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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Merwin Carlson,	**Supreme Court Case No. 20110163**
Appellant,	
vs.	
North Dakota Workforce Safety and Insurance Fund and GMR Transportation, Inc.,	
Appellees.	

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BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE FUND

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APPEAL FROM APRIL 6, 2011, ORDER VACATING NOVEMBER 8, 2010, ORDER AND ORDER ON APPEAL AND JUDGMENT DATED JUNE 2, 2011
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN C. IRBY

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STATEMENT OF THE ISSUES

[1] Whether res judicata/law of the case precluded WSI from exercising its continuing jurisdiction under N.D.C.C. § 65-05-04 after Carlson v. Workforce Safety and Insurance, 2009 ND 87.

[2] Whether there were procedural and/or substantive due process violations in connection with these proceedings.

[3] Whether the ALJ could reasonably determine that Carlson was an independent contractor.

[4] Whether the ALJ properly denied intervention from Blue Cross-Blue Shield of North Dakota.

[5] Whether Carlson is entitled to N.D.C.C. § 28-32-50 attorney's fees.

STATEMENT OF THE CASE

[6] On May 18, 2009, this Court decided Carlson v. Workforce Safety and Insurance, 2009 ND 87, 765 N.W.2d 691 (hereafter "CarlsonI"). On June 29, 2010, the District Court remanded the case to WSI "for further proceedings consistent with the Supreme Court's opinion." (C.R. [1] 324)

[7] On July 2, 2009, Kim Ehli, Director of Claims for WSI wrote advising WSI was "considering exercising its continuing jurisdiction pursuant to North Dakota Century Code § 65-05-04. (App. 142) On October 2, 2009, WSI issued an administrative order exercising its continuing jurisdiction for further review and determining the claim remained denied as Carlson was an independent contractor. (WSIApp. 1-21) Carlson requested rehearing from the October 2, 2009, Order. (WSIApp. 22-27)

[1] "C.R." refers to the Certificate of Record on Appeal to District Court filed pursuant to N.D.C.C. § 28-32-44, dated August 24, 2010.

[8] In the Notice of Hearing and Prehearing Order the administrative law judge set a dispositive motion filing deadline for January 15, 2010. (C.R. 373) On January 14, 2010, Carlson filed a Prehearing Motion on the issues of (1) res judicata; (2) due process; and (3) attorney fees. (C.R. 580-767) WSI and GMR submitted responses to the Motion. (C.R. 770-803; 804-814) Carlson then submitted a Reply to WSI and GMR's responses to the Prehearing Motion. (C.R. 815-822) On March 18, 2010, Carlson submitted a Motion to Intervene of Blue Cross Blue Shield of North Dakota. (C.R. 826-845) WSI submitted a response to the Motion to Intervene. (C.R. 846-850) Carlson submitted a Reply to WSI's Response. (C.R. 1020-1023)

[9] On April 5, 2010, ALJ Susan Bailey issued her Order on the Prehearing Motions filed by Claimant. (App.91-103) On those motions, ALJ Bailey held that (1) res judicata did not bar litigation of the issue of Carlson's status as an independent contractor or employee of GMR (App. 91-103); (2) that although WSI should have reinstated benefits under its October 3, 2006, order awarding benefits after the Supreme Court issued its decision, but Carlson had not established WSI acted in an arbitrary, unreasonable or discriminatory manner by its failure to do so (App. 97); (3) that Carlson had not established that he was entitled to attorney's fees under N.D.C.C. § 28-32-50 (App. 100); and (4) denied Blue Cross-Blue Shield's motion to intervene. (App. 101)

[10] An administrative hearing was held on April 6, 2010. (C.R. 373-377; 1213) Following submission of post-hearing briefs (C.R. 1043-1067; 1068-1091; 1092-1159; 1160-1178; 1179-1186), Administrative Law Judge Susan L. Bailey ("ALJ Bailey") issued Findings of Fact, Conclusions of Law and Order dated July 8, 2010 (App. 65-90), affirming WSI's determination that Carlson's was an independent contractor, and finding

that failure to reinstate Carlson's benefits after CarlsonI constituted a violation of procedural due process but because Carlson was an independent contractor he was entitled to no net monetary award.

[11] Carlson appealed ALJ Bailey's April 5, 2010 and July 8, 2010, decisions to the District Court, Cass County. (App. 60-64) On November 8, 2010, Judge Douglas R. Herman issued a Memorandum Opinion and Order reversing the ALJ's Order in part and affirming in part and awarding attorney's fees. (App. 110-119) WSI objected to the entry of such order without the opportunity to brief the issues presented. (App. 143-144) As a result, Judge Herman stayed the Order and assigned consideration of the appeal to another District Judge. (App. 145) On April 6, 2011, Judge John C. Irby issued an Order Vacating November 8, 2010, Order and Order on Appeal. (App. 120-131) Order for Judgment was entered May 31, 2011, and Judgment entered June 2, 2011. (App. 133, 134) Carlson then took the instant appeal to this Court on June 3, 2011. (App. 140-141)

STATEMENT OF FACTS

[12] Carlson began his career as a truck driver when he was 21 years old. (C.R. 238 at 35) When he first began working as a truck driver, he worked as an employee for Wiest Trucking and then E. W. Wylie. (C.R. 238 at 36) While driving for E. W. Wylie, Carlson did not own his own truck. (C.R. 238 at 66) Instead, he hauled freight driving an E. W. Wylie vehicle. (C.R. 238 at 68) Carlson left E. W. Wylie "to be a contractor." (C.R. 238 at 83, 143; C.R. 482) From that point forward, Carlson conducted trucking operations as an independent owner operator, utilizing equipment that he owned. (C.R. 238 at 83-85)

[13] In March of 2001, Carlson began a contractual relationship with GMR Transportation as an owner-operator, hauling flatbed freight. (C.R. 238 at pp. 39, 75,110, 201) When Carlson came to GMR, he spoke with Dennis Gustafson and informed him he wanted to become an independent contractor with GMR. (C.R. 238 at 143) In 2000, prior to entering into the contractual relationship with GMR, Carlson personally leased a 2000 Freightliner tractor and 1999 Trailmobile trailer. (C.R. 238 at 65-66,85) Car;spm confirmed to GMR in July of 2001 that he did not carry workers' compensation coverage on himself. (C.R. 69) Carlson filed income taxes for 2002-2004 reporting his income as a truck driver under Schedule C "profit or loss from business." (C.R. 4553-454; 462-463; 473-474)

[14] The relationship under which Carlson hauled freight for GMR was memorialized in an Independent Contractor Service Agreement. (C.R. 54-68; 238 at p. 39-40) The Agreement dated December 30, 2003 (C.R. 54-68) replaced a previous contract that he had been working under. (C.R. 238 at p. 40) Carlson provided to GMR on the contract his Federal Identification Number. (C.R. 423) Throughout his relationship with GMR, Carlson would haul flatbed freight under the Independent Contractor Service Agreement. (C.R. 238 at 40, 70) Carlson utilized a truck that he leased in his own name in approximately December of 2000, prior to entering into the owner-operator relationship with GMR. (C.R. 238 at pp. 65-66, 67) The contract executed between GMR and Carlson set forth:

