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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kathy Inwards,	)	**Supreme Court Case No. 20140015**
	)	**Sargent Co. No. 41-2013-CV-00032**
Appellant,	)	
	)	
vs.	)	
	)	
North Dakota Workforce Safety and Insurance,	)	
	)	
Appellee,	)	
	)	

BRIEF OF APPELLEE NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE

APPEAL FROM DISTRICT COURT JUDGMENT ENTERED NOVEMBER 22, 2013, WITH NOTICE OF ENTRY OF JUDGMENT SERVED NOVEMBER 25, 2013, AND MEMORANDUM OPINION REVERSING THE ADMINISTRATIVE LAW JUDGE'S DECISION DATED FEBRUARY 19, 2013

SARGENT COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE BRADLEY A. CRUFF

Shanon M. Gregor, ID # 05811
Special Assistant Attorney General
for Workforce Safety and Insurance
1800 Radisson Tower
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544
sgregor@nilleslaw.com

TABLE OF CONTENTS

Paragraph No.

TABLE OF AUTHORITIES

STATE CASES

Paragraph No.

STATUTES

Paragraph No.

STATEMENT OF ISSUES FOR REVIEW

[1] Whether the District Court had subject matter jurisdiction over WSI's appeal of the Administrative Law Judge's decision.

[2] Whether the Administrative Law Judge's determination that Inwards had good cause for failing to comply with vocational rehabilitation was supported by the facts and in accordance with the law.

LAW AND ARGUMENT

A. BURDEN OF PROOF AND SCOPE OF REVIEW ON APPEAL.

[3] On an administrative appeal, the Court reviews the decision of the agency to determine whether a reasoning mind could have reasonably determined that the factual determinations were supported by the evidence . See, e.g., Swenson v. Workforce Safety and Ins., 2007 ND 149, ¶22, 738 N.W.2d 892. The Court does not make independent findings or substitute its judgment for that of the agency. Id. But, "questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision." Bjerklie v. Workforce Safety and Insurance, 2005 ND 178, ¶ 9, 704 N.W.2d 818; see also North Dakota Securities Comm'n v. Juran and Moody, Inc., 2000 ND 136 ¶ 27, 613 N.W.2d 503 (legal conclusions are "reviewed in the same manner as legal conclusions generally, without special deference to the ALJ").

[4] An agency's order should be reversed if the court finds:

1. The Order is not in accordance with the law.
2. The Order is in violation of the constitutional rights of the Appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedures of the agency have not afforded the Appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the Appellant.

N.D.C.C. § 28-32-46.

B. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE APPEAL.

[5] Appellant, Kathy Inwards ("Inwards") has raised two challenges to WSI's service of the Notice of Appeal and Specification of Errors: first, that it was not properly served on Inwards; and second, that it was not served at all on Inwards' former employer, Bobcat Company—Doosan Infracore Intl., (hereafter "Bobcat"). Neither challenge requires this Court to reverse the district court based on lack of subject matter jurisdiction to adjudicate WSI's appeal.

[6] Section 28-32-42(4), N.D.C.C., governs appeals from a final agency decision to the district court and provides:

> An appeal shall be taken by serving a notice of appeal and specification of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of appeal…with the clerk of the district court to which the appeal is taken.

N.D.C.C. § 28-32-42(4).

[7] Service of notice of an administrative appeal to the district court may be made by serving the attorney for the party under Rule 5, N.D.R.Civ.P. Reliance Ins. Co. v. Public Service Comm'n, 250 N.W.2d 918, 922-23 (N.D. 1977).

i. The District Court Properly Granted Technical Relief as to Service of the Notice of Appeal on Inwards.

[8] On April 15, 2013, the North Dakota Supreme Court's 2013 amendments to Rules 3.1 and 3.5 of the North Dakota Rules of Court mandating electronic filing and service became effective. (App 185) As amended, Rule 3.5(e)(1) requires that "All documents filed electronically after the initiating pleading must be served electronically through the Odyssey® system" and Rule 3.5(e)(3) further provides that "all attorneys must provide an e-mail address to the State Board of Law Examiners for accepting electronic service." (App.186-87)

