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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

[1] I. Did Workforce Safety & Insurance's (WSI) failure to properly serve the Notice of Appeal on both the Claimant/Appellee and the Employer/Respondent deprive the District Court of subject matter jurisdiction?

[2] II. Could a reasonable person find, as did the Administrative Law Judge, that the Claimant/Appellee had reasonable cause not to comply with a vocational rehabilitation order which was not final?

II. STATEMENT OF THE CASE

[3] On October 21, 2011, WSI issued a Notice of Intention to Discontinue/Reduce Benefits, asserting that Kathy Inwards was noncompliant with her statutory vocational rehabilitation obligations (Appendix 34; (hereafter App.). Following Ms. Inwards' Request for Reconsideration (App. 36), WSI issued an Order Denying Further Disability Benefits on January 13, 2012 (App. 37-42). Ms. Inwards demanded a formal hearing (App. 62) and a hearing was held on December 12, 2012, before Administrative Law Judge Rosellen Sand (App. 139).

[4] After both Ms. Inwards and WSI submitted post-hearing briefs (App. 100-113), ALJ Sand issued Findings of Facts, Conclusions of Law and Order on February 19, 2013 (App. 114-123). WSI petitioned for reconsideration (App. 124-130), and ALJ Sand issued an Order Denying Reconsideration on April 4, 2013 (App. 135-137).

[5] WSI appealed ALJ Sand's decision to the District Court (App. 17). Ms. Inwards moved to dismiss WSI's Appeal, asserting that the District Court lacked subject matter jurisdiction because WSI had failed to serve both Ms. Inwards and her employer, Bobcat Company-Doosan Infracore Intl., with the Notice of Appeal (App. 156). The District Court, the Honorable Bradley A. Cruff presiding, denied Ms. Inwards' Motion to Dismiss and reversed ALJ Sand's decision (App. 201, 208, 210). Ms. Inwards has appealed Judge Cruff's Order for Judgment to this Court (App. 224).

III. STATEMENT OF THE FACTS

[6] Kathy Inwards injured both her right and left hands while employed as an assembler with Bobcat. (App. 21-23. Ms. Inwards filed a claim for worker's compensation benefits on September 10, 2004 (App. 21). She was later diagnosed with bilateral carpal tunnel syndrome and had carpal tunnel release on the right and left wrists in 2005 and repeat carpal tunnel release on the right wrist in 2006. (App. 87)

[7] WSI awarded vocational rehabilitation benefits to Ms. Inwards to assist her in returning to work. A vocational rehabilitation plan identified the first appropriate rehabilitation option for Ms. Inwards as retraining, and she began an associate's degree program in June 2010 (App. 76, 77). Shortly after beginning classes at Hutchinson Community College in Hutchinson, Kansas, Inwards complained of increased numbness and tingling in her hands. WSI had her evaluated by Dr. Bernard M. Abrams, a neurologist (App. 82). Dr. Abrams recommended that Inwards be removed from her retraining program until her carpal tunnels were reevaluated. (App. 84, 85).

[8] On February 3, 2011, Ms. Inwards underwent a functional capacity evaluation (FCE) (App. 93-99). The evaluator noted that, although Ms. Inwards gave inconsistent effort during the exams, she was capable of sedentary-light duty. (App. 98). On February 6, 2011, Dr. Kirtie Lo concurred with the results of the FCE (App. 88).

[9] Thereafter, WSI re-opened vocational rehabilitation services for Ms. Inwards' return to work. (App. 77, 78)

[10] On June 27, 2011, WSI issued a formal order requiring Ms. Inwards to participate in a retraining program, terminating temporary total disability benefits and awarding retraining benefits. (App. 25-30) Ms. Inwards claimed she was totally disabled and objected to the

retraining program. (App. 31, 32) She requested a hearing to challenge WSI's order.

[11] In July 2011, Ms. Inwards began the retraining program and took one computer course during at Hutchinson Community College (App. 79-80). On July 15, 2011, Ms. Inwards told Dr. Lo that she was having increased pain as a result of her course work (App. 90). Ms. Inwards finished the course and registered for the fall semester. On August 18, 2011, Ms. Inwards withdrew from Hutchinson Community College (App. 33, 81).

