

IN THE SUPREME COURT OF NORTH DAKOTA

Kenneth L. Risovi,)	
)	Supreme Court No.: 20130302
Appellant,)	Dist. Court No.: 52-2013-CV-00015
)	
vs.)	APPELLANT’S REPLY BRIEF
)	
Job Service North Dakota,)	
)	
Appellee.)	
)	

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: January 17, 2014

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ARGUMENT

THE FACTS AND ARGUMENTS PRESENTED BY JOB SERVICE LACK CREDIBLE EVIDENCE AND LEGAL AUTHORITY.

[¶1] In summary, Job Service presents facts that are not supported by credible evidence and ignores on point authority. This case is about whether Kenneth Risovi committed fraud in reporting his wages in the month of January 2012, while working as a commercial truck driver. The case on point in this matter is *Snyder v. North Dakota Workers Comp. Bureau*, 2001 ND 38, 622 N.W.2d 712, wherein the Court established the standard that a state agency “must prove a claimant **willfully** made a material false claim.” Id. at ¶16, emphasis added. “To be willful, conduct must be engaged in intentionally, not inadvertently.” Id.

[¶2] Of particular note, Job Service did not address the *Snyder* case in its Brief, rather it danced around the law by making bold, unsubstantiated assertions. For example, the following paragraph provides no authority or factual references:

Risovi’s argument that there was no intent to defraud is also unpersuasive. Risovi made misrepresentations of his earnings. The law provides that if a false statement is made to obtain benefits to which the individual is not entitled, he is disqualified for the date of the false statement to the date of the determination, and for one year thereafter. An exception to this rule is that the disqualification does not apply if 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.” Job Service did not apply the exception because it was not satisfied that there was a mistake or misunderstanding of law or of facts without fraudulent intent. Under these facts, it was not an abuse of discretion for Job Service to determine that Risovi’s underreporting of his wages was not due to a mistake.

Resp. Br. at 15-16.

[¶3] In effect, Job Service wants to persuade this Court that Risovi committed a fraudulent act without providing credible facts or current authority. In *Synder*, this Court established the standard that agencies must follow, that is, they must prove that a claimant made a willful and intentional material false claim. *Synder, supra*, at ¶16. The agency must prove that the act was not merely inadvertent. *Id.* In this case, Job Service has not met their burden of proof.

[¶4] To further illustrate, Job Service argues, “Risovi is properly disqualified from benefits [...] for willfully underreporting his wages earned during the month of January 2012 for the purpose of obtaining unemployment benefits. C.R. 35.” Br. at 16. The record at page 35 is a “Claimant Notice” dated 11/05/2012, and the Notice does not find that Risovi “willfully” made a false claim. CR at 35. In fact, it states, “After reviewing your explanation [sic] of the discrepancy(s) and the information in the file, it has been determined that you misrepresented your earnings to obtain UI benefits to which you were not entitled.” *Id.* The facts do not support the legal conclusion of fraud. There was no finding of willful intent.

[¶5] Furthermore, Job Service asserts: “Risovi **admitted he fabricated** his work hours when reporting the \$260 earned wages to Job Service for the [four] weeks in question. See C.R. 100-01” Br. at 9, emphasis added. That is another misrepresentation of the facts. During the hearing before the Job Service referee, Risovi actually testified under oath that he may have made a mistake. CR at 100. His sworn testimony is as follows:

Q: And, then if it says you did work, does it ask you the number of hours?

[...]

A: No, I had nothing to lie about there. ... [I]f I remember right, they did ask the hours and the amount and what I did is just basically I just figured it out to the \$260 and **I guess that was my mistake**, I should have basically told them and that's it's a flat fee [under the contract]....

CR at 100, emphasis added.

[¶6] Another misrepresentation made by Job Service regards Risovi's testimony with respect to the accounting of his hours, stating, "At the hearing Risovi acknowledged Milo's [his employer's] accounting of his hours was accurate, and that he began working for Milo on January 4, 2012. C.R. 88." Br. at 3. In fact, Risovi only testified that he worked 94 hours in the first week of January, 2012. CR at 88. The transcript of the hearing is as follows:

Q: [...] On Exhibit 1, for the period of January 4, 2012, during the week of January 7, the employer reported that you worked a total of 94 hours.

A: [...] The hours that he put down, I'm sure are correct [...]

CR at 88.

[¶7] When compared to his pay stub (CR at 3), this hourly accounting is inconsistent with what Risovi was actually paid, because his first pay check for this job was on February 13, 2012, and it does not account for the first two weeks in January 2012. Id. Therein is the root of the problem in this case. There's no real accounting for the first two weeks in January 2012.

[¶8] Job Service relies on conclusory assertions and fails to apply the law. N. D. Pattern Jury Instructions mirror the law in *Synder*. Fraud is defined as "1) the suggestion as fact of that which is not true by one who does not believe it to be true; [and] 2) the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true" N.D. Pattern Jury Instruction No. 72.12 (1995), abbreviated.

