

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

Brendan Muldoon,)	Supreme Court Case No. 20120273
)	
Appellant,)	
)	
vs.)	
)	
North Dakota Workforce Safety and Insurance,)	
)	
)	
Appellee,)	
)	
and)	
)	
Patrick Lauth Contracting, LLC,)	
)	
Respondent.)	
_____)	

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

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**APPEAL FROM DISTRICT COURT MEMORANDUM OPINION AND
ORDER DATED MARCH 22, 2012, AND JUDGMENT DATED MARCH 27, 2012
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART**

+++++

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

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STATEMENT OF THE ISSUES

[1] Whether the ALJ could reasonably conclude that Muldoon was an employer as defined under N.D.C.C. § 65-01-02(17).

[2] Whether the ALJ could reasonably conclude that Muldoon willfully violated N.D.C.C. § 65-04-33 by failing to secure workers' compensation coverage.

[3] Whether the ALJ could reasonably conclude that Muldoon is personally liable for premiums and penalties owed to WSI.

[4] Whether the common law test for independent contractor status was applicable to the determination of Muldoon's relationship to Patrick Lauth Contracting.

STATEMENT OF THE CASE

[5] On July 11, 2008, Brandon Morin ("Morin") filed a claim for benefits with Workforce Safety and Insurance alleging an injury while in the employ of Patrick Lauth Contracting. (App¹.87) The Policyholder Services Department within WSI determined that the identified employer had no coverage. (WSIApp.²1, 293) On October 28, 2008, WSI issued a Notice of Decision ("NOD") to Patrick Lauth d/b/a Patrick Lauth Contracting finding that Patrick Lauth had willfully and intentionally violated N.D.C.C. § 65-04-33 by failing to secure workers compensation coverage for his employees, and that Morin and other similarly situated employees are/were employees of Patrick Lauth d/b/a Patrick Lauth Contracting, LLC. (App.94-97) Lauth did not request reconsideration from this NOD.

[6] The Policyholder Services and Underwriting Departments within WSI sought the assistance of the Special Investigations Unit ("SIU") to bring Patrick Lauth

¹ "App." refers to the Appellant's Appendix.

² "WSIApp." refers to WSI's Appendix.

Contracting into compliance with coverage. (WSIApp.293-294) Following completion of the SIU investigation, WSI determined that both Patrick Lauth and Brendan Muldoon were partners/co-owners in Patrick Lauth Contracting, LLC and concluded they had willfully failed to secure workers compensation coverage for their employees. (WSIApp.294) On June 28, 2010, WSI issued an Order concluding Muldoon, Lauth and Patrick Lauth Contracting LLC were employers of certain individuals; that Muldoon, Lauth and Patrick Lauth Contracting, LLC violated N.D.C.C. § 65-04-33 by failing to secure workers compensation coverage; and that Muldoon and Lauth were personally liable for premiums. (App.98-104) Muldoon requested rehearing. (App.105)

[7] On August 31, 2010, a Notice of Hearing and Specification of Issues was issued to consider the following: 1) Whether Brendan Muldoon was an employer as defined under N.D.C.C. § 65-01-02(17) of the following individuals: Aaron Maves, Alyssa Rodriguez, Anthony Doodoien, Morin, Chuck Swiggum, Corey Heiser, Corinna Moses, David Davidson, David Phillips, Dennis Lauth, Dylan Hammerschmidt, Ethan House, Guadalupe Morin, Jason Suchla, Jesse Paskey, Justin Lauth, Lexi Phillips, Michael Clark, Moses Morin, Neva Lauth, Paul Schribuer, Richard Sarrello, Robert Leach, Robin Lauth, Ronald Jore, Terence Maurstad, Tessa Albertson, Thomas Morin, Tim Busche and Tim Melville; 2) Whether Brendan Muldoon willfully violated N.D.C.C. § 65-04-33 by failing to secure workers' compensation premium coverage in 2008 for those employees listed in paragraph 1; and 3) Whether Brendan Muldoon was personally liable for premiums and penalties owed to WSI. (App.106-108)

[8] An administrative hearing was held February 22-23, 2011, and continued to March 11, 2011. (App.137) Post-hearing briefs were submitted by WSI (C.R. 1648;

1664; 1673) On July 2, 2011, ALJ John Allen issued Findings of Fact, Conclusions of Law and Order affirming WSI's June 28, 2010, Order (App.116-128) concluding Muldoon was an employer of the individuals identified in WSI's Order (App.125); that Muldoon willfully failed to secure workers compensation premium coverage for employees (App.125); and that Muldoon was personally liable for premiums and penalties owed to WSI (App.126-127). Muldoon petitioned for reconsideration of the ALJ decision. (App.129-131) WSI responded to the petition for reconsideration. (C.R. 1696-1698) On August 8, 2011, ALJ Allen issued a Reconsideration Order denying Muldoon's petition for reconsideration. (App.132-136)

[9] On September 1, 2011, Muldoon filed an appeal with the District Court, Cass County, North Dakota. (App.82-86) On March 19, 2012, the District Court, the Honorable Steven L. Marquart, issued a Memorandum Opinion and Order affirming the ALJ's Findings of Fact, Conclusions of Law and Order dated July 2, 2011, and Order Denying Petition for Reconsideration and Rehearing dated August 8, 2011. (App.176-178) Judgment was entered March 27, 2012. (App.180) Muldoon then filed an appeal to this Court. (App.183)

STATEMENT OF FACTS

[10] On July 11, 2008, Morin filed a claim for benefits with Workforce Safety and Insurance alleging an injury while in the employ of Patrick Lauth Contracting. (App.87) The Policyholder Services Department within WSI determined that the employer identified on the claim form, Patrick Lauth Contracting, had no coverage through WSI. (WSIApp.1, 293) On October 28, 2008, WSI issued a NOD to Patrick Lauth d/b/a Patrick Lauth Contracting finding that Patrick Lauth had willfully and

intentionally violated N.D.C.C. § 65-04-33 by failing to secure workers compensation coverage for his employees, and that Morin and other similarly situated employees are/were employees of Patrick Lauth d/b/a Patrick Lauth Contracting, LLC. (App.94-97) SIU was asked to continue to investigate to assist in bringing Patrick Lauth Contracting into compliance with coverage for its employees. (WSIApp.293-294)

[11] SIU's investigation included an interview of Morin who had filed the claim which alerted WSI to the lack of coverage for Patrick Lauth Contracting. (WSIApp.3-4; See Hearing Exhibit 4 [CD]) Morin reported he did not believe he was an independent contractor, and that there were at least 10 employees working for Lauth. Morin also reported that after reporting his work injury to WSI Lauth made co-workers sign agreements that they were "independent contractors." (WSIApp.3-4; Exhibit 4 [CD])

[12] On May 15, 2009, the deposition of Patrick Lauth was taken in connection with SIU's investigation. (WSIApp.7) During that deposition, WSI first learned of Brendan Muldoon's involvement with Patrick Lauth and Patrick Lauth Contracting, LLC. (WSIApp.7, 298) Lauth was not aware of the type of business entity that he and Muldoon operated under. (WSIApp.9) Lauth explained that he and Muldoon were partners, with Muldoon doing the paperwork, bank accounts and being the "money man" with Lauth performing the work and having the "tools and knowledge" to perform the work. (WSIApp.9-10) Muldoon obtained the bank account for the business. (WSIApp.10) Money used to open up the account was Muldoon's money. (WSIApp.22) Lauth did not know how much the initial deposit was into the account. (WSIApp.22) All bank statements went to Muldoon's office. (WSIApp.18) Patrick Lauth Contracting

utilized a Menard's credit card in the name of Brendan Muldoon to purchase items. (WSIApp.59, 98-99, 154-155, 156-157)

