

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota by and)	Supreme Court Case No. 20130292
through Workforce Safety and)	
Insurance,)	
)	
)	Appellant,
)	
vs.)	
)	
Larry's On Site Welding,)	
)	
)	Appellee,
)	
and)	
)	
William Snook,)	
)	
)	Respondent.

+++++

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

and Addendum

+++++

**APPEAL FROM DISTRICT COURT JUDGMENT ENTERED JULY 9, 2013,
WITH NOTICE OF ENTRY OF JUDGMENT SERVED JULY 31, 2013 AND
ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE DECISION DATED
JUNE 24, 2013, AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF ALJ ROSELLEN SAND DATED SEPTEMBER 23, 2012
MOUNTRAIL COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE RICHARD L. HAGAR**

+++++

**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
janderson@nilleslaw.com**

TABLE OF CONTENTS

	<u>Paragraph No.</u>
I. Statement of the Issue	1
II. Statement of the Case.....	2
III. Statement of Facts.....	6
IV. Law and Argument	12
A. Standard of Review.....	12
B. Applicable Law.....	14
C. The ALJ Erred in Her Application of the More Weighted Factors in the Common Law Test Under N.D. Admin.R.92-01-02-49	17
D. The ALJ Erred in Her Application of the Other Factors in the Common Law Test Under N.D.Admin.R. 92-01-02-49	36
V. Conclusion	55

Addendum

Page No.

VI. North Dakota Administrative Rule § 92-01-02-49	29
--	----

TABLE OF AUTHORITIES

STATE CASES

Paragraph No.

<u>Auck v. North Dakota Workforce Safety and Insurance</u> 2010 ND 126, 785 N.W.2d 186	12, 13
<u>Baker v. Barnard Construction Co., Inc.</u> 860 F. Supp. 766 (D.N.M. 1994)	25, 27, 33, 38
<u>Baker v. Flint Engineering & Const., Inc.</u> 137 F.3d 1436 (10 th Cir. 1998)	24
<u>Bishop v. North Dakota Workforce Safety and Insurance</u> 2012 ND 217, 823 N.W.2d 257	12, 13, 55
<u>Burkhardt v. State</u> 78 ND 818, 53 N.W.2d 394 (N.D. 1952).....	55
<u>Chao v. Westside Drywall, Inc.</u> 709 F. Supp. 2d 1037 (D. Or. 2010)	37
<u>Dole v. Snell</u> 875 F.2d 802 (10 th Cir. 1989)	25
<u>Erickson v. Director, North Dakota Dept. of Transp.</u> 507 N.W.2d 537 (N.D. 1993)	35
<u>Gottus v. Job Service North Dakota</u> 2011 ND 204, 804 N.W.2d 192	13
<u>Johnson v. North Dakota Workers Compensation Bureau</u> 539 N.W.2d 295 (N.D. 1995)	35
<u>K & D Auto Body, Inc. v. Division of Employment Security</u> 171 S.W.3d 100 (Mo. Ct. App. 2005).....	18
<u>Louisiana Workers' Compensation Corp. v. Genie Industries</u> 801 So.2d 1161 (La. Ct. App. 2001).....	50
<u>Matter of BKU Enterprises, Inc.</u> 513 N.W.2d 382 (N.D. 1994).	13, 16, 34, 35

<u>Midwest Property Recovery, Inc. v. Job Service North Dakota</u> 475 N.W.2d 918 (N.D. 1991)	13, 14
<u>Montoya v. S.C.C.P. Painting Contractors, Inc.</u> 589 F. Supp. 2d 569 (D. Md. 2008)	27
<u>Myers-Weigel Funeral Home d/b/a WBM, Inc. v. Job Service North Dakota</u> 1998 ND 87, 578 N.W.2d 125	14
<u>National Heritage Enterprises v. Division of Employment Security</u> 164 S.W.2d 160 (Mo. Ct. App. 2005).....	18
<u>Rush v. Employers Nat. Ins. Co.</u> 598 N.W.2d 603 (La. Ct. App. 1992)	50
<u>Secretary of Labor v. Lauritzen</u> 835 F.2d 1529 (7 th Cir. 1987), <i>cert. denied</i> , 488 U.S. 898 (1988).....	18
<u>Sloan v. North Dakota Workforce Safety and Insurance</u> 2011 ND 194, 804 N.W.2d 184	12, 13
<u>Spectrum Care v. Stevick</u> 2006 ND 155, 718 N.W.2d 593	13
<u>Stover Delivery Systems, Inc. v. Division of Employment Security</u> 11 S.W.3d 685 (Mo. Ct. App. 1999).....	29, 42, 44
<u>Sunderland v. North Dakota Workmen’s Compensation Bureau</u> 370 N.W.2d 549 (N.D. 1985)	14
<u>Turnbow v. Job Service North Dakota</u> 479 N.W.2d 827 (N.D. 1992)	13

STATUTES

	<u>Paragraph No.</u>
N.D.C.C. § 28-32-46.....	12, 16, 17, 20, 23, 27, 31, 33, 35, 36, 38, 40, 42, 45, 46, 47, 49, 51, 52, 54
N.D.C.C. § 65-01-03.....	14
N.D.C.C. § 65-02-22.1.....	12
N.D. Admin. R. 92-01-02-49.....	15, 18, 36

N.D. Admin. R. 92-01-02-49(1)(a)(3)	18
N.D. Admin. R. 92-01-02-49(1)(b).....	54
N.D. Admin. R. 92-01-02-49(1)(b)(1)	37
N.D. Admin. R. 92-01-92-49(1)(b)(2)	39
N.D. Admin. R. 92-01-02-49(1)(b)(6)	21
N.D. Admin. R. 92-01-02-49(1)(b)(7)	41
N.D. Admin. R. 92-01-02-49(1)(b)(9)	45
N.D. Admin. R. 92-01-02-49(1)(b)(10)	46
N.D. Admin. R. 92-01-02-49(1)(b)(11)	48
N.D. Admin. R. 92-01-02-49(1)(b)(12)	50
N.D. Admin. R. 92-01-02-49(1)(b)(14)	52
N.D. Admin. R. 92-01-02-49(1)(b)(16)	24
N.D. Admin. R. 92-01-02-49(1)(b)(17)	28
N.D. Admin. R. 92-01-02-49(1)(b)(18)	32
N.D. Admin. R. 92-01-02-49(2)	35
N.D. Admin. R. 92-01-02-11(1)(b)(8)	43, 44

STATEMENT OF THE ISSUE

[1] Whether the ALJ erred in concluding that Snook and other similarly situated welders were independent contractors.

