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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

Kenneth L. Risovi, Appellant, vs. Job Service North Dakota, Appellee.	Supreme Court No.: 20130302 District Court No.: 52-2013-CV-00015 **APPELLANT'S BRIEF**

THE APPELLANT, KENNETH L. RISOVI

APPEALS FROM THE

ORDER AND JUDGMENT

IN THE COUNTY OF WELLS

STATE OF NORTH DAKOTA

BY THE HONORABLE JAMES D. HOVEY

Date: December 6, 2013

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] This case is brought to the Court from Wells County, and the issue presented for review regards the definition and application of a fraudulent claim for unemployment compensation. Appellant Kenneth L. Risovi is disputing that he committed fraud in obtaining unemployment benefits while reporting his wages as $260 per week for the month of January 2012, and also receiving unemployment benefits at the time until the end of the month of January 2012. Also at issue is whether the state's service of its Respondent's Brief was defective, since the Certificate of Service had a caption of "North Central Transportation, Inc. v. Job Service North Dakota, and Nicodemus A. Wald" with the case no. "30-2012-CV-00479" in Burleigh County vice Wells County, as filed with the lower court. Appendix at 12.

STATEMENT OF THE CASE

[¶2] Appellant Risovi appeals the decision of the lower court, which affirmed the decision of Job Service North Dakota ("Job Service") regarding unemployment compensation benefits, which he is entitled to since he did not commit an act of fraud. An administrative hearing in this matter was conducted on January 8, 2013. CR at 78. The Petitioner appeared by phone and a transcript of the hearing is part of the Certificate of Record (CR) at pages 79 – 104. The appeals referee affirmed the decision of Job Service. CR at 143-146, App. at 15-18. Petitioner filed an appeal to the district court for judicial review of the matter. App. at 19. The district court affirmed the decision of Job Service. App. at 3-9, 10.

STATEMENT OF THE FACTS

[¶3] Risovi is a 56-year-old truck driver, who lives in Harvey, ND. CR at 2. During the month of January 2012, he was working for Milo Trucking Company ("Milo"), owned by Dean Tracy, in Jamestown, ND. CR at 1. Risovi agreed to work for Milo, while he was also

collecting unemployment benefits at the time, because he had an agreement with Tracy that his weekly salary would be $260 for the month of January 2012. CR at 146. However, in a "Crossmatch Comparison", dated 7/15/12, to check on his wages, Job Service asked Milo what Risovi made for the month of January 2012, and the employer responded that Risovi made $999.99 per week or in excess of $4,000 for the month. CR at 2. Compared to his actual monthly employee pay stub, dated 2/13/12, Risovi was paid $10,320.92 for the period 1/14/12 to 2/13/12, of which $6,100.00 was itemized as a "payroll advance". CR at 3. The difference between his actual pay and the advance pay is $4,220.92. There is no record of any pay for the period 1/1/12 to 1/14/12. Risovi reported he worked for $260 per week in January 2012, per an agreement he had with his employer. CR at 4. His paycheck does not show what he earned for each of the last two weeks in January. His pay stub does not reflect an hourly wage. CR at 3.

[¶4] Job Service determined that Risovi was making a fraudulent claim for unemployment benefits because he was receiving $442 per week in January 2012 and he reported $260 per week in wages from Milo, which is 58.8%, and meets the 60% criteria for receiving benefits under the rules. CR at 144. Compounding the reported wage issue is the fact that Risovi was reportedly working an excessive amount of hours for the month of January 2012, to wit: 94 hours for the week ending January 7; 100.5 hours for the week ending January 14; 72.5 hours for the week ending January 21; and 84.5 hours for the week ending January 28, 2012. Id. All totaled, Risovi worked 351.5 hrs. in January. If he only received $260 per week, that amount to about $1.35 per hour. Job Service questioned the reasonableness of that. CR at 91, 102.