[12] On October 21, 2011, WSI notified Ms. Inwards that she was in noncompliance with her retraining program and that her rehabilitation benefits would be discontinued (App. 34). Ms. Inwards requested reconsideration of WSI's decision on November 9, 2011 (App. 36). On January 13, 2012, WSI issued an Order denying Ms. Inwards' further rehabilitation benefits based on her noncompliance (App. 37-48) Ms. Inwards requested a hearing to challenge the finding of noncompliance and the termination of her benefits (App. 62).

[13] On January 26, 2012, the parties appeared for the administrative hearing on Ms. Inwards' challenge to the vocational rehabilitation plan (App. 49). On February 25, 2012, ALJ Rosellen Sand issued Findings of Fact, Conclusions of Law, and Order approving retraining as the first appropriate rehabilitation option for Ms. Inwards (App. 49-61). Although Ms. Inwards requested ALJ Sand to reconsider the decision, this was denied in an Order dated May 11, 2012 (App. 67-75). Ms. Inwards did not appeal the February 25, 2012 final order approving the retraining program or the May 11, 2012, Order on Reconsideration.

[14] Still pending was the issue of whether Ms. Inwards had good cause for failing to comply with the retraining program. A hearing on that issue was held on December 12, 2012. (App. 63-66; App. 139 (Hearing Transcript CR 255, p. 4). Ms. Inwards agreed that she had withdrawn from the program, and the issue became whether she had good cause for

discontinuing her retraining (App. 141, 142 (Hearing Trans. pp. 5-6, p.12)).

[15] At the conclusion of the hearing, ALJ Sand questioned the enforceability of WSI's January 13, 2012 order finding Ms. Inwards in noncompliance. ALJ Sand suggested that the underlying June 27, 2011, order requiring Ms. Inwards to attend retraining was not enforceable until the appropriateness of Ms. Inwards' rehabilitation plan was resolved, which occurred when ALJ Sand denied Ms. Inwards' Petition for Reconsideration on May 11, 2012 (App. 67-75). The parties submitted post-hearing briefs addressing these issues (App. 100-102; 103-110; and 111-113).

[16] On February 19, 2013, ALJ Sand issued Findings of Fact, Conclusions of Law and Order on Ms. Inwards' alleged noncompliance with retraining (App. 114-123). ALl Sand concluded that Ms. Inwards had good cause for not complying with WSI's Order requiring her to attend retraining because "[a] reasonably prudent person would refuse to attend vocational training while their appeal was being resolved" (App. 120, Conclusion. of Law 7). WSI was held to have prematurely attempted to enforce its order approving the vocational rehabilitation plan (App. 121). ALJ Sand reversed WSI's January 13, 2012, order suspending Ms. Inwards' benefits for noncompliance (App. 121).

[17] WSI requested ALJ Sand to reconsider the February 19, 2013, Order, and this request was denied in an Order Denying Reconsideration dated April 4, 2013 (App. 124-130, 135-138) WSI appealed from both orders.

IV. LAW AND ARGUMENT

[18] I. The District Court lacked subject matter jurisdiction to consider WSI's appeal because WSI failed to properly serve Ms. Inwards and her employer Bobcat-Doosan Infracore, Intl., with the Notice of Appeal.

[19] The record plainly shows that WSI claimed to have served Ms. Inwards' counsel electronically (App. 20). Although, at the time, Ms. Inwards' counsel had not registered with this Court's Odyssey program and had not consented to electronic service of process, WSI could nevertheless have served the Notice of Appeal and Specification of Error either electronically or by regular mail. Neither WSI nor its counsel ever inquired whether Ms. Inwards' counsel accepted electronic service or had, in fact, received service. Ms. Inwards' counsel was unaware of WSI's appeal until he received the certified record electronically on May 20, 2013 (See: Sargent County Register - Service Document Doc ID# 50 (App. 2)).

[20] The Court documents clearly show that WSI electronically filed and served the Certificate of Record on May 20, 2013 (Id.). Other documents show, equally clearly, that, on April 23, 2013, WSI electronically filed but did not serve the Notice of Appeal and Specification of Errors on Ms. Inwards, her counsel, or Bobcat Company-Doosan Infracore Intl. (App. 161-168; 195-196; 205-206). WSI's intentional failure to serve Bobcat Company-Doosan Infracore Intl., is particularly troubling since WSI had served them a number of times during the pendency of the administrative proceeding (App. 24, 28, 34-35, 46).