STATEMENT OF THE CASE

[2] On October 29, 2010, William Snook (“Snook”) sustained an injury when he fell off a ladder on an oil rig platform. (App.105) Snook filed a claim with WSI but did not identify an employer. (App.105) WSI issued a Notice of Decision Establishing Employee Status and Accepting Claim and Awarding Benefits, concluding an employer/employee relationship existed between Snook and Larry’s Onsite Welding (“Larry’s”). (App.106-107) Larry Bumpous, submitted a request for reconsideration. (App.107-108)

[3] On April 19, 2011, WSI issued an Order finding Snook was an employee of Larry’s. (App.64-72) On April 25, 2011, Larry’s demanded a formal hearing. (App.73) On July 7, 2011, WSI issued a further Order accepting claim for left hip fracture and disability benefits through December 30, 2010. (App.74-80) Larry’s again demanded a formal hearing. (App.81)

[4] An administrative hearing was held before ALJ Rosellen M. Sand. (C.R. 1320) Post-hearing briefs were submitted. (C.R. 1264-1273, 1274-1299, 1300-1301) On September 23, 2012, the ALJ issued Findings of Fact, Conclusions of Law and Order, reversing WSI’s decisions awarding Snook benefits, concluding Snook and other similarly situated welders were independent contractors. (App.82-98)

[5] WSI appealed the ALJ’s decision to District Court, Mountrail County. (App.99) On June 24, 2013, the District Court, the Honorable Richard L. Hagar, issued

an Order Affirming Administrative Law Judge Decision. (App.100-103) On September 20, 2013, WSI filed a Notice of Appeal to this Court. (App.104)

STATEMENT OF FACTS

[6] On October 29, 2010, Snook sustained an injury when he fell off an oil rig platform. (App.105) Snook was seen at Mountrail County Medical Center, where he was given a claim for injury form to submit to WSI. (C.R. 1241; App.203-204) The claim form was submitted to WSI by Snook. (App.105) WSI contacted Snook to obtain information on the identity of and contact information for his employer.. (C.R. 2; Ex. 48b(DVD)). Snook reported to WSI that he was working for Larry's, owned by Larry Bumpous, at the time of his injury but that Bumpous was claiming he was not an employee and was a "contractor." (C.R. 2; Ex. 48b(DVD))

[7] Larry's had no coverage with WSI. (C.R. 2) An account number was assigned to register the claim and an investigation into employment status was initiated. (C.R. 2,3) Worker Relationship Questionnaires were obtained from Mike Cecil (App.113-118); Larry Bumpous (App.119-122); and William Snook (App.123-128). Interviews were also conducted. (C.R. 346-348; Ex. 46)

[8] Bumpous told WSI he had work for Snook because one of his welders had gone elk hunting, a welder had to turn in an invoice to him for work performed, they were paid by the hour off his ticket they complete at a rate of \$65.00 per hour, on a weekly basis. (Ex. 46(DVD)) Bumpous told WSI he provided safety meetings once in a while for the workers. (Ex. 46(DVD)) Bumpous also confirmed Snook was required to perform the work personally, and could not hire helpers. (Ex. 46(DVD)) Bumpous had five welders working for him. (Ex. 46(DVD)) Bumpous admitted he could terminate

welders and welders could quit at any time without any liability. (Ex. 46(DVD))
Bumpous reported that when Snook or other welders were out on a jobsite they were performing services for Larry's not themselves. (Ex. 46(DVD))

[9] Snook initially performed work for Larry's in February of 2010. (App.130,199) Snook was paid by Larry's for the work performed, less an advance. (App.131,133) Snook performed work on a second occasion for Larry's in October of 2010. (App.200) Bumpous took Snook out to a rig where Snook performed welding work, using Bumpous' tools and welder, and this work billed to the rig. (App.134,200) Bumpous showed Snook where the rigs were located where he wanted him to perform work. (App.201) Bumpous would call Snook and give a "vague description" of welding work to be done. (App.192,201) Snook would call Bumpous to advise he completed the work and how many hours he had done. (App.201) Bumpous supplied the forms to complete and report the work performed. (App.201,202) Snook also performed work for Larry's on October 27 (App.135), October 28, (App.136,202), and October 29, 2010. (App.137,202)

[10] Bumpous set the price for the work performed and paid to welders. (App.202) Snook understood he needed to be at Larry's "beck and call." (App.202) Bumpous told Snook that he would have enough work for him to stay busy and would not need to look for other work. (App.202) If a welder turned down work, he would not call that welder back. (App.194) Welders that performed work for Larry's were covered for liability under his insurance. (App.191) Larry's was responsible for any problems that arose with the work performed by welders. (App.191) Bumpous instructed welders that if they are at a job site and problems arose to call him. (App.192) Larry's performed

work 24 hours a day 7 days a week. (App.139,193) A welder could not perform work at the rig without being directed by Bumpous and using his invoicing. (App.192) Welders could not re-assign work to another welder or helper. (App.193) Welders report to Bumpous when they were done with the assigned work and were available for more work. (App.194) Bumpous would come out and solve problems. (App.192) If a welder's work was performed unsatisfactorily, Bumpous would redo the work or correct the problem, but not deduct or charge back any corrective work.

[11] Bumpous supplied the materials for the jobs to be performed by the welders. (App.192) Bumpous would call welders pick up and deliver supplies to the jobsite. (App.192,196) Bumpous would also direct welders to jobs to be performed and the sequence at which jobs were to be performed. (App.194) Payments for work performed by individual welders were made to Larry's. (App.194) Welders were paid by the hour, every Friday, at the rate set by Bumpous, without negotiation. (App.194-195) Bumpous did train at least one welder that performed work for him. (App.193,196; Ex. 47(DVD))

LAW AND ARGUMENT

A. STANDARD OF REVIEW.

[12] The standard of review of an independent ALJ decision is set out in N.D.C.C. § 28-32-46. Bishop v. North Dakota Workforce Safety and Insurance, 2012 ND 217, 823 N.W.2d 257. "When an independent ALJ issues final findings of fact, conclusions of law and order under N.D.C.C. § 65-02-22.1, courts apply the same deferential standard of review to the ALJ's factual findings as used for agency decisions." Bishop, 2012 ND 217 ¶ 5, 823 N.W.2d 257, citing Sloan v. North Dakota Workforce

Safety and Insurance, 2011 ND 194 ¶ 5, 804 N.W.2d 184, Auck v. North Dakota Workforce Safety and Insurance, 2010 ND 126 ¶ 9, 785 N.W.2d 186. No deference is given to an ALJ's legal conclusions. Bishop, 2012 ND 217 ¶ 6, 823 N.W.2d 257; Sloan, 2011 ND 194 ¶ 5, 804 N.W.2d 184; Auck, 2010 ND 126 ¶9. 785 N.W.2d 186.

[13] The question of whether a worker is an employee or independent contractor is a mixed question of law and fact. Matter of BKU Enterprises, Inc., 513 N.W.2d 382, 387 (N.D. 1994); Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 830 (N.D. 1992); Midwest Property Recovery, Inc. v. Job Service North Dakota, 475 N.W.2d 918, 922 (N.D. 1991). On review the decision, the Court must “separately inquire whether the order or decision is ‘not in accordance with the law’; whether ‘the findings of fact made by the [ALJ] are not supported by a preponderance of the evidence’; and, whether the conclusions of the [ALJ] ‘are not supported by [the] findings of fact.’” Midwest Property, 475 N.W.2d at 922. Furthermore, “the underlying predicate facts are treated as findings of fact, and the conclusion whether those facts meet the legal standard is a question of law.” BKU Enterprises, 513 N.W.2d at 387. Questions of law are fully reviewable on appeal. Bishop, 2012 ND 217 ¶ 6, 823 N.W.2d 257; Sloan, 2011 ND 194 ¶ 5, 804 N.W.2d 184; Auck, 2010 ND 126 ¶9. 785 N.W.2d 186. If facts are undisputed the Court reviews the legal question “anew.” Gottus v. Job Service North Dakota, 2011 ND 204 ¶ 8, 804 N.W.2d 192, citing Spectrum Care v. Stevick, 2006 ND 155, 718 N.W.2d 593.