[¶9] If Risovi made a mistake, that is not fraud. The problem in this case is that Risovi's wages for the month of January 2012 are not clearly accounted for.

[¶10] The most credible and reliable piece of evidence in this discussion is Risovi's pay stub of February 13, 2012. CR at 3. That shows his actual pay, which was not an hourly based pay check. Id. It shows he received a Net Pay of \$1,284.79 for the pay period of January 14, 2012 to February 13, 2012. Id. It does not give an hourly rate, nor does the pay stub show hours worked for the period. Id. It shows that Risovi's wages for that period were \$10,320.92, and that there were \$2,936.13 deductions for federal taxes and FICA withholding. Id. Also, there was a "payroll advance" for \$6,100.00. Id. The problem is that the pay stub does not define "payroll advance". Id. It does not break down when Risovi actually earned his wages by showing days and hours worked per day. Id. It shows, however, that Risovi received a Net Pay of \$1,284.79 for the pay period 1/14/12 to 2/13/12. Id.

[¶11] Job Service argues that Risovi willfully underreported his wages for the month of January 2012 (Br. at 14), because he reported \$260.00 for each of the four weeks in January (CR at 4), which amounts to \$1,040.00 for the month of January 2012. If one divides his net pay of \$1,284.79 (CR at 3) into four weeks of equal wages, that equates to \$321.00 per week, from 1/14/12 to 2/13/12. The math supports his honest claim.

[¶12] The burden of proof is on Job Service to prove that Risovi willfully and intentionally made a false claim to receive unemployment insurance. *Synder, supra.* They have not met that burden. Rather, they make conclusory assertions and convoluted factual statements that Risovi worked 351 hours in January 2012. Br. at 9. His pay stub does not show that. CR at 3. They also assert, "It is an act of fraud for Risovi to arrange

with an employer to work for a flat fee in order to draw unemployment benefits knowing full well he is going to be subsequently paid a percentage rate of what the truck earns over the same period of time, and not adjust or apprise Job Service of the additional income amount.” Br. at 10. Here, they argue that if Risovi was being paid a percentage or commission of the trucking contract, it was not reported correctly. That is not consistent with his pay stub. CR at 3. If Risovi was being paid a commission or percentage of what the trucking contract earned, then how can Job Service conclude it was fraud to report what he thought was what he earned and his pay stub supports his testimony?

[¶13] Job Service further argues that Risovi could have requested the hearing officer to subpoena his employer to prove his side of the story. Br. at 12. Under *Synder*, the burden of proof is on the agency to prove fraud, and not on the claimant to show he didn’t commit fraud. If Job Service wanted to prove fraud, it should have requested Risovi’s employer to appear for the hearing and testify under oath. His employer could have explained the net pay of \$1,284 for two weeks in January and two weeks in February 2012; and explained what the “advance pay” of \$6,100 was for under oath and on the record. Instead, Job Service relied on hearsay evidence to prove its assertion that Risovi committed fraud. Job Service relies on evidence obtained from a phone call with Risovi’s employer that the \$6,100 payroll advance was “for services rendered prior to 1/14/12.” CR at 14. But there’s no actual accounting definition for his payroll advance. The Fraud Investigation Notes dated 10/31/12 (CR at 13) further state that evidence from the employer was obtained by phone to show that Risovi was paid in excess of \$1,000 per

week in January 2012. CR at 14. Those facts are not consistent with his pay stub – the best evidence. Job Service has no credible evidence to conclude fraud.

[¶14] Risovi reported what he thought he was making for the month of January, or what he relied on as a verbal contract with his employer, which was testified to under oath.

[¶15] Job Service relies on hearsay evidence obtained by phone from an office employee at Milo that he “works the system” and likes to be paid in cash so he would not have to report it. Br. at 8, citing CR at 18, lines 115-16. Again, that’s hearsay.

[¶16] Risovi is an honest trucker and works a seasonal employment schedule, thus he has a history of filing for unemployment benefits. CR at 15. Since 2008, he has had to file for unemployment insurance because of his lack of employment opportunity during the winter months due to the construction season. Id. Why would he jeopardize his entitlement to benefits by making a fraudulent claim in one reporting month after years in the system?

[¶17] Job Service is trying to persuade this Court of a very serious allegation of fraud without credible proof. They have resorted to hearsay evidence to prove their case. They have not shown why *Snyder* does not apply in this case. Job Service has not shown credible evidence of willful and intentional deception by Risovi. His pay stub speaks for itself. That’s the best evidence, and it proves that he reported his income for the month of January 2012 as accurate as he thought was right. He had no intention of making a false claim. At worst, Risovi made an inadvertent mistake. Under *Snyder*, that’s not fraud.

[¶18] Therefore, this Court should reverse the district court’s decision to affirm the findings of Job Service that Risovi committed fraud.

CONCLUSION

[¶19] For the foregoing reasons, the Court should reverse the lower court's ruling, and order Job Service to comply with a ruling in favor of the Defendant, Kenneth Risovi.

Dated this 17th day of January, 2014.

RESPECTFULLY SUBMITTED,

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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 Reply Brief;

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

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