[21] This Court has noted that, in an appeal of a final decision in a workers compensation proceeding, an appellant's failure to serve the respondent employer with the Notice of Appeal deprives the District Court, acting in an appellate capacity, of subject matter jurisdiction. See: Pederson v. ND Workers Comp. Bureau, 534 N.W.2d 809 (N.D. 1995) citing: Reliable, Inc. v. Stutsman County Commission, 409 N.W.2d 632, 634 (ND 1987).

[22] Furthermore, this Court has noted that the statutory requirement for serving a Notice of Appeal from an administrative agency order is jurisdictional. See: Boyko v. N.D. Workmen's Comp. Bureau, 409 N.W.2d 638, 641 (ND 1987). To perfect an appeal, the Appellant must serve

a Notice of Appeal on all parties to the proceedings. If the Appellant does not serve the Notice of Appeal, as required by statute, the District Court lacks subject matter jurisdiction, and the appeal must be dismissed. See: Benson v. Workforce Safety and Insurance, 2003 ND 193, 672 N.W.2d 640.

[23] As is apparent from the Affidavit of Patricia Schonert (App. 205-206), the Notice of Appeal could not be served until it was filed and given a civil number by the clerk of court. WSI's failure to serve Ms. Inwards was not due to "technical problems," e.g., a programming error, loss of internet service, etc. Rather, WSI's failure was apparently due to a misunderstanding of the Odyssey System's requirement (and therefore, the Court's requirement) for effectuating service. It is clear that proper service on all parties is required before the District Court had subject matter jurisdiction. WSI's failure to serve was not due to "technical problems" but to poor decision-making.

[24] In the instant case, the Sargent County Register of Actions Doc ID# 3 (App. 20) and Affidavit of Counsel (App. 195) clearly show that WSI electronically filed but did not serve the Notice of Appeal on either Ms. Inwards' counsel or Bobcat and did not serve either party by U.S. Mail (App. 20). Consequently, WSI's appeal must be dismissed for lack of subject matter jurisdiction.

[25] II. A reasonable person could find, as did the Administrative Law Judge, that a workers compensation Claimant, such as Kathy Inwards, has reasonable cause not to comply with a vocational rehabilitation order which was not final.

[26] When an administrative agency requests the designation of an administrative law judge from the Office of Administrative Hearings to issue a final decision, judicial review of the ALJ's factual findings is the same as that used for agency decisions. Workforce Safety &

Insurance v. Auck, 2010 ND 126 paragraph 9, 785 N.W.2d 186; North Dakota Securities Commissioner v. Juran and Moody, Inc., 2000 ND 136 paragraph 27, 613 N.W.2d 503. This is a limited, deferential standard of review. Auck, 2010 ND 126 paragraph 9, 785 N.W.2d 186; Bruder v. Workforce Safety and Insurance, 2009 ND 23 paragraph 6, 761 N.W.2d at 588. The ALJ's decision must be affirmed unless the "findings of fact are not supported by a preponderance of the evidence, [the] conclusions of law are not supported by [the] findings of fact, [the] decision is not supported by [the] conclusions of law, or [the] decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 paragraph 8, 569 N.W.2d 1, 3-4.

[27] The Court must exercise restraint in determining whether the ALJ's decision is supported by a preponderance of the evidence and should not make independent findings of fact or substitute its judgment for that of the ALJ. Bruder, 2009 ND 23 paragraph 7, 671 N.W.2d at 790; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436; Lucier v. North Dakota Workers Compensation Bureau, 556 N.W.2d 56, 69 (N.D. 1996). The Court need determine "only whether or not a reasoning mind could have decided the agency's findings were proven by the weight of the evidence from the entire record." Barnes v. Workforce Safety and Insurance, 2003 ND 141 paragraph 9, 668 N.W.2d 290. A preponderance of the evidence is defined as "evidence more worthy of belief," or "the greater weight of the evidence," or "testimony that brings the greater conviction of the truth." Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979).