B. APPLICABLE LAW.

[14] N.D.C.C. § 65-01-03 provides a presumption that individuals performing services for another are employees. The party against whom the presumption is directed bears the burden of proving that the nonexistence of the presumed fact is more probable than

its existence." Sunderland v. North Dakota Workmen's Compensation Bureau, 370 N.W.2d 549, 552 (N.D. 1985). The label the parties place on the relationship is not determinative; rather, it is how the relationship between the parties actually operates which is important. Midwest Property, 475 N.W.2d at 923. "The central question in determining whether an individual is an employee or independent contractor is: Who is in control?" Myers-Weigel Funeral Home d/b/a WBM, Inc. v. Job Service North Dakota, 1998 ND 87 ¶ 9, 578 N.W.2d 125.

[15] N.D. Admin. R. § 92-01-02-49¹ which sets forth the factors of the "common law test" for determination of employment status, and provides:

An employment relationship exists when the person for whom services are performed has the right to control and direct the individual person who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is a significant factor indicating that the person possessing that right is an employer. The right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, establish an employment relationship. Other factors indicating an employer-employee relationship, although not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the person who performs the services. The fact that the contract must be performed at a specific location such as building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the industry. If a person is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the person will likely be an independent contractor.

Greater weight is given to eight of the factors in the Rule: integration, continuing relationship, significant investment, realization of profit or loss, working for more than

¹ A copy of this administrative rule is attached to Appellant's Brief.

one firm at a time, making service available to general public, right to dismissal and right to terminate.

[16] The ALJ erred in concluding, based on the undisputed evidence, that Snook and similarly situated workers met the legal standard of an independent contractor. The conclusion of whether the facts met the legal standard is a question of law. BKU Enterprises, 513 N.W.2d at 387. The ALJ also failed to adequately address other undisputed evidence and admissions of Bumpous pertinent to the legal conclusion of whether when Snook and other similarly situated workers were employees. Based on the evidence, the ALJ could not reasonably conclude that Snook and other similarly situated workers were independent contractors. Therefore, because the ALJ's decision is not in accordance with the law, it should be reversed. N.D.C.C. § 28-32-46.

C. THE ALJ ERRED IN HER APPLICATION OF THE MORE WEIGHTED FACTORS IN THE COMMON LAW TEST UNDER N.D. ADMIN. R. 92-01-02-49.

[17] Of the eight weighed factors, the ALJ concluded that two factors were neutral, Factor 3 (integration) (C.R. 1313) and Factor 16 (realization of profit or loss)(C.R. 1316); that Factor 6 (continuing relationship) (C.R. 1314) and Factor 17 (working for more than one firm at a time) (C.R. 1316) weighed in favor of Snook being an independent contractor and the other welders as employees; that Factor 15 (significant investment) (C.R. 1316) and Factor 18 (making services available to the public) (C.R. 1316) weighed in favor of independent contractor status; and that Factor 19 (right to dismissal) and Factor 20 (right to terminate) weighed in favor of employee status. As to Factors 3, 6, 16, 17 and 18, the ALJ failed to address undisputed factual evidence in the record. The ALJ also erred in applying the factors to the evidence. Therefore, the ALJ

her decision is not in accordance with the law and must be reversed. N.D.C.C. § 28-32-46.

Factor 3 - Integration.

[18] The ALJ misapplied the integration factor in concluding it was neutral. “Integration of the person’s services into the business operations generally shows that the person is subject to direction and control. 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.” N.D. Admin. R. 92-01-02-49(1)(a)(3). “The integration factor refers to whether a business could continue without the contribution of the services in question; as such, integral services are more likely to be subject to the business’ control.” K & D Auto Body, Inc. v. Division of Employment Security, 171 S.W.3d 100, 107 (Mo. Ct. App. 2005), quoting National Heritage Enterprises v. Division of Employment Security, 164 S.W.2d 160, 168 (Mo. Ct. App. 2005). See also Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1537-38 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988)(stating integration focuses on whether the workers’ services are a necessary component of the business.”).

[19] The ALJ’s analysis reflects only that Larry’s could have stayed in business even absent the other welders, but ignores that Larry’s was in business to service rigs on a 24/7 basis. (App.139,193) Bumpous admitted that without the integration of the other welders, Larry’s could not perform services on this 24/7 basis or handle the workload associated with his business. (App.163,193) Integration of Snook and other welders was necessary in order for Larry’s to provide its services to the oil industry. (App.148-

149,193) When welders are working on rigs, they perform services as Larry's, not as an individual. (Ex. 46(DVD); App.122,193,203) The tickets/work orders that document work performed are from Larry's, (see C.R. pp. 537-1226; App.130,134-137, 194).

[20] The undisputed evidence demonstrates Snook and the other welders were integrated into Larry's in order to provide the 24/7 services. The success or continuation of Larry's 24/7 onsite welding business, required integration of other welders. The undisputed evidence demonstrates an employer-employee relationship between Larry's and Snook and the other welders, and the ALJ's conclusion otherwise is not in accordance with the law. N.D.C.C. § 28-32-46.

Factor 6 - Continuing Relationship.

[21] Te ALJ erred in concluding that while Snook did not have a "continuing relationship" with Larry's and the factor weighed in favor of independent contractor status but as to other welders the factor weighed in favor of employee status. "A continuing relationship between the person and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist when work is performed at frequently recurring although irregular intervals." N.D. Admin. R. 92-01-02-49(1)(b)(6).

[22] Larry's had welders that were used "continuously, as much as I can, I feed those boys as much work as I can before I give it to anyone else." (C.R. 268; C.R. 1320 at 79) This included, Mike Cecil, did not work for anyone other than Larry's. (App.155,193) Bumpous promised individuals if they stick around he will call them for work. (App.194) The evidence reflected Bumpous enticed welders with ongoing continuous work in order to maintain a relationship with them. The 1099's produced by

Larry's reflect continuous relationships from 2009-2010 with Randall Lee Baldrige (C.R. 422, 450), Glenn Prejean (C.R. 423, 456), Michael Cecil (C.R. 424, 455), Darrin Janisch (C.R. 425, 452), Michael Fugli (C.R. 426, 445) and Christopher Marable (C.R. 427, 453). Thus, the the relationship of Larry's to the welders was frequent and recurring, which supports a finding of employee status, as found by the ALJ.