[9] Eight days after the April 15, 2013 effective date, WSI's counsel filed a Notice of Appeal and Specification of Errors in this matter and attempted to electronically serve the same upon Inwards' counsel on April 23, 2013. (App. 17-20) The Certificate of Electronic Service filed therewith clearly shows that Inwards' counsel was intended to be served through Odyssey®. (App. 17-20) It is unclear whether the Notice of Appeal technically could have been served through Odyssey at that time or whether the wrong filing event was selected, i.e., the "Efile" event instead of the "Efile and Serve". (App. 166; App. 205-06) Nevertheless, it is undisputed that the Notice of Appeal and Specification of Errors did not actually get served on Inwards' counsel on April 23, 2013. The Certificate of Electronic Service indicating that the Notice of Appeal and Specification of Errors had been served electronically on Inwards' counsel, however, was accepted and filed without issue on April 23, 2013. (App 1, 17-20)

[10] Inwards' counsel asserts that he first learned of the appeal when served with the Certified Record on May 20, 2013. WSI does not contest this assertion since it appears that due to another technical glitch the Clerk of Court's emailed Notice of Assignment and Case Number to all counsel on April 23, 2013 was not delivered to Inwards' counsel either. (App. 195-99) Thus, it appears that Inwards' counsel received neither the electronic service of the Notice of Appeal and Specification of Errors nor the emailed Notice of Assignment and Case Number on April 23, 2013.

[11] WSI's counsel did not become aware of the lack of actual service of the Notice of Appeal and Specification of Errors on Inwards' counsel until a Motion to Dismiss the appeal was filed on June 12, 2013. (App. 174) Under Rule 3.5(e)(2), N.D.R.Ct., "electronic service of a document is not effective if the party making service learns through any means that the document did not reach the person to be served." Immediately after learning of the lack of actual service, the Notice of Appeal and Specification of Errors were served on Inwards' counsel on June 13, 2013. (Supplemental Appendix "Supp. App." 3-5)

[12] The district court rejected Inwards' Motion to Dismiss reasoning that there was no prejudice to Inwards and that there was good cause to provide technical relief to WSI under Rule 3.5, N.D.R.Ct. (App. 201-202, 208-09) The "technical relief" provision of Rule of Court 3.5 provides:

> (f) **Technical Issues; Relief**. On a showing of good cause, the court may grant appropriate relief if electronic filing or electronic service was not completed due to technical problems.

The term "technical problems" is not defined by Rule of Court 3.5(f). Inwards argues for a restrictive construction of the provision, which would allow relief only when there is an equipment or Internet service type related problem. Rule 3.5(f), however, is not so limited

and may be applied where, as here, the technical issues relate to application of a new procedural rule requiring electronic service of "all documents filed electronically after the initial pleadings."

[13] The ambiguity of this provision is apparent in the context of an appeal to a district court from an administrative agency's decision. This Court has long recognized that the Rules of Appellate Procedure do not apply to administrative appeals to district court. Reliance Ins., 250 N.W.2d at 920 (holding that rules of appellate procedure do not apply in appeals to district court); see also N.D.R.App.P. 1(a) (noting that appellate rules govern procedures in the supreme court of North Dakota). Moreover, this Court has also approved the use of Rule 5(b), N.D.R.Civ.P., for service of a Notice of Appeal from an administrative agency's decision upon a party or the party's attorney. Reliance Ins., 250 N.W.2d at 921. Rule 5 governs the service of documents other than the service of a summons and complaint. N.D.R.Civ.P. 5(a)(1). Furthermore, Rule 5(b) as effective as of April 1, 2013, states that "[a] document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5." N.D.R.Civ.P. 5(b)(1). Under Rule of Court 3.5(e), as of April 15, 2013, all attorneys had to accept electronic service unless granted an exemption, a claim which is not made here by Inwards' counsel. Since Inwards was represented by an attorney electronic service of the Notice of Appeal was attempted to be made on him in compliance with the mandates of Rule of Court 3.5 and in conjunction with the procedure approved in Reliance Ins.

[14] Add to this that the documents were accepted for filing without incident, including the Certificate of Electronic Service showing that the Notice of Appeal and Specification of Errors were served through the Odyssey system, and that the Clerk of Court

emailed WSI's and Inwards' counsel with the Notice of Assignment and Case Number on April 23, 2013. It is known ***now*** that Inwards' counsel did not receive the Notice of Appeal or the Notice of Assignment on April 23, 2013, but WSI's counsel did not know that until the Motion to Dismiss was filed on June 12, 2013. When apprised of the actual situation regarding the attempted service, the Notice of Appeal and Specification of Errors was served on June 13, 2013 as instructed by Rule of Court 3.5(e)(2) and Rule of Civil Procedure 5(b)(1).

