

20160270

IN THE SUPREME COURT

FILED
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CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

SEP 29 2016

JB Construction Inc.,)
)
 Petitioner and Appellant,)
)
 v.)
)
 Job Service North Dakota,)
)
 Respondent and Appellee.)
)

STATE OF NORTH DAKOTA
Supreme Ct. No. 20160270
District Ct. No. 15-2015-CV-00036

**APPEAL FROM THE DISTRICT COURT
JUDGMENT DATED JUNE 22, 2016
EMMONS COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT**

HONORABLE SONNA ANDERSON

BRIEF OF RESPONDENT AND APPELLEE

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STATEMENT OF THE ISSUES

[¶1] Whether the services provided by Jesse Jahner and Vance Jahner for JB Construction Inc. are employment as defined in N.D.C.C. § 52-01-01(17) and (18)?

[¶2] Whether Jesse Jahner filed a timely written application to exclude his services as an officer of JB Construction Inc. from employment as allowed by N.D.C.C. § 52-01-01(17)(a)(1)?

[¶3] Whether Vance Jahner filed a timely written application to exclude his services as an officer of JB Construction Inc. from employment as allowed by N.D.C.C. § 52-01-01(17)(a)(1)?

STATEMENT OF THE CASE

[¶4] JB Construction, Inc. (JB), appeals the decision of Job Service North Dakota (Job Service), which held that services performed by two of its corporate officers Vance Jahner (Vance) and Jesse Jahner (Jesse) was employment as defined in N.D.C.C. § 52-01-01(17) and that the corporation did not exclude the two individual officers' services from employment by filing a written application for exemption.

[¶5] In 2015, JB was randomly selected for an audit. Certificate of Record (C.R.) 20-21. After reviewing the payroll records for the years 2012 through 2014 Job Service noted that neither Jesse's nor Vance's wages had been included in quarterly wage reports. Job Service completed statements to correct the company's contribution and wage reports to include Jesse's and Vance's wages from the years 2012 through 2014. Appendix (App.) 18-21.

[¶6] On March 10, 2015, Job Service issued its Notice of Determination Wages and/or Employment advising JB that the services performed by Vance and Jesse for the corporation are considered employment as that term is defined by N.D.C.C. § 52-01-01(17) and (18). App. 3. On March 24, 2015, JB appealed Job Service's determination. App. 10. The matter was referred to the appeals section of Job Service, and a hearing was held before an appeals referee on June 26, 2015. C.R. 11; App. 11.

[¶7] On July 8, 2015, a Notice of Decision was sent to JB affirming Job Service's decision that JB owed unemployment premiums, interest and penalties for wages paid to Jesse and Vance. App. 40-44. JB petitioned for Bureau Review of the appeals referee's decision. App. 45. An Order Denying Review was issued by Job Service on July 23, 2015. App. 47. On August 14, 2015, JB petitioned for judicial review of Job Service's decision. App. 48-50.

[¶8] On June 2, 2016, the district court issued its Order Affirming Decision of Job Service North Dakota, holding:

Here, the statute does not allow for a new corporate officer to be substituted into an exemption without filing "an application to exclude that officer's service . . ." N.D.C.C. § 52-01-01(17)(a)(1). As a result, the interpretation of Job Service is a reasonable interpretation that is not contradicted by the plain language of the statute. Therefore, this Court will defer to that interpretation.

App. 58. A Judgment affirming the decision of Job Service was entered on May 22, 2016. App. 61. It is from that Judgment which JB appeals. App. 63.

STATEMENT OF THE FACTS

[¶9] JB is a power-line construction company incorporated in North Dakota in 1975 as an S corporation. C.R. 2; App. 29, 31. On January 5, 2000, JB applied

to exempt the wages of its three corporate officers who held more than one-fourth ownership interest in the company, under the requirements set forth in N.D.C.C. § 52-01-01(17)(a)(1). App 8. At that time, the three officers making the exemption request were JB's President Wesley Jahner (Wesley), Vice President Harvey Jahner (Harvey), and Secretary/Treasurer Wayne Jahner (Wayne). App. 8, 21. Each officer owned 33.3% of the ownership interest in the corporation. App. 8. And, each signed the application, referencing their title, social security number and ownership amount to indicate their individual consent to be excluded from unemployment insurance coverage. App. 8, 21.

[¶10] On January 21, 2000, Job Service issued a letter to JB advising the company that its "application to exempt corporate officers, or LLC managers, Wesley Jahner, President; Harvey Jahner Vice-president; and Wayne Jahner, Secretary/Treasurer, from job insurance coverage is approved." App. 9. The letter further advised JB to "not include the name, social security number, or wages for exempt corporate officers or exempt LLC managers on future quarterly reports." Id.

