

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Brian Brown,	)	
	)	
Appellant,	)	
	)	Supreme Court No. 20170083
vs.	)	Ward Co. No. 2016-CV-01293
	)	
Workforce Safety and Insurance Fund,	)	
	)	
Appellee.	)	

**APPEAL FROM ORDER, DATED JANUARY 11, 2017, ORDER FOR JUDGMENT, DATED JANUARY 17, 2017, JUDGMENT, DATED JANUARY 17, 2017, AND NOTICE OF ENTRY OF JUDGMENT, DATED JANUARY 18, 2017, AFFIRMING THE MAY 23, 2016, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER**

**THE DISTRICT COURT OF WARD COUNTY, NORTH DAKOTA  
NORTH CENTRAL JUDICIAL DISTRICT  
THE HONORABLE GARY H. LEE**

**BRIEF OF APPELLEE**

Mitchell D. Armstrong, ND ID #05892  
[marmstrong@smithbakke.com](mailto:marmstrong@smithbakke.com)  
Sarah E. Kuntz, ND ID #07822  
[skuntz@smithbakke.com](mailto:skuntz@smithbakke.com)  
Special Assistant Attorneys General  
for Workforce Safety and Insurance  
122 East Broadway Avenue  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630

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## **STATEMENT OF THE ISSUES**

- I. Whether the ALJ erred by determining Brown is not entitled to further disability and vocational rehabilitation benefits after September 10, 2015.

## I. STATEMENT OF THE CASE

[¶ 1] This is an appeal from the district court's *Judgment* dismissing Brian Brown's ("Brown") appeal from the administrative law judge's May 23, 2016, *Findings of Fact, Conclusions of Law, and Order* ("ALJ's Decision"). Appellant's Appendix ("App.") at 60-69. The ALJ's Decision affirmed WSI's underlying order ending disability and vocational rehabilitation benefits after September 10, 2015, due to noncompliance. Id. at 39.

[¶ 2] On February 10, 2012, Brown sustained a compensable injury to his pelvis while working for Chippewa Resources, Inc. Id. at 61 (Finding 1). WSI accepted liability and paid the associated medical and disability benefits. Id. Brown and WSI entered into an amended stipulation regarding vocational rehabilitation benefits in January/February 2015. Id. at 33-37. On November 16, 2015, WSI issued an administrative order finding Brown engaged in a first instance of noncompliance with vocational rehabilitation and he failed to come back into compliance within thirty days from the date benefits were discontinued, therefore, Brown is not entitled to any further disability benefits or vocational rehabilitation benefits after September 10, 2015. Id. at 45-46. WSI also ordered it erroneously paid \$2,558.57 in vocational rehabilitation benefits due to a clerical error, and required Brown to repay this amount. Id. at 46. Brown requested an administrative hearing on WSI's order. Id. at 50.

[¶ 3] The administrative hearing was held on May 17, 2016. Id. at 60. The ALJ affirmed WSI's order. Id. at 68. Brown requested reconsideration, which was denied. Id. at 70-75, 91. Brown appealed to the district court on August 3, 2016. Id. at 10-24. The district court affirmed the ALJ's Decision, and *Judgment* was entered on January 17, 2017, with the

*Notice of Entry of Judgment* following on January 18, 2017. Doc. ID# 33; App. at 219-20. Brown appealed on March 7, 2017. App. at 221. WSI requests the *Judgment* be affirmed.

## **II. STATEMENT OF THE FACTS**

### **A. Background of Brown's WSI Claim.**

[¶ 4] Brown injured his pelvis on February 10, 2012, while working for Chippewa Resources, Inc., when he was pinned between two vehicles. App. at 41, 61 (Finding 1). Brown's claim was accepted and WSI paid medical and disability benefits. *Id.* at 61. Vocational rehabilitation services were initiated on November 7, 2012, to assess his work capability and medical status. *Id.* at 61 (Finding 4), 106.