[15] The case relied upon by Inwards, Benson v. Workforce Safety and Insurance, 2003 ND 193, 672 N.W.2d 640, is not persuasive or controlling in this situation. In Benson, the claimant filed a notice of appeal but did not attempt to serve WSI and did not file proof of service of the notice of appeal. Id. ¶3. This case is quite different. Here, there was clearly an intent to serve Inwards with the Notice of Appeal and Specification of Errors on April 23, 2013, through Odyssey. The documents were accepted without incident, and it was not until June 12, 2013 when the Motion to Dismiss was filed that WSI's counsel learned that service did not actually reach Inwards' counsel. Moreover, WSI also served Inwards' counsel with the Certificate of Record on May 20, 2013, and it is undisputed that he received those documents. (App. 161-62) Thus, this is not a case where the requirement of service was deliberately ignored or not appreciated by the filing party as in Benson. This is a case where service was clearly attempted to be made through good faith compliance with newly enacted mandatory rules requiring electronic service that went into effect eight days before the filing of the Notice of Appeal. Having been made aware of the lack of actual receipt of the documents that were intended to be served on April 23, 2013, WSI's counsel served the Notice of Appeal and Specification of Errors on June 13, 2013.

[16] Under the unique and limited circumstances of this case, there was good cause for the district court to grant technical relief to WSI under Rule of Court 3.5(f). Findings of "good cause" are generally left to the discretion of the district court and not reversed on appeal absent an abuse of discretion. Kline v. Landeis, 147 N.W.2d 897, 903 (N.D. 1966).

ii. The District Court Properly Concluded the Employer Was Not Required to be Served With Notice of the Appeal.

[17] Inwards is correct that the employer, Bobcat was not served with the Notice of Appeal and Specification of Errors, but there is a good reason for that, specifically that service on the employer was not required. At no time during these proceedings had the employer made an appearance or participated in either of the administrative hearings on the claim, nor was it a party who may be factually aggrieved by the decision.

[18] In Reliance Ins., this Court recognized that only those persons having an interest in the subject matter of the administrative appeal, either as an adverse party or real party in interest, need to be made parties thereto, stating:

> We believe that any person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a 'party' to any proceedings for the purpose of taking an appeal from the decision.

Reliance Ins., 250 N.W.2d 923, 926; see also Pederson v. N.D. Workers Comp. Bureau, 534 N.W.2d 809, 810 (N.D. 1995).

[19] The Court held in Reliance Ins. that service of a notice of appeal is not jurisdictionally required on a party that did not participate in the administrative proceedings and would not suffer a detriment if the appeal was successful. Id. 926-27. In contrast, in Pederson, the Court held that notice of the appeal was required for an employer that did

participate in the administrative proceedings and had an economic interest in the outcome of the appeal. Pederson, 534 N.W.2d at 810. This case is more like Reliance Ins.

[20] Inwards worked as an assembler for Bobcat at the time she filed a claim for injury to her bilateral hands on September 10, 2004. (App. 21, 50) She had bilateral carpal tunnel release surgeries in June 2005, and was able to return to work at Bobcat in August 2005. (App. 50) Approximately six months later, on February 25, 2006, Inwards was taken off work by her doctor due to a resurgence of symptoms, and she never returned to work. (App. 50-51) The most recent contact that WSI's vocational rehabilitation services had with Bobcat was on February 1, 2008. (Certificate of Record "CR" 99)

[21] Although WSI copied Bobcat on its internal administrative decisions (see, e.g., App. 25-28), Bobcat did not make an appearance or participate in the administrative hearing proceedings. Bobcat did not retain an attorney for the administrative proceedings, submitted no correspondence during the proceedings, and did not send a representative to appear at the hearing. Bobcat took no active role in the proceedings at all, but that is not surprising because Bobcat had no economic interest in the outcome of the proceedings.