[28] WSI's arguments ask this Court to reconsider/reweigh the evidence and come to an opposite conclusion than that of ALJ Sand, which this Court cannot do. See: Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 paragraph 40, 599 N.W.2d 280 (noting

even though court may have a different view of the evidence, it must only consider whether the ALJ's decision is supported by the evidence). Quite simply, "[i]t is within [the ALJ's] province to weigh the credibility of the evidence presented." Latraille v. North Dakota Workers Compensation Bureau, 481 N.W.2d 446, 450 (N.D. 1992). This Court cannot substitute its judgment for that of the ALJ. S & S Landscaping Co. v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995).

[29] At the outset, it must be noted that, despite occasional incorrect and colloquial references to the formal, administrative hearing as an "appeal" of WSI's noncompliance Order, it was not an appeal, but merely the post-deprivation due process hearing required by both statute and case law. See: N.D.C.C., Section 65-01-16; Beckler v. Workers Compensation Bureau, 418 N.W.2d 770 (ND 1988) and Flink v. ND Workers Compensation Bureau, 1998 ND 11, 574 N.W.2d 784.

[30] This Court has long recognized a claimant's right to a timely post-termination evidentiary hearing and the award of retroactive disability benefits. See: Beckler, supra. Ms. Inwards' entitlement to continued disability/rehabilitation benefits is a property right protected by the Due Process Clause. Id., at 772. WSI's intent in immediate termination of disability/rehabilitation benefits does not outweigh Ms. Inwards' significant interest in the continuation of those benefits. Financial cost alone is not paramount and is outweighed by Ms. Inwards' significant property interest and by the risk of an erroneous deprivation. Id. at 775.

[31] In the instant case, WSI discontinued Ms. Inwards' disability benefits and awarded rehabilitation benefits on June 8, 2011, (App. 24). That decision did not become final until May 11, 2012 (App. 24), when Ms. Inwards exhausted all of her administrative due process remedies. While Ms. Inwards was exhausting those remedies, WSI terminated her remaining rehabilitation

benefits (App. 30), asserting that she was in noncompliance with a vocational rehabilitation Order which, because she had challenged that Order and was proceeding to a "timely" administrative hearing, was not yet final.

[32] Ms. Inwards also challenged WSI's determination of noncompliance without good cause. When WSI's rehabilitation Order became final on May 11, 2012, (App. 67-75), she had already been without any wage loss benefits, whether denominated disability or rehabilitation, for more than seven months due solely her alleged noncompliance with a non-final order.

[33] Furthermore, N.D.C.C., 65-05.1-04(4) provides that, if the period of noncompliance continues for thirty days following the date benefits are discontinued, WSI may not pay any further disability benefits. Thus, because WSI found Ms. Inwards in noncompliance with a vocational rehabilitation plan which was not final, she was faced with either submitting to a plan with which she disagreed (making a mockery of due process) or being denied the opportunity to come back into compliance once her due process rights were exhausted (making a mockery of the statutory mechanism for reinstatement of wage loss benefits.

[34] As the ALJ noted in her decision, "The question here is whether the appeal provisions provided by the legislature can be circumvented by issuing a second order to enforce the provisions of a prior, non-final order that has been appealed" (App. 115). No matter how WSI couches it argument, it all boils down to its contention that it can hold Kathy Inwards in noncompliance with an order which has not become final. The ALJ determined that a reasonably prudent person would have good cause for not complying with an order which was not final and which, consequently, she had no legal obligation to obey (App. 120-121 (Conclusion of Law 7)).

[35] Due process and common sense demand that WSI obtain final orders before finding claimants in noncompliance and terminating benefits. The situation WSI finds itself in is of its

own creation and can be remedied by having pre-termination hearings or actual timely post-termination hearings. Kathy Inwards should not have to pay the price for WSI's intransigence or incompetence.

V. CONCLUSION

[36] The District Court never acquired subject matter jurisdiction. WSI's appeal should be dismissed summarily. Kathy Inwards had good cause for not complying with an Order which was not final. She respectfully requests that ALJ Sand's order be affirmed.

Respectfully submitted this 20th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 20th day of February, 2014, a true and correct copy of the Appellant's Brief with an attached Certificate of Service and an Appendix were mailed to the following:

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