> **IF AT ANY TIME DURING THE TERM OF THIS AGREEMENT CONTRACTOR IS OF THE OPINION THAT SOMETHING OTHER THAN AN INDEPENDENT CONTRACTOR RELATIONSHIP EXISTS BETWEEN CONTRACTOR AND GMR, CONTRACTOR SHALL IMMEDIATELY NOTIFY THE VICE PRESIDEN TOF GMR, IN WRITING.**

(C.R. 414) Carlson never exercised this provision and never notified the vice president of GMR that he thought he was an employee and not an independent contractor. (C.R. 238 at 74)

[15] On July 8, 2005, Carlson was involved in a motor vehicle accident. (C.R.143-148) The accident was Carlson's fault where he either fell asleep or was dazed and rear-ended another vehicle. (C.R. 238 at 43-44) On July 5, 2006, Carlson submitted a claim to WSI relating to his injuries. (C.R. 5-7) Carlson identified his "employer" as GMR Transportation. (Id.) GMR disputed that Carlson was an employee. (C.R. 13) GMR was asked by Tami O. of WSI to complete the "employer" information regarding First Report of Injury. (C.R. 16-18) WSI then began gathering information on Carlson's employment status.

[16] WSI initially found Carlson was an employee of GMR Transportation based on the initial documentation submitted (C.R. 23). Subsequently, WSI determined Carlson was an independent contractor based upon information submitted by GMR Transportation. A Notice of Decision Denying Benefits was issued January 4, 2007, notifying Carlson of that fact and that he had been overpaid benefits for wage loss ($18,817.08) and medical expenses ($11,817,87). (C.R. 161-162) Carlson requested reconsideration from that decision. (C.R. 163-196) WSI issued an Order on February 20, 2007, denying the claim and finding Carlson was an independent contractor. (C.R. 213) Carlson requested rehearing. (C.R. 230-237) The resulting litigation culminated in this Court's decision in CarlsonI. The Court stated it "need not address" the issue of Carlson's employment status or ability to exercise continuing jurisdiction due to its resolution of the GMR request for reconsideration. Carlson, 2009 ND 87 ¶¶ 35, 36.

[17] Thereafter, WSI informed Carlson and GMR that it was considering exercising its continuing jurisdiction to review the employment status decision under N.D.C.C. § 65-05-04. (App. 142) After reviewing additional information/commentary/arguments submitted by Carlson (C.R. 326-328, 342-344) and GMR Transportation (C.R. 329-341), WSI issued its October 2, 2009, Order exercising its continuing jurisdiction for further review of Carlson's claim and concluded the claim remained denied as Carlson was an independent contractor. (WSIApp. 1-21) Following an administrative hearing from WSI's October 2, 2009, Order, ALJ Bailey affirmed WSI's determination that Carlson was an independent contractor, and decided other legal issues as outlined above. (App. 65-89)

LAW AND ARGUMENT

A. STANDARD OF REVIEW

[18] This Court has held when an administrative agency requests designation of an administrative law judge from the Office of Administrative Hearings to issue a final decision, judicial review of the ALJ's factual findings is the same as used for agency decisions. North Dakota Securities Commissioner v. Juran and Moody, Inc., 2000 ND 136 ¶ 27, 613 N.W.2d 503. The ALJ's decision must be affirmed unless the "findings of fact are not supported by a preponderance of the evidence, [the] conclusions of law are not supported by [the] findings of fact, [the] decision is not supported by [the] conclusions of law, or [the] decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. This requires the Court determine "whether or not a reasoning mind could have reasonably determined that the . . . factual determinations were supported by the evidence." Johnson v. North Dakota Workers

Compensation Bureau, 496 N.W.2d 562, 564 (N.D. 1993); Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459, 462 (N.D. 1992). See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93, 576 N.W.2d 861. However, as it pertains to the review of the ALJ's legal conclusions, they "must be reviewed in the same manner as legal conclusions generally, without special deference to the ALJ. Juran and Moody, Inc., 2000 ND 136 ¶ 27, 613 N.W.2d 503; Workforce Safety & Insurance v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186.

B. ADMINISTRATIVE RES JUDICATA/LAW OF THE CASE DID NOT BAR RELITIGATION OF CARLSON'S EMPLOYMENT STATUS.

[19] ALJ Bailey held that because there was no legally recognized trial-type hearing held on the issue of Carlson's status as an independent contractor, due to the decision in CarlsonI, all of the proceedings following issuance of the October 3, 2006, notice of decision were "nullified, i.e., are all treated under the ruling as if they never occurred." (App. 92) ALJ Bailey was in holding that administrative res judicata did not bar WSI's exercising continuing jurisdiction under N.D.C.C. § 65-05-04 to review Carlson's employment status. The District Court agreed. (App. 127)

[20] In CarlsonI, this Court did not establish that he was an employee of GMR. To the contrary, this Court did not reach the merits of whether Carlson was an employee or independent contractor. Specifically, the Court stated: "We hold WSI erred in considering GMR's request for reconsideration. Because of our resolution of this issue, we need not address Carlson's arguments that WSI's procedure for terminating his benefits violated his due process right to ongoing disability benefits and that WSI erred in deciding he was an independent contractor." (Emphasis supplied.) Likewise, the Court did not reach the issue of whether WSI could exercise its continuing jurisdiction,"any

discussion of WSI's authority under its continuing jurisdiction would be advisory. (citation omitted)."

[21] The issue decided by this Court in CarlsonI was that the October 3, 2006, Notice of Decision finding Carlson was an employee of GMR on the date of his injury was final. Existing case law and the procedural history, however, clearly points to the fact that WSI could properly exercise its continuing jurisdiction to reopen the issue of Carlson's employment status even if the Notice of Decision was final.

[22] In Johnson v. North Dakota Workers' Compensation Bureau, 484 N.W.2d 292 (N.D. 1992), a claim was filed and accepted for a back injury and medical and disability benefits were paid after issuance of an "informal decision" (such as was done in Carlson's case). That informal decision became final. Approximately two years later, the claim was dismissed after WSI concluded the injury did not arise out of and in the course of employment activities and WSI ordered Johnson to repay benefits it had paid in error.

[23] On appeal, Johnson asserted challenges to WSI's ability to order repayment of benefits, including that N.D.C.C. § 65-05-04 did not provide for reimbursement and therefore WSI had no jurisdiction to demand repayment. One of the arguments advanced by Johnson was that there was no adjudication, i.e., a hearing by a court, after notice, in which evidence was presented and therefore no repayment of benefits was permitted. However, this Court rejected that argument stating that the regulations governing WSI provide that its review and determination of a claim based on the file constitutes an "informal hearing." In Johnson, the determination that benefits had been paid in error was affirmed after a formal hearing and on appeal by the district court. This Court

concluded that WSI had the authority under N.D.C.C. § 65-05-04 to review an award after an informal decision becomes final, and if one of the reasons for diminishing or ending benefits was contained in N.D.C.C. § 65-05-29, including an erroneous adjudication, WSI could end benefits and seek repayment.

