

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Supreme Court No. 20160270  
Emmons County No. 2015-CV-00036

JB Construction Inc.,

Petitioner and Appellant,

v.

Job Service North Dakota,

Respondent and Appellee.

**Appeal from District Court, Emmons County, North Dakota  
South Central Judicial District  
Honorable Sonna Anderson**

Appeal from Order for Judgment dated June 20, 2016  
and Judgment dated June 22, 2016

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**BRIEF OF APPELLANT JB CONSTRUCTION INC.**

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## TABLE OF CONTENTS

Statement of the Issues .....	iv
	¶ No.
Statement of the Case .....	1
Statement of the Facts.....	5
Law and Argument .....	9
1. Standard of Review.....	9
Rules of Statutory Construction .....	10
2. Job Service has not interpreted N.D.C.C. § 52-01-01(17)(a)(1) correctly .....	11
Conclusion .....	17

## TABLE OF AUTHORITIES

### Citations

	¶ No.
<i>Gray v. North Dakota Game and Fish Department</i> , 2005 ND 204 ¶ 7, 706 N.W.2d 614.....	9
<i>Olson v. Job Service North Dakota</i> , 2013 ND 24 ¶ 4.....	10
<i>Stutsman County v. State Historical Society</i> , 317 N.W.2d 321, 324 (N.D. 1985).....	10
<i>McDowell v. Gillee</i> , 2001 ND 91 ¶ 11, 626 N.W.2d 666.....	10
<i>State v. Brown</i> , 2009 ND 150 ¶ 15, 771 N.W.2d 267.....	10
<i>Airvator, Inc. v. Turtle Mountain Manufacturing Company</i> , 329 N.W.2d 596, 602 (N.D. 1983).....	12
<i>Little v. Tracy</i> , 497 N.W.2d 700, 703 (N.D. 1983).....	14
<i>Amerada Hess Corporation v. State Ex. Rel. Tax Commissioner</i> , 2005 ND 155 ¶ 12, 704 N.W.2d 8.....	16

### Statutes

N.D.C.C. § 52-01-01(17).....	2, 8, 10, 11
N.D.C.C. § 52-01-01(18).....	2, 8
N.D.C.C. § 28-32-49.....	9
N.D.C.C. § 28-32-46.....	9
N.D.C.C. § 10-19.1-52.....	12

## **STATEMENT OF THE ISSUES**

- [¶ 1]** Whether Job Service erred in interpreting N.D.C.C. § 52-01-01(17) and (18) that the services of Vance Jahner and Jesse Jahner were employment and subject to North Dakota job insurance taxes.
- [¶ 2]** Whether Job Service erred in concluding that when Jesse Jahner purchased 33⅓% of J B Construction Inc. and became vice president of J B Construction Inc. in 2009, that he was not exempt from paying North Dakota job insurance taxes as his employment by J B Construction Inc. was employment under N.D.C.C. § 52-01-01(17) and (18).
- [¶ 3]** Whether Job Service erred in concluding that when Vance Jahner purchased 33⅓% of J B Construction Inc. and became secretary/treasurer of J B Construction Inc. in 2009, that he was not exempt from paying North Dakota job insurance taxes as his employment by J B Construction Inc. was employment under N.D.C.C. § 52-01-01(17) and (18).
- [¶ 4]** Whether the Order of Job Service is in accordance with the law.

## STATEMENT OF THE CASE

[¶ 1] In 2015, JB Construction Inc. ("JB") was randomly selected for a Job Service North Dakota ("Job Service") audit. (Joint Appendix, P. 1, 42). The audit included the years of 2012 through 2014 per Job Service policy. (JA P. 42). In reviewing the company's payroll records, it was determined that neither Jesse Jahner ("Jesse") nor Vance Jahner's ("Vance") wages had been included in quarterly wage reports. (JA Pp. 4-7, 42). The auditor then determined that Jesse and Vance's services were not exempted and completed statements to correct the company's contribution and wage reports to include Jesse and Vance's wages from the years 2012 through 2014. (JA Pp. 4-7, 42).