[23] Instead of analyzing Snook's status in the same manner, the ALJ found he did not have a continuing relationship because he had worked for others companies in 2010. (App.89) In doing so, the ALJ failed to analyze whether relationship that Snook was to have with Larry's when he resumed work in October of 2010 was the same or different than the other welders. Snook was injured shortly after he resumed work with Larry's in October of 2010. At that time, the evidence demonstrated Bumpous promised there was a lot of work available, that he had enough work for Snook to keep busy and he could stay as long as he wanted and work. (App.200, 202; Ex. 48a(DVD)) Thus, when properly analyzed and applied, this factor supports an employer-employee relationship between Snook and Larry's, just as it does with the other welders with which Larry's maintained a relationship. The ALJ's conclusion on this factor as it pertains to Snook, therefore, is not in accordance with the law. N.D.C.C. § 28-32-46.

Factor 16 – Realization of Profit or Loss

[24] The ALJ erred when she concluded that this factor was neutral, favoring neither employee nor independent contractor status. (App.95) "A person who may realize a profit or suffer a loss as a result of the person's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the person who cannot is an employee. If the person is subject to a risk of economic loss due

to significant investment or bona fide liability for expenses that indicates that the person is an independent contractor.” N.D. Admin. R. 92-01-02-49(1)(b)(16). “Generally speaking, an independent contractor has the ability to make a profit or sustain a loss due to the ability to bid on projects at a flat rate and to complete projects as it sees fit.” Baker v. Flint Engineering & Const., Inc., 137 F.3d 1436, 1444 (10th Cir. 1998). Here, the evidence was undisputed that there were no negotiations as to how much to charge for the services, nor were bids or quotes submitted. (App.163). Charges were set solely by Bumpous. (App.163)

[25] Furthermore, and most importantly, courts have held that the proper analysis “is to determine whether the worker ‘undertake[s] risks usually associated with an independent business.” Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989). In Baker v. Barnard Construction Co., Inc., 860 F. Supp. 766 (D.N.M. 1994) the court considered whether certain rig welders were independent contractors or employees. The rig welders supplied their own welding equipment mounted on flat bed pickup trucks. Id. at 768. In concluding the factor of profit or loss supported a conclusion these rig welders were employees, that court pointed out the following facts:

Plaintiffs were paid a fixed hourly rate. They had no opportunity to exercise a loss on the job site. In fact, if one of their welds was inadequate they did not have to repeat the weld on their own time. Thus, the Defendants assumed the only risk a rig welder undertook on a job site. . . .

While there was no evidence submitted on what percentage of a rig welders’ expenses went to welding rod, fuel and other maintenance of the welding rig, the Court does not doubt that rig welders who did not waste materials and who shopped around for these items increased their actual income at the end of the year. However, this also holds true for every worker, whether independent contractor or employee. The automobile mechanic who takes good care of his tools and the salesclerk who gets a bargain on his work clothes all have more money in their pocket at the end

of the year than a careless and less discriminating worker. However, the sales clerk did not make more “profit” based on his shopping prowess. . . .

Id. at 773.

[26] Applying the above analysis to this case, if the work performed by a welder was not satisfactory, that welder was not called back to fix or repair the faulty work product; instead, Bumpous redid the work himself. (App.159,161) Bumpous would not bill for the repairs, nor dock the pay of the welder or charge back those repairs. (App.160-161, 191, 195) Bumpous carried liability insurance on the individual welders and the work they performed on the oil rigs. (App.160) The welders therefore had no expense or risk of loss associated with faulty workmanship.

[27] Because the ALJ erred in her analysis and application of the law to the undisputed facts, this factor weighed in favor of an employer-employee relationship. See Baker v. Barnard Construction Co., Inc., 860 F. Supp. at 768, 773 (noting the only potential loss for a rig welder for doing poor work is to lose his job, as rig welder is not required to repeat weld on his own time); Montoya v. S.C.C.P. Painting Contractors, Inc., 589 F. Supp. 2d 569, 578-80 (D. Md. 2008)(noting under factor relating to opportunity for profit or loss, where employee’s work by its nature is time oriented courts have weighed the factor in favor of employee status). The ALJ’s conclusion on this factor, therefore, is not in accordance with the law. N.D.C.C. § 28-32-46.

Factor 17 - Working for More than One Firm at a Time.

[28] The ALJ again erroneously concluded this factor weighed in favor of independent contractor status as to Snook, but employee status as to other welders. (App.95) N.D. Admin. R. 92-01-02-49(1)(b)(17) provides that: “If a person performs services under multiple contracts for unrelated persons or firms at the same time, that

generally indicates that the person is an independent contractor. A person who performs services for more than one person may be an employee for each of the persons, especially when such persons are part of the same service arrangement.” As the administrative rule provides, a person can perform services for more than one person at a time and still be an employee. The ALJ concluded that that the factor weighed against Snook being an employee because he “clearly did other work and seemed to come and went as he pleased.” (App.95) However, as to the other welders, she concluded that “although they were free to work elsewhere and some actually did so, because Bumpous would not call a welder back if they were not available when he had work for them, his expectation was that they were not actually free to work elsewhere and were therefore more akin to employees.” (App.95)

[29] Similar to the error in the ALJ’s analysis of Factor 6, outlined above, she failed to address the undisputed evidence that Snook was injured shortly after he resumed a relationship with Larry’s but that he was hired on the same basis as other welders. Bumpous admitted in deposition and hearing testimony that all welders are “on call” at all times of the day and all days of the week. (App.158, 193, 194) Bumpous also admitted, that he promised welders that if they are good at what they do and they “hang out” waiting for work from him, “I’ll call you” for work to be done. (App.158, 163) If Bumpous called a welder and they say “I don’t want to go,” he doesn’t call that welder back for additional work. (App.163, 194) Thus, the undisputed evidence reflects that in order to work for Larry’s, the welders have to commit to (1) being on call 24/7; and (2) take the jobs when called to do the work. There is no real opportunity to do other work as Larry’s had a priority on their time. See Stover Delivery Systems, Inc. v. Division of

Employment Security, 11 S.W.3d 685, 693 (Mo. Ct. App. 1999)(noting that when schedules require substantially full time commitment it impliedly restricts workers ability to engage in other work, thus favoring employee status).

[30] The ALJ erred when she found Snook was an independent contractor simply because he had worked for others companies [as an employee] in 2010. (App.96) When Snook began work with Larry's the evidence supports that he was hired on the same as any other welder that Larry's had used in the past. At the time Snook resumed work with Larry's in October of 2010, Bumpous had promised him there was a lot of work available, that he had enough work for Snook to keep busy and he could stay as long as he wanted and work. (App.200; Ex. 48a(DVD))

[31] Simply because Snook performed services for more than one entity does not automatically mean he is an independent contractor. Although Snook worked for other entities from February and October of 2010, his tax records reflect that on none of those occasions was he working as an "independent contractor." Rather, at all times he worked as an employee. (App.172-177) When properly analyzed and applied, this factor supports an employer-employee relationship between Snook and Larry's, just as it does with the other welders. The ALJ's conclusion on this factor as to Snook is not in accordance with the undisputed facts, and contrary to law. N.D.C.C. § 28-32-46.