[24] This Court has reiterated on numerous occasions that absent a timely request for reconsideration, an "informal decision" issued by WSI is final "subject only to reopening under N.D.C.C. § 65-05-04." Gregory v. North Dakota Workers Compensation Bureau, 1998 ND 94 ¶ 9, 578 N.W.2d 101; Freezon v. North Dakota Workers Compensation Bureau, 1998 ND 23 ¶ 11, 574 N.W.2d 577; McArthur v. North Dakota Workers Compensation Bureau, 1997 ND 105 ¶ 10, 564 N.W.2d 655. What is significant about Johnson is that it reflects that WSI has the authority, on its own motion, to review an "informal decision" that had become final. In this case, WSI has now sought to reverse its decision to accept the claim but is not seeking repayment of benefits. (WSIApp. 1-21) The rationale of Johnson still supports WSI's position – specifically, that when an "informal" decision has become final, WSI may still reopen and review the award previously made and end benefits if it finds benefits have been awarded erroneously.

[25] This Court's decision in CarlsonI determined a procedural issue only, that WSI's "informal decision" of October 3, 2006, was final as the request for reconsideration submitted by GMR was invalid. WSI has not in any way sought to alter that decision. However, as Johnson and the other case law cited above notes, a final informal decision is still subject to reopening by WSI under N.D.C.C. § 65-05-04. WSI did formally, on its own motion, exercised its continuing jurisdiction under N.D.C.C. § 65-05-04 of the final "informal decision" which, under Johnson, it is permitted to do. See also N.D.C.C. § 65-

01-16(10) (stating "[a]ny notice of decision, administrative order, or posthearing administrative order is subject to review and reopening under section 65-05-04). WSI specifically solicited new information from both Carlson and GMR prior to exercising its continuing jurisdiction and asked for arguments from both prior to rendering its decision . (App. 142) It is upon that information, arguments supplied by Carlson and GMR, as well as the information contained in WSI's, that was considered in issuing its Order of October 2, 2009. (WSIApp. 1-21)

[26] Furthermore, Cridland v. North Dakota Workers Compensation Bureau, 1997 ND 223, 571 N.W.2d 351, does not compel a different result. As this Court stated in Cridland, "we apply administrative res judicata more circumspectly than judicial res judicata, taking into account (1) the subject matter decided by the administrative agency, (2) the purpose of the administrative action, and (3) the reasons for the later proceeding." Cridland, 1997 ND 223 ¶ 18. In CarlsonI, the administrative law judge held the request for reconsideration from the informal decision was timely and proper. As a result of that decision, the hearing proceeded on the issue of Carlson's employment status. The decision of the ALJ and District Court on the employment status question was contrary to Carlson's position. On appeal, this Court reached only the procedural issue. Carlson's position is that WSI and GMR should be precluded considering the issue of his employment status because he prevailed on the procedural issue.

[27] To accept Carlson's position would mean that every claim of a procedural defect must be considered separately and if either party disagrees with the decision, a full exhaustion of appeals on that issue is necessary before proceeding with the merits or substantive issue to be addressed in order to preclude application of administrative res

judicata. The absurd result of such a process would be piecemeal rehearings and appeals first on procedural issues, and then subsequent proceedings on the substantive issue(s). This Court has a long-standing policy against piecemeal appeals. Horsley v. North Dakota Workers Compensation Bureau, 2001 ND 60 ¶ 13, 623 N.W.2d 377, quoting Sickler v. Kirkwood, 2997 ND 40 ¶ 5, 560 N.W.2d 532.

[28] Furthermore what is significant about Cridland and cases where administrative res judicata was found to apply, was the administrative agency's attempt to change the result on a specific substantive issue which had been finally judicially determined unfavorably to the agency in the prior proceeding. In contrast here, the issue of Carlson's employment status upon which WSI has now issued its October 2, 2009 Order (WSIApp. 1-21) following exercise of its continuing jurisdiction resulted in findings and conclusions fully favorable to WSI's position at the prior hearing. Therefore, this case stands in direct contrast to the factual scenario at issue in Cridland.

[29] Finally, as this Court stated in Ziesch v. Workforce Safety and Insurance, 2006 ND 99, 713 N.W.2d 525, the purpose of applying administrative res judicata is an important factor in determining whether to preclude subsequent action. In Ziesch, the Court recognized that the situation at bar was not one where WSI has "held evidentiary ammunition on compensability in reserve, to be brought out if its initial determination denying the claim is reversed." Id. ¶ 19. It is that type of action that Cridland "and its progeny" relating to application of administrative res judicata is attempting to preclude. That simply is not the case here. The issue of Carlson's employment status was decided favorably to WSI in the prior proceedings. Because of the ruling on the procedural issue, this Court did not review the issue of Carlson's employment status. However, well-

established existing case law permits WSI to exercise continuing jurisdiction on final informal decisions. The decision of this Court in CarlsonI did not preclude WSI from exercising its continuing jurisdiction. Accordingly, the factors for applying administrative res judicata are simply not present here and do not bar WSI's actions. See Ziesch, 2006 ND 99 ¶¶ 17-20.

[30] Carlson also asserts that the law of the case/mandate rule preclude WSI from revisiting Carlson's employment status following CarlsonI. A proper analysis at those legal principles demonstrates otherwise.

[31] The law of the case principle applies "if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case . . . ." State v. Burckhard, 1999 ND 64 ¶ 7, 592 N.W.2d 423 (emphasis supplied). As fully outlined above, this Court in CarlsonI did not address whether WSI could exercise its continuing jurisdiction or Carlson's employment status. Therefore, there is no binding, legal principle on either issue that must be followed in this subsequent appeal.

[32] In the proceedings subsequent to CarlsonI WSI did not seek to change the Court's decisions relating to the unauthorized practice of law or revisit the issue of whether WSI's acceptance of GMR's request for reconsideration from its October 3, 2006, Notice of Decision was timely. Rather, the action take by WSI after CarlsonI was to give notice to Carlson and GMR that it was contemplating exercising its continuing jurisdiction under N.D.C.C. § 65-05-04, and providing both parties an opportunity to submit additional evidence and arguments. (App. 142) Therefore, neither the issue of whether

WSI could exercise its continuing jurisdiction nor the issue of Carlson's employment status were decided in CarlsonI, and therefore these issues are not subject to the "law of the case doctrine."