[¶5] In its Decision from a telephonic hearing with Risovi on January 8, 2013, Job Service Appeals Referee, Dave Schnase, found: "The claimant did not fail to report the proper earnings due to a lack of knowledge. On the contrary, he was fully aware of the reporting requirements.

His failure to report the earnings was an intentional act to receive benefits to which he was not entitled to receive in order to meet his financial obligations." CR at 146, App. at 18. Consequently, Risovi was disqualified from receiving unemployment insurance benefits from November 4, 2012 to October 26, 2013, a one year sanction, and he must pay back the overpayments to Job Service. Id.

[¶6] In a 1/18/13 Notice of Decision, Job Service stated, "This decision will become final unless a petition requesting a Judge to review the decision of Job Service is filed in District Court […] within thirty [30] days from the date of mailing of this decision." CR at 187. Risovi filed a Petition for Review of Job Service Decision on 2/13/13 in Wells County District Court. CR at 190, App. at 19. The district court affirmed the decision of Job Service. App. at 3, 10.

STANDARD OF REVIEW

[¶7] This Court's standard of review for administrative cases appealed from a district court is well established. In ***Synder v. North Dakota Workers Comp. Bureau***, 2001 ND 38 ¶7, 622 N.W.2d 712, the Court stated:

> *On appeal, we review the decision of the administrative agency, rather than that of the district court, although the district court's analysis is entitled to respect.* ***Wanstrom v. North Dakota Workers Comp. Bureau***, 2000 ND 17, ¶ 5 , 604 N.W.2d 860. "The interpretation of a statute is a question of law, which is fully reviewable by this court." Id. We recently reiterated the scope of our review: On appeal, we review the decision of the Workers Compensation Bureau. ***Siewert v. North Dakota Workers Comp. Bureau***, 2000 ND 33, ¶ 18, 606 N.W.2d 501. Under N.D.C.C. §§ 28-32-19 and 28-32-21, we affirm the Bureau's decision unless its findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, its decision is not in accordance with the law or violates the claimant's constitutional rights, or its rules or procedure deprived the claimant of a fair hearing. ***Negaard-Cooley v. North Dakota Workers Comp. Bureau***, 2000 ND 122, ¶ 7, 611 N.W.2d 898. We exercise restraint in determining whether the Bureau's findings of fact are supported by a preponderance of the evidence and do not make independent findings or substitute our judgment for that of the Bureau, but determine only whether a reasoning mind reasonably could

> have determined the findings were proven by the weight of the evidence from the entire record. [Citations omitted.]

Id., emphasis added.

[¶8] Further, the Court stated, "We give deference to the Department's sound findings, but review questions of law de novo. ***Bjerklie v. Workforce Safety and Ins.***, 2005 ND 178, ¶ 9 , 704 N.W.2d 818.

ARGUMENT

I. THE LOWER COURT MISAPPLIED THE LAW BY RULING THAT THE APPELLANT MADE A FRAUDULENT CLAIM IN HIS UNEMPLOYMENT COMPENSATION BENEFIT DURING THE MONTH OF JANUARY 2012.

[¶9] The facts regarding what Risovi earned during the month of January 2012 are somewhat convoluted. But the law should be made in deference to him, not Job Service or the employer. ***Willits v. Job Service of North Dakota***, 2011 ND 135, ¶7, 799 N.W.2d 374 (wherein the Court found: "because unemployment compensation laws are remedial legislation, the balance should be struck in favor of the employee.")

[¶10] The law regarding fraudulent claims is found under NDCC § 52-06-02(8), which states in pertinent part:

> **52-06-02. Disqualification for benefits.**
>
> An individual is disqualified for benefits:
>
> [. . .]
>
> 8. For the week in which the individual has filed an otherwise valid claim for benefits and:
>
> a. For one year from the date on which a determination is made that such individual has made a false statement for the purposes of obtaining benefits to which the individual was not lawfully entitled. Provided, however, that *this disqualification does not apply to cases in which it appears to the satisfaction of job service North Dakota that the false statement was made by reason of a mistake or misunderstanding of law or of facts without fraudulent intent*[.]

