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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

KATHY INWARDS,	)	SUPREME COURT NO.: 2014 0015
	)	SARGENT CO. NO: 41-2013-CV-00032
Appellant,	)	
	)	
vs.	)	
	)	APPELLANT'S REPLY BRIEF
NORTH DAKOTA WORKFORCE SAFETY & INSURANCE	)	
	)	
Appellee.	)	
	)	

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

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

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Reliance Ins. Co. v. Public Service Comm'n,
250 N.W.2d 918 (N.D. 1977). 2

OTHER AUTHORITIES CITED

North Dakota Rules of Court, Rule 3.5. 1

[1] Appellant Kathy Inwards submits this short reply to the argument of Appellee Workforce Safety and Insurance.

I. Service of Notice of Appeal

[2] If WSI's counsel made any effort to serve Inwards' counsel with the Notice of Appeal/Specification of Errors when she filed that document with the District Court, it is not apparent. After April 1, 2013, the use of the Odyssey system to serve a Notice of Appeal on opposing counsel was mandatory. See: Rule 3.5 North Dakota Rules of Court. The Odyssey system does not allow a "file and serve" option for the initial filing, e.g., a Notice of Appeal. Quite simply, the actions of filing and serving the Notice of Appeal cannot be performed simultaneously but must be performed sequentially. Certainly, it is not the responsibility of the Clerk of the District Court to serve the Notice of Appeal; that responsibility lies with counsel. Whether through inadvertence, neglect, or misunderstanding of the requirements of service, WSI's counsel failed to serve the Notice of Appeal within the time limit prescribed by law. That is not a "technical problem"; it is human error.

[3] WSI likens its failure to serve opposing counsel with the Notice of Appeal to the District Court Clerk's failure to notify Inwards' counsel of the assignment of judge (WSI brief, para. 10). WSI categorizes that failure as "another technical glitch." It is apparent that the District Court Clerk's notification was sent to the wrong e-mail address (App. 199). Once again, that is not a technical problem or glitch; it is human error.

[4] While Inwards has maintained throughout the course of this appeal that WSI's failure to serve Inwards in a timely manner deprived the District Court of subject matter jurisdiction, she has never claimed

prejudice, and prejudice is not a prerequisite to a lack of jurisdiction.

[5] WSI remains unabashedly unapologetic regarding its continuing failure to serve the Notice of Appeal on Ms. Inwards' employer, Bobcat Co. Doosan Infracore. WSI's reliance on this Court's decision in Reliance Ins. Co. v. Public Service Comm'n, 250 NW. 2d 918 (N.D. 1977), is misplaced unless WSI is somehow fiduciarily "bonded" to Bobcat. Furthermore, if, as WSI insists, Bobcat was never a party to the administrative proceedings, because it allegedly had no actual interest in the outcome, why did WSI serve Bobcat with the Notice of Intention to Discontinue/Reduce Benefits (App. 34-35), the Order Denying Further Disability Benefits (App. 37-43), WSI's Post-Hearing Brief (CR 219-225) and WSI's Petition for Reconsideration (App. 124-130)? Finally, it seems axiomatic that any party to an appeal has standing to point out that the Court lacks subject matter jurisdiction to consider the appeal.

II. Good Cause

[6] Inwards had good cause not to attend a vocational rehabilitation program which she did not consider appropriate and not to comply with an order which was not yet final. Furthermore, she had good cause not to come back into compliance with a vocational rehabilitation program which was not yet final. WSI's position in this matter is twofold: (1) WSI, as a state agency is not required to follow the law unless an injured worker complains; otherwise, it can do whatever it can get away with. (2). Regardless of whether an injured worker considers a vocational rehabilitation plan to be appropriate, for whatever reason and based on whatever evidence, that injured worker must comply with that program,

even though it is not yet final and even though it is WSI's burden to prove the appropriateness of that program, or face permanent loss of disability benefits without recourse.

[7] The Administrative Law Judge determined not merely that Kathy Inwards had good cause but that any reasonable person would have good cause not to comply with an order which was not final (Conclusion of Law 7; App. 120-121). The ALJ determined that WSI's enforcement of a vocational rehabilitation order which was not final, because the injured worker had properly sought a due process hearing, "would be merely a subterfuge, or facade, an exercise in futility" (Conclusion of Law 5; App. 236). While the ALJ may have colloquially and mistakenly referred to Inwards' challenge of WSI's vocational rehabilitation order as an appeal, e.g., Conclusion of Law 2 (Id.), it was not an appeal but a post-termination due process hearing. The District Court also mistakenly referred to Inwards' exhaustion of her due process remedies as an appeal. While the ALJ's mistake was harmless, the mistake by the District Court was not (Conclusion of Law 9(j); App. 219). To require Inwards or any other injured worker to comply with an order which has not become final and is the subject of a due process hearing would, in the ALJ's words, be "merely a subterfuge, or facade, [or] an exercise in futility." Inwards suggests that it would be nonsensical as well. Surely, the purpose of allowing a post-termination due process hearing cannot be to enforce a non-final order.

III. Conclusion

[8] WSI's failure to serve Inwards' counsel was human error, not a technical problem. That failure deprived the District Court of *subject* matter jurisdiction. Allowing WSI to find Inwards in noncompliance, and

deprive her of a means to come back into compliance, while she challenges the underlying order makes a mockery of post-termination due process.

Respectfully submitted this 15th day of April, 2014.

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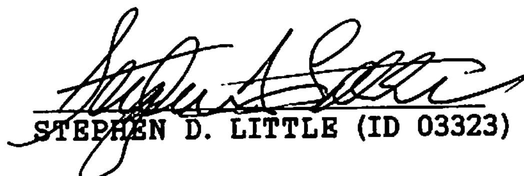

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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 15th day of April, 2014, a true and correct copy of the Appellant's Reply Brief with an attached Certificate of Service were mailed to the following:

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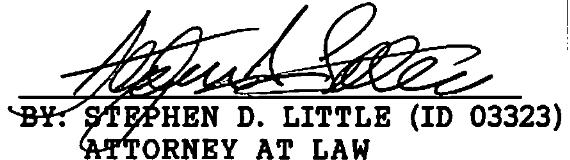

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