[33] Carlson also asserts that WSI is bound by the statutory presumption of employment status under N.D.C.C. § 65-01-03. That statute goes provides that the presumption may be rebutted by the person asserting that the person is an independent contractor under the "common law" test. The statute further provides that the burden of proof is on the person asserting an individual is an independent contractor. Carlson does not cite any case law to support his argument. There is, in fact, nothing in N.D.C.C. § 65-01-03 which precludes WSI from asserting a position contrary to the presumption. Rather, as is the case with other statutory presumptions within the Workers' Compensation Act, the presumption contained in N.D.C.C. § 65-01-03 shifts the burden of going forward with the evidence and the burden of persuasion to whomever is asserting that an individual is an independent contractor. See e.g., Sunderland v. North Dakota Workers Compensation Bureau, 370 N.W.2d 549, 552 (N.D. 1985) (holding firefighter and law enforcement presumption shifts burden of production and persuasion). At the hearing, WSI acknowledged that it had the burden of proof as to employment status. (C.R. 1213 at 10)

[34] Furthermore, the Court has addressed the issue that WSI acts as both a finder of fact and an advocate in claims for benefits. Hayes v. North Dakota Workers Compenastion Bureau, 425 N.W.2d 356, 357 (N.D. 1988). Because it does so, it is held to a specific standard in considering the evidence in that it must "consider the entire record, clarify inconsistencies, and adequately explain its reasons for disregarding

medical evidence favorable to the worker." Id. The Court has characterized this role is "parallel to its responsibility to adequately explain its rationale for rejecting an ALJ recommendation." Blanchard v. North Dakota Workers Compensation Bureau, 1997 ND 118 ¶ 23, 565 N.W.2d 485. However, WSI no longer acts as a finder of fact in administrative hearings because decisions of administrative law judges are now final decisions. N.D.C.C. § 65-02-22.1.

[35] There is nothing in the language of N.D.C.C. § 65-01-03 that gives the presumption of employment the conclusive effect Carlson asserts or which precludes WSI from adjudicating the issue in an administrative proceeding. Such a construction would be contrary to N.D.C.C. § 65-05-03 which states WSI has "full power and authority to hear and determine all questions within its jurisdiction." Furthermore, under N.D.C.C. § 1-01-49(8), as used in the Century Code, "person" may include an "individual, organization, government, political subdivision, or government agency or instrumentality." Accordingly, there is simply no basis for asserting that N.D.C.C. § 65-01-03 limits WSI's continuing jurisdiction or prohibited WSI from making a determination that Carlson was an independent contractor.

C. THE ADMINISTRATIVE LAW JUDGE COULD REASONABLY DETERMINE CARLSON WAS AN INDEPENDENT CONTRACTOR.

[36] N.D.C.C. § 65-01-03 an individual is presumed to be an employee "unless it is proven that the person is an independent contractor under the 'common law' test." This same requirement is also found in N.D.C.C. § 34-05-01.4 relating to determinations by the Department of Labor and N.D.C.C. § 52-01-01(17)(e) relating to employment determinations made by Job Service. Thus, it is clear that under North Dakota law, in determining employment status, the "common law" test is to be applied.

[37] Carlson raises a number of arguments on how to construe "common law test" under N.D.C.C. § 65-01-03. "The primary objective of statutory construction is to ascertain the intent of the legislature." Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶ 11, 602 N.W.2d 704, 708. In doing so, courts look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 12, 687 N.W.2d 714 717. Statutes are construed "as a whole to harmonize and give meaning to each word and phrase." Baity ¶ 12, 687 N.W.2d at 717; Witcher, ¶ 11, 602 N.W.2d at 78.

[38] Carlson's arguments do not focus on the actual legislative intent of the term "common law test" within N.D.C.C. § 65-01-03, but instead advocates for use of the "relative nature of the work test." However, case law reviewing the legislative history of the enactment of the applicable statutes makes it clear that by "common law test" the legislature intended to apply the "right to control" test in making the determination as to whether an individual is an independent contractor or an employee.

[39] In 1991, the Legislature amended Section 52-01-01 and 65-01-03 to reflect that the "common law" test was to be applied. 1991 N.D. Sess. Laws ch. 533 §§ 1, 3. In doing so, it adopted the "common law" test for both Job Service and workers compensation determinations.[2] The legislative history of that enactment is discussed in Midwest Property Recovery, Inc. v. Job Service of North Dakota, 475 N.W.2d 918, 921 fn. 4 (N.D. 1991), making it clear the "common law test" is in fact the "right to control test." See Myers-Weigel Funeral Home v. Job Ins. Div. of Job Service North Dakota,

[2] The Department of Labor statute providing for making such determinations was enacted in 1993.

1998 ND 87 ¶ 9, 578 N.W.2d 125, 127 (noting legislative history reflects that "right to control" test and "common law test" are one and the same).

[40] ALJ Bailey found that factors of both the relative nature of the work and common law tests were fairly reflected in the administrative rule adopted by WSI for determination of employment status. (App. 75) However, she properly focused on the right to control, as that is the test to be applied under N.D.C.C. § 65-01-03.

[41] N.D. Admin. R. 92-01-02-49, sets forth factors to consider in making the determination of independent contractor vs. employee. The rule specifically provides that factors (3), (6), (15), (16), (17), (18), (19), and (20) are to be given greatest weight – all factors that more heavily weigh the right to control the work performed. Accordingly, WSI's rule is consistent with the statutory promulgating authority and can also be applied in making the determination of employment status. See Martin v. Stutsman County Social Services, 2005 ND 117 ¶¶ 16, 18, 698 N.W.2d 278 (noting legislature may leave it to administrative agencies to promulgate rules as administrators are experts familiar with the subject matter); Myers-Weigel, 1998 ND 87 ¶ 9, 578 N.W.2d at 127 (noting administrative rules promulgated by Job Service measure right to control).

[42] Carlson also argues via history within the trucking industry that the statutorily mandated "common law test" should not be applied to the determination of Carlson's employment status. Not only are Carlson's arguments unsupported by citation to any specific authority so stating, but in fact, there is case law and commentary on the federal regulations which mandates a conclusion to the contrary.

[43] In Wilkinson v. Palmetto State Transportation Co., 676 S.E.2d 700 (S.C. 2009), the South Carolina Supreme Court considered in a workers compensation case whether

the claimant was an employee or independent contractor. One of the issues analyzed by the Court was the requirement to comply with government regulations where the Court stated:

> [W]e address two matters which at first glance appear to evidence Palmetto's right of control. First is the presence of a global positioning satellite (GPS) system in each tractor. The record establishes, however, that GPS monitoring was for the benefit of Palmetto customers tracking shipment of goods, not Palmetto's exercise of control over drivers. **Second is the presence of governmental regulatory controls affecting the transportation of goods in interstate commerce. The parties' contract required Wilkinson to operate "the equipment in accordance with all applicable regulations." We agree with the Pennsylvania Supreme Court that requiring a worker to comply with the law is not evidence of control by the putative employer.**
>
> > [R]estrictions upon a workers' [sic] manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the workers' compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status. "The employer cannot evade the law . . . and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver."
>
> Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., 563 Pa. 480, 762 A.2d 328, 335 (2000) (citations omitted).
>
> We agree that the strong regulatory presence concerning motor carriers reflects control by the government, not the motor carrier.

Id. at 703, emphasis supplied. The Court then reviewed the federal regulations and commentary and noted as follows:

> Congress provides in 49 U.S.C.A. § 14102(a) (West 2007) that the "Secretary [of Transportation] may require a motor carrier . . . that uses motor vehicles not owned by it . . . to-(4) have control of and be responsible for operating those motor vehicles in compliance with the requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier." The Secretary of Transportation, through the

Federal Motor Carrier Safety Administration, has promulgated regulations addressing a carrier's lease of equipment from an owner-operator.