Id. (emphasis added).

[¶11] This Court addressed the interpretation of fraud in a Job Service claim in ***Snyder v. North Dakota Workers Comp. Bureau***, 2001 ND 38, 622 N.W.2d 712, wherein there was a "willful" false statement made in connection to Snyder's claim for unemployment benefits, which he admitted to. In this case, there is no proof that Risovi made a willful or intentionally false statement.

[¶12] That's the issue here. Did Risovi knowingly, willfully and intentionally make a false statement to defraud Job Service? The facts bear out that he did not. At worst, he made a mistake by agreeing to work for $260 a week with an employer, who, at best, made false reports to Job Service. Milo, the trucking company Risovi worked for, reported that he worked 351.5 hours in January 2012, and reported that he was paid $999.99 per week for four weeks in that month, while Risovi's paycheck clearly shows that he was not paid for the first two weeks of January, and was paid $4,220.92 for 1/14/12 to 2/13/12. CR at 3, 4, 144, App. at 16.

[¶13] The advance payment of $6,100 in his 2/13/12 paycheck cannot be for work performed prior to 1/14/12, because that would not fit under the definition of "payroll advance." The common language definition of an advance is for pay for "future" performance, not "past" performance. If it was pay for work performed before 1/14/12, that should have been reflected in a previous paycheck. Risovi explained that he needed the advance to cover expenses for his girlfriend, who moved back from Arizona. CR at 89. In his hearing before the Job Service Appeals Referee, he said, "I asked if I could **borrow** some money to get her back here and he [Tracy, his employer] wrote me a personal check for that[.]" Id. In effect, the advance was a loan from his employer.

[¶14] Hence, his paycheck on 2/13/12 for $10,320.92 was actually for $4,220.92, because of the advance of $6,100.00 he took to help his girlfriend pay her for moving expenses. The "payroll advance" is clearly itemized as such on his paycheck. CR at 3. It was a loan, and cannot be found in any way to be payment for work done before 1/14/12, despite assertions to the contrary. Again, under ***Willits***, "the balance should be struck in favor of the employee."

[¶15] His paycheck is consistent with Risovi's assertion that he was only paid $260.00 per week in January 2012. The $4,220.92 balance of his pay stub does not show what exactly he made for each of the weeks covering the pay period of 1/14/12 to 2/13/12. CR at 3. It would be pure conjecture on the part of Job Service to determine that Risovi did not accurately report his earnings, since his paycheck is the best evidence of his actual pay. The "crossmatch comparison" that Job Service relies on is not accurate. CR at 4. It reflects that Risovi earned $999.99 per each of the four weeks in January 2012, when, in fact, he didn't get paid for the period of 1/1/12 to 1/13/12, which is reflect on his pay stub. CR at 3.

[¶16] There is no reliable evidence that Risovi committed fraud in his reporting. The facts do not support that conclusion of law.

[¶17] In a decision made by a retirement board, the definition of fraud was addressed as a "deliberate intent to deceive" and an element of "knowingly" failing to report compensation was not found, therein it determined:

> Because the Board did not find that Weyerhaeuser had knowingly failed to report compensation for the intervening respondents and concedes that the Board did not find Weyerhaeuser had committed fraud as that term is commonly used, we need not decide whether a knowing failure to report compensation would qualify as "fraud" under 20 C.F.R. § 211.16(b)(1). Other portions of the regulations provide that "[u]nlike fraud, fault does not require a *deliberate intent to deceive*," indicating that fraud requires a deliberate intent to deceive. 20 C.F.R. § 255.11(b).

Weyerhaeuser Co. v. USRR Retirement Bd., 503 F. 2d 596 (7th Cir.2007), fn 11.