[¶11] In 2009, Jesse Jahner (Jesse) purchased Wayne's interest in the company and Vance Jahner (Vance) purchased Wesley's interest. App. 30-32. Harvey became President, Jesse became Vice President, and Vance became Secretary/Treasurer. App. 31, l. 13 – App. 32, l. 23. JB did not notify Job Service of the ownership transfer. JB simply believed that since Jesse and Vance were corporate officers holding more than one fourth ownership in JB, their wages were also exempt as a result of the January 21, 2000 letter from Job

Service granting its former officers' application for exemption. App. 34. At no time had JB included Jesse's or Vance's wages on any of its quarterly reports. App. 18.

[¶12] In 2015, JB was randomly selected for an audit. App. 18-19. The audit was performed by Job Service UI Field Representative Melissa Parks (Parks). App. 17-18. The audit included the years 2012 through 2014 per Job Service policy. App. 19. In reviewing the company's payroll records, it was determined that neither Jesse's nor Vance's wages had been included in quarterly wage reports. Id. Parks then verified that Jesse's and Vance's services were not exempted and completed statements to correct the company's contribution and wage reports to include Jesse's and Vance's wages from the years 2012 through 2014. App. 18-21.

[¶13] On March 10, 2015, Job Service issued its Notice of Determination Wages and/or Employment advising JB that the services performed by Vance and Jesse for the corporation are considered employment as that term is defined by N.D.C.C. § 52-01-01(17) and (18). App 3. On March 24, 2015, JB appealed Job Service's determination. App. 10. A hearing was held before an appeals referee on June 26, 2015. C.R. 11; App. 11.

[¶14] At the hearing Job Service provided testimony through Parks. App. 11. JB provided testimony through Harvey and Vance. App. 13, 29, 36. JB did not contest the determination that Jesse's and Vance's services for JB would not be considered employment under the statutory definition but rather argued that wages paid to Jesse and Vance should not be subject to unemployment

insurance taxes because JB filed an exemption to exclude its officers' services from employment in January 2000. App. 34, 37-38.

LAW AND ARGUMENT

I. Standard of Review.

[¶15] A determination of an administrative agency is presumed to be correct. Turnbow v. Job Serv. N.D., 479 N.W.2d 827, 828 (N.D. 1992). This Court's review of an agency's decision is governed by N.D.C.C. § 28-32-46, which requires the Court to determine: "(1) if the findings of fact are supported by a preponderance of the evidence; (2) if the conclusions of law are sustained by the findings of fact; (3) if the agency decision is supported by the conclusions of law; and (4) if the decision is in accordance with the law." N. States Power Co. v. N.D. Public Serv. Comm'n, 502 N.W.2d 240, 242 (N.D. 1993).

[¶16] The North Dakota Supreme Court has explained the standard it and the district courts follow when reviewing administrative agency decisions:

"(1) we do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence; (2) we exercise restraint when we review administrative agency findings; (3) it is not the function of the judiciary to act as a super board when reviewing administrative agency determinations; and (4) we will not substitute our judgment for that of qualified experts in the administrative agencies."

Sonterre v. Job Serv. N.D., 379 N.W.2d 281, 283-84 (N.D. 1985) (quoting N.D. Real Estate Comm'n v. Boschee, 347 N.W.2d 331, 335 (N.D. 1984) (internal citations omitted)).

[¶17] Furthermore, "[b]ecause of the doctrine of separation of powers, all courts must exercise restraint in reviewing administrative determinations." Barnes Cty. v. Garrison Diversion Conservancy Dist., 312 N.W.2d 20, 25 (N.D. 1981) (citation omitted). "Ordinarily, determinations of an administrative body are presumed to be correct and valid." Id.; see also Turnbow v. Job Serv. N.D., 479 N.W.2d at 827. An agency is also afforded a "reasonable range of informed discretion in the interpretation and application of its own rules." Bottineau Cty. Water Res. Dist. v. N.D. Wildlife Soc'y, 424 N.W.2d 894, 900 (N.D. 1988).

[¶18] The only issue before this Court is whether the services performed by Jesse and Vance for JB were exempt under the provisions of N.D.C.C. § 52-01-01(17)(a)(1). Thus, the issue is one of statutory interpretation, which is a question of law fully reviewable on appeal. See Morris v. Job Serv. N.D., 2000 ND 45, ¶ 5, 658 N.W.2d 345 ("Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision").

II. Jesse Jahner and Vance Jahner did not file an application for exemption in accordance with the law and their respective wages are employment under the law.