[13] Business cards were prepared for Patrick Lauth Contracting, with a listed address of Muldoon's office at Keller Williams. (WSIApp.10; App.90-91) The telephone number was Lauth's cell number, but the fax number was that of Muldoon's office. (WSIApp.10) Muldoon also set up an e-mail address for Patrick Lauth Contracting and listed that on the business cards (see id.), but Lauth did not know how to use a computer, and did not know the password to get into the e-mail account. (WSIApp.10-11)

[14] Most of the jobs performed by Lauth were for properties owned by Brendan Muldoon. (WSIApp.9-10) On larger projects, Muldoon would tell Lauth to go out and get whoever he needed to get the job done. (WSIApp.43) Lauth explained that he and any other individuals that assisted in performing the work would keep track of the hours worked, turn in a time card, and Muldoon's secretary would cut a check out of the account set up by Muldoon for the Lauth business. (WSIApp.11, 34-80) Lauth and the other workers were all paid weekly. (WSIApp.11, 170-242)

[15] Initially, checks were written on an account of Muldoon's, until a second account was set up. (WSIApp.11) Lauth had no involvement in any aspects of the paperwork for the business. (WSIApp.8) If documents needed to be signed, Muldoon's secretary would call Lauth to come in, and mark where he was to sign. (WSIApp.8, 13) The documentation filed with the North Dakota Secretary of State for registration of Patrick Lauth Contracting, LLC reflected Lauth was the registered agent, but the address listed was that of Brendan Muldoon. (App.92)

[16] Lauth confirmed Morin was asked to sign an agreement stating he was an independent contractor. (WSIApp.16) This was done because Muldoon told Lauth to do so. (Id.) Lauth continued to work with Brendan Muldoon until approximately October of 2008 when the investigation by WSI started concerning the Morin claim. (WSIApp.25) At that point, Muldoon “ditched” Lauth. (Id.)

[17] Nicole Hofer, Muldoon’s secretary was also deposed in connection with WSI’s investigation. (WSIApp.243) Hofer confirmed she would prepare checks for Patrick Lauth Contracting based on time cards that were submitted by Lauth and others that were working with him on projects at properties owned by her husband and Muldoon, through a company known as Newton Development. (WSIApp.245) Hofer testified she took instructions on how to do the checks from Muldoon. (WSIApp.246) Hofer also assisted Muldoon in submitting a filing with the North Dakota Secretary of State’s office for Patrick Lauth Contracting, LLC. (WSIApp.247, 253) The filing listed Patrick Lauth as having Brendan Muldoon’s home address. (WSIApp.247, 253) The records for Lauth’s business were maintained by Hofer and kept at Muldoon’s office. (WSIApp.248) The amounts billed to Newton Development for work performed by Lauth and any other workers was exactly the amount charged by the hour by Lauth and any other individuals that performed work, in essence a “wash” of funds. (WSIApp.249)

[18] Michael Hofer, husband of Nicole Hofer and partner with Brendan Muldoon in Newton Development, was also deposed in connection with WSI’s investigation. (C.R. 27) Hofer confirmed that Lauth Contracting did work for Newton Development. (C.R. 27 at 8-9) Although Hofer testified that the projects were done by

Lauth Contracting on a “time and materials” basis, 95% of the time Newton Development purchased the materials. (C.R. 27 at 12-13)

[19] Muldoon was also deposed in connection with WSI’s investigation. (WSIApp.255) Muldoon confirmed that Newton Development provide the materials in the “majority of the cases” where Lauth performed work on properties he owned. (WSIApp.257-258) Lauth was authorized to charge materials needed for projects on Muldoon’s personal Menards account. (WSIApp.258) Muldoon testified he assisted Lauth in preparing the documents for filing with the Secretary of State. (WSIApp.261) He confirmed the address on the registration was his home address. (WSIApp.262) He could not recall why he placed his home address on the registration instead of Lauth’s. (Id.)

[20] Muldoon also assisted in opening up bank accounts for the Lauth business entities. (WSIApp.262) An account opened by Muldoon in April 2008 was for a sole proprietorship under the name of Brendan Muldoon dba Lauth Installation. (WSIApp.280) The owner/sole proprietor and only authorized person to use the account was Brendan Muldoon. (Id.) A second account was opened in May of 2008 under Patrick Lauth Contracting, LLC (WSIApp.274-275) On that account, Muldoon was represented to be a “member” of Patrick Lauth Contracting LLC. (WSIApp.275) Muldoon testified he did not know how much capital was contributed to open the initial account and “did not believe” he deposited any money to open that initial account. (WSIApp.264) Muldoon claimed that after getting the checking account set up he “virtually had no involvement” with the Lauth business. (WSIApp.265)

[21] The SIU unit within WSI continued its investigation contacting employees and customers of Lauth. (C.R. 29-45; 201-214) WSI also subpoenaed records from MHD Campus Properties (C.R. 46-103) and Newton Development (C.R. 104-200). In addition, WSI subpoenaed bank records from U. S. Bank relating to the accounts of Patrick Lauth Contracting, Brendan Muldoon d/b/a Lauth Installation and Brendan Muldoon. (C.R. 248)

[22] Based on its continued investigation, WSI issued an Order on June 28, 2010 (App.98-104) concluding not only Lauth and Patrick Lauth Contracting LLC were employers of certain individuals, but that Brendan Muldoon was also an employer (App.101); that Muldoon, Lauth and Patrick Lauth Contracting, LLC violated N.D.C.C. § 65-04-33 by failing to secure workers compensation coverage; and that Muldoon and Lauth were personally liable for premiums. (App.102) Muldoon requested rehearing. (App.105)

[23] At the administrative hearing relating to the June 28, 2010, Order, Lauth testified he and Muldoon became partners in business whereby Lauth would perform work on remodeling projects for apartments that Muldoon had purchased. (WSIApp.303) Lauth was to receive an hourly wage, as would the individuals working with him. (WSIApp.303) Lauth discussed with Muldoon the wages to be paid to him as well as two individuals that worked with Lauth, Dennis Lauth, his father, and Ron Jore, a carpenter. (WSIApp.304) Lauth also discussed with Muldoon and “hired” other workers to perform work for the business as needed. (WSIApp. 305, 310-312, 316, 318, 321) Lauth explained he discussed these hires with Muldoon because he could not “just give Brendan a fake name and expect a check for it. So I had to explain who it was and what they were

doing and what their part was.” (WSIApp.310) Lauth also discussed with Muldoon that payroll taxes were not going to be withheld from any of the workers’ paychecks, but instead they would “1099 everybody.” (WSIApp.319) He also discussed obtaining workers compensation coverage, at least on himself, his father and Jore. (Id.) Lauth left these decisions up to Muldoon. (Id.)