[22] Employers pay premiums for worker's compensation coverage through WSI. See generally N.D.C.C. § 65-04-01. The amount of those premiums is "determined by the classifications, rules, and rates made and published by [WSI] and must be based on a proportion of the annual expenditure of money by the employer for the service of persons subject to the provisions of [the worker's compensation law]." Id. § 65-04-04. When an employee's claim is accepted by WSI, the employer's premiums increase based

on their "experience rating." Id. § 65-04-17. Pursuant to WSI regulations, the employer's experience rating is based on an analysis of the employer's "three-year losses." See N.D.A.C. § 92-01-02-18(3). "'Three-year losses' means the total sum of ratable losses accrued **on claims occurring during the first three of the four years immediately preceding the premium year** being rated." Id. § 92-01-02-18(1)(a) (emphasis added) Only losses on ***claims occurring*** during the first three of the four years immediately preceding the premium year in question are factored into the experience rating. See id. Because the experience rating is based on a three-year loss analysis, the effect of any accepted claim on the employer's experience rating drops off after three years. See id.

[23] Here, Inwards' injury date was 2004. In calculating premiums, a "claim is deemed to occur in the premium year in which the injury date occurs." N.D.A.C. § 92-01-02-18(3)(a). Inwards' claim is deemed to occur in the 2004 premium year. Accordingly, Inwards' claim would have dropped off Bobcat's "three-year losses" for its experience rating by 2007 (2008 at the outside limit). In either case, the claim dropped off Bobcat's experience rating long before this matter arose. Hence, Bobcat did not have an economic interest that would be adversely affected by the proceedings before the Administrative Law Judge ("ALJ") or in the appeal to district court. Moreover, since WSI was appealing an ALJ decision that essentially reinstated vocational rehabilitation benefits to Inwards it is a stretch to conclude that the employer's interests were "adverse" to WSI's. Thus, service of the Notice of Appeal on the employer was not required in this case. See Reliance Ins., 250 N.W.2d at 925-27.

[24] Finally, as noted by the district court, Inwards does not have standing to allege lack of service on the employer to defeat the appeal against her. (App. 209)

C. THE ALJ'S DECISION THAT INWARDS HAD GOOD CAUSE FOR FAILING TO COMPLY WITH VOCATIONAL REHABILITATION IS NOT SUPPORTED BY THE FACTS AND IS NOT IN ACCORDANCE WITH THE LAW.

[25] Turning to the substance of Inwards' appeal, the issue is whether ALJ Sand's determination that Inwards had "good cause" for failing to comply with her retraining plan is supported by the facts and in accordance with the law.

i. The ALJ Strayed from the Evidence in Finding "Good Cause".

[26] Whether a claimant has "good cause" for noncompliance is determined by the standard set out in Fuhrman v. North Dakota Workers Comp. Bureau, 1997 ND 191, 569 N.W.2d 269. Under that standard there is "good cause" if there is a "reason that would cause a reasonably prudent person to refuse to attend the rehabilitation program under the same or similar circumstances." Id. ¶9. ALJ Sand concluded that Inwards had "good cause" to discontinue the vocational retraining program because her appeal of the rehabilitation plan had not been resolved. (App. 120-21, Concl. of Law 7) This conclusion is flawed both factually and legally.

[27] The "good cause" standard considers the individual facts and circumstances of the claimant's conduct. See Bjerklie v. Workforce Safety and Insurance, 2005 ND 178, 704 N.W.2d 818 (holding no good cause for failing to attend IME when Claimant didn't timely notify WSI that she couldn't attend); Hoffman v. N.D. Workers Compensation Bureau, 2002 ND 138, 651 N.W.2d 601 (concluding that good cause may be established by medical evidence indicating inability to participate in retraining program); Lawrence v. N.D. Workers Compensation Bureau, 2000 ND 60, 608 N.W.2d 254 (concluding that place of

residence is a factor to consider for good cause to reject an out-of-state job offer); Fuhrman v. North Dakota Workers Comp. Bureau, 1997 ND 191, 569 N.W.2d 269 (good cause established for failure to attend training program due to economic and financial hardship). In other words, the analysis first considers the reasons that the claimant herself gave for not complying with the retraining program and then considers whether such reasons would cause a reasonable person to make the same decision under the same or similar circumstances. ALJ Sand rejected the reasons that Inwards herself gave as "good cause," but incredibly decided that "good cause" existed for reasons that the ALJ conjured and Inwards never claimed.