Factor 18 - Making Services Available to the Public.

[32] The ALJ concluded this factor weighed in favor of independent contractor status, again simply because Snook and other welders "actually did work for others during this period of time and that they tried to pick up other work when they were not busy working for Larry's." (App.95-96) The ALJ's conclusion is not supported by the

evidence and she could not reasonably so conclude. N.D. Admin. R. 92-01-02-49(1)(b)(18) states: “If a person makes the person’s services available to the general public on a regular and consistent basis that indicates an independent contractor relationship.” Mike Cecil responded that he did not advertise or maintain a business listing in the telephone directory, a trade journal, etc. (App.116). While Cecil also responded that he represented himself to the public as being a business to perform the same or similar services, the actual evidence reflects that Cecil represented himself as being with OnSite Welding & Trenching with Bumpous. (App.139) Snook did not have an independent business or go by any type of trade or business name. (App.126, 198)

[33] Once again, the ALJ erroneously relied on the fact that simply because Snook and other welders did work for others that this somehow means they are independent contractors. The only evidence in the record as to other welders performing work for others during the period of time in question up to the point when Snook was injured (2009 to 2010) are Snook’s tax records which reflect that he worked for and was treated as an employee for all other entities to whom he offered his services. (App.172-177). See also Baker, 860 F. Supp. at 771-772 (noting court should find relevant the fact that when welders work for other companies “they are classified as employees”). For the ALJ to draw the conclusion she does that this factor weighs in favor of independent contractor status if contrary to the evidence and the law. N.D.C.C. § 28-32-46.

Factors 19 & 20 – Right to Dismissal/Right to Terminate

[34] The last weighed factors (19) and (20) right to dismissal and right to terminate, provides: “The right to dismiss a person indicates that the person is an employee and the person possessing the right is an employer. An employer exercises

control through the right of dismissal, which causes the person to obey the employer's instruction. An independent contractor, on the other hand, cannot be fired without liability for breach of contract ..." "The power to terminate is highly suggestive of the power to control." Matter of BKU Enterprises, 513 N.W.2d 382, 388 (N.D. 1994). The ALJ correctly concluded these factors weighed in favor of an "at-will employee." In this analysis, ALJ did not differentiate Snook's relationship with Larry's and that of the other welders. As argued above, there is nothing in the record to support that Snook's relationship with Larry's was in any way different from any of the other welders that performed services. The fact that the ALJ was inconsistent in how she analyzed the factors demonstrates error and that her analysis of other factors referenced above.

[35] When the law is properly applied to the undisputed facts applicable to the weighted factors outlined in N.D. Admin. R. 92-01-02-49(2), six of those factors (3), (6), (16), (17), (19) and (20) weigh in favor of employee status, one is either neutral or slightly favors that status (18), and only one (15) weighs in favor of independent contractor status. While this Court has recognized that the determination of employee status is not a "blind factoring of numerical quotients," when certain factors are given greater importance under the analysis, one simply cannot ignore that of those given more weight under WSI's administrative rule, the majority of those factors weigh in favor of employee status. See Matter of BKU Enterprises, Inc., 513 N.W.2d at 387 (noting that although factors may support a finding of independent contractor status, some factors may have greater importance than others). Therefore, because the ALJ's decision is not in accordance with application of the facts to the law, it should be reversed. N.D.C.C. § 28-32-46; see Johnson v. North Dakota Workers Compensation Bureau, 539 N.W.2d 295,

297 (N.D. 1995)(noting appellate court will reverse agency decision when not in accordance with the law); Erickson v. Director, North Dakota Dept. of Transp., 507 N.W.2d 537 (N.D. 1993)(id.).

D. THE ALJ ERRED IN HER APPLICATION OF THE OTHER FACTORS IN THE COMMON LAW TEST UNDER N.D. ADMIN. R. 92-01-02-49.

[36] Of the additional 12 factors for determining employee status, he ALJ concluded nine favored independent contractor status (Factors (1) instructions; (2) training; (7) set hours of work; (8) full time required; (9) doing work on the premises; (10) order or sequence set; (11) oral and written reports; (13) payment of business or travelling expenses or both; (14) furnishing of tools and materials); two favored employee status (Factors (4) services rendered personally and (5) hiring, supervising and paying assistants), and one factor she made no conclusion either way (Factor 12 payment by hour, week, month). An analysis of the ALJ's conclusions as to several of these factors again demonstrates that she erred in her application of the law to the facts, failed to adequately address undisputed facts pertinent to the application of those factors, and therefore erred as a matter of law in determining Snook and other similarly situated workers were independent contractors. Thus, the ALJ's decision should be reversed. N.D.C.C. § 28-32-46.

Factor 1 – Instructions

[37] When a person “is required to comply with other person’ instructions about when, where, and how the person is to work is ordinarily an employee.” N.D. Admin. R. 92-01-02-49(1)(b)(1) (emphasis supplied). The ALJ concluded that this factor weighed in favor of independent contractor status (App.91-92), stating that “while Bumpous gave direction on where to go and general instruction on what was to be done,

the actual job specifications and instructions including when and how the work was to be accomplished were given by the rig employees.” “[T]he fact that [workers] are not supervised in detail at all times does not necessarily mean they are not ‘employees.’” Chao v. Westside Drywall, Inc., 709 F. Supp. 2d 1037, 1064 (D. Or. 2010).

[38] The undisputed evidence confirmed that it was solely Bumpous that directed the welder as to which rig to go for the work to be performed. (App.192) If questions or problems arose when a welder was on the jobsite, the welders were instructed to call Bumpous because, as he testified, he goes out and can “fix” the problem. (App.192-193) The instructions Bumpous provided extended beyond his direction of the welders to the jobsite. If additional supplies are needed to complete a job by a welder, that welder is not responsible for obtaining the additional needed supplies. Instead the welder is instructed to call Bumpous. Bumpous decides who to call (usually another welder) to bring supplies to the jobsite including instructing that welder where to get supplies, what supplies to bring and where to deliver the supplies. (App.149-150, 192,202) Bumpous instructs welders not to drink alcohol when they are “on call.” (App.158, 194) Bumpous instructed welders on the sequence of jobs to be performed. (App.196) The evidence therefore, demonstrated Bumpous was in control of where and when the welders worked, what job is given priority, whether they were to perform delivery rather than welding services, and where and when to deliver supplies to jobsite. Accordingly, the ALJ erred in her analysis of this factor. See Baker, 860 F. Supp. at 771 (“A laborer on a construction site, who is told where and when to dig, does not exhibit characteristics of an independent contractor if the company does not actually tell him how to use a shovel” and “one would not say a secretary has independence consistent

with independent contractor status simply because [the] supervisor does not actually tell him how to type.”). The instructions factor supports employee status, and the ALJ’s decision is not in accordance with the law. N.D.C.C. § 28-32-46.

Factor 2 - Training.