[¶19] The applicable statute, N.D.C.C. § 52-01-01(17)(a)(1) allows a corporation to exempt corporate officer wages from the definition of employment on the following grounds:

If a corporate officer is employed by a corporation in which one-fourth or more of the ownership interest, however designated, is owned or controlled by the officer or by the officer's parent, child, or spouse, or by any combination of them, the corporation with the concurrence of the officer may exclude that officer's service from employment as of the first day of January of any calendar year if, during January of that year, the corporation files a written application to exclude the officer's service from employment or as

of the formation of the corporation if, within sixty days of the formation, the corporation files a written application to exclude the officer's service from employment.

Id. (emphasis added).

[¶20] Statutory interpretation is a question of law, fully reviewable on appeal.

GO Comm. ex. rel. Hale v. City of Minot, 2005 ND 136, ¶ 9, 701 N.W.2d 865.

The objective in interpreting a statute is to determine legislative intent by first looking at the language of the statute. Amerada Hess Corp. v. State ex rel. Tax Comm'r, 2005 ND 155, ¶ 12, 704 N.W.2d 8. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined in the code or unless the drafters clearly intended otherwise. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. This Court will harmonize statutes if possible to avoid conflicts between them, and the Court's statutory interpretation "must be consistent with legislative intent and done in a manner [to further] the policy goals and objectives of the statutes." Haugenoe v. Workforce Safety and Ins., 2008 ND 78, ¶ 8, 748 N.W.2d 378 (quoting Rojas v. Workforce Safety and Ins., 2006 ND 221, ¶ 13, 723 N.W.2d 403). If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. A statute is ambiguous if it is susceptible to different, rational meanings. Amerada Hess Corp. v. Fong, 2005 ND 155, ¶ 12, 704 N.W.2d 8. If the language of a statute is ambiguous or doubtful in meaning, a court may consider extrinsic aids, such as legislative history, to determine legislative intent. N.D.C.C. § 1-02-39. While questions of

law, including the interpretation of a statute, are fully reviewable on appeal, this Court will give deference to an administrative agency's construction of a statute in administering the law when that interpretation does not contradict clear and unambiguous statutory language. Indus. Contractors, Inc. v. Workforce Safety & Ins., 2009 ND 157, ¶ 6, 772 N.W.2d 582.

[¶21] It is uncontested that on January 5, 2000 JB filed a written application to exempt the services of Wesley, Harvey, and Wayne, the corporation's respective President, Vice President, and Secretary/Treasurer, from employment. App. 8. Job Service granted JB's application. App. 9. It is further uncontested that in 2009 Jesse bought Wayne's interest and Vance bought Wesley's interest in the corporation, and the corporation was reorganized with Harvey as President, Jesse as Vice President and Vance as Secretary/Treasurer. App. 30-32; Appellant's Br. ¶ 7.

[¶22] JB argues the services performed by Jesse and Vance should be excluded from employment because they assumed to the corporate officer positions previously held by Harvey and Wayne which Job Service approved exempt in January 2000. Appellant's Br. ¶ 13. JB's argument is contrary to the plain language of the statute and is meritless.

[¶23] As the appeals referee determined, the plain language of the statute refers to officers rather than offices in creating the exemption. App. 43. "Its use of the singular 'officer' and singular pronouns in establishing the exemption further supports a conclusion that exemptions are individual." Id.

[¶24] JB, however, contends that the statute's exemption "belongs to the corporation and not to the corporate officer or the individual who holds the corporate office." Appellant's Br. ¶ 12. This argument should be rejected as it is not supported by the statutory text. Indeed, JB's position is belied by the inclusion of the phrase, "with the concurrence of the officer." Essentially, JB suggests that the statutory language be read to exempt all officers who are employed by the corporation who own more than 25% of the corporation. Appellant's Br. ¶ 11. Based on well-settled principles of statutory interpretation, "with the concurrence of the 'officer'" must mean something other than "with the concurrence of the 'corporation.'" See N.D.C.C. § 1-02-38(2) ("In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective"); Sandberg v. Am. Family Ins. Co., 2006 ND 198, ¶ 9, 722 N.W.2d 359. The phrase, "with the concurrence of the officer" must be given meaning. JB's interpretation that the exemption belongs to the corporation and not the individual officer would render the phrase meaningless.