[28] Here, Inwards testified that the reason she quit her training program was because her doctors told her it was not the best plan for her:

> Q. Let me just ask: Did you discontinue the rehabilitation plan that WSI identified for you?
>
> A. Yes, I did, after my doctors ordered.
>
> Q. Okay. And I guess that's my second question. Why did you discontinue the plan?
>
> A. Because my doctors said that it wouldn't – it's not the best plan for me
>
> ***
>
> Q. What—again, just so I understand, what is your – what was – at the time what was your understanding of Dr. Lo's opinion of whether you should continue that class or not?
>
> A. She said that it was not a good option for me and that I should –that there should be something else…for me to do. She didn't know what.

(App. 142, 145 (Hearing Transcript "HT" 12, 19))

[29] ALJ Sand rightfully rejected these reasons concluding that Inwards had misled her doctors, including Dr. Lo, about her retraining program and the accommodations

provided for her to attend the program. (App. 118-19, Finding of Fact 16, Concl. of Law 3)

ALJ Sand wrote:

> Here the evidence shows that Ms. Inwards' physician told her she should not pursue a career in computers and should not be going to school for that kind of career. Normally that would be good cause to stop attending classes. However, the record also shows that Ms. Inwards' physicians were misled by information provided by Ms. Inwards. Ms. Inwards should have been aware that her physicians did not have all of the pertinent information when they concluded that she should not attend school because it was she who gave them the information. Because the basis of the physician's determination was created by faulty or incomplete information provided by Ms. Inwards, she does not have good cause to rely upon the physicians' decisions to refuse to attend the training.

(App. 119, Concl. of Law 3)

[30] Yet, ALJ Sand went beyond rejecting the reasons Inwards gave for quitting the program and held that good cause existed because Inwards had appealed the order finding that retraining was the first appropriate rehabilitation option. The ALJ concluded:

> 6. Ms. Inwards' appeal of the order was a timely and statutorily allowed challenge to the June 27, 2011, order. That order did not become final until the administrative law judge denied Ms. Inwards' request for reconsideration on May 11, 2012.
>
> 7. WSI has pointed to no statute or case law that required Ms. Inwards to comply with a non-final order during the pendency of an appeal. A reasonably prudent person would refuse to attend vocational training whether their appeal was being resolved. Here the law does not permit WSI to enforce an order that is not final, Ms. Inwards had a statutory right to appeal the order and WSI's January 13, 2012, order to enforce its June 27, 2011 order was premature. These circumstances constitute good cause not to comply with the order. Ms. Inwards behaved as a reasonably prudent person when she stopped attending the VCR she was appealing.

(App. 120-21, Concl. of Law 6, 7)

[31] The ALJ's decision is not based on the facts and evidence. There is no evidence and Inwards did not testify that the reason she withdrew from the program was

because she had appealed the order requiring her to attend. ALJ Sand, herself, came up with this reason. ALJ Sand's conclusion essentially creates a rule of law that would excuse compliance regardless of the individual circumstances any time a claimant appeals a vocational rehabilitation plan. This interpretation of "good cause" does not depend on the claimant's intentions, knowledge, motive, medical condition, finances or other circumstances like the previous cases examining "good cause". See supra. Instead, under this ALJ's application an appealed vocational rehabilitation order does not have to be followed until the appeal is resolved, period. Because ALJ Sand's conclusion is not even remotely based on the factual evidence in the record her findings are not a reasonable interpretation of the evidence. Accordingly, her finding of "good cause" should be reversed.

ii. WSI has Continuing Jurisdiction Over Claims and Must Discontinue Benefits Based on Non-Compliance.

[32] Moreover, the ALJ's conclusion that WSI had no authority to find Inwards in non-compliance of an appealed order is not supported by the law. WSI is vested with "continuing jurisdiction" over worker's compensation claims. N.D.C.C. § 65-05-03. Section 65-05-03 provides WSI "shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions, except as provided in chapter 65-10, are final and are entitled to the same faith and credit as a judgment of a court of record." Id. Section 65-05-04, N.D.C.C., additionally provides that WSI "at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation." Id. § 65-05-04.

[33] ALJ Sand's decision ignores and gives no effect to WSI's continuing jurisdiction and its statutory "full power and authority to hear and determine all questions within its jurisdiction". See N.D.C.C. §§ 65-05-03, 65-05-04. Under ALJ Sand's interpretation, WSI is essentially divested of authority and power once a claimant requests a hearing from an order. This interpretation, however, ignores the practical realities. A myriad of issues arise during the administration of a claim, and decisions on those issues cannot wait while an appeal is pursued on a prior administrative order.