[¶18] Further, the commonly used definition of fraudulent intent is "where one, either with a view of benefitting oneself or misleading another into a course of action, makes a representation which one knows to be false or which one does not believe to be true." ***Black's Law Dictionary***, at 662, 6th Ed. (West Publishing Co., 1990).

[¶19] Under ***Willits***, Risovi's side of the story should be found credible, since deference should be given to the employee. Under ***Snyder***, *supra,* there is a noted tough burden to prove where there is a willful intent to make false statements. There, Snyder admitted to making $80 per month when he was receiving permanent total disability from Job Service, which violates the rules. 2001 ND 38, ¶3, 622 N.W.2d 712. That's fraud. Risovi has made a perfectly acceptable explanation for his earnings for the month of January 2012. The evidence presented by Job Service to the contrary is not credible. It conflicts with Risovi's actual paycheck and pay stub.

[¶20] There was not fraudulent intent by Risovi in this matter. He may have made a mistake or misunderstood the law, but he did not knowingly make a false statement or willfully file a false report of his wages. Looking at the facts, in the administrative hearing, regarding the wages he reported, Risovi testified as follows:

> "Well, I guess I never thought of it that way. I guess … the honest way I never thought of it that way I guess. I was just concerned at that point I was working to me I guess I looked at it like it really didn't matter how many hours I worked because if I can emphasize that *I was working for a flat fee and there wasn't any concern how many hours I worked.* I was working for a flat fee of $260 [per week] no matter how many hours I worked."

CR at 102 (emphasis added).

[¶21] Further in the transcript of the hearing, Risovi clarified his testimony as follows:

> "So, how am I supposed to prove the overpayment when it's Tracy's [his employer] word against mine? *I claimed $260 [per week] verbally said that in my claims when I called in he wrote down a figure for his payroll for income tax purposes*, so basically it is all for the same purpose his word against mine. I can't prove that there was a verbal agreement, he can't prove there was a verbal agreement, but yet they are taking his side of what he wrote for his wages."

CR at 103 (emphasis added).

[¶22] Under the findings of fact, it states: "He [Risovi] further stated he would be paid on a **percentage basis**; that is, a percentage of what the truck earned. The claimant also understood that it would be up to a month or more before he would receive his first payroll check." CR at 144, App. at 16, emphasis added. In fact, as shown in the testimony of Risovi above, he understood he was working for $260 per week. CR at 102-03.

[¶23] In any event, the trucking business in the oil patch, where Risovi was hauling truck loads of water to oil rig sites, it's obviously an usual compensation system. Trucking companies are paid on the amount of water hauled and truckers are paid a percentage of what the "truck earns." CR at 144, App. at 16. Thus, as Risovi and Milo agree, he worked over 350 hours in January hauling water to oil rig sites and was paid $4,000 for half the month and half of February. There's absolutely no accountability for Risovi's paycheck in accounting terms for hourly wages, except that he was most likely paid a percentage of what his truck earned. He certainly was not paid an hourly wage. That definitely does not make any sense. So, it's conceivable that he had a contract for $260 per week, as he's testified and there's no evidence to the contrary that's credible.

[¶24] Risovi was employed by Milo Trucking to drive a 6,000 gallon water truck to and from a site within a 100 mile radius between the water supply and oil well sites. CR at 1. Thus, he could drive an unlimited amount of time. At times, he would log in a 24-hour day because his truck would be in line for a delivery at the site and he could actually take a nap while waiting in a queue. The hours are tracked because that is what the company contracting Milo Trucking pays in part at the end of a contracted period, so they are logged. But Milo was not paying Risovi for an hourly wage. He was getting paid on a percentage or commission basis for the amount of truck loads he hauled. CR at 8, 81, 87. He had made a verbal contract to work for $260 per week. Id.