### **B. The Amended Stipulation.**

[¶ 5] Brown agreed to participate in a vocational rehabilitation retraining program on April 15, 2014. App. at 61 (Finding 10), 117-18. A Vocational Case Manager's Report ("VCR") was issued on July 14, 2014, determining that retraining of 104 weeks or less in an Engineering Technology program was the first appropriate return to work option. *Id.* at 61 (Finding 10), 128-29. "As a labor market and wage could not be verified for the Technical Studies degree, it [was] considered for Mr. Brown via stipulation." *Id.* at 132. Brown and WSI engaged in negotiations to stipulate to the terms of his retraining program. See generally *id.* at 33-38, 159-213.

[¶ 6] Ultimately, the parties agreed to an Amended Stipulation in January/February 2015. *Id.* at 33-37. The Amended Stipulation provided in relevant part:

1. Claimant shall participate in and attend the Technical Studies – Associates program through Bismarck State College, Bismarck, North Dakota beginning August 25, 2014, and continuing through December 23, 2016, or completion of the coursework, whichever occurs first. Claimant is participating in this training program on-line.

.....

3. Claimant's vocational rehabilitation allowance and school costs will continue to be paid beginning August 24, 2014, and continuing only through December 23, 2016, or sooner, if completion of the training program occurs prior to December 23, 2016, and only if Claimant satisfies the requirements of paragraph 4. Claimant's vocational rehabilitation allowance and school costs will be discontinued prior to December 23, 2016, if he does not satisfy the requirements as outlined in paragraph 4 and he will be deemed to be in noncompliance with vocational rehabilitation. School costs will be paid by WSI directly to the school in a manner and at a time set by each school participating in the program.

4. Claimant agrees to:

- a) Register for the required classes that will allow Claimant to complete the training program on or before December 23, 2016, b) Attend these classes as a student, as dictated by circumstances and based on advice of school advisors and teachers, including the summer sessions, keep up with the coursework, and maintain himself as a registered student without dropping out from August 25, 2014, through December 23, 2016, c) Maintain a 2.0 grade point average, d) Sign updated Release of Authorization forms for WSI and WSI's School Coordinator to obtain copies of Claimant's school records, e) Cooperate and communicate with WSI and WSI's School Coordinator, f) Consult with the school advisor to verify the classes needed to complete the training program on or before December 23, 2016, and g) Submit Income and Work Status Reports to WSI as requested.

....

8. If Claimant does not satisfy the requirements of paragraph 4 and he does not prove good cause, he will be deemed to be in noncompliance with vocational rehabilitation and a Notice of Decision will be issued discontinuing vocational rehabilitation benefits and establishing Claimant's noncompliance with vocational rehabilitation.

Id. at 34-35, 62-63 (Finding 25-26) (emphasis added).

### **C. Brown's Withdrawal from Summer 2015 Classes.**

[¶ 7] On May 7, 2015, Brown was registered to take six credits in the summer of 2015. App. at 63 (Finding 27). On July 22, 2015, WSI received information that Brown had withdrawn from the summer courses on June 12, 2015. Id. at 63 (Finding 28); ROA

62-63 at 151-52 (Doc. ID# 21); *Hearing Transcript*, ROA 74 (Doc. ID# 22) at 17:19-18:16. WSI Claims Adjuster Faylene Darling contacted Brown's attorney's office on August 18, 2015, inquiring about the reason(s) Brown withdrew from his summer classes. Id. at 63 (Finding 29); ROA 64 at 153; *Tr.* at 53:9-54:23. She was informed Brown withdrew from the classes because "[t]he book he was supposed to have was not in print, it wasn't available at all, [and] [w]hen he did get it he would have had to cram 9 months of work into 4 months." Id.; *Tr.* at 54:7-12.