[34] More importantly, ALJ Sand's interpretation ignores the legislature's directive with regard to claimants who are not complying with WSI. WSI's June 27, 2011 order notified Inwards that vocational rehabilitation benefits would be discontinued if she was noncompliant with the terms of the retraining program without good cause. (App. 27) Section 65-05.1-04(5) provides that if retraining is the first appropriate option, the "employee ***shall attend*** a qualified rehabilitation training program." N.D.C.C. § 65-05.1-04(5) (emphasis added). If the employee discontinues the training program without good cause the employee is in noncompliance. Id. § 65-05.1-04(6). Section 65-05.1-04(6) expressly provides that when an employee is in noncompliance WSI "***shall discontinue*** disability and vocational rehabilitation benefits." Id. (emphasis added). It is well established that "shall" is mandatory language. The law does not allow WSI to keep paying disability and rehabilitation benefits to a claimant who has discontinued a retraining program without good cause.

[35] In addition to WSI's continuing authority and the legislature's mandate that WSI not pay disability or rehabilitation benefits to a claimant who is in noncompliance, ALJ Sand's decision results in an absurd application of the law. WSI's vocational rehabilitation

order here was issued on June 27, 2011. (App. 25-27) The June 27, 2011 order was, in fact, WSI's second attempt at retraining Inwards. WSI had removed Inwards from school in the fall of 2010 upon a doctor's recommendation that her carpal tunnel syndrome be reevaluated. (App. 52-53, Finding of Fact 13; CR 103) Once that process was complete, WSI found that retraining was still the appropriate rehabilitation for option for Inwards and ordered her to attend on June 27, 2011. (App. 25-27) The ALJ's decision approving the rehabilitation plan was issued on February 25, 2012 (App. 49-60), but did not become final until a petition for reconsideration was denied on May 11, 2012. (App. 117, Finding of Fact 10) Inwards withdrew from the retraining program in August 2011. (App. 118, Finding of Fact 15) If WSI was required to pay Inwards the vocational rehabilitation allowance during the pendency of her appeal of the retraining program, she would have received benefits for more than nine months (from August 2011 to May 2012) without having done anything in return. Under such a situation, claimants would have an incentive to appeal a vocational plan and not comply knowing their benefits would not be affected until the appeal is resolved.

[36] The district court noted the incongruity of the ALJ's decision:

> It is neither reasonable nor logical that Inwards may appeal an order to participate in a vocational rehabilitation program and expect to continue receiving rehabilitative benefits while awaiting the determination of the appeal[,] [w]hile simultaneously elect[ing] to not participate in the ordered vocational retraining in the interim.

(App. 219)

[37] The legislature could not have intended such an absurd result. See N.D.C.C. § 1-08-38 (statutes are intended to be reasonable; just and effective; and feasible of execution); § 65-05.1-01(3) (the goal of vocational rehabilitation is to return the employee to substantial gainful employment as soon as possible). Indeed, this this is presumably why the

legislature mandated that WSI discontinue benefits to a claimant who is not in compliance with vocational rehabilitation. N.D.C.C. § 65-05.1-04(6) (providing "[i]n all cases of noncompliance by the employee, the organization shall discontinue disability and vocational rehabilitation benefits.") Accordingly, ALJ Sand's decision that WSI did not have authority to find Inwards' in noncompliance and terminate her benefits while the rehabilitation plan was being appealed is not in accordance with the law.

iii. Due Process Does Not Require WSI to Provide a Pre-termination Hearing before Discontinuing Disability and Rehabilitation Benefits.

[38] ALJ Sand's decision that essentially requires WSI to pay Inwards disability and rehabilitation benefits during the pendency of her appeal of the rehabilitation order is further not consistent with established case law that WSI can terminate disability or vocational benefits upon notice without a formal pre-termination hearing.

