

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.
	)	

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

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**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

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## LAW AND ARGUMENT

### **A. STANDARD OF REVIEW.**

[1] Contrary to Appellee's assertions, WSI is not asking this Court to reweigh the evidence. Rather, WSI simply asks the Court to apply the standard of review it has articulated when reviewing a decision involving the question of whether a worker is an employee or independent contractor. In those cases, this Court has stated that "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." Matter of BKU Enterprises, 513 N.W.2d 382, 387 (N.D. 1994). As to questions of law, this Court has stated they are fully reviewable on appeal, and no deference is given the ALJ's legal conclusions. Bishop v. North Dakota Workforce Safety and Insurance, 2012 ND 217, 823 N.W.2d 257; North Dakota Workforce Safety and Insurance v. Auck, 2010 ND 126, 785 N.W.2d 186.

[2] The facts of how the relationship operated between Snook and other welders and Larry Bumpous/Larry's Onsite Welding were essentially undisputed. WSI cited in its Brief the testimony of Larry Bumpous, owner of Larry's Onsite Welding as to admissions made about how that relationship worked. 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. This is the standard by which this Court must review the ALJ's decision.

### **B. APPELLEE'S ARGUMENTS RELATING TO "INDUSTRY PRACTICE" ARE CONTRARY TO THE FACTS AND LAW.**

[3] Appellee argues that the ALJ's decision should be affirmed because it was industry practice to operate in the manner that Larry Bumpous/Larry's Onsite Welding

did and treat welders as independent contractors. This argument is without merit. If others are operating in the manner Larry's Onsite Welding did, they are not in compliance with the law. Furthermore, the evidence demonstrated that this was clearly not the case as to Snook and thus it certainly was not "uncontroverted" that one must treat welders as independent contractors or you would not be able to hire them. The evidence confirmed that even though Snook had his own welding equipment (App.167-169), he had never before been treated as an independent contractor, instead receiving W-2's for pay received in 2009 and 2010. (App. 167,172-177). Instead, only Larry Bumpous/Larry's Onsite Welding paid Snook as an independent contractor in 2010. (App. 177).

[4] Appellee also argues that the parties intent is a factor to be considered and that WSI ignored this intent, citing Barsness v. General Diesel & Equipment Co., 422 N.W.2d 819 (N.D. 1988). In fact, Barsness did not deal with a decision on independent contractor vs. employee status, but rather interpretation of an indemnity agreement/contract between parties where intent of the parties entering into the contract was an issue the Court looked at. This Court has clearly stated that in reviewing decisions of administrative agencies on the issue of whether an individual that receives remuneration for services performed, what the parties call or label themselves is of "very little importance" versus how the relationship operated. See Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 184 (N.D. 1990)(citing 1C Larson, Workmen's Compensation Law, § 4630 (1990). WSI reviewed the factors outlined in N.D. Admin. R. § 92-01-02-49, and correctly applied the law when it analyzed the facts and determined the relationship was one of employer-employee. The ALJ erred in

concluding, based on the undisputed evidence and admissions of Bumpous/Larry's Onsite Welding, that Snook and similarly situated workers met the legal standard of an independent contractor based on those facts, and the ALJ's decision therefore should be reversed.

**C. APPELLEE'S ARGUMENTS FOR CONCLUDING SNOOK AND OTHER WELDERS WERE INDEPENDENT CONTRACTORS ARE NOT SUPPORTED BY THE LAW.**

[5] Appellee argues that if Snook and the other welders were employees, "they would have had regular hours of employment." Such is not the case, N.D. Admin. R. § 92-01-02-49(1)(b)(7) provides that an individual is an employee if the work for whom the person provides services is set by that person. There is no need that the individual have "regular hours of employment," rather the focus is on whether the person for whom services are performed sets the hours of work. In this case, as set out in WSI's main brief, it was Larry Bumpous that set the hours of work for welders, that being they must be available 24 hours a day, 7 days a week.

[6] Appellee also contends employees have to be paid even during their idle time. Again, this is not a factor and there is no authority for such statement. Employees are not paid when they are not performing services. Rather, employees are generally paid by the hour, week or month and independent contractors by the job or straight commission. N.D. Admin. R. § 92-01-02-49(1)(b)(12). Snook and the other welders were paid by the hour for work performed, including non-welding work, at a rate set by Bumpous.