[¶ 2] 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). (JA P. 3). On March 24, 2015, JB appealed Job Service's determination. (JA P. 10). The matter was referred to the appeals section of Job Service, for a hearing.

[¶ 3] 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 in an amount in excess of \$25,000. (JA P. 40). JB petitioned for Bureau Review of the appeals referee's decision. (JA P. 45). An Order Denying Review was issued by Job Service on July 23, 2015. (JA Pp. 49-50). On August 14, 2015, JB petitioned for judicial review of Job Service's decision. (JA P. 51).

[¶ 4] On June 2, 2016, Burleigh County District Court issued an Order affirming the Job Service decision. (JA P. 53). The Court then issued an Order for Judgment and Judgment which were entered on June 22, 2016. (JA P. 60). Notice of Entry of Judgment was entered on June 28, 2016. (JA P. 62). Notice of Appeal was timely filed on July 26, 2016. (JA P. 63).

### **STATEMENT OF THE FACTS**

[¶ 5] JB is a powerline construction company organized as an S corporation in 1975. (JA P. 41). On January 5, 2000, JB applied to exempt the wages of corporate officers who were employed by the corporation and who each owned at least one fourth of the ownership interest. At that time, those corporate officers were President Wesley Jahner ("Wesley"), Vice President Harvey Jahner ("Harvey"), and Secretary/Treasurer Wayne Jahner ("Wayne"). They each owned 33.3% and were employed by JB. (JA P. 41).

[¶ 6] On January 21, 2000, a letter was sent from Job Service to JB advising it the corporation's application had been approved exempting corporate officers, which included the president, vice president, secretary/treasurer. (JA P. 9). Most importantly, while the letter makes reference to the individuals, the exemption is to "corporate officers". The letter also states, "This exemption is effective January 1, 2000, and will remain in effect until an application is filed to void the exemption." Id. JB was then given the following instruction regarding filling out future quarterly reports: "Please do not include the name, social security number or wages for exempt corporate officers on future quarterly

reports.” Id. There was no notice that a change in corporate officers would void the exemption.

[¶ 7] In 2009, Jesse bought Wayne's 33.3% interest in JB and became Vice President. Vance bought Wesley's 33.3% interest in JB and became Secretary/Treasurer. Harvey went from being Vice President to President. He still owned his 33.3% interest. (JA P. 41). It is not disputed that JB did not notify Job Service of this stock transfer or the assumption of corporate officer positions by Jesse and Vance. (JA P. 42). JB simply assumed that since Jesse and Vance purchased qualifying amounts of ownership in JB, were corporate officers, and were employed by JB, it did not have to refile any documents with Job Service. Believing their employment was exempt as a result of the January, 2000, application to exempt employment, the wages of Jesse and Vance were not included in any subsequent quarterly wage reports. (JA Pp. 29-34).

[¶ 8] In 2015, JB was selected for a random audit. As set forth, Job Service determined that service performed by JB was employment as defined by N.D.C.C. § 52-01-01(17) and (18). (JA P. 3). Job Service concluded that Jesse and Vance's services to JB were employment and that JB was liable for unpaid job insurance taxes. JB has filed a timely appeal.

## **LAW AND ARGUMENT**

### **1. Standard of Review.**

[¶ 9] An appeal from an administrative agency decision is governed by N.D.C.C. § 28-32-49. This statute allows this Court to review the appeal of a determination made by an administrative agency based upon the record. The

transcript and the attached exhibits have been filed with this Court. This Court must affirm the order of the agency unless it finds the order is not in accordance with the law. See N.D.C.C. §§ 28-32-46 and 28-32-49. While the courts do give some deference to findings of fact made by an agency, questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative agency. Gray v. North Dakota Game and Fish Department, 2005 ND 204 ¶ 7, 706 N.W. 2d 614.