[24] Lauth had nothing to do with the paperwork and financial side of the business, leaving that to Muldoon. (WSIApp. 305-307, 309, 312, 314, 315, 323, 324-325) Lauth had no involvement in the opening up of the initial bank account Brendan Muldoon d/b/a Lauth Installation. (WSIApp.312; see WSIApp.279-283) Regarding the initial capitalization of that bank account, Lauth testified he did not provide any of the \$1,373.00 in cash that was deposited (286-287), stating “I ain’t got that money. You know, I live in a trailer. I ain’t got that kind of money.” (WSIApp.306, 334) Lauth went to the bank on one occasion, that being when the Patrick Lauth Contracting account was opened. (WSIApp.312, 273-275) Lauth did not provide any money for the initial deposit into the Patrick Lauth Contracting account. (WSIApp.315) Bank documentation reflects this deposit came from Muldoon’s personal account. (WSIApp.284-285) Lauth testified that Muldoon’s representation to WSI in his deposition that his only involvement was setting up bank accounts for his business and then signing checks was not true. (WSIApp.310, 323)

[25] Lauth also had no involvement in filing with the State of North Dakota to become an LLC. (WSIApp.313, 322) Muldoon handled those activities with the assistance of his secretary. Id. Lauth’s involvement was limited to coming in to the office, when called, and signing where “sticky notes” were placed for him to sign.

(WSIApp.314) Lauth also had no involvement in preparation of the invoices for work performed on Muldoon projects. (WSIApp.315, 317-318) He also had no involvement out of what account he was paid for the work he performed based on timecards submitted. (WSIApp. 320) The documentary evidence submitted via subpoenas to U.S. Bank supported Lauth's testimony that Lauth never signed a single check out of the Lauth Installation or Lauth Contracting accounts.

[26] When Morin was injured, Lauth learned he had filed a claim with WSI. (WSIApp.321) He discussed the filing of the claim with Muldoon. (Id.) Muldoon drafted a form for Morin to sign that stated he was a "subcontractor." (WSIApp.321-322) It was shortly after this occurred that Muldoon stopped using Lauth for contacting work and had nothing further to do with Lauth. (WSIApp.322-324)

[27] Muldoon testified at the hearing that in late 2007/early 2008 Patrick Lauth performed some jobs for him on properties that he owned. (App.158) Between that time and the end of April of 2008, Muldoon opened up a checking account for a business by the name of Brendan Muldoon d/b/a Lauth Installation. (App.159; C.R. 1704 at 354-357) According to the paperwork to open the account, Muldoon was the sole proprietor for the business, and he was the sole owner. (C.R. 1704 at 357) Muldoon confirmed he did not have any workers' compensation coverage taken out at that time for the work to be performed under Brendan Muldoon d/b/a Lauth Installation. (C.R. 1704 at 357-358)

[28] Muldoon acknowledged he completed forms for submission to the State of North Dakota to obtain the LLC designation for Patrick Lauth Contracting. (App.160) Muldoon was listed hi home address as the address for Patrick Lauth as registered agent for the business. (App.160) Muldoon filled in his name and contact information for the

State to contact about the filing. (App.161) Muldoon confirmed Lauth denied knowledge of what an LLC designation was, while he has experienced in holding two other LLC businesses, those being MHD Properties and Newton Development. (Id.)

[29] Muldoon opened a second bank account, this one on May 19, 2008, in the name of Patrick Lauth Contracting, LLC. (App.161) It was Muldoon's business address and contact name that was provided for the account. (App.161) Muldoon acknowledged in documents signed at the Bank when this account was open that he was "A member responsible for the management of the company pursuant to the terms of the operating agreement of the company." (App.161-162; see WSIApp.274-275) Muldoon also confirmed at the time he opened the second account that he was a "member" in Patrick Lauth Contracting. (App.162; see WSIApp.275)

[30] Muldoon knew that Hofer was preparing invoices for Patrick Lauth Contracting for work performed for MHD Properties and Newton Development, based on time sheets for individuals working on a particular project. (App.162) He also was aware she would then deliver the invoices to her husband. (App.162) Muldoon agreed Hofer would put the exact amount listed on time sheets for the project that the individuals worked on, compute the hours based on the hourly rate, and bill that exact amount to either MHD or Newton Development. (App.162) Muldoon knew there was no mark up for profit associated with the work performed by Lauth on MHD and Newton Development projects. (Id.)

[31] Muldoon confirmed he filled out the independent contractor affidavit questionnaire from Workforce Safety and Insurance. (App.88, 163) This document was

faxed from Muldoon's office to WSI. (Id.) This was consistent with Lauth's testimony he would simply sign documents where told to by Muldoon or his secretary. (Id.)

[32] Muldoon claimed at hearing the initial deposit into the Lauth bank account was not his money and it was "Patrick's cash." (C.R. 1704 at 354-355, 420) However, when called on rebuttal, Lauth reaffirmed that he did not provide any capital contribution into any bank account opened by Muldoon. (WSIApp.339) Lauth reaffirmed that he did not have that kind of money, and that even if he did, "I ain't giving it to someone to be a bookkeeper." (Id.)

[33] On July 2, 2011, ALJ Allen issued Findings of Fact, Conclusions of Law and Order. (App.117-128) The ALJ concluded, based on the evidence presented, that "Muldoon was indeed in a partnership with Lauth and therefore was an employer of the individuals listed [in WSI's Order]." (App.125) ALJ Allen further concluded, based on the evidence presented, that Muldoon "intentionally attempted to relieve himself of any responsibility by having Lauth sign" a document representing to WSI that Lauth was the sole owner of the company (App.126), and Muldoon's actions showed "an intentional attempt to avoid responsibility for workers' compensation coverage." (Id.) ALJ Allen further concluded that Muldoon was "personally liable for premiums and penalties owed to WSI." (App.126-127)

[34] Muldoon requested reconsideration from the ALJ's decision, challenging the very same findings and conclusions that he now claimed on appeal were not supported by the evidence and are contrary to established law, specifically that the ALJ failed to apply the "common law" test to him, that the ALJ was "charmed by Mr. Lauth" but cannot ignore other testimony, that Lauth was paid in the same manner as other

contractors, and that Muldoon did not personally benefit from the formation of the LLC, such that no reasonable person could conclude he willfully failed to pay workers compensation premiums for Lauth's employees. (App.129-130) WSI submitted its response to Muldoon's request for reconsideration, pointing out that the "common law" test does not relate to whether an individual is an "employer" and that WSI had found Muldoon was an "employer"; that WSI never argued res judicata as to Muldoon and he had every opportunity to challenge the employment status of the individuals identified in the Order, but simply chose to contest whether he was a business partner with Lauth; that it is within the province of the administrative law judge to judge the credibility of witnesses and resolve conflicts in the evidence, and therefore the ALJ's decision was fully supported by the evidence presented at the hearing. (WSIApp.288-290) ALJ Allen issued a Reconsideration Order on August 8, 2011, denying Muldoon's petition for reconsideration. (App.132-136)

[35] Muldoon appealed ALJ Allen's decisions to the District Court, Cass County, North Dakota. (App.82-83) The District Court, the Honorable Steven L. Marquart, issued a Memorandum Opinion and Order on March 19, 2012, affirming the ALJ's decisions. (App.176-178) Judgment was entered March 27, 2012. (App.180) This appeal followed. (App.183)

LAW AND ARGUMENT

A. SCOPE OF REVIEW ON APPEAL.

[36] 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. Workforce

Safety & Insurance v. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186; North Dakota Securities Commissioner v. Juran and Moody, Inc., 2000 ND 136 ¶ 27, 613 N.W.2d 503. This is a limited, deferential standard of review. Auck, 2010 ND 126 ¶ 9, 785 N.W.2d 186; Bruder v. Workforce Safety and Insurance, 2009 ND 23 ¶ 6, 761 N.W.2d at 588. “This Court reviews the administrative agency’s decision, but “giv[es] due respect to the district court’s analysis and review.” Johnson v. Workforce Safety and Insurance, 2012 ND 87 ¶ 6, 816 N.W.S.2d 74, quoting Bergum v. N.D. Workforce Safety & Ins., 2009 ND 52 ¶ 8, 764 N.W.2d 178.