[39] The ALJ erred in concluding this factor weighed in favor of independent contractor status. (App.92) “Training a person by requiring an experienced employee to work with the person, by corresponding with the person, by requiring the person to attend meetings, or by using other methods, indicates that the person or person for whom the services are performed want the services performed in a particular method or manner.” N.D. Admin. R. 92-01-92-49(1)(b)(2). For the most part, the welders that were hired by Larry’s were experienced welders and thus little or no training would be involved. Thus, this factor in reality is not applicable. However, the evidence that was presented on this factor reflects more of an employee status than independent contractor status as found by the ALJ.

[40] Bumpous admitted that he taught Mike Cecil, one of the claimed independent contractors, how to weld. (Ex. 47; App.193,196) When Snook again began working with Larry’s on October 26, 2010 he rode around in Bumpous’ truck and he showed Snook where the drilling rigs were located where he would be working. (App.200) Bumpous showed Snook how to weld/fix certain flanges that were used on the drilling rig so they could be reused. (App.124,200) The ALJ’s failure to properly consider all of these undisputed facts in this factor demonstrates she erred in determining it weighed in favor of independent contractor status. N.D.C.C. § 28-32-46.

Factor 7 - Set Hours of Work.

[41] “The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.” N.D. Admin. R. 92-01-02-49(1)(b)(7). The ALJ concluded this factor weighed in favor of Snook and the welders being independent contractors, but focused only on the fact that the work was performed when drilling rigs called for work. (App.93) However, the ALJ failed to properly consider all of the undisputed evidence in applying this factor, and therefore her conclusion of law is not supported by the evidence and not in accordance with the law.

[42] As fully outlined above, the undisputed evidence demonstrated that the services offered by Larry’s was 24/7. (App.139,194) Larry’s determined who was sent to what jobsite to perform the work. By doing so, Larry’s solely set the hours of work to be performed by the individual welders, including defining the set period of time, be it two weeks, six months, or a few days. (App.149,192) Furthermore, it was not the individual welder that set the schedule that Larry’s performs work 24/7; it was Bumpous that set the business up in that manner so as to establish the hours of that services. Snook described this as being at the “beck and call” of Bumpous (App.124,202) If the welder did not agree to do the work that Bumpous called them to do, the welder was not called again. (App.194) The undisputed facts reflect that the control over the number of hours worked by the welders was directly in the hands of Bumpous by his assignment of jobs to a specific welder. See also Argument as to Factor 3, supra. Maintaining control over the schedule of the workers is evidence of control that weighs in favor of an employee status. See Stover Delivery Systems, Inc. v. Division of Employment Security, 11 S.W.3d 685, 691 (Mo. Ct. App. 1999)(noting retention of control over scheduling weighs in favor of

employee status). The ALJ's conclusion on this factor is not in accordance with the law. N.D.C.C. § 28-32-46.

Factor 8 – Full Time Required.

[43] “If the person must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the person is able to do other gainful work.” N.D. Admin. R. 92-01-02-11(1)(b)(8). In concluding this factor weighed in favor of independent contractor status, the focus solely on the fact that the nature of the work was sporadic. (App.93) However, the rule clearly focuses on “the person” and whether that “person must devote substantially full time to the business of the person or persons for whom the services are performed” no on the nature of the work involved. Id.

[44] Bumpous admitted all of his welders are “on call” at all times of the day and all days of the week. (App.158) Bumpous admitted he promises welders that if they are good at what they do and they “hang out” waiting for work from him, “I’ll call you” for work to be done. Id. Bumpous admitted that if he calls a welder and they say “I don’t want to go,” he doesn’t call that welder back for additional work. (App.163,194) In order to continue to work for Larry’s, the welders have to commit to (1) being on call 24/7; and (2) take the jobs when Bumpous calls them to do the work. There is no opportunity to do other work as Larry’s had a priority on their time. Because Larry’s exercised the degree of control over the welders that required them to devote substantially all of their time to him in order to receive work, this factor weighed in favor of employee status under the administrative rule. The ALJ erred in concluding otherwise.

See Stover, 11 S.W.2d 685 at 693 (noting if schedules are restricted facts impliedly indicate full time commitment is required and supports employee status).

Factor 9 - Doing work on the premises of the person or person for whom the services are performed.

[45] The ALJ concluded that this factor weighed in favor of independent contractor status because there was no work “premises” based on the nature of the work involved. (App.93) However, the nature of the work performed by Larry’s was that of a mobile business with work being performed on a particular jobsite. (App.194) As noted in the administrative rule: “The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such service on the employer’s premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to . . . work at specific places as required.” N.D. Admin. R. 92-01-02-49(1)(b)(9). The exclusive control over which places the work was to be performed was determined by Larry’s. Only Larry’s could assign welders to a specific rig once a job came in. Thus, when considering this factor in light of the overall control to be exercised, it clearly reflects an employee status. The ALJ erred in concluding otherwise. N.D.C.C. § 28-32-46.

Factor 10 - Order or Sequence Set.

[46] “If the person must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the person is not free to follow the person’s own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.” N.D. Admin. R. 92-01-02-49(1)(b)(10). The ALJ concluded that this factor weighed in

favor of independent contractor status, focusing exclusively on the work to be done at the jobsite. (App.94) However, the ALJ failed to look at the other undisputed evidence of who set the order of sequence of the jobs to be performed, and therefore erred in her application of the undisputed facts to the law. N.D.C.C. § 28-32-46.

[47] The evidence was undisputed that if there are two short jobs to do on a particular day, and Bumpous called a welder to do those jobs, he would direct which job to perform first. (App.194) Furthermore, a welder cannot go out to work without Bumpous directing them under Larry's tickets. See Argument as to Factors (7) and (8) supra. In a true independent contractor relationship there would be no need to direct the contractor as to what job to do next. Thus, this factor points to an employer-employee relationship, and the ALJ erred as a matter of law in concluding otherwise. N.D.C.C. § 28-32-46.

Factor 11 - Oral and Written Reports.

[48] “A requirement that the person submit regular or written reports to the person or persons for whom the services are performed indicates control.” N.D. Admin. R. 92-01-02-49(1)(b)(11). The ALJ concluded that this factor weighed in favor of independent contractor status as the reports only provided hours that were worked, a description of what was done, and its purpose was to provide for timely payment. (App.94) The ALJ's analysis is once again flawed.

[49] The ALJ ignored undisputed facts in evidence that the welders were required to document work performed on invoices, supplied by Larry's. (App.130,134,135,136,137; C.R. 537-1226). It is undisputed that the services were to be reported on Larry's “tickets.” These reports were required to be turned in at the

completion of the each job assignment. (App.114,194) In addition, welders were required to report their “availability” either by “phone/person” for the next assignment. (App.114,120,194) The ALJ erred in failing to consider these undisputed facts, and thus her conclusion that this factor weighs in favor of independent contractor status if not in accordance with application of the facts to the law. N.D.C.C. § 28-32-46.