### **RULES OF STATUTORY CONSTRUCTION**

[¶ 10] While JB has set forth four issues in its Statement of Issues, the resolution in this case comes down to an interpretation of N.D.C.C. § 52-01-01(17). This Court must apply the rules of statutory construction to determine if Job Service properly interpreted subsection 17 and whether the Order is in accordance with the law. The primary purpose of statutory construction is to determine legislative intent. In doing so, the legislature's intent must be sought initially from the statutory language. If the language of the statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because the legislative intent is presumed clear from the fact of the statute. Words in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. But if the statute is ambiguous or of doubtful meaning, the court may look to extrinsic aids to interpret the statute. Olson v. Job Service North Dakota, 2013 ND 24 ¶ 4 (citations omitted). Statutes must be construed to avoid absurd and ludicrous results. All sections of the statute must be construed to have meaning because the law neither does nor requires idle acts. In short,



the court must be guided by a common sense principle that the statute is read to give effect to each of its provisions, whenever fairly possible. Stutsman County v. State Historical Society, 371 N.W.2d 321, 324 (N.D. 1985). Courts construe statutes in a practical manner and consider the context of statutes and the purpose for which they were enacted. McDowell v. Gillie, 2001 ND 91 ¶ 11, 626 N.W.2d 666. Courts must presume that the legislature did not intend an absurd or ludicrous result or unjust consequences, and construe statutes in a practical manner, giving consideration to the context of the statute and the purpose for which they were enacted. State v. Brown, 2009 ND 150 ¶ 15, 771 N.W.2d 267. With these rules, the Court must now interpret the statute and its application to JB.

**2. Job Service has not interpreted N.D.C.C. § 52-01-01(17)(a)(1) correctly.**

[¶ 11] Pursuant to N.D.C.C. § 52-01-01(17) a corporation is allowed to exempt a corporate officer's service from employment and the payment of job insurance taxes by filing a written application to exclude the corporate officer's service from employment. The substantive requirements for the granting of the exemption is that the individual must be, (1) a corporate officer, (2) employed by the corporation, and (3) own at least one fourth (25%) of the corporation. In 2000, the three individuals selected for exemption by JB were corporate officers, employed by JB and each owned more than 25% of the company. Those individuals were Wesley Jahner, Harvey Jahner and Wayne Jahner. In its decision, Job Service continually emphasizes that these individuals should not be seen as qualified corporate officers but rather should be seen as individuals

designated by their names. However, concentrating on them as individuals and not corporate officers is not in keeping with the statute, nor is it in keeping with corporation law.

[¶ 12] JB is a corporation. A corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person, distinct and separate from its individual stockholders. Airvator, Inc. v. Turtle Mountain Manufacturing Company, 329 N.W.2d 596, 602 (N.D. 1983). The characteristics of a corporation generally include the capacity of perpetual existence; the power to sue and be sued in the corporate name; the ability to acquire and transfer property and do other acts in the corporate name; the ability to purchase and hold real estate; the power to actually engage in a specific business as set forth in the articles of incorporation; and such other characteristics and powers as may be provided by statute. Airvator at 604, citing *1 Fletcher Cyclopedia Corporation* (Perm. Ed.) Ch. 1 § 5. In North Dakota, a corporation must have officers who are 18 years of age, which must include a president, secretary and treasurer and may also include one or more vice presidents. The officers must be elected by the board at a time and in a manner as may be provided by the bylaws unless the articles or bylaws provide that the shareholders may elect the officers. N.D.C.C. § 10-19.1-52. Corporate officers may come and go, but corporations can exist perpetually. This corporation has been in existence for 41 years and has seen two generations of owners. In ruling against JB, Job Service attempts to make the artificial distinction between a "corporate officer" and a class of

corporate officers. This is a distinction without a difference. In addition, the exemption belongs to the corporation and not to the corporate officer or the individual who holds the corporate office. The legislature was very clear as to the criteria that needed to be satisfied by a corporation such as JB when it wanted to exempt its corporate officers from employment and subsequent Job Services taxes. Job Service's interpretation conveniently adds language to the statute which is not found in the statute.