For example, 49 C.F.R. § 376.12(c)(1)(2008) states that the "lease [of equipment by the carrier] shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." This regulation, and others, reflects the regulatory goal of promoting highway safety. . . .

. . . **Moreover, federal law is not intended to affect a state court's determination of the relationship between a carrier and a lessor of equipment under workers' compensation laws.** 49 C.F.R. § 376.12(c)(4)(2008)(providing that imposing ultimate responsibility on a carrier under federal law is not "intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessees"). We find the comment to subsection (c)(4) of the federal regulation instructive:

> While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held that the language to be prima facie evidence of an employer-employee relationship.
>
> We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact. By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense.

Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 671 (1992).

The federal regulations may, therefore, not be viewed as controlling when a state court is charged with assessing whether the relationship between a motor carrier and a lessor of equipment is one of employment or independent contractor for workers' compensation

> **purposes. In the workers' compensation setting, we properly make the determination under our common law framework.**

Id. at 705, emphasis supplied. Thus, the adoption of federal motor carrier regulations had neither the purpose nor effect of impacting how states determine employment status under their workers' compensation systems. That determination is left to the framework within the individual states. Id.

[44] ALJ Bailey found the following factors favored an independent contractor relationship. (App. 76-78):

N.D.A.C. § 92-01-02-49(1) Instructions.

[45] The testimony of Kelly Jaeger, GMR's dispatcher, and Dennis Gustafson, President of GMR, was clear that the information supplied by GMR to Carlson, and any owner-operator/independent contractor when they would call in to dispatch regarding loads was how much does the load pay and where was the load to go. (C.R. 238 at 154, 222) Carlson, and owner/operator could determine whether they desired to take the load or not. (C.R. 238 at 154, 222; 55 (§2.03), 400) This fact was confirmed by the testimony of John Gehrke. (C.R. 1213 at 19-20) The independent contractor/owner operator would determine their own routes when hauling a load for GMR (C.R. 238 at 223), except when the customer designated what route was taken or the nature of the cargo or order of stops as requested by the customer. (C.R. 238 at 223-225; 1213 at 20) GMR was concerned only with the end result to be accomplished – delivery of the load. How Carlson chose to accomplish that result was up to him.

[46] In contrast to employees of GMR, the independent owner-operators were free to reject any loads offered to them. (C.R. 238 at 228; 1213 at 19-20) This was particularly apparent in the testimony of John Gehrke who testified that he did not want to take loads

out east and therefore would not accept such a load from GMR. (C.R. 1213 at 19) There are no repercussions for owner-operators not accepting a load from GMR. (C.R. 1213 at 20)

[47] In order for GMR to be granted its operating authority, it had to certify that it would comply with federal regulations pertaining to safe operation of commercial motor vehicles. (C.R. 32-35; 239 at 140) Thus, the only "control" exercised by GMR was that necessary to ensure compliance with the terms of its contract with Carlson in accordance with federal law. This does not change Carlson's status to that of an employee. See id. See also 49 C.F.R. § 376.12(c)(4)(2004) (stating "[n]othing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier complies with 49 U.S.C. § 14102 and the attendance administrative requirements.")

N.D.A.C. § 92-01-02-49(3) Integration.

[48] The rule reflects that "when the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the persons who perform those services must necessarily be subject to a certain amount of control by the owner of the business." On this factor the evidence demonstrated that GMR could continue to operate its business without Carlson. GMR did not rely exclusively on Carlson or any other owner-operator. GMR had employee drivers that drove company owned equipment. (C.R. 238 at 138) GMR supplemented its company fleet with owner operators "to be able to go with the supply and demand in the industry as far as freight." (C.R. 238 at 148)

[49] In contrast, Carlson could not operate without contracting with GMR or some other entity as he did not have interstate operating authority. (C.R. 238 at 88, 101) In order to transport nonexempt materials in interstate commerce, Carlson needed to contract with GMR. (C.R. 238 at 99-100) On the other hand, GMR had employee drivers and equipment which it utilized to operate its business and could continue to do so without Carlson or other owner-operators. (C.R. 238 at 150)

N.D.A.C. § 92-01-02-49(4) Services Rendered Personally
N.D.A.C. § 92-01-02-49(5) Hiring, Supervising and Paying Assistants

[50] Under the contract with GMR, Carlson had the ability to hire others and/or assign others his responsibilities under the contract. (C.R. 402-403; 238 at 155-156) In such a case, GMR would still make payment to Carlson as owner-operator of the tractor-trailer. (C.R. 238 at 156) It was Carlson's responsibility to pay any driver that may take a load at his request in his equipment. (C.R. 238 at 156) WSI's administrative rule provides: "if one person hires, supervises, and pays the other assistants pursuant to a contract under which the person agrees to provide materials and labor and under which the person is responsible only for the attainment of a result, this factor indicates an independent contractor status." This is precisely what Carlson's contract with GMR provided.

N.D.A.C. § 92-01-02-49(7) Set Hours of Work
N.D.A.C. § 92-01-02-49(8) Full Time Required

[51] The nature of the work involved, over-the-road trucking, did not have "set hours of work." However, in terms of how much or how little Carlson worked, he was the one free to make that determination by accepting or rejecting loads offered by GMR. In contrast, employee drivers of GMR could not reject loads offered. (C.R. 238 at 228) Therefore, Carlson was not required to work full time. He had the right to accept or

reject any dispatches offered to him. Kelly Jaeger of GMR testified Carlson routinely would reject dispatches offered to him. (C.R. 238 at 224, 225) There were no set minimum number of hours, miles or loads that were required to be driven or taken in a given month or week. (C.R. 238 at 160) Thus, it was Carlson himself that was in control of how much he worked.

N.D.A.C. § 92-01-02-49(12) Payment by Hour, Week, Month

[52] Carlson was paid by the load/job. Likewise, John Gehrke testified he received payment by the load. (C.R. 1213 at 21) GMR issues a settlement check each week, deducting expenses, including fuel charges, insurance charges, licensing charges, cellphone charges, and any other charges authorized by the contractor/owner-operator to be deducted. (C.R. 238 at 71-72, 207; 1213 at 21) If no loads were transported in a particular week or a driver took time off for whatever reason, they would not receive a settlement check. (C.R. 238 at 121-122; 1213 at 21-22) In contrast, employees of GMR would receive vacation pay if they requested it. (C.R. 238 at 209) As noted in WSI's administrative rule, "[p]ayment by the job . . . generally indicates that the worker is an independent contractor."