[¶ 8] On August 20, 2015, WSI issued a Notice of Intention to Discontinue/Reduce Benefits ("NOID"), which as most relevant, provided:

.... Per the signed Stipulation you agreed to Register for the required classes that will allow you to complete the training program on or before December 23, 2016. This includes attending summer classes, keeping up with the coursework, and maintaining yourself as a registered student without dropping out from August 25, 2014 through December 23, 2016.

You are no longer in compliance as you have withdrawn from your summer sessions.

In order to come back into compliance, you must do the following within 30 days from the date benefits are discontinued: maintain a 2.0 GPA, register for the required classes, attend these classes, including the summer session, keep up with the coursework, maintain yourself as a registered student, complete the coursework on or before December 23, 2016, and provide verification that you can complete the program by December 23, 2016. You will need to be in compliance with all of the terms of the stipulation.

Id. at 39. Brown requested reconsideration on August 26, 2015. Id. at 40, 64 (Finding 31). Brown did not provide any evidence or verification to WSI within thirty days of September 10, 2015, that he could complete the retraining program by December 23, 2016. Id. at 40, 64 (Finding 33); ROA 68 at 158 (Doc. ID # 21).



**D. Brown's Withdrawal from Fall 2015 Classes.**

[¶ 9] On October 30, 2015, Brown's academic advisor informed WSI that he withdrew from two more courses on October 28, 2015. App. at 64 (Finding 35); ROA 69 at 159. Brown's stated reason for dropping the courses was for "technology issues with his computer and got too far behind in his classes to catch up." Id.; ROA 69, 72 at 159, 179. Brown's transcript from Bismarck State College in October 2015 demonstrated he had only earned thirteen credits toward his two-year associate degree. Id. at 64 (Finding 34); ROA 69 at 161. Including the 2015 fall semester, Brown had enrolled in forty-three credits, but had already dropped twenty-six credits. Id. On November 13, 2015, Brown's academic advisor informed WSI that Brown would not be able to complete his program by December 23, 2016. Id. at 64 (Finding 36); ROA 69 at 159.

[¶ 10] WSI issued an administrative order on November 16, 2015, which provided in part:

**FINDINGS OF FACT**

The evidence indicates Claimant has engaged in a first instance of noncompliance with vocational rehabilitation without good cause, per the terms of the Stipulation, and he has not successfully come back into compliance within 30 days from the date benefits were discontinued. On August 20, 2015, a Benefits Discontinuation Notice was issued discontinuing Claimant's vocational rehabilitation allowance after September 10, 2015.

Claimant withdrew from his 2 enrolled classes during the 2015 summer session and he did not complete any classes during the 2015 summer session. Claimant withdrew from 2 enrolled classes during the 2015 fall semester and currently, he is enrolled in General Biology (3 credits) and General Biology Lab (1 credit) for a total of 4 credits during the 2015 fall semester, which is not full time. Claimant's curriculum planning sheet shows that he will need to attend classes through the 2017 spring semester to graduate in the program, plus he needs to take 3 math classes through UND.

In summary, Claimant did not register for the required classes to complete the training program on or before December 23, 2016, and he will not complete the program on or before December 23, 2016; Claimant did not attend classes during the 2015 summer session; Claimant did not attend classes on a full-time basis during the 2015 summer session or the 2015 fall semester; and Claimant did not communicate to WSI that he withdrew from summer classes on June 12, 2015. There is no documentation showing that Claimant could not physically attend the summer session or the 2015 fall semester on a full-time basis due to his work injury.

Claimant has not successfully come back into compliance within 30 days from the date benefits were discontinued because he is not attending the 2015 fall semester on a full-time basis; he did not register for the required classes to complete the training program on or before December 23, 2016, and he will not complete the program on or before December 23, 2016.

WSI erroneously overpaid Claimant's vocational rehabilitation allowance from September 11, 2015 – September 28, 2015, in the amount of \$2,558.57 and Claimant must repay \$2,558.57 to WSI.

### **CONCLUSIONS OF LAW**

According to the terms of the Stipulation dated February 10, 2015, Claimant has engaged in a first instance of noncompliance with vocational rehabilitation without good cause.