[¶ 13] Job Service then tries to justify its decision that interpreting the statute to provide exemptions beyond a specific individual corporate officer creates a potential conflict with the limitations. (JA P. 44). However, that conflict is not created under the facts of this case and therefore is hypothetical. The one fact that Job Service cannot get away from is that in 2000, three corporate officers were employed by JB and each owned more than one quarter of the stock of the corporation. In 2009, from a corporate standpoint, nothing had changed in regard to the corporation structure of JB. There were still three corporate officers who were employed by the corporation, who each owned more than one quarter of its stock. The fact that Jesse and Vance purchased qualifying amounts of stock and assumed corporate officer positions did not change the exemption for the corporation. The exemption from paying taxes does not belong to Wesley or to Wayne, the former owners and former officers. Rather, the exemption belongs to JB, the corporation. Therefore, in order for the corporation to claim the exemption and receive the benefit of not paying taxes, it must meet the three

required statutory criteria. Those criteria were met by JB. A common sense reading of the statute does not support the legal conclusion of Job Service.

[¶ 14] The analysis is rather simple. If a corporation, regardless of who the corporate officers may be, can satisfy the three statutory requirements, the exemption to the corporation is available. There is no requirement under the statute that the corporation notify Job Service each and every time a corporate officer retires, leaves or resigns from their corporate and employment opportunities. If the legislature would have wanted that requirement, it could have said so in plain language. In addition, there is no discretion on the part of Job Service regarding granting or denying the exemption. If the requirements are met, the exemption is granted. Generally, the law is what the legislature says, not what is unsaid. Little v. Tracy, 497 N.W.2d 700, 703 (N.D. 1983).

“It is presumed that the legislature intended all that it said, and that it said all that it intended to say. The legislature must be presumed to have meant what is plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the ‘court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.” Little at 703. Citing City of Dickinson v. Thress, 69 N.D. 748, 290 N.W. 653, 657 (1940).

[¶ 15] The fact situation in this case is unique from the perspective that the purchasing stockholders purchased qualifying amounts of stock under the statute and also assumed corporate officer positions. There is nothing in the law, or in the notices from Job Service which place JB on notice that in the event that

qualifying corporate officers retire or sell out, and are replaced by individuals who qualify for the exemption, it must notify Job Service or file a new form.

[¶ 16] In interpreting statutes, this Court presumes the legislature did not intend an absurd or ludicrous result of unjust consequences. This Court construes statutes in a practical matter and gives consideration to the context of the statutes and the purpose for which they were enacted. Amerada Hess Corporation v. State Ex. Rel. Tax Commissioner, 2005 ND 155 ¶ 12, 704 N.W.2d

8. The interpretation Job Service has given to subsection 17 is clearly unjust and does not give consideration to the purpose for which subsection 17 was enacted. In enacting subsection 17, it appears the legislature intended to provide an exemption to corporations from paying unemployment taxes for a very specific category of corporate officer. The requirements of subsection 17 are not onerous and were met by JB in 2000 and to this very day. There are several reasons why the interpretation given by Job Service is unjust. There is no notice in the statute or a notice from Job Service that a change in officers in a small closely held corporation required refiling of the forms to claim the exemption. JB simply assumed that as long as its corporate officers worked for the corporation and owned at least 25% of the corporation, there was no reason to refile the notice that it filed in 2000. Moreover, there is no harm to the state of North Dakota or Job Service in this action. From 2000 until today, JB has not filed any type of claims for unemployment compensation for the owners and corporate officers of JB. This is not a situation in which the state of North Dakota or Job Service has been harmed. Lastly, it is unjust to interpret subsection 17 in a way to hold JB

liable for more than \$25,000 (which has grown considerably over time) simply because it did not file the correct form with Job Service. Even if it had filed the form in 2009 when the corporation transaction took place in which Jesse and Vance bought out Wayne and Wesley's interests, Job Service would not have collected any fees as the exemption clearly would have been granted. The position of Job Service clearly places form over substance and its interpretation is unjust.

### **CONCLUSION**

[¶ 17] For all of the reasons stated herein, JB Construction, Inc. respectfully requests this Court to reverse the decision of Job Service.

Dated this 30<sup>th</sup> day of August, 2016.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on September 1, 2016, the following documents:

**Brief of Appellant JB Construction, Inc.  
Joint Appendix**

were filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov) and were served electronically on the following:

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