N.D.A.C. § 92-01-02-49(13) Payment of Business or Travelling Expenses or Both
N.D.A.C. § 92-01-02-49(14) Furnishing Tolls and Materials
N.D.A.C. § 92-01-02-49(15) Significant Investment

[53] Carlson was responsible for his own operating costs, including fuel, licensing cellphone, maintenance and repairs, tarps, etc. (C.R. 238 at 71, 167) Although Carlson had the ability to charge these costs to a "trip card," any charges were then deducted from Carlson's settlement check for the load that was taken. (C.R. 238 at 207) Deductions for charges made on the "TCARD," licenses, insurance and other charges that were agreed to

be deducted from a settlement check. (C.R. 73-81) Carlson reported his income taxes as a self-employed business owner, deducting his car and truck expenses as well as meals on Schedule C. (C.R. 453, 462, 473) John Gehrke testified he was responsible for the same types of expenses relating to maintenance, fuel, insurance and meals he had on the road. (C.R. 1213 at 17-18) There was no evidence presented GMR made any payments for Carlson or any other owner-operator.

[54] The semi tractor and trailer Carlson brought into the contractual relationship with GMR were owned by him. Carlson confirmed in his testimony he bought tires, tarps, chains, etc. for his tractor-trailer. In addition, he was required to maintain his own tractor and trailer. No evidence was presented GMR provided any of these materials to Carlson or other owner-operators.

[55] Carlson had a significant investment in the equipment necessary to operator his truck pursuant to his contract with GMR. Carlson made his own financing arrangements for the truck and trailer. (C.R. 238 at 65, 85) GMR did not receive any proceeds from insurance for the tractor and trailer after the accident demonstrating it had no monetary or ownership interest in the equipment. All monies from the insurance settlement went to pay off the lease payments that remained due by Carlson. (C.R. 238 at 72) WSI's administrative rule reflects that if an individual "invests in facilities that are used by the person in performing services and are not typically maintained by employees, that factor tends to indicate that the person is an independent contractor." The tractor/trailer is essentially the "facilities" for the work performed. As an owner-operator Carlson owned the tractor/trailer he used to perform services for GMR, while employee drivers of GMR had no such investment and drove vehicles owned by GMR.

N.D.A.C. § 92-01-02-49(6) Realization of Profit or Loss

[56] Carlson bore a significant risk of loss in determining whether to accept a load offered by GMR or not. He had to know his fixed costs in order to make a determination on whether a load would cover such costs. The further risk involved determining whether there would be a return load available for him to take, if it would be necessary to travel empty to another destination to pick up a load, or possibly sit and wait until another load became available. All of these factors played into whether Carlson would realize a profit or loss in accepting a load. Carlson had to make the determination of whether an offered load would be profitable under all of these factors. It was also these factors which played into whether Carlson would reject the load offered by GMR. John Gehrke confirmed he, as an owner-operator, bore the risk of losing money on a load. (C.R. 1213 at 24)

[57] In terms of the remaining factors under WSI's administrative rule, ALJ Bailey found N.D.A.C. § 92-01-02-49 (9) (doing work on the premises), did not really apply inasmuch as the work was performed over the road whether an individual was an employee or owner-operator. (App. 78) However, she noted GMR could not compel Carlson to travel a designated route or work at specific places. (Id.) Thus, although ALJ Bailey did not make a specific finding the factor favored independent contractor status, she noted that the right of control was absent on the part of GMR and thus this factor cannot be construed to favor employee status.

[58] Likewise, ALJ Bailey noted that N.D.A.C. § 92-01-02-49(11) (oral or written reports) "appeared" to indicate control. However, the control was required by federal regulations of drivers and their qualifications, rather than the desire by GMR to control or

supervise Carlson. (App. 79) Thus, ALJ Bailey found the factor neutral reflected industry regulatory realities. (Id.) In addition, ALJ Bailey found the factors relating to right of dismissal and right to terminate (N.D.A.C. § 92-01-02-49(19) and (20) favored neither independent contractor or employee status. (App. 80)

[59] ALJ Bailey found the factors of N.D.A.C. § 92-01-02-49(17) and (18) relating to working for more than one firm at a time/making services available to the general public "mildly" favored employment status. (App. 79) She found only two factors weighed in favor of employment status: N.D.A.C. § 92-01-02-49(2) (training) and (6) ongoing relationship. (App. 80)

[60] ALJ Bailey's approach demonstrates she carefully considered and weighed the evidence to arrive at her determination. Based upon the evidence presented at the hearing, the ALJ could reasonably determine Carlson was an independent contractor applying the factors in N.D. Admin. R. 92-01-02-49. On appeal, this Court cannot reweigh that evidence, as Carlson seeks in his brief. Rather, the Court need determine only whether ALJ Bailey could reasonably conclude as she did. That standard has clearly been met based on the evidence as applied to the factors outlined above. Accordingly, this Court must, as the District Court did, reject Carlson's appeal to overturn the finding of ALJ Bailey on his employment status, and affirm WSI's determination that Carlson was an independent contractor. See Rooks v. North Dakota Workers Compensation Bureau, 506 N.W.2d 78, 80 (N.D. 1993)(noting appellate court does not substitute its judgment for that of WSI). WSI's decision should be affirmed. See Sprunk, 1998 ND 93 ¶ 12.

D. THERE WERE NO DUE PROCESS VIOLATIONS ENTITLING CARLSON PAYMENT OF BENEFITS.

[61] "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law."* Zinermon v. Burch, 494 U.S. 113, 125 (1990), citing Parratt v. Taylor, 451 U.S. 527, 537 (1981). See also Carey v. Piphus, 435 U.S. 247 (1978) (stating "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property). "Due process requires a state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation . . . ." Mann v. North Dakota Tax Commissioner, 2007 ND 119 ¶ 11, 736 N.W.2d 464, 470.

[62] Carlson interprets WSI's October 2, 2009, Order as a "notice" advising Carlson that WSI was exercising its continuing jurisdiction under N.D.C.C. § 65-05-04, and "discontinuing" his benefits rather than a formal appealable order. From this, he contends there has been a procedural due process violation. ALJ Bailey correctly did not so find because Carlson's arguments are in error.

[63] N.D.C.C. § 65-01-16(1) states: "Any notice of decision, administrative order, or posthearing administrative order is subject to review and reopening under section 65-05-04." Therefore, WSI's October 3, 2006, informal Notice of Decision was statutorily subject to review and reopening under N.D.C.C. § 65-05-04. N.D.C.C. § 65-05-04 states "the organization at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued

may award compensation." (Emphasis supplied.) This Court has already made it clear that when WSI conducts an internal review of a claim, no notice is required to be provided. See Tooley v. Alm, 515 N.W.2d 137, 142 (N.D. 1994)(holding "it would be absurd to require the bureau to issue a "notice of decision" every time the bureau conducts any investigation or review of a claimant's file." Instead, as noted in Tooley, N.D.C.C. § 65-01-16 (formerly N.D.C.C. 65-01-14) governs when notice is provided when decisions are rendered.

[64] Under N.D.C.C. § 65-01-16(2) WSI "may conduct a hearing on any matter within its jurisdiction by informal internal review of the information of record." WSI may issue a notice of decision after that informal review, N.D.C.C. § 65-01-16(3), or WSI "may serve an administrative order on any decision made by informal internal review without first issuing a notice of decision and receiving a request for reconsideration. N.D.C.C. 65-01-16(5). (Emphasis supplied.) Thus, it was consistent with the statutory process for WSI to conduct an internal review of Carlson's claim following the Supreme Court decision and, based on that internal review, issue a formal appealable order without first issuing a notice of decision.