[37] 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 Court must exercise restraint in determining whether WSI’s decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the agency. Johnson, 2012 ND 87 ¶ 6, 816 N.W.2d 74; Bruder, 2009 ND 23 ¶ 7, 671 N.W.2d at 790; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996).

[38] The Court need determine “only whether or not a reasoning mind could have decided the agency’s findings were proven by the weight of the evidence from the entire record.” Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. A preponderance of the evidence is defined as “evidence more worthy of belief,” or “the

greater weight of the evidence,” or “testimony that brings the greater conviction of the truth.” Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

[39] Muldoon’s arguments ask this Court to reconsider/reweigh that evidence and come to an opposite conclusion, which this Court cannot do. See Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 40, 599 N.W.2d 280 (noting even though court may have a different view of the evidence, it must only consider whether WSI’s decision is supported by the evidence). Quite simply, “[i]t is within [the ALJ’s] province to weigh the credibility of the evidence presented.” Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). This Court cannot substitute its judgment for that of the agency. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995).

B. THE ALJ PROPERLY CONCLUDED THE COMMON LAW TEST FOR INDEPENDENT CONTRACTOR STATUS WAS NOT APPLICABLE TO BRENDAN MULDOON’S RELATIONSHIP TO PATRICK LAUTH.

[40] Muldoon incorrectly asserts on appeal, as he did to the ALJ and the District Court, that he was not allowed to contest the employer/employee relationship between Patrick Lauth Contracting and the individuals identified in WSI’s Order. (Appellant’s Brief at 8) An examination of the facts and procedural history reflects otherwise.

[41] WSI issued a NOD on October 10, 2008, finding Patrick Lauth Contracting, LLC, was an employer that hired employees and willfully failed to secure workers’ compensation coverage. (App.94-97) At the time of issuance of this NOD, Stacey Kautzman’s testimony confirmed WSI had no knowledge of Brendan Muldoon’s involvement in Patrick Lauth Contracting, LLC. (WSIApp.298) WSI’s investigation

into Patrick Lauth Contracting continued because they were unable to secure its compliance with the workers' compensation laws. (WSIApp.293) It was during that additional investigation that the knowledge of Muldoon's involvement in Patrick Lauth Contracting became known to WSI, specifically when Lauth's deposition was taken in May of 2009. (WSIApp.298)

[42] After WSI's additional investigation was completed, it issued a formal Order dated June 28, 2010, concluding that Muldoon, Lauth and Patrick Lauth Contracting, LLC were employers of certain individuals identified in that Order. (App.98-104) It was from that Order that Muldoon's appeal originated. (App.105) In connection with that appeal, the issues specified included whether Muldoon was an employer of the individuals identified in the Order. (App.109). WSI never asserted or took the position during the administrative proceedings that the October 10, 2008, NOD was res judicata on the employment status of the individuals as to Muldoon. Muldoon was free to assert that the individuals were not employees of Patrick Lauth Contracting and/or assert they were independent contractors. Muldoon chose instead to assert during the rehearing process that he was not involved in Patrick Lauth Contracting and not partners with Patrick Lauth in that entity such that he should not be held responsible for workers' compensation premiums and penalties.

[43] The Specification of Issues dated August 31, 2010, generated as a result of Muldoon's request for rehearing provided that if a party objected to any of the issues, the party should first attempt to stipulate to the issues with the other party and failing that, request a prehearing conference to address the same. (App.109-110) Had Muldoon desired, he could have requested the addition of a further issue specifically addressing

whether the individuals identified in WSI's Order were employees of Patrick Lauth Contracting or if they were independent contractors. N.D.C.C. § 65-01-03 provides that an individual performing service for remuneration is presumed to be an employee, and the person asserting otherwise, "has the burden of proving that fact." Thus, it was Muldoon who had the burden to challenge the finding of employment status as to the individuals in the administrative proceeding. Instead of specifically challenging the employment status of those individuals, Muldoon chose to challenge the finding that he was an employer of the individuals by asserting that he was not involved in or partners with Patrick Lauth in Patrick Lauth Contracting, LLC. The citation to the record wherein Muldoon asserts the ALJ ruled the "common law test" irrelevant had to do with whether it was applied to Muldoon. (WSIApp.296) WSI's Order did not conclude that Muldoon was an employee of Patrick Lauth Contracting; rather, it concluded Muldoon was an employer. Therefore, the ALJ correctly concluded that the issue of whether the common law test was applied to Muldoon was irrelevant. (App. 132) The District Court agreed. (App.177)

[44] At the hearing, WSI presented evidence via testimony from Patrick Lauth as to who all of the individuals identified in WSI's Order were – that being, individuals Lauth hired to work for Patrick Lauth Contracting as employees, after he consulted with Muldoon. (WSIApp.305, 310-312, 316, 318, 321) As ALJ Allen concluded, Muldoon was aware that these individuals were hired both because Lauth discussed their hiring with him and because he signed payroll checks for them as well as writing some checks to the individuals himself. (App.122) Muldoon's focus at the hearing was not attempting to refute the job duties of these individuals, but instead attempting to refute his

relationship with Patrick Lauth and Patrick Lauth Contracting. It was by Muldoon's own choosing, therefore, that he failed to present evidence to refute that the individuals were employees of Patrick Lauth Contracting, LLC, which it was his burden to do. By failing to do so, the presumption of employment status with Patrick Lauth Contracting, LLC was never rebutted, as the ALJ so found. (App.133) As to Muldoon's status and relationship with Patrick Lauth Contracting, LLC, the evidence fully supports the ALJ's findings that Muldoon was a partner in business with Patrick Lauth and is personally liable for the premiums, as fully outlined below.

C. THE ALJ COULD REASONABLY CONCLUDE THAT BRENDAN MULDOON WAS A PARTNER IN PATRICK LAUTH CONTRACTING, LLC AND THEREFORE AN EMPLOYER OF THE INDIVIDUALS IDENTIFIED IN WSI'S ORDER OF JUNE 28, 2010.

[45] Muldoon argues that the ALJ's determination of the truth concerning Muldoon's relationship with Lauth required a determination of credibility of the witnesses. WSI agrees. In that regard, ALJ Allen found as follows:

24. The testimony of Lauth was more credible than the testimony of Muldoon. Lauth provided more candid and timely responses than Muldoon. His demeanor in answering the questions exhibited greater credibility than that of Muldoon. The testimony provided by Lauth was more consistent with the exhibits and was supported by the exhibits more than the testimony of Muldoon

(App.123) As this Court has recognized, ALJ Allen was in the best position to decide this issue, and therefore this Court should defer to his findings.