[¶25] Had he not made that contract agreement prior to starting, he would have turned the job down because he wasn't getting paid until late February and he needed the unemployment benefit that he was getting to pay his bills in January. CR at 144, App. at 17. So, it was a reasonable arrangement and consistent with his history and actual payment. He stated at his hearing: "when he [Tracy, employer] told me he couldn't afford to pay me anything until the truck got paid because he told me he had a lot of expenses on the truck and he couldn't afford to pay me that's why I made the deal with him. I told him you've gotta pay me $260 then, I said that's the only way I'd work for you." CR at 95.

[¶26] In ***Snyder***, *supra*, the Court made a finding of fraud in a Job Service claim, and found that there must be a deliberate, intentional and unequivocal factual pattern of untruthful reporting of income to conclude a fraudulent act. At worst, there was a misunderstanding made in this case regarding Risovi's reported income. He assumed his agreement for $260 per week was genuine with his employer. There was no intention to defraud Job Service.

[¶27] When Risovi speaks of protecting his own interests in his statement to Job Service on

10/24/12 (CR at 9), he was simply stating that his agreement with Milo for $260 a week was made to ensure he wouldn't lose his unemployment benefits because of being overpaid. He wasn't working the system. There's no credible evidence of that. Being a seasonal worker as a truck driver for a construction company, it's routine to collect unemployment in the off season. The 60% arrangement of weekly pay to unemployment pay was not a calculating, willful intention to deceive by Risovi; rather it was coincidental with the off season work. He explains, "[d]uring the winter months when there was nothing to do, I mean basically during the winter when we're off, when all the drivers are off for the season, he [another employer] might have called me to work in the shop or a lot of times there were one or two days that we were able to haul rock or somebody needed gravel or something." CR at 98.

[¶28] To that, Schnase, the Appeals Referee, replied, "Fair enough. Well, I understand the logic and what happened then. I don't have any other questions for you Kenneth at this time, anything else you'd like to add Sir? [sic]" Id. In his decision, Schnase states, "His failure to report the earnings was an intentional act to receive benefits to which he was not entitled to receive in order to meet his financial obligations." CR at 146, App. at 18.

[¶29] That legal conclusion does not comport with North Dakota law. The district court's order and judgment to affirm the decision of Job Service does not comport with North Dakota law, since there was no credible evidence of fraud in this case.

[¶30] Had Job Service applied the ***Snyder*** standard in its determination, it would have found that the proof needed for fraud is much greater than mere hearsay and conjecture. ***Snyder***, *supra*, is controlling authority. Risovi did not intentionally and willfully mislead. Under ***Snyder***, there was no fraud in this case.

II. JOB SERVICE DID NOT SERVE ITS BRIEF PROPERLY IN THE DISTRICT COURT AND THE DEFECTIVE CERTIFICATE OF SERVICE SHOULD BE DEEMED FATAL.

[¶31] As noted under the Statement of the Facts earlier, the Certificate of Service filed with the Wells County District Court in this matter showed a case name of "North Central Transportation, Inc. v. Job Service North Dakota, and Nicodemus A. Wald," case no.: 30-2012-CV-00479, in the County of Burleigh. App. at 12. Under any measure of adequacy of service, the Certificate of Service filed by Job Service should be deemed fatally flawed. Consequently, Job Service has defaulted in this action.

CONCLUSION

[¶32] For the reasons stated above, the Court should find in favor of the Appellant, and reverse the lower court's decision.

Dated this 6th day of December, 2013.

RESPECTFULLY SUBMITTED,

/s/ Timothy C. Lamb

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IN THE SUPREME COURT OF NORTH DAKOTA

Kenneth L. Risovi, Appellant, vs. Job Service North Dakota, Appellee.	)	Supreme Court No.: 20130302 District Court No.: 52-2013-CV-00015 **CERTIFICATE OF SERVICE**

I, Timothy C. Lamb, Esq., a licensed attorney in the State of North Dakota and an officer of the Court, do hereby certify that on this date a true and correct copy of the following papers:

1) Appellant's Brief; and

2) Appendix;

was served upon the opposing counsel by U.S. Mail and e-mail to the address listed below:

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