[65] Carlson was not receiving ongoing disability benefits as they had not been reinstated following the Supreme Court decision and therefore no "notice" was required to be provided to him that they were going to be "discontinued." See Sorlie v. Workforce Safety and Insurance, 2005 ND 83 ¶ 12, 594 N.W.2d 453 (noting it would be "impractical to give pretermination notice when claimant was not receiving benefits and parties in process of litigation). despite there being no requirement to do so WSI did in fact give Carlson notice that it was going to be conducting an informal internal review of

the claim with an eye towards exercising continuing jurisdiction under N.D.C.C. § 65-05-04. See July 2, 2009, letter (App. 142). Carlson was provided an opportunity to engage in that process by submitting any additional information he desired for WSI to consider in its internal review of the claim. Carlson did so. thereafter, WSI issued its formal administrative order under N.D.C.C. § 65-01-16(5). Accordingly, WSI's October 2, 2009, is WSI's formal administrative order following exercise of its continuing jurisdiction under N.D.C.C. § 65-05-04 on Carlson's employment status. Carlson was not entitled to any extra procedural due process procedures. See id.

[66] Carlson asserts that WSI's failure to reinstate benefits after the Supreme Court decision in Carlson while WSI was contemplating exercising its continuing jurisdiction, he is entitled to reinstatement of benefits dating back to the date of the October 2006 notice of decision. This argument is not supported by the case law and was properly rejected by the ALJ and the District Court.

[67] Carlson relies upon Scott v. North Dakota Workers Compensation Bureau, 1998 ND 221, 587 N.W.2d 153, as authority for a remedy for a substantive due process violation. However, there is no reference in the Scott opinion to a substantive due process violation. Furthermore, this Court made it abundantly clear on what was required to establish "institutional noncompliance" stating:

> In order to establish the "institutional noncompliance" which amounts to "systemic disregard of law," the claimant must establish more than a single miscue or improper act. Greenwood [v. Moore], 545 N.W.2d at 793. Here, the record establishes that, rather than a single, isolated incident, the Bureau's standard practice was to allow its outside litigation counsel who had appeared at the hearing to consult with the decision maker and advise whether to adopt the ALJ's recommended decision. This practice by the Bureau is also admitted in the legislative history of the 1997 enactment of N.D.C.C. § 65-01-16(8). See Hearing on H.B. 1270 Before the House Industry, Business, and Labor Comm., 55th N.D. Legis.

> Sess. (Feb. 3, 1997) (written testimony of Reagan R. Pufall, attorney for the Bureau). This is hardly a "single miscue." Rather, the Bureau concedes it routinely allowed these communications to occur.

Id. ¶ 21. Here, there was absolutely no showing by Carlson that there was any type of "institutional noncompliance" as defined above. Under the Court's Prehearing Order, Carlson was entitled to present evidence that WSI acted in an arbitrary, unreasonable or discriminatory manner. (C.R. 1032) However, Carlson presented no such evidence at the hearing. (C.R. 1213 at 9) Accordingly, the remedy proposed by Carlson has no support in the law.

[68] This is also not a situation similar to Baier v. North Dakota Workers Compensation Bureau, 2000 ND 78, 609 N.W.2d 722 where there was a finding of administrative res judicata and the refusal to pay benefits. Paying Carlson benefits through the date of WSI's decision on his employment status as of October 2, 2009, would have simply resulted in a huge overpayment of benefits for it to recoup. Had WSI reinstated benefits, and then determined, as it did, that it had erroneously accepted the claim, WSI could seek recoupment based on that adjudication. See N.D.C.C. § 65-05-29; Kerzman v. North Dakota Workers Compensation Bureau, 1999 ND 44 ¶ 16, 590 N.W.2d 888; Johnson, 484 N.W.2d at 295-96. As ALJ Bailey found, it made no sense for WSI to make payment of benefits at the outset, and then seek recoupment of those benefits right afterwards. (App. 87) In addition, the Court should note that in WSI's October 2, 2009, Order, rather than seek repayment of the benefits it had previously paid up until benefits were discontinued following the NOD of January 4, 2007, as it had done in the previous Order litigated in Carlson (C.R. 223), this time, WSI concluded that because WSI had initially accepted the claim in error, WSI would not seek repayment of

benefits previously paid on the claim. (WSIApp. 20) Given Carlson is and was not entitled to benefits related to his workers' compensation claim because he was an independent contractor and failed to secure coverage on himself, payment of those benefits for a period in excess of 4 years makes neither legal or logical sense. WSI's waiver of any claim for benefits paid in error is sufficient to rectify any claimed violation of due process.

E. THE ALJ PROPERLY DENIED THE REQUEST OF BLUE CROSS-BLUE SHIELD TO INTERVENE IN THE PROCEEDING.

[69] Less than 20 days before the hearing, Blue Cross Blue Shield of North Dakota filed a Motion to Intervene in the administrative action. This was after the time for exchange of exhibits for the hearing, and 10 days before the required disclosure of witnesses for the hearing. (C.R. 373-375) WSI objected the intervention and the ALJ denied the same. This decision was proper under the circumstances.

[70] WSI submitted an Affidavit of Connie Todd (C.R. 848-849) which outlined the procedure/process that WSI had in place in the event WSI's denial of Carlson's claim is reversed. As outlined in Todd's Affidavit, upon reversal of a denial of a claim, the claims adjuster proceeds to gather medical bills that previously had been denied, and authorize payment in accordance with WSI's fee schedule. WSI cannot make payment directly to a health insurer reimbursing them for payments made, as WSI is statutorily precluded from making payment for certain items. N.D.C.C. § 65-05-07(8). In addition, WSI has a promulgated fee schedule for payment of medical bills that must be followed.

[71] Intervention under N.D.C.C. § 28-32-28 is permitted only if it will "promote the interests of justice" and "not impair the orderly and prompt conduct of the proceeding." Because WSI has a process in place by which ultimately Blue Cross-Blue Shield would

receive payment back from the medical providers if the denial of this claim is reversed, there was no need to complicate the hearing further by having Blue Cross-Blue Shield's claim be part of the administrative hearing. If Blue Cross-Blue Shield's claim was required to be submitted, it would have required further work by WSI's medical auditors to review the claims and make determinations of the amounts payable pursuant to the WSI fee schedule and whether there are any excluded charges not payable under N.D.C.C. § 65-05-07(8). This process was completely unnecessary because it would occur automatically if there is a final decision favorable to Carlson. If there was not a decision favorable to Carlson, that work would have been done for no reason. It would also have required a delay in the hearing to allow the medical auditors time to evaluate those charges, and present testimony/evidence on the amounts payable under WSI's fee schedule.