Like a trial court judge, an administrative law judge "hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses," and is, therefore, "in a much better position to ascertain the true facts than an appellate court relying on a cold record" without " 'the advantage ... of the innumerable intangible indicia that are so valuable to a trial judge.' " *Guthmiller*, at ¶ 7 (quoting *Doyle v. Doyle*, 52 N.D. 380, 389, 202 N.W. 860, 863 (1925)). Thus, "[w]e defer to the hearing officer's opportunity *12 to judge the credibility of witnesses."

Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, ¶ 12, 682 N.W.2d 308. *See also* Reynolds v. North Dakota Workmen's Comp. Bureau, 328 N.W.2d 247, 251 (N.D. 1982).

Vogel v. Workforce Safety and Insurance, 2005 ND 43 ¶ 6, 693 N.W.2d 8. *See also* Ingebretson v. Ingebretson, 2005 ND 41 ¶ 13, 693 N.W.2d 1 (stating “trier of fact can best evaluate testimony because it observes the demeanor and credibility of the witnesses” and appellate court does not substitute its judgment for the trier of fact when reasonable evidence supports the findings).

[46] Muldoon raised the exact same issues he now raises with this Court to ALJ Allen in his request for reconsideration. In denying the request for reconsideration, ALJ Allen confirmed that he “gave the witnesses their proper weight and credibility under the circumstances. The collective testimony of all of them [Hofer, DeBoer, Haug and Allen] provided support for both Lauth and Muldoon’s positions on whether there was a partnership between the two of them. Their collective testimony did not overcome the testimony of Lauth as suggested by Muldoon. Their collective testimony was considered with the exhibits and the testimony of both Lauth and Muldoon by the ALJ in reaching his findings and conclusions.” (App.134) Therefore, there is no basis, in law (none is cited by Muldoon in his Brief in support of his position) or fact to reverse ALJ Allen’s decision based on the evidence.

[47] On appeal, Muldoon simply reargues the evidence presented to the ALJ to this Court, and asks the Court to reconsider/reweigh that evidence and come to an opposite conclusion. Muldoon’s attempt to do so should be rejected. All of Muldoon’s arguments were presented to ALJ Allen who, after considering the testimonial and documentary evidence, determined that the greater weight of the evidence supported

WSI's conclusion that Muldoon was an employer of the individuals identified in the June 28, 2010. This Court cannot substitute its judgment for that of the agency. S & S Landscaping Co 541 N.W.2d at 82. Based upon the evidence presented at the hearing, the ALJ could reasonably determine as he did. Accordingly, the ALJ's decision should be affirmed. See Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93 ¶ 12, 576 N.W.2d 861.

[48] Lauth performed a few jobs for Muldoon personally while he was associated with Lee Allen or shortly after that association was discontinued. (C.R. 1704 at 69; App.158) After meeting Lauth when he did those few jobs, it transitioned into Lauth and Muldoon entering into a relationship. The nature of relationship was the dispute that this case centered upon, i.e., were Muldoon/Lauth business partners in Patrick Lauth Contracting, LLC or did Muldoon simply "help" Lauth get his business up and running and "doing him a favor by keeping his books" as he asserts in his Brief to this Court. The ALJ found the relationship to be consistent with how Lauth described it – that of being partners in Patrick Lauth Contracting, LLC, with Lauth performing the labor and Muldoon responsible for paperwork and finances. That decision is supported by a preponderance of the credible evidence and should be affirmed.

[49] Lauth and Muldoon's business relationship began in the spring of 2008. (WSIApp.301-303; App.159) On April 23, 2008, Muldoon opened an account at U. S. Bank under the name of Brendan Muldoon dba Lauth Installation ("dba account"). (App.159; WSIApp.279-283; C.R. 265) The business was listed as a sole proprietorship, with Muldoon's address, phone, and tax ID # on the account. (WSIApp.279; App.159) Lauth had absolutely no involvement in going in to U. S. Bank and opening that account.

(WSIApp.305-306) Lauth had no authority to do anything with respect to that account based on how the account was set up by Muldoon. (App.159) This dba account was initially capitalized with \$1,373.00 in cash (WSIApp.286-287). Both Muldoon and Lauth denied it was their funds that capitalized the account. (WSIApp.306, 339; C.R. 1704 at 355; App.164, 389) However, when considered as a whole, it was simply not credible to assume that Lauth gave Muldoon money to open that account. As Lauth testified, he spent his money “stupidly, “he “bought things,” he liked to “gamble and drink.” (WSIApp.309) To Lauth, “that’s what I do with my money – spend it.” (Id.) As Lauth so aptly put it, “I ain’t got that kind of money.” (WSIApp.306) “I don’t have \$1300.00 to give away for someone to be my partner.” (WSIApp.334) Lauth’s testimony relating to the unlikelihood that he would have the necessary sum of cash to deposit into these bank accounts was confirmed by the testimony of Lee Allen. Allen confirmed Lauth “spent money before he could get it” and agreed Lauth was “lousy” with books and money. (C.R. 1704 at 328)

[50] On the other hand, Muldoon was a college educated, successful real estate agent and testified he had access to lines of credit. (C.R. 1704 at 337, 380) In addition, the ALJ was obviously struck by Muldoon’s inability to answer the specific inquiry about when and how Lauth allegedly provided him with this \$1,373.00 in cash to open the bank account. Furthermore, when confronting this issue at the hearing Muldoon’s hesitated when asked and did not immediately state the money came from Patrick. Instead, he in a round about way said it simply had to have come from Patrick because he denied making any contributions to the bank account. Muldoon claimed he did not normally have that much cash. One would reasonably assume, however, that if an individual handed him

such a large and odd sum of cash, he would remember those details. Facts relating to such an important detail were not forthcoming from Muldoon, detracting from the credibility of his testimony. ALJ Allen specifically noted that “Lauth provided more candid and timely responses than Muldoon.” (App.123)

[51] That Muldoon was a “partner” with Lauth was also supported by Lauth’s testimony regarding the hiring of additional individuals. Lauth testified, when he did work “on his own” he only had a few individuals he worked with besides himself, principally his father Dennis, and Ron Jore. (C.R. 1704 at 75-76) The wages to be paid were also discussed with Muldoon. (WSIApp.304) After Lauth entered into his partnership with Muldoon, additional properties were purchased through Muldoon’s entities for which Lauth’s services were utilized to perform work. As Lauth testified, Brendan then told him, “I don’t care who we get Let’s hire whoever we need to. We have to get these jobs done.” (WSIApp.312) The payroll under Lauth Contracting then exploded from the few individuals he usually worked with, to many “crews” with numerous workers, as evidenced by the statements submitted and checks written to additional individuals for work performed. See C.R. 283-288, 297, 303-309, 311-322, 325-330, 338-355, 360-371, 373-376, 380-391, 394-396 and 180, 188-189. Lauth discussed with Muldoon and “hired” other workers to perform work for the business as needed. (WSIApp.305, 310-312, 316, 318, 321) Lauth had no idea out of which account checks were written, those determinations being made by Muldoon. (WSIApp.315)

[52] Muldoon’s assertion that he provided nothing more than bookkeeping services for Lauth was inconsistent with other evidence, for example, Muldoon’s involvement in establishing the business as an LLC. Lauth made it abundantly clear in

his testimony that he didn't even know what an LLC was, and had no involvement in that process. (WSIApp.313) In fact, Lauth thought this had to do with becoming a licensed contractor in the State of North Dakota. (WSIApp.313) The filing documents also reference that the contact person about the filing report is in fact Brendan Muldoon, with his e-mail address, and phone number. (App.161) Muldoon admitted on cross-examination that he was in fact involved in the process to obtain the LLC designation. (App.161) What was Lauth's involvement in the process? It was, consistent with all of his testimony as to "paperwork" relating to the business, to come in and sign by a sticky note. (WSIApp.313)