Factor 12 - Payment by the Hour, Week, Month

[50] “Payment by the hour, week, or month indicates an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.” N.D. Admin. R. 92-01-02-49(1)(b)(12). On this factor, the ALJ made no specific finding., stating: “On its face, this factor weighs in favor of Mr. Snook and other similarly situated individuals as being employees because they were paid by the hour. However, the hourly rate was necessary because the actual scope of the work was not known and often required so many changes that setting a lump sum was impracticable.” (App.94) However, “[p]ayment on an hourly rate is a strong indicator of employee status.” Rush v. Employers Nat. Ins. Co., 598 N.W.2d 603, 606 (La. Ct. App. 1992). See also Louisiana Workers’ Compensation Corp. v. Genie Industries, 801 So.2d 1161 (La. Ct. App. 2001)(noting typically payment of hourly wages is more indicative of employee status; whereas payment on a per job basis is indicative of independent contractor status).

[51] The ALJ also failed to consider other undisputed evidence relevant on this factor, including there no negotiations took place as to how much to charge for the services nor were bids or quotes solicited from the welders. (App.194) All of those

matters were determined solely by Larry's. (App.194) Bumpous also allowed advances against pay. (App.131,133,138) By failing to adequately address this evidence, the ALJ erred in her conclusion as to this factor, and her decision is not in accordance with the law. N.D.C.C. § 28-32-46.

Factor 14 - Furnishing Tools and Materials

[52] “If the person or persons for whom the services are performed furnished significant tools, materials and other equipment, it is an indication an employer-employee relationship exists.” N.D. Admin. R. 92-01-02-49(1)(b)(14). The ALJ concluded this factor weighed in favor of independent contractor status, concluding in part that “metal was provided at a mark-up by Larry's, but it was not provided to the welder, but to the rig being repair.” (App.94) This conclusion is in error. Bumpous clearly and unequivocally testified that he makes the call and supplies the iron for the jobs performed by the welders. (App.192) As to this factor, in terms of materials it was Bumpous, not the individual welders, that purchased the supplies for the job. (App.149,192) Bumpous was responsible to identify the additional supplies needed for the job, to arrange for transportation to the jobsite for these supplies, and paid the individuals an hourly rate for bringing the iron to the jobsite. (App.149,192) Thus, the ALJ misconstrued the evidence in concluding that Larry's supplied the materials to the rig – he specifically acknowledged that the materials, such as iron, would be supplied by him to the welder he had assigned to complete a job. Under the administrative rule, this is indicative of employee status, and the ALJ erred in her application of the law to the facts. Therefore her conclusion, on this factor is not in accordance with the law. N.D.C.C. § 28-32-46.

[53] The ALJ correctly concluded that Factor (4) services rendered personally, and Factor (5), hiring, supervising and paying assistants weighed in favor of employee status. (App.92-93) However, when properly analyzed and the law properly applied the non-weighed factors, the following additional factors also weigh favor of employee status: Factor (1) instructions; Factor (7) set hours of work; Factor (8) full time required; Factor (10) Order or sequence set; Factor (11) Oral and written reports; and Factor (12) payment by hour, week, month weighing in favor of employee status. That leaves only Factor (13) payment of business or travelling expenses, that weighs in favor of independent contractor status, with Factors (9) doing work on the premises and (14) furnishing of tools and materials being the only non-weighed factors that arguably weigh in favor of neither or slightly in favor of employee status.

[54] When the law is properly applied to the undisputed facts, and all relevant undisputed facts are considered, the vast majority of the factors under N.D. Admin. R. 92-01-02-49(1)(b) weigh in favor of employee status, not independent contractor status as the ALJ concluded. When the findings of fact are not supported by the evidence, the conclusions of law are not supported by the findings of fact, and the findings of fact do not sufficiently address the evidence presented, the ALJ's decision must be reversed. N.D.C.C. § 28-32-46.

CONCLUSION

[55] When the underlying facts do not meet the legal standard of being an independent contractor, that conclusion is a question of law which this Court may fully review on appeal. Bishop, 2012 ND 217 ¶ 6. As outlined above, the ALJ's decision was not in accordance with the law and the District Court's decision affirming that decision

should be reversed and WSI's decision finding Larry's to be an employer of Snook and similarly situated workers affirmed. See Burkhardt v. State, 78 ND 818, 53 N.W.2d 394, 400-401 (N.D. 1952)(reversing determination that individual was an independent contractor where appellate court's view of the facts permitted no conclusion other than worker is an employee).

Dated this 2nd day of December, 2013.

/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
janderson@nilleslaw.com

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 7,980.

Dated this 2nd day of December, 2013.

/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

- a. The C4 form or other correspondence requesting benefits signed by the employee;
 - b. Wage verification as requested by the organization, if disability benefits are claimed; and
 - c. Appropriate records from the provider.
4. The elements of filing for payment of a medical bill are satisfied when a bill review is completed and after the organization has received:
 - a. A bill from the provider or employee; and
 - b. Appropriate records from the provider or employee.
 5. If the organization requests additional information from the employee needed to process a reapplication and the employee does not provide the information, elements of filing are not satisfied until the employee provides the requested information.
 6. The organization may waive elements of filing in conjunction with programs established for the expedited processing of selected claims.

History: Effective January 1, 1994; amended effective January 1, 1996; April 1, 1997; February 1, 1998; January 1, 2000; July 1, 2006.

General Authority: NDCC 65-02-08

Law Implemented: NDCC 65-02-08

92-01-02-49. Determination of employment.

1. Any service performed for another for remuneration under any agreement or contract of hire express or implied is presumed to be employment unless it is shown that the individual performing the service is an independent contractor as determined by the "common law" test.
 - a. An employment relationship exists when the person for whom services are performed has the right to control and direct the individual person who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is a significant factor indicating that the person possessing that right is an employer. The right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, establish an employment relationship. Other factors indicating an employer-employee relationship, although

not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the person who performs the services. The fact that the contract must be performed at a specific location such as building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the industry. If a person is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the person will likely be an independent contractor. A person performing services as an independent contractor is not as to such services an employee. Persons such as physicians, lawyers, dentists, veterinarians, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

- b. In determining whether a person is an independent contractor or an employee under the "common law" test, the following twenty factors are to be considered:
- (1) Instructions. A person who is required to comply with other persons' instructions about when, where, and how the person is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.
 - (2) Training. Training a person by requiring an experienced employee to work with the person, by corresponding with the person, by requiring the person to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
 - (3) Integration. Integration of the person's services into the business operations generally shows that the person is subject to direction and control. 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.
 - (4) Services rendered personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

- (5) Hiring, supervising, and paying assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the persons on the job. However, 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.
- (6) Continuing relationship. A continuing relationship between the person and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist when work is performed at frequently recurring although irregular intervals.
- (7) Set hours of work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
- (8) Full time required. If the person must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the person is able to do other gainful work. An independent contractor, on the other hand, is free to work when and for whom the person chooses.
- (9) Doing work on the premises of the person or persons for whom the services are performed. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the person, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. This fact by itself does not mean that the person is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such service on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.
- (10) Order or sequence set. If a person must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the person is not free to follow the person's own pattern of work

but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

- (11) Oral or written reports. A requirement that the person submit regular or written reports to the person or persons for whom the services are performed indicates control. By contract, however, parties can agree that services are to be performed by certain dates and the persons performing those services can be required to report as to the status of the services being performed so that the person for whom the services are being performed can coordinate other contracts that person may have which are required in the successful total completion of a particular project.
- (12) Payment by hour, week, month. Payment by the hour, week, or month indicates an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.
- (13) Payment of business or traveling expenses, or both. If the person or persons for whom the services are performed ordinarily pay the person's business or traveling expenses, or both, the person is an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the person's business activities.
- (14) Furnishing of tools and materials. If the person or persons for whom the services are performed furnished significant tools, materials, and other equipment, it is an indication an employer-employee relationship exists.
- (15) Significant investment. If the person invests in facilities that are used by the person in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), or if the person invests in other business expenses (such as equipment and supplies, vehicles, liability insurance, advertising, or other promotion of services), that factor tends to indicate that the person is an independent contractor. Lack of investment in expenses relative to the performance of services indicates dependence on the person or persons

for whom the services are performed for such facilities and indicates the existence of an employer-employee relationship.