[72] The ALJ correctly determined that including Blue Cross-Blue Shield's intervention claim would unnecessarily complicate and delay the proceeding. It would be ridiculous to adjudicate each of the medical bills at the hearing in order to determine what, if any amounts, would be payable if Carlson prevailed. See Ziesch, 2006 ND 99 ¶ 19, 713 N.W.2d 525. Therefore, the ALJ properly denied the intervention.

F. CARLSON IS NOT ENTITLED TO N.D.C.C. § 28-32-50 ATTORNEY'S FEES.

[73] Carlson attempted to obtain attorney's fees under N.D.C.C. § 28-32-50 from the administrative law judge, to and including all attorneys fees incurred through the decision in CarlsonI, and including fees for the hearing in this proceeding. However, the plain language of N.D.C.C. § 28-32-50 provides, this is a matter for determination by a court for judicial

review of a final agency order, not an administrative law judge. N.D.C.C. § 28-32-50 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 . . .

(Emphasis supplied.) The plain language states that the issue of substantial justification must be raised in connection with judicial review of a final agency order or in a civil action between adverse parties, one of which is an agency or agent of an agency [subpart 1]. This is not a case that falls within subpart 1 as it is not a civil judicial proceeding involving adverse parties not an administrative agency against an agency. It is an adjudicative proceeding which, when complete, would be subject to judicial review of a final agency outlined in subpart 2. See Med Center One v. North Dakota State Board of Pharmacy, 1997 ND 54, 561 N.W.2d 634 (construing provision to require court finding in favor of nonagency in judicial review of final agency order and that agency acted without substantial justification).

[74] This was made clear in Berger v. State Personnel Board, 502 N.W.2d 539 (N.D. 1993) where it was asserted an administrative proceeding before the State Personnel Board was not a "civil judicial proceeding" within the meaning of the statute. Id. at 542-43. Because the Board did not perform "judicial review" of final agency orders, it could not award attorney's fees under the statute. Id. at 543. Likewise, the hearing in this case

before the ALJ was not a "civil judicial proceeding" nor does the ALJ perform "judicial review" of final agency orders. Accordingly, based on the plain language of N.D.C.C. § 28-32-50 and the case law noted above, the issue of attorney's fees was not a matter that could be decided by the ALJ.

[75] In connection with this appeal, in order to award fees under N.D.C.C. § 28-32-50, a two-fold test must be met: (1) the appellant must prevail, and (2) the agency must have acted without substantial justification. See Singha v. North Dakota State Board of Medical Examiners, 1998 ND 42 ¶ 37, 574 N.W.2d 838, 848; MedCenter One v. North Dakota State Board of Pharmacy, 1997 ND 54 ¶ 25, 561 N.W.2d 634. In Rojas v. Workforce Safety and Insurance, 2006 ND 221 ¶¶ 16, 17, 723 N.W.2d 403, this Court held that N.D.C.C. § 28-32-50 "will not apply in all WSI cases; rather it is only applicable in rare cases where WSI's action lack substantial justification."

[76] The Court has defined "substantially justified" to mean "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person. 'A position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.'" Peterson v. North Dakota Department of Transportation, 518 N.W.2d 690, 696 (N.D. 1994), quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988); Aggie Investments GP v. Public Serv. Comm'n, 470 N.W.2d 805, 814 (N.D. 1991). As noted by the Court in Peterson, 518 N.W.2d at 696, "[s]ubstantial justification . . . represents a middle ground between an automatic award of attorney's fees to a prevailing party and an award of attorney's fees for

frivolous claims. . . . Merely because an agency's actions are not upheld by a court does not mean that the agency's action was not substantially justified."

[77] In Service Oil, Inc. v. State, 479 N.W.2d 815 (N.D. 1992), the district court held the State's position on the interpretation of a tax statute was not "substantially justified" and awarded attorney's fees. This Court reversed that award because the case involved complicated issues and although the State's position was not upheld, that did not mean the State acted without substantial justification. Id. at 825. The Court noted that although the interpretation of the statutory provision advocated by the State was not persuasive, it was reasonable, and "[a] contrary conclusion would deter administrative agencies from making good faith arguments for credible extensions and interpretations of law. We do not believe that Section 28-32-21.2, N.D.C.C., was intended to restrict administrative agencies in that manner." Id.

[78] This Court also reversed an award of attorney's fees in Tedford v. Workforce Safety and Insurance, 2007 ND 142, 738 N.W.2d 29. The Court provided further guidance on the attorney's fees by looking to federal case law:

> The fact that WSI convinced one district judge that its legal position was correct is a strong indicator that "a reasonable person could think the position is correct, and the position has a reasonable basis in law and fact." Rojas, 2006 ND 221, ¶ 17, 723 N.W.2d 403. Federal courts construing the EAJA have recognized that acceptance of the government's position by another federal judge, even if the position is ultimately found to be incorrect, is persuasive evidence that the position was substantially justified. (Citations omitted.) The court . . . . noted that "the Government's ability to convince federal judges of the reasonableness of its position, even if the judges' and Government's position is ultimately rejected in a final decision on the merits, is 'the most powerful indicator of the reasonableness of an ultimately rejected position.'" (Citations omitted.).

Tedford, 2007 ND 142 ¶ 27. WSI's position in this and prior proceedings clearly meets this test.

[79] Where both sides present reasonable interpretations of the law as applied to the facts, "the closeness of the question is itself evidence of substantial justification." United States v. Gears, 835 F. Supp. 1093, 1101 (N.D. Ind. 1993), citing Cummings v. Sullivan, 950 F.2d 492, 598 (7th Cir. 1991). Here, WSI convinced independent decisionmakers of the reasonableness of its position as to the unauthorized practice of law and employment status of Carlson (ALJ Bailey and Judge Dawson); that Carlson was an independent contractor (ALJ Bailey, Judge Dawson and Judge Irby); that WSI had the right to exercise its continuing jurisdiction (ALJ Bailey and Judge Irby); and that there were no due process violations warranting other relief (ALJ Bailey and Judge Irby). This is a "powerful indicator of the reasonableness" of the position. See Tedford, 2007 ND 142 ¶ 29; Dutton v. Workforce Safety and Insurance, 2010 ND 99 ¶ 15, 783 N.W.2d 278.

[80] This simply is not that "rare case" where WSI's was not "substantially justified." A contrary holding would fly in the face of both North Dakota case law interpreting N.D.C.C. § 28-32-50 and federal case law interpreting the EAJA. Because WSI's position was reasonable based on the record, this Court must find that its position was "substantially justified" on appeal. See Peterson, 518 N.W.2d at 696; Tedford, 2007 ND 142 ¶ 29; Dutton, 2010 ND 99 ¶ 15. Therefore, Carlson should not be awarded attorney's fees under N.D.C.C. § 28-32-50.

CONCLUSION

[81] For the foregoing reasons, respectfully requests that this Court affirm the decision of the District Court.

DATED this 14th day of September, 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Workforce Safety and Insurance, and the author of the Brief of Appellant Workforce Safety and Insurance hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 10,492 from the portion of the brief entitled "Statement of Facts" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 14th day of September, 2011.

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