Albrecht, et al.*, 379 N.W.2d 266 (N.D. 1985) & *Bender v. Liebelt*, 303 N.W.2d 316 (N.D. 1981). Whenever reasonably possible, cases should be disposed of on the merits, *Dehn v.*

Otter Tail Power Co., 248 N.W.2d 851 (N.D. 1976) (emphasis added).

Section 65-10-01 is clear that an employer may appeal under that section. The word "may" does not mean "must." The employer is not precluded from appealing under Section 28-32-42. Indeed, any ambiguity in jurisdictional requirements should be construed in favor of the clear purpose of the law. Section 65-01-01, N.D.C.C., as applicable to this case indicates that a "civil action or civil claim arising" under title 65, which is subject to judicial review, "must be reviewed solely on the merits of the action or claim." Thus, since the purpose of the law is to make sure claims are reviewed solely on the merits any ambiguity should be construed in favor of that result.

2. *Basin Electric* Cooperative is Not Controlling

In submitting his Motion to Dismiss the claimant relied solely on this Court's decision in *Basin Electric Cooperative v. N.D. Worker's Compensation Bureau*, 541 N.W.2d 685 (N.D. 1996). Interestingly, WSI did not take a position on the claimant's motion. There are very important distinctions between this case and the scenario addressed in the *Basin Electric* case. A critical statutory amendment occurred which directly impacts the legal analysis in the *Basin Electric* decision. As noted above, Section 65-01-01 was amended to specify that the purpose of the law was to make sure that matters should be reviewed solely on the merits of the action or claim.

In *Basin Electric* the Court examined the word "may" in 65-10-01 in deciding whether or not an employer could only appeal under that section, and noted that

any ambiguities in jurisdictional requirements of a statute should be construed in favor of the clear purpose of the law. The Court went on to note:

> The purpose of the worker's compensation law is to provide workers sure and certain relief regardless of questions of fault in exchange for their employer's immunity from injured employees' claims for relief. We, therefore, construe the law governing worker's compensation liberally in favor of injured workers to promote their well being. Construing N.D.C.C. § 65-10-01 to make it easier for employers to appeal from a Bureau decision than it is for claimants would conflict with the worker's compensation laws stated purpose and turn the rule of liberal construction in favor of injured workers on its head.

Basin Electric Power Coop., 541 N.W.2d at 689 (emphasis added).

Thus, the Court concluded it would read the word "may" in 65-10-01 as "must" in light of the purpose of the law which was to be liberally construed in favor of claimants. The requirement that worker's compensation laws be liberally construed in favor of the injured worker was removed from the statute in 1995. The statute was amended to clearly indicate that the title "may not be construed liberally on behalf of any party to the action or claim." Section 65-01-01, N.D.C.C. But, moreover, the statute was amended to specify the purpose of the law by stating "a civil action or civil claim arising under this title, which is subject to judicial review, must be reviewed solely on the merits of the action or claim." *See* Section 65-01-01, N.D.C.C. This Court has held that "ambiguities in jurisdictional requirements of a statute should be construed in favor of the clear purpose of the law." *Basin Electric Power Coop.*, 541 N.W.2d at 689 (*citing Erickson v. Director, N.D. Dept. of Transportation*, 507 N.W.2d 537 (N.D. 1993)). The clear stated purpose of the law, as amended and as applicable to the present case, is to ensure that appeals are

reviewed solely on the merits of the action or claim. Therefore, when examining Section 65-10-01 which indicates an employer "may" appeal a decision under that section, whether to construe the word "may" as "must" should now be examined and construed in favor of the clear purpose of the law which is to allow a review on the merits of the claim.

In *Cahoon v. N.D. Worker's Compensation Bureau*, 482 N.W.2d 865 (N.D. 1992), the claimant appealed from the judgment of the District Court of Oliver County dismissing his appeal from the North Dakota Worker's Compensation Bureau for lack of jurisdiction. This court reversed and remanded the action. An analysis of the *Cahoon* decision sheds light on the present issues before the Court.

After an adverse administrative ruling, the claimant appealed within the 30 day period to the District Court of Burleigh County by filing a Notice of Appeal, Specifications of Error, and Proof of Service of the Notice of Appeal with the Burleigh County District Court. However, the proof of service filed only showed that the Notice of Appeal had been served upon the Bureau and did not reflect that Cahoon's employer who had participated in the proceedings before the Bureau, had also been served.

Subsequently, the Bureau moved to dismiss the appeal asserting that pursuant to §§ 28-32-15 & 65-10-01, N.D.C.C., the District Court for Burleigh County lacked jurisdiction in that Cahoon was required to appeal to the District Court for Foster County, the place where the alleged injury took place, or the District Court for Oliver County, Cahoon's county of residence. Cahoon resisted the motion

and moved to have the appeal transferred to Oliver County. The District Court denied the Bureau's motion concluding that Cahoon's appeal did comply with § 65-05-01, N.D.C.C., since the appeal was to the South Central Judicial District, for which both Oliver and Burleigh Counties are a part. The District Court on April 4, 1991, concluded that the filing of the Notice of Appeal in the Burleigh County Clerk's office instead of the Oliver County Clerk's office was not a jurisdictional defect and, thus, granted Cahoon's motion to have his appeal venued in Oliver County. Subsequently, on June 19, 1991, the district court concluded that the appeal must be dismissed for lack of subject matter jurisdiction since it was filed in Burleigh County even if the employer was served with a Notice of Appeal.