[53] In addition, Muldoon opened a second account at U. S. Bank, this one in the name of Patrick Lauth Contracting, LLC. (WSIApp.273-278) Lauth's total involvement in this process – confirmed by DeBoer testimony, was to stop in and sign documents – again entirely consistent with Lauth's testimony about his involvement in the "paperwork" aspect of the business. (WSIApp.314; C.R. 1704 at 279) On this second account, Muldoon represented himself as a "member" of Patrick Lauth Contracting, LLC (WSIApp.275; App.161-162) which was defined as "a Member responsible for the management of the Company pursuant to the terms of the operating agreement of the Company." (WSIApp.275) An "employer", under North Dakota law, includes "managers" of a limited liability company. N.D.C.C. § 65-01-02(17)(g).

[54] ALJ Allen found that the documentary evidence was more consistent with the testimony of Lauth than Muldoon. (App.123) That documentary evidence reflected Muldoon signed all of the checks written out of the dba account, and endorsed the checks deposited into the account regardless of how they were written out (i.e., either to Lauth

personally or to some form of a Lauth business entity. (C.R. 561-665) Many of the checks written out of the account were to individuals with a notation in the memo portion regarding a time period. See, C.R. 562, 575, 581, 582, 584, 591, 592, 593, 600, 605, 606, 612, 614, 618, 619, 620, 621, 622, 625. For the most part, Lauth hired the individuals and determined the hourly rate at which they would be paid. Lauth would, however, discuss with Muldoon when he hired these individuals, explain who they were and what they would be doing. As Lauth testified, since Muldoon's part of the "partnership" was to be the "paper guy" and run the bank accounts he felt Muldoon needed to know who these individuals were so he knew he wasn't simply giving a "fake name" to obtain money. (WSIApp.310) In addition, if one reviews the checks written out of the dba account, there were in fact some checks that were written by Muldoon himself to these individuals. See C.R. 630, 632, 633, 634, 635, 636, 637, 638, 639. In fact, if one reviews the checks written out of the dba account, the vast majority of the checks are to individuals for "payroll."

[55] The documentary also evidence supports Lauth's version of the relationship based on use of Muldoon's personal Menard's credit card for purchases relating to projects undertaken by the dba entity and Lauth Contracting. Contrary to Muldoon's testimony, these purchases were not simply limited to items for projects for the Muldoon properties, because the records reflect tools were also charged to the card (WSIApp.95, 142-143) and for projects for other individuals performed by Lauth Installation/Lauth Contracting (Lauth Depo. Ex. p. 00025-197 to 199 and 00025-212 to 213 Dave Carlson project (C.R. 25-197-199; 212-213). Lauth had other means for

charging supplies as there are credit card receipts for purchase of gasoline that reflect charges to a VISA card in the name of Lauth. (WSIApp.88)

[56] The actual documentary evidence is also consistent with Lauth's testimony that he and Muldoon fixed up a Ford F-150 pick truck for the business. (WSIApp.304) In documentation produced at the Lauth deposition, (Depo. Ex. p. 00025-126 (WSIApp.97), is an invoice for work performed on a 1993 Ford F-150 in the amount of \$525.39. This amount was paid by Patrick Lauth Contracting to Newton Development via check #4081, and "coded" as "reimbursement for billing error." (WSIApp.96) The invoice found at WSIApp.97 is from June 25, 2008, and no where referenced in anything billed to Newton Development based on the records produced. (C.R. 104-201) This alleged "reimbursement for billing error" is in fact payment for repairs to a vehicle out of a Newton Development account (a business affiliated with Muldoon). There was no logical reason presented which that explains why this expense would have anything to do with work performed by Lauth Contracting for Newton Development.

[57] Furthermore, Muldoon and Hofer at the hearing attempted to portray Lauth being the individual involved in invoicing of jobs that he performed. Lauth's testimony, however, has been consistent throughout – he simply dropped off the time slips for himself and the other workers for work performed, and picked up checks for the payroll and that he had "no involvement" in preparing the invoices. Hofer's testimony at hearing was impeached with her deposition testimony wherein she admitted she took her directions from Muldoon, not Lauth. (C.R. 1704 at 247-248) Hofer's testimony has little credibility because she testified she initially did payroll for herself when she began working for Muldoon, but after it became too complicated when she was putting in too

many hours, they turned that over to a service, Payroll Professionals. Yet, Hofer testified she could do the payroll for the Lauth businesses, where there were ultimately over 15 individuals involved. See C.R. 121.

[58] Furthermore, Hofer attempted in her deposition and hearing testimony to convey that the time slips submitted by Lauth employees were clear enough that she was able to determine which entities to bill for the hours and work performed. Her testimony and how invoices were prepared is refuted from the documents themselves and how they were processed. For example, WSIApp.42, a time slip from Patrick Lauth, reflects he worked at several places on the Monday of the week involved (Designated 214, 921, 2008, 1003). From that time slip it reflects Hofer paid Lauth two separate checks on 5/5/2008 – one check 2021 out of the dba account (C.R. 680 - \$210.01) and out of Muldoon’s personal account, check 6537 (C.R. 922 - \$374.43). What is significant is that the total hours referenced on the time slip is 16 at \$15.00 per hour, or a total of \$240.00 for wages. Yet, the amounts paid total of payment of \$584.44. It is discernable from the documentation, WSIApp.86, that there was a receipt for gas for \$90.01 that Lauth put in and was also referenced as paid on 5/5/08 under ck. 2021 (dba account), and a Menard’s slip referencing being paid with ck. 6537 for \$8.25 for some products as well as a handwritten notation of “+\$200 trailer.” From the exhibits and the testimony, the 214 and 208 identifiers reflect Muldoon personally owned properties, and the 1003 and 921 reflect MHD Properties. If these truly are separate discernable entities, and Muldoon had “no involvement” in the Lauth businesses other than to sign checks, wouldn’t the records reflect that all of Lauth’s time would be paid out of the Lauth bank accounts (dba or Lauth Contracting), billed out, and then paid back to those entities? The documents

clearly reflect that two entities were paying Lauth's wages, Muldoon personally and the Lauth business accounts. If Hofer testimony was accurate that she asked "Patrick" questions about billing, Lauth would have to authorize her to pay part of his wages out of Muldoon's personal account and part out of the Lauth account. That simply is not credible. It also appears that Muldoon personally reimbursed Lauth for something associated with a "trailer" for the business, again consistent with Lauth's testimony. (WSIApp.304)

[59] The testimony from Muldoon and Hofer about why portions of Newton Development billings would be paid by Muldoon individually and partly Newton Development is also not consistent with the documentary evidence. The claimed "reason" given by both was that Hofer would have been out of town and unable to pay the invoice so Muldoon would pay the invoice and get reimbursed. However, if one looks at C.R. 180 the invoice of 7/14/2008 which was partially paid by Muldoon and partially by Newton, the Newton payment is made with a check dated the same day, 7/14/2008, C.R. 358. Obviously, therefore, Muldoon and Hofer's "stories" don't match up with the documents. Muldoon's testimony overall regarding the billing issue is, quite simply, wholly without credibility as the documentary evidence contradicts his version of his participation with Lauth in his business. Muldoon was in fact intricately involved in how to best run these accounts and the expenses and billings to be paid out of these accounts to his advantage. Thus, as ALJ Allen found, the documentary evidence supports that Muldoon was more involved in Patrick Lauth Contracting than he attempted to portray at hearing, and was more consistent with Lauth's testimony that he and Muldoon were partners.