[39] This Court has held that it is not a violation of a claimant's due process rights for WSI to terminate disability benefits without first providing an evidentiary hearing. Sjostrand v. N.D. Workers Comp. Bureau, 2002 ND 125, 649 N.W.2d 537. In Sjostrand, the claimant's disability benefits were discontinued because he misrepresented his physical condition and capabilities. Id. ¶3. The Court held that due process is satisfied as long as WSI notifies the claimant in advance of its intention to discontinue benefits, the claimant has an opportunity to respond, and a post-termination hearing is available if requested by the claimant. Id. ¶¶ 9-11. The Court specifically rejected the argument that an evidentiary hearing on the merits of a misrepresentation claim was required ***before*** the claimant's disability benefits could be discontinued. Id. ¶¶ 10-11. Instead, pre-termination notice of the contemplated action, a summary of the evidence supporting the proposed termination, and a pre-termination opportunity to respond in writing to the alleged grounds for

termination is sufficient. Id. ¶ 10; see also Rojas v. Workforce Safety and Insurance, 2005 ND 147, ¶11, 703 N.W.2d 29; Stewart v. North Dakota Workers Comp. Bureau, 1999 ND 174, ¶ 12 , 599 N.W.2d 280; Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770, 773-75 (N.D. 1988).

[40] This Court's holding in the Sjostrand line of cases directly supports that WSI has authority to terminate disability or vocational benefits for noncompliance even though the claimant has appealed a vocational rehabilitation plan. Requiring WSI to wait until after a final order is issued by an ALJ on appeal of the vocational rehabilitation plan is essentially requiring WSI to provide a pre-termination evidentiary hearing, which this Court has ruled is not necessary.

[41] Here, WSI provided Inwards with the due process requirements established by this Court in Sjostrand. WSI notified Inwards of its intent to discontinue benefits and the reasons for the decision in a notice dated October 21, 2011. (App. 34) Inwards was advised there was no medical evidence supporting her professed inability to attend classes and she was in noncompliance. (Id.) Inwards was also instructed that she could come back into compliance by enrolling in the spring 2012 semester, which she did not do. (Id.) Inwards requested reconsideration on November 9, 2011, indicating she had followed her treating doctor's advice. (App. 36) WSI sought the input of Dr. Lo, who advised that Inwards had sufficient accommodations to allow her to participate in the retraining program. (Supp. App. 6-8) Based on Dr. Lo's opinion, WSI rejected Inwards' claim of good cause and issued an order of noncompliance on January 13, 2012. (App 37)

[42] These processes indicate that Inwards received all that due process required before WSI terminated her disability and rehabilitation benefits. ALJ Sand's decision that

WSI was required to wait until after the appeal of Inwards' vocational rehabilitation plan was final to issue an order of noncompliance is not in accordance with the law and must be reversed.

CONCLUSION

[43] For the foregoing reasons, WSI respectfully requests that the Court ***reverse*** the ALJ's Findings of Fact, Conclusions of Law and Order dated February 19, 2013 and the Order Denying Reconsideration dated April 4, 2013, and ***affirm*** the District Court's Orders denying Inwards' Motion to Dismiss dated July 30, 2013 and August 28, 2013, and Memorandum Opinion and Order Reversing and Affirming dated November 20, 2013.

Dated this 7th day of April, 2014.

/s/ Shanon M. Gregor
Shanon M. Gregor (ID # 05811)
Special Assistant Attorney General
for the Workforce Safety and Insurance
201 Fifth Street North, Suite 1800
P.O. Box 2626
Fargo, ND 58108-2626
T/N: 701-237-5544
F/N: 701-280-0762
sgregor@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 5,235.

Dated this 7th day of April, 2014.

/s/ Shanon M. Gregor

Shanon M. Gregor (ID # 05811)
Special Assistant Attorney General
for the Workforce Safety and Insurance
201 Fifth Street North, Suite 1800
P.O. Box 2626
Fargo, ND 58108-2626
T/N: 701-237-5544
F/N: 701-280-0762
sgregor@nilleslaw.com

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FILED
IN THE OFFICE OF THE
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APRIL 7, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kathy Inwards, Appellant, vs. State of North Dakota by and through Workforce Safety and Insurance, Appellee.	**Supreme Court Case No.: 20140015** **Sargent County Case No.: 41-2013-CV-00032** **AFFIDAVIT OF SERVICE**

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

Sarah D. Iverson, 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 Appellee North Dakota Workforce Safety and Insurance; and**
2. **Supplemental Appendix of Appellee North Dakota Workforce Safety and Insurance.**

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

Stephen D. Little
Little Law Firm
2718 Gateway Ave. Ste. 302
Bismarck, ND 58503

littlelaw@btinet.net

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

N/A

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. Iverson

SUBSCRIBED AND SWORN TO before me on April 7, 2014.

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

Notary Public

cc.: Al Schmidt, ND WSI
Claim No.: 2004 702,697
Nilles File No.: 11-300.069