[¶25] JB's interpretation would also cause problems if the officer did not hold at least a 25% ownership interest in the company. While that is not the case here, the statutory language limits the exemption to individual officers holding at least a one-fourth (25%) ownership interest. Under JB's interpretation, the statute would provide the practical exemption of an officer holding less than 25% ownership. This is because once the officer class is approved exempt by Job Service the exemption "remain[s] in effect until an application is filed to void the exemption." See App. 9. Once an exemption is granted Job Service would have no way of

knowing if and when a new individual were to assume the officer position and if that individual had a sufficient ownership stake in the company. In fact, in referring to the ownership amount necessary to qualify for the exemption, the statute notes the controlling interest can include amounts controlled by the officer's "parent, child, or spouse". This language presumes reference to an individual person and not an officer classification because an artificial legally created person cannot have a parent, child, or spouse. Again, if the statute intended the exemption to apply to a class of officer and not an individual officer the phrase "parent, child, or spouse" would be rendered a nullity. Therefore, the plain reading of the statutory exemption applies to an individual officer and not a class of officer.

[¶26] Additionally, in JB's "Application To Exempt Corporate Officers or Limited Liability Company Managers from Job Insurance Coverage" the application required the social security number and signature of the specified individual officer seeking the exemption. App. 8. In fact, the application explicitly notes, that the "* Signature Indicates the officer/manager consents to be excluded from job insurance coverage." Id. If the statute permitted a class of officer to be exempt there would be no need for the individual officer to certify his or her consent. Presumably only an authorized corporate signature would suffice. Further, when Job Service granted JB's January 5, 2000 application to exempt corporate officers it named the individuals it was approving to be exempt from unemployment insurance coverage. See App. 9 (stating, "[y]our application to exempt corporate officers, or LLC managers, Wesley Jahner, President; Harvey

Jahner Vice-president; and Wayne Jahner, Secretary/Treasurer, from job insurance coverage is approved.”). Job Service did not simply name only the offices being granted the exemption.


CONCLUSION

[¶27] Job Service respectfully requests this Court affirm Job Service’s determination that the services performed by Jesse Jahner and Vance Jahner for JB Construction, Inc., was employment and that no application to exclude those services was made by the corporation.

Dated this 29th day of September, 2016.

State of North Dakota
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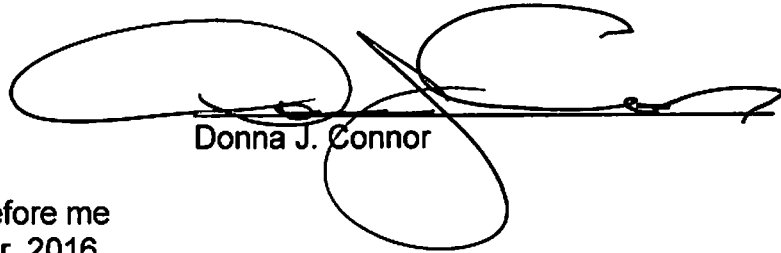
[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 29th day of September, 2016, I served the attached original **BRIEF OF APPELLEE** upon JB Construction Inc., by and through its attorney, Michael J. Geiermann, by placing a true and correct copy thereof in an envelope addressed as follows:


Michael J. Geiermann
Attorney at Law
P.O. Box 2196
Bismarck, ND 58501-2196

and depositing the same, with postage prepaid, in the United States mail at Bismarck,
North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 29th day of September, 2016.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019

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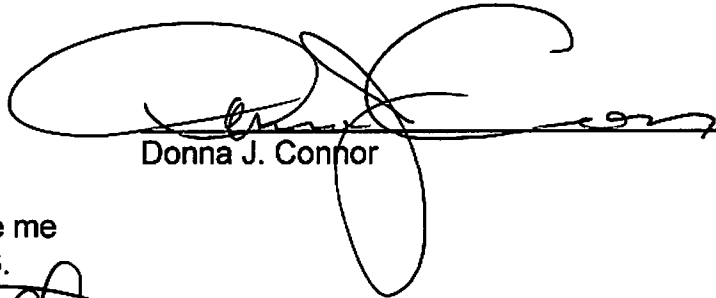
[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 7th day of October, 2016, I served the enclosed title page of the **BRIEF OF RESPONDENT AND APPELLEE** upon JB Construction Inc., by and through its attorney, Michael J. Geiermann, by placing a true and correct copy thereof in an envelope addressed as follows:

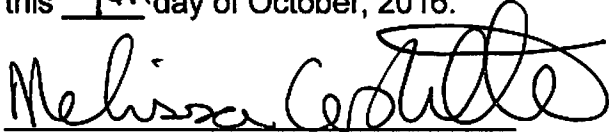
Michael J. Geiermann
Attorney at Law
P.O. Box 2196
Bismarck, ND 58501-2196

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 7th day of October, 2016.



Melissa Castillo
Notary Public