[60] Muldoon also argued to the ALJ and reasserts on appeal that he was not an “employer” and had no interest in Patrick Lauth Contracting because he did not “profit” from this relationship with Lauth. First, here is nothing that would require any showing of a “profit” in order to be found to be an employer in this case. The ALJ agreed. (App.134) Rather, the question is Muldoon’s relationship with Lauth and the dealings with Muldoon d/b/a Lauth Installation and Patrick Lauth Contracting, LLC. Nonetheless, the ALJ concluded the evidence reflected that Muldoon and his entities for which he utilized the services of Patrick Lauth got the benefit of work being performed without paying any mark-up for profit on the job or supplies/materials for those jobs, he was in Muldoon’s own words “available on a minute’s notice which was uncommon in the industry.” (App.134)

[61] Muldoon’s entire “story” simply made no logical sense and was disproven by Lauth’s more credible testimony and the documentary evidence. At the hearing Lauth repeatedly confronted Muldoon in his allegations and prior testimony that despite what he was saying now, “he knew they were partners.” ALJ Allen had the opportunity to hear, see and evaluate the testimony of all of the witnesses for credibility purposes. He compared that testimony to the documentary evidence to arrive at his findings of fact and conclusions of law on the relationship of Muldoon to Patrick Lauth Contracting. It was within his province to do so, and his findings should not be disturbed on appeal by this Court. Latraille v. North Dakota Workers Compensation Bureau, 481 at 450. Based on the evidence, ALJ Allen could reasonably conclude as he did, and his decision should therefore be affirmed. See Curran v. Workforce Safety and Insurance, 2010 ND 227 ¶ 29, 791 N.W.2d 622.

D. ALJ ALLEN COULD REASONABLY CONCLUDE THAT BRENDAN MULDOON WILLFULLY FAILED TO OBTAIN WORKERS COMPENSATION COVERAGE FOR EMPLOYEES OF PATRICK LAUTH CONTRACTING, LLC, AND IS PERSONALLY LIABLE FOR THE SAME.

[62] ALJ Allen found that Muldoon “intentionally and willfully engaged in conduct to avoid being responsible to pay workers compensation coverage for the employees” of Patrick Lauth Contracting identified in WSI’s June 28, 2010, Order. (App.123) Conclusion of Law II outlines ALJ Allen’s bases for so finding. (App.125) In his Reconsideration Order, ALJ Allen further outlined the bases for his determination that Muldoon willfully failed to pay premiums and why he was personally liable for the same. (App.134) On appeal, Muldoon cites no legal basis for reversing ALJ Allen’s decision, but instead again reargues the evidence to this Court. As fully outlined above, it is not this Court’s role to re-weigh the evidence. Stewart, 1999 ND 174 ¶ 40, 599 N.W.2d 280. Instead, this Court must simply determine if the ALJ could reasonably conclude as he did, and if so, affirm that decision. See Curran, 2010 ND ¶ 29, 791 N.W.2d 622.

[63] The evidence demonstrated that Muldoon consulted an accountant about the employment status of Nicole Hofer and was aware that once an individual was designated an employee, workers’ compensation coverage was required. (App.158) Muldoon also confirmed he discussed the concept of checking into workers’ compensation coverage for the business with Lauth. (App.169) Muldoon had the requisite knowledge about the requirements for workers’ compensation coverage for employees in North Dakota to give Lauth this advice.

[64] Muldoon opened the initial dba account, of which he was the sole owner, signed all of the checks associated with the account, and was aware of who the checks were being made out to and the amount of money going out the account. This continued when the LLC account was opened. (App.159-160) Muldoon admitted that despite his responsibility for the business account, he did not take out workers' compensation coverage for the employees being paid out of that account. (C.R. 1704 at 357-358) Lauth testified that he discussed with Muldoon when their partnership began that they should have coverage on himself, his father and Jore, as those were the workers' that primarily did work. This was not done. (WSIApp.319)

[65] Muldoon's knowledge of the requirements for workers' compensation coverage is further evidenced by the fact that when the Morin claim was filed and Lauth began receiving paperwork, he turned that paperwork over to Muldoon. (WSIApp.321) Muldoon, in turn, filled out paperwork relating to the Lauth Contracting business designating Patrick Lauth as the sole owner of the business and simply asked Lauth to sign it. (App.88, 163) Muldoon admitted the handwriting on the document, but for the signature, was completed by him. The document was faxed out of Muldoon's office to WSI. (Id.)

[66] Muldoon's complicity in the scheme to avoid workers' compensation coverage was further evidenced by his conduct after Morin's claim was filed. This was the beginning of the end of Lauth's relationship with Muldoon. The documentary evidence is consistent that after July of 2008, Lauth Contracting work for the Muldoon entities took a dramatic turn downward. Cf. Lauth Contracting Bank Statements between 5/19/2008 and 7/31/2008 with 8/1/2008 to 10/31/2008, C.R. 523-542. The bank

statements confirm Lauth's testimony that, within 60 days of the Morin claim coming to the attention of WSI and they started gathering information around the end of July of 2008 regarding lack of coverage, the Muldoon/Lauth relationship ended. Morin also confirmed this fact in his interview. (WSIApp.3-4)

[67] After the Morin claim with WSI arose, Lauth and Morin confirmed Muldoon drafted a form to have Morin sign stating he was a subcontractor. (WSIApp.3-4, 321; audiotape Exhibit 4). Given the contrast between Muldoon and Lauth, and that Muldoon admitted to the ALJ upon questioning that he would have easy access to legal advice, who is more likely to have drawn up a document for workers to sign, after the workers compensation claim was filed, stating that they were independent contractors and not employees – Muldoon or Lauth? It had to be Muldoon. The ALJ's findings in this regard are supported by the evidence. (App.125-126)

[68] "Willfully" has been defined as "conduct engaged in intentionally, not inadvertently." Forbes v. Workforce Safety & Insurance, 2006 ND 208 ¶ 13, 722 N.W.2d 536, citing Dean v. North Dakota Workers Compensation Bureau, 1997 ND 165 ¶ 15, 567 N.W.2d 626. "A state of mind can rarely be proven directly and must usually be inferred from conduct and circumstantial evidence." Dean, 1997 ND 165 ¶ 20. The facts, as outlined above, support that Muldoon's conduct was not in any way "inadvertent", but intentional and calculated to avoid responsibility for workers compensation coverage for individuals that were obviously employees, of which he was well aware. Muldoon had the requisite willful intent to deceive WSI about the nature of his relationship with Lauth and the relationship of the individuals with Patrick Lauth Contracting, LLC The ALJ properly concluded that Muldoon was liable under N.D.C.C.

§ 65-04-33 for willfully and intentionally failing to secure workers' compensation coverage.