On appeal, this Court noted that, in essence, the district court had concluded that the claimant's failure to name his employer in the Affidavit of Service of the Notice of Appeal as having been served with the Notice of Appeal within a 30 day time period was a jurisdictional defect even if the employer may actually have been served. This Court held that the filing of a document showing proof of some service is sufficient under § 28-32-15 to confer jurisdiction on the district court, at least for the limited purpose of allowing the proof of service to be corrected to accurately reflect the facts. "In other words, an inaccurate but timely filed proof of service may be the basis for a hearing to determine the actual facts surrounding the service upon proper motion." *Cahoon*, 482 N.W.2d at 867. In doing so, this Court specifically noted that "our decision in this case follows the long established general principle in favor of allowing liberal amendment of filed documents." *Cahoon*, 482

N.W.2d at 867.

In reaching its conclusion, the Court in *Cahoon* noted, "we express no view regarding Cahoon's initial appeal to the District Court for Burleigh County instead of Oliver County, as this issue has not been briefed or argued on appeal. Notwithstanding that the Bureau asserted in district court, and filed a brief in support thereof, that this deprived the district court for Oliver County of jurisdiction, and that a jurisdictional issue may be considered on our own initiative, we will not do so in this case lest we improvidently decide the issue because of the lack of adversary briefs and arguments in this Court." *Id.*

As outlined above, the claimant relies exclusively on the *Basin Electric* decision in support of his position in this case. However, as also pointed out above, § 65-01-01 was amended effective August 1, 1995. Thus, the statute addressed by the Court in *Basin Electric* was not the statute applicable to the present case. The claimant is sure to cite the Court's dicta in the *Basin Electric* case that, "because the amendment was not effective when Basin filed the appeal and the trial court denied the motion to dismiss, it does not apply in this case. But even if we applied the new law, construing N.D.C.C. § 65-10-01 to make it easier for employers to appeal than it is for claimants would constitute a liberal construction on behalf of the employer in violation of the statutory amendment." *Basin Electric*, 541 N.W.2d at 689. As this Court was careful to note in *Cahoon*, it is important not to address complex jurisdictional issues that have not been fully briefed and argued on appeal, "lest we improvidently decide the issue because of the lack of adversary briefs and

arguments in this court." *Cahoon*, 482 N.W.2d at 867. The dicta contained in *Basin Electric* regarding the effect the statutory change would have on the jurisdictional analysis was improvidently stated as the issue was not fully briefed and argued. It is not controlling in this case. Moreover, this Court has clearly held that a "prior opinion is only stare decisis on points decided therein; any expression of opinion on a question not necessary for decision is merely dicta, and is not, in any way, controlling upon later decisions." *First Federal Savings and Loan v. Scherle*, 356 N.W.2d 894 (N.D. 1984).

The *Cahoon* decision was decided in 1992. This Court, in discussing the jurisdictional issues, specifically stated:

> We urge the legislature to clarify the law as it relates to this issue to advance the objective of permitting claims to be decided on their merits with the least procedural obstructions.

Cahoon, 482 N.W.2d at 867, n 2 (*citing Hayden v. N.D. Worker's Compensation Bureau*, 447 N.W.2d 489 (N.D. 1989).

The legislature took this Court's urging and did clarify the law. The legislature amended § 65-01-01 to read:

> A civil action or civil claim while arising under this title, which is subject to judicial review, must be reviewed solely on the merits of the action or claim. This title may not be construed liberally on behalf of any party to the claim or action.

Thus, in *Cahoon*, this Court urged the legislature to clarify the law to advance the objective of permitting claims to be decided on their merits. Three years later the legislature amended § 65-01-01 noting that civil actions under the worker's compensation title "must be reviewed solely on the merits of the action or claim."

As noted above, in *Basin Electric*, this Court struggled with interpreting § 65-10-01 wherein it indicates the employer "may" appeal the same way in which a claimant may appeal, but not that it "must." The lynch pin in the Court's analysis on that issue was that ambiguities in jurisdictional requirements of a statute should be construed in favor of the clear purpose of the law. At that time the Court specifically noted the purpose of the worker's compensation law was to provide sure and certain relief regardless of questions of fault for injured workers and be liberally construed in favor of injured workers. Under the present statutory language in § 65-01-01, specifically amended after this Court urged the legislature to clarify the law to advance the objectives of permitting claims to be decided on the merits, that lynch pin is missing. Instead, now any ambiguities must be read in favor of the purpose of the law . . . to allow a review of the merits.

3. Even if ICI Should Have Appealed to Morton and Mercer County, the District Court Erred in Not Granting ICI's Motions to Remedy.