[7] While Appellee correctly cites that there must have been a continuing relationship for there to be an employee-employer relationship, that factor is met when "work is performed at frequently recurring although irregular intervals." N.D. Admin. R.

§ 92-01-02-49(1)(b)(6). As outlined in WSI's Brief, this factor supports an employer-employee relationship based on the undisputed facts as to Snook.

[8] Appellee argues that the rate of pay received is a factor. This in fact is not a factor under N.D. Admin. R. § 92-01-02-49, and relates back to the unfounded argument relating to "industry practice" as outlined above.

[9] Appellee also contends that these workers would have been supervised in their work if they were employees. "Supervision" is not a factor under N.D. Admin. R. § 92-01-02-49. However, simply because Bumpous did not explicitly tell the worker how to use the welding equipment or watch over every aspect of the work performed, does not mean that the worker is an independent contractor. See Baker v. Barnard Construction Co., Inc., 806 F. Supp. 766, 771 (D.N.M. 1994).

[10] Appellee contends that Snook and the other welders would not have been able to work for others if they were employees. Again, this is not the case. Certainly, individuals can have more than one job and more than one employer. However, N.D. Admin. R. § 92-01-02-49(1)(b)(8) a factor is whether a person must devote "substantially full time" to the business, which was met in this case because Snook and the other welders were restricted based on impliedly requiring a full time commitment. See Stover Delivery Systems, Inc. v. Division of Employment Security, 11 S.W.3d 685 (Mo. Ct. App. 1999).

[11] Appellee argues that if Snook and the welders were employees they would not have realized a profit if equipment (sic) performed satisfactorily or loss if equipment broke down and they would not have paid their own travel expenses. While Appellee is correct that independent contractors have the risk of a profit or loss based on the job

performed, that was not what occurred here, as the undisputed evidence from Bumpous was that he corrected any work that was unsatisfactory and did not charge that back to the welders. (App. 160-161, 191, 195) Here there was no “bidding” or negotiation process for the jobs performed; charges were set solely by Bumpous. (App. 163) Also, even though the Snook and the welders had their own equipment, they did not supply he materials for the jobs to be performed. (App. 149,192) These are indications of employee status. See Baker, 860 F. Supp. at 773. Also, Snook utilized his own equipment for Larry’s as well as other companies he worked for, and was uniformly treated as an employee until he went to work for Larry’s. (App. 172-178) Appellee’s arguments, therefore, should be rejected.

### **CONCLUSION**

[12] 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. 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.

DATED this 7<sup>th</sup> day of January, 2014.

/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 1,363.

Dated this 7<sup>th</sup> day of January, 2014.

/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

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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. Reply Brief of Appellant North Dakota Workforce Safety and Insurance.**

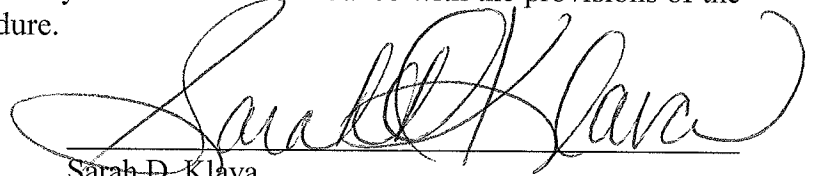
on the following person by electronic mail only on January 7, 2014:

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

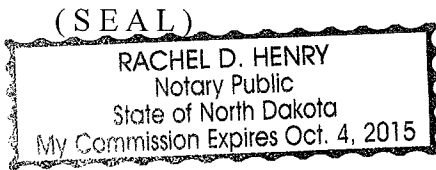
and on the following by U.S. Mail only on January 7, 2014:

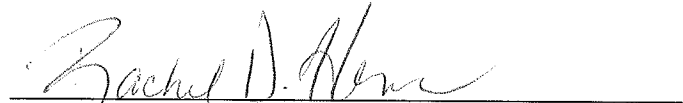
**William Snook**  
**837 Crooked Creek Road**  
**Brilliant, AL 35548**

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 January 7, 2014.



  
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Notary Public

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