[69] In terms of personal liability, N.D.C.C. § 65-04-26.1(1) provides:

An officer or director of a corporation, or manager or governor of a limited liability company, or partner of a limited liability partnership, or employee of a corporation or limited liability company having twenty percent stock ownership who has control of or supervision over the filing of and the responsibility for filing premium reports or making payment of premiums or reimbursements under this title and who fails to file the reports or to make payments as required, is personally liable for premiums under this chapter and reimbursement under section 65-05-07.2, including interest, penalties, and costs if the corporation or limited liability company does not pay to the organization those amounts for which the corporation or limited liability company is liable.

Under N.D.C.C. § 65-04-26.1(1), a manager or governor of a limited liability company or an owner who has twenty percent ownership who has control of or any supervision over the filing of workers' compensation premiums subjects himself to personal liability for nonpaid premiums, interest and penalties. Id. Because the evidence showed that Muldoon was either an owner with control or supervision over the workers' compensation premium payment *or* was a manager/governor of the limited liability company, he could be personally liable for unpaid premiums, penalties, and interest. This Court stated the legislative purpose of N.D.C.C. § 65-04-26.1 is to increase the likelihood that the premiums at issue are paid. Raboin v. North Dakota Workers Compensation Bureau, 1997 ND 221 ¶ 16, 571 N.W.2d 833.

[70] As outlined above, the evidence fully supports the ALJ's finding that Muldoon and Lauth were partners in Patrick Lauth Contracting, LLC and therefore the employer of the individuals identified in WSI's June 28, 2010, Order. Likewise, the evidence was abundantly clear that Muldoon was the individual involved in the "paper"

and “financial” aspects of the Lauth business entities. Muldoon signed all checks that went out of the dba and Lauth Contracting bank accounts. Muldoon was the individual responsible for filing documents with the state to obtain the LLC designation, and attested to U.S. Bank that he was a “member” of the LLC with responsibility for “management” of Patrick Lauth Contracting, LLC. Muldoon was the logical person that would look over these aspects of the business partnership. Lauth and Muldoon discussed workers’ compensation coverage and Lauth left this matter up to Muldoon as he was the “paper guy.” However, it never got done. See argument, supra. Muldoon’s responsibilities, therefore, are consistent with having personal liability under N.D.C.C. § 65-04-26.1(1). The ALJ so found. (App.126)

[71] Alternatively, Muldoon is also liable for such premiums under N.D.C.C. § 10-29-32 if any of the following factors are met: there is “insufficient capitalization . . . failure to observe corporate formalities . . . absence of corporate records . . . and existence of the corporation as merely a façade for individual dealings.” To start up the dba business, it is undisputed that there was an initial deposit of \$1,373.00 in the account. (WSIApp.286-287) Muldoon testified that he “wanted Patrick to succeed in his business” and that is why he wanted to help him. (App.165) Muldoon could not explain, however, how Lauth could “succeed” in his business if there was nothing built into the jobs he performed for the Muldoon business entities (MHD and Newton), which Lauth estimated comprised at least 80% of the work the business performed. Indeed, without building any profit into the business, there would be no way to purchase additional tools or other supplies, for the business, no way to fund the payment of expenses relating to gasoline travelling to and from jobsites or to pick up supplies, no way to fund payment of

the cellphone that Lauth was utilizing, and no way to fund payment of the advertising expenses that were being paid out. (C.R. 1704 at 433-434) It is also evident that the business was undercapitalized because there were NSF notices provided on the dba account (WSIApp.122-125) as early as May of 2008, less than a month after the account was opened. This was the claimed “temporary” account set up until the LLC account could be established, but it is irrefutable that these accounts were opened based on establishing the business Patrick Lauth Contracting, LLC.

[72] There were absolutely no “corporate formalities” observed as it pertains to Patrick Lauth Contracting. The only documents generated for the organization of the business itself. No other minutes or records were maintained regarding the LLC business. In addition, the lines between Muldoon’s other business entities, his personal business, and the Lauth Contracting were blurred in terms of how the companies operated. A Menard’s card in the name of Muldoon personally was used to pay for Lauth Contracting business expenses, supplies and equipment. Muldoon paid for portions Lauth’s wages referenced on his time card via his personal account, rather than all wages being paid directly by Lauth Contracting and then billed to whatever entity for which the work was performed. Muldoon admitted contributing personal funds from a personal line of credit to make payments on behalf of Patrick Lauth Contracting. Muldoon was personally paid by Newton Development for bills from Patrick Lauth Contracting to Newton Development. His explanation for payment of a portion of a Newton Development invoices from Lauth Contracting directly to him (C.R. 179-180) was because Mike Hofer may have been out of town and unable to do so and Lauth wanted to be paid right away. However none of these claimed payments appear on the summary of payments made by

Newton Development to Lauth Contracting, (C.R.. 110-113), and did not comprise part of the 1099 issued to Lauth Contracting in 2008 (C.R. 109). In addition, as outlined above, the explanation is contradicted by the documents as payments were made by Newton on the same day. There were, therefore, personal dealings with the funds by Muldoon without observing corporate formalities.

[73] Finally, overwhelmingly the evidence supports a finding and that the existence of the Patrick Lauth Contracting was nothing more than a facade for Muldoon's individual dealings to obtain workers to perform contracting work on his individual businesses. Muldoon testified Lauth was available "on a moment's notice" to perform work. By being able to do so, Muldoon had immediate access to workers, without the need to a company put in a formal bid, and pay the business without any mark-up for profit on the work performed or supplies used. Muldoon could also avoid having those workers designated as employees of MHD or Newton, but still pay actual wages times an hourly rate, again with no "mark-up for profit", and no need to incur the expense of payroll taxes, unemployment coverage or workers compensation coverage. Patrick Lauth Contracting was merely a "pass through entity" for Muldoon to utilize to get the work he wanted done for his other business entities without the need to establish the required coverages and payments under North Dakota law. Lauth's testimony was accurate – Muldoon "used" him. It is evident he made Lauth the "fall guy" for all of the issues pertaining to failure to obtain workers' compensation coverage for Patrick Lauth Contracting LLC. (WSIApp.26). This evidence supports piercing the corporate veil. See Jablonsky v. Klemm, 377 N.W.2d 560, 566 (N.D. 1985) (recognizing utilizing a

business entity as merely a “pass through” for self-dealing as supporting evidence for piercing the corporate veil).

[74] Finally, an “element of injustice, inequity, or fundamental unfairness” must be present to pierce the corporate veil. Axtmann v. Chillemi, 2007 ND 179 ¶ 13, 740 N.W.2d 838. The essence of this requirement “is that an individual cannot hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell.” Id. Given the evidence in this case, it would be fundamentally unfair to allow Muldoon to escape personal liability for the premiums, penalties and interest owed by Patrick Lauth Contracting, given his involvement in and manipulation of the business, through self-dealing. Accordingly, the evidence supports the ALJ's determination that Muldoon should be held personally liable.

CONCLUSION

[75] Muldoon has not presented any legal basis upon which this Court can overturn the decision of ALJ Allen. As to the factual issues, this Court must not substitute its judgment for that of the ALJ. S & S Landscaping Co 541 N.W.2d at 82. Accordingly, for the foregoing reasons, WSI respectfully requests this Court affirm the decisions of ALJ Allen dated July 2, 2011, and August 8, 2011, in all respects.

Dated this 23rd day of August, 2012.

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

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 10,291.

Dated this 23rd day of August 2012.

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