Pursuant to Section 65-10-01, N.D.C.C., a claimant may appeal to the district court wherein the injury was inflicted or to the county in which the claimant resides. In this case the claimant resided in Mercer County and the injury occurred in Morton County. The Notice of Appeal was captioned in "Burleigh County." The district court is authorized to change venue in a case "[w]hen the county designated for that purpose in the complaint is not the proper county." § 28-04-07(1), N.D.C.C. Moreover, the court also has the authority to amend the process and proof of service.

> At any time and upon such notice and terms as it deems just, the court, in its discretion, may allow any process or proof of service thereof to be amended unless it clearly appears the material prejudice would result to the substantial rights of the party against whom the process issued.

Rule 4(h), N.D.R. Civ. P. (emphasis added).

ICI requested, pursuant to Rule 4(h), N.D.R. Civ. P., that the district court amend the process and proof of service to reflect the county where the appeal occurred as Morton rather than Burleigh. In appeals from administrative agency decisions, the Rules of Civil Procedure "govern the procedure and practice relating thereto insofar as these rules are not inconsistent with such statutes." *See* Rule 81(b), N.D.R. Civ. P. & *Reliance Ins. Co. v. PSC*, 250 N.W.2d 918 (N.D. 1977) (applying certain procedural aspects of Rules 5 and 6, N.D.R. Civ. P.) Higginbotham cannot establish any material prejudice. Indeed, all of the parties were served the specification of issues outlining each of the factual and legal challenges to the ALJ's ruling. Higginbotham could not assert surprise. The Notice of Appeal and Specification of Errors was filed with the Court and served on all the parties within 30 days after the ALJ issued her decision. As such, Higginbotham cannot establish any prejudice at all, much less material. Indeed, the action was in the same judicial district and the very same judge could be assigned regardless of the caption indicating Burleigh versus Morton County. The dismissal of ICI's appeal under these circumstances is hyper technical and deprives ICI of its day in court. The district court erred in dismissing the appeal without addressing ICI's motion.

Alternatively, ICI moved the district court to enlarge the time for service and filing of appeal.

Pursuant to Rule 6, North Dakota Rules of Civil Procedure:

> When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request for enlargement is made before expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect . . . .

Rule 6, N.D.R. Civ. P. (emphasis added).

Counsel for ICI inadvertently listed Burleigh County in the caption of the Notice to Appeal rather than Morton County. Pursuant to § 28-32-42, N.D.C.C., an appeal may be taken from the order within 30 days after notice of the order had been given. The Findings of Fact, Conclusions of Law, and Order issued by Administrative Law Judge Rosellen Sand was mailed on December 31, 2010. Accordingly, including three days for mailing, the deadline to file an appeal was February 2, 2011. Fifteen days later, ICI requested the district court grant an enlargement of time to file the Notice of Appeal and Specification of Errors. The district court erred in dismissing the appeal without addressing ICI's motion.

The motion for enlargement of time to appeal was additionally, and alternatively, made pursuant to Rule 4(a)(4), North Dakota Rules of Appellate Procedure. That rule provides:

> (A) The district court may extend the time to file a notice of appeal if:
>
> (i) a party so moves no later than 30 days after the time prescribed by subdivision (a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) If a motion for extension of time is filed, notice must be given to the other parties.

(C) No extension under paragraph (a)(4) may exceed 30 days after the prescribed time.

Rule 4(a)(4), N.D.R. App. P. (emphasis added).

A trial Court's determination on a motion for an extension of time based upon excusable neglect will not be set aside on appeal absent an abuse of discretion. *K&K Implement v. First Nat'l Bank*, 501 N.W.2d 734 (N.D. 1993). The district court erred in dismissing the appeal without addressing ICI's motion.

CONCLUSION

The Administrative Law Judge in this case incorrectly determined, as a matter of law, that the claimant was not required to make a good faith work effort to perform the modified job duties. This is an important substantive issue for employers in this state, for injured workers, and for Workforce Safety & Insurance. Depriving ICI of judicial review of this decision under the circumstances of this case is legally incorrect and simply inequitable.

For the reasons outlined above, ICI requests that this Court reverse the district court's dismissal of appeal and allow the district court to review the matter on its merits.

Dated this 13th day of June, 2011.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Industrial Contractors Inc., Appellant, -vs- Workforce Safety and Insurance, Appellee, and James Higginbotham, Claimant and Appellee.	Supreme Court Case No. 20110135 Burleigh County Case No. 11-C-274 **AFFIDAVIT OF MAILING**

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

The undersigned, being duly sworn and of legal age, deposes and says that: I am a United States citizen, over 18 years of age, and on June 13, 2011, I served a copy of the attached:

APPELLANT'S BRIEF

by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota.

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Valerie Krapatsch

Subscribed and sworn to before me, today, June 13, 2011.

Kelsey Backhaus
NOTARY PUBLIC

KELSEY BACKHAUS
Notary Public
State of North Dakota
My Commission Expires November 25, 2015