- (16) Realization of profit or loss. A person who may realize a profit or suffer a loss as a result of the person's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the person who cannot is an employee. If the person is subject to a risk of economic loss due to significant investment or a bona fide liability for expenses, that indicates that the person is an independent contractor. The risk that a person will not receive payment for services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support a finding of an independent contractor.
- (17) Working for more than one firm at a time. If a person performs services under multiple contracts for unrelated persons or firms at the same time, that generally indicates that the person is an independent contractor. A person who performs services for more than one person may be an employee for each of the persons, especially when such persons are part of the same service arrangement.
- (18) Making service available to general public. If a person makes the person's services available to the general public on a regular and consistent basis that indicates an independent contractor relationship.
- (19) Right to dismissal. The right to dismiss a person indicates that the person is an employee and the person possessing the right is an employer. An employer exercises control through the right of dismissal, which causes the person to obey the employer's instruction. An independent contractor, on the other hand, cannot be fired without liability for breach of contract so long as the independent contractor produces a result that meets the contract specifications.
- (20) Right to terminate. If either person has the right to end the relationship with the person for whom the services are performed at any time the person wishes without incurring liability, that indicates an employer-employee relationship. If a contract can be terminated by the mutual agreement of the parties before its completion or by one of the parties to the contract before its completion to prevent a further breach of contract or to minimize damages, that indicates an independent contractor relationship.

2. The factors described in paragraphs 3, 6, 15, 16, 17, 18, 19, and 20 of subdivision b of subsection 1 must be given more weight in determining whether an employer-employee relationship exists.

History: Effective January 1, 1994; amended effective January 1, 2007; April 1, 2012.

General Authority: NDCC 65-02-08

Law Implemented: NDCC 65-01-03

92-01-02-49.1. Determination of employment status. A person may apply to the organization for a determination of whether that person is an employer as that term is defined by North Dakota Century Code title 65. A person claiming not to be an employer under the Workers' Compensation Act has the burden of proving by a preponderance of the evidence that the person is not an employer. The request for a determination must be in writing and must be supported by evidence of the employment status of the requesting party. If the party is asserting an independent contractor relationship, the party must submit copies of written contracts, if any, establishing the relationship. The organization may request, and the party shall provide promptly, any additional relevant information bearing on the issue of the employer status of the party. After review of the evidence, the organization shall issue its decision determining the employment status of the requesting party under North Dakota Century Code title 65. This determination is effective for no more than one year from the date of the decision and may be reconsidered or revoked at any time by the organization. The requesting party has a continuing obligation to notify the organization of any material change in that party's business relationships, and a failure to notify the organization of a material change shall nullify the organization's certification as of the date of the change.

History: Effective January 1, 1996; amended effective May 1, 1998.

General Authority: NDCC 65-02-08

Law Implemented: NDCC 65-09-01

92-01-02-50. Other states' coverage.

1. The terms used in this section have the same meaning as in North Dakota Century Code title 65 and in North Dakota Administrative Code title 92, except:
 - a. "Covered employment" means hazardous employment principally localized in this state which involves incidental operations in another state. The term "covered employment" does not include employment in which the employer is required by the laws of that other state to purchase workers' compensation coverage in that other state.
 - b. "Employee" means any North Dakota employee as that term is defined in North Dakota Century Code section 65-01-02 who engages in covered employment and who is eligible to file for workers' compensation benefits in another state if the employee

4/2012

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>State of North Dakota by and through Workforce Safety and Insurance,</p> <p style="text-align:right">Appellant,</p> <p style="text-align:center">vs.</p> <p>Larry’s On Site Welding,</p> <p style="text-align:right">Appellee,</p> <p style="text-align:center">and</p> <p>William Snook,</p> <p style="text-align:right">Respondent.</p>	<p style="text-align:center">Supreme Court Case No.: 20130292</p> <p style="text-align:center">AFFIDAVIT OF SERVICE</p>
---	--

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

Sarah D. Klava, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

- 1. **Brief of Appellant North Dakota Workforce Safety and Insurance (with Attached North Dakota Administrative Rule § 92-01-02-49);**
- 2. **Appendix of Appellant North Dakota Workforce Safety and Insurance (Table of Contents and Specification of Errors Only Pg. 209-210).**

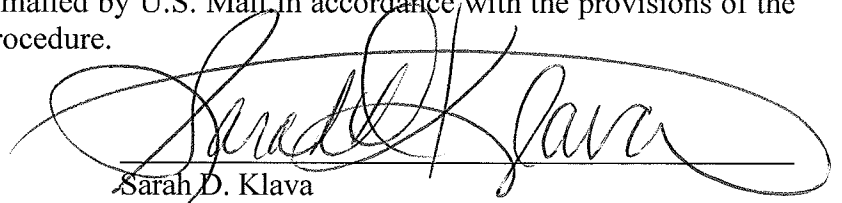
on the following person by electronic mail only on December 2, 2013:

Steven Little **littlelaw@btinet.net**
Little Law Firm
2718 Gateway Ave. Ste. 302
Bismarck, ND 58503

and on the following by U.S. Mail only on December 2, 2013:

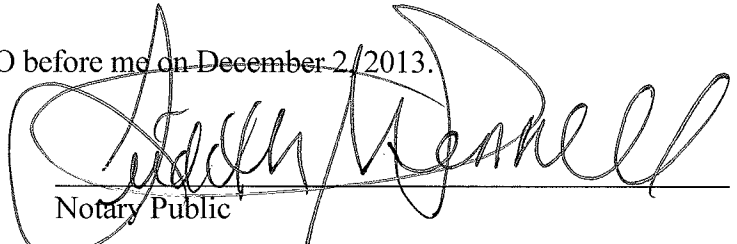
William Snook
837 Crooked Creek Road
Brilliant, AL 35548

To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Appellate Procedure.


Sarah D. Klava

SUBSCRIBED AND SWORN TO before me on December 2, 2013.

SEALED
JUDITH M. FENNELL
Notary Public
State of North Dakota
My Commission Expires June 2, 2017


Notary Public

cc.: Susan Schafer, ND WSI
Employer No.: 1295287
Nilles File No.: 09300.173