If at any time the employee is noncompliant without good cause, subsequent efforts by the employee to come into compliance with vocational rehabilitation are not considered successful compliance until the employee has successfully returned to compliance for a period of thirty days. In all cases of noncompliance by the employee, the organization shall discontinue disability and vocational rehabilitation benefits. If the period of noncompliance continues for thirty days following the date benefits are discontinued, or a second instance of noncompliance occurs without good cause, the organization may not pay any further disability or vocational rehabilitation benefits, regardless of whether the employee sustained a significant change in medical condition due to the work injury. N.D.C.C. § 65-05.1-04(6).

Claimant has engaged in a first instance of noncompliance with vocational rehabilitation and he has not come back into compliance within 30 days from the date benefits were discontinued, therefore, he is not entitled to any further disability benefits or vocational rehabilitation benefits of any kind after September 10, 2015.

ROA 70 at 167-68. Brown requested an administrative hearing on WSI's Order on January 12, 2016. *Id.* at Finding 38; ROA 71 at 172.

**E. The Administrative Hearing**

[¶ 11] The administrative hearing on WSI's Order was held on May 17, 2016. *App.* at 60.<sup>1</sup> Vicki Betz ("Betz") testified that she has been a School Coordinator for WSI for almost ten years. *Tr.* at 15:11-22. As Brown's School Coordinator, Betz monitored his progress in the retraining program, including gathering schedules and comparing enrolled classes to curriculum. *Tr.* at 16:21-25. Betz testified it was unusual to have to contact Brown through his attorney, and that this was the only case she could not communicate directly with the injured worker. *App.* at 64-65 (Finding 39); *Tr.* at 16:25-17:5.

[¶ 12] Betz became concerned Brown would not finish his program as scheduled when Brown dropped his two classes in the summer semester 2015. *Id.*; *Tr.* 17:9-18:22. As a result, Betz conferred with WSI personnel to determine if he was in compliance with the Amended Stipulation. *Id.*; *Tr.* at 18:19-22. Subsequently, WSI issued the NOID. *Id.*; *Tr.* at 18:23-19:3.

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<sup>1</sup> Brown did not call his academic advisor at the hearing. In his brief on appeal, he quotes and relies on a letter from Mary Sennert, which was not admitted into evidence at the administrative hearing. *Appellant's Brief* at ¶ 20. The letter was first submitted to the ALJ in Brown's *Petition for Reconsideration*. ROA 15 at LVI-LVIII (Doc. ID# 21).

[¶ 13] Similarly, in the fall semester, Betz became aware that Brown had again dropped courses and was concerned he would not timely complete his program. *Id.*; *Tr.* at 19:4-17. In response, Betz contacted Brown's academic advisor, who confirmed Brown would not be able to complete the program by December 23, 2016. *Id.*; *Tr.* at 19:18-20:7. During her testimony, Betz explained the general courses Brown dropped in the summer semester might not have made it impossible for him to timely complete his program, but dropping the core program classes in the fall semester prevented him from being able to complete the program by December 2016. *Id.* at 65 (Finding 41); *Tr.* at 43:5-46:22. Betz also testified she was not informed by Brown about problems obtaining a course book or with course technology, but if she had been informed, she would have tried to assist Brown with these issues. *Id.* at 65 (Finding 40); *Tr.* at 20:8-21:23. Betz explained WSI can only order a retraining program for up to 104 weeks with discretion to add another 20 weeks, and here, Brown was given the maximum amount of 124 weeks to complete his retraining program. *Id.* at 65 (Finding 42); *Tr.* at 33:23-34:16, 37:12-38:4; see also N.D.C.C. §§ 65-05.1-01(4)(g) and 65-05.1-06.1(2)(d).

[¶ 14] Faylene Darling is the claims adjuster on Brown's claim. *Tr.* at 52:2-4. Her responsibilities for his claim while retraining was taking place included conferring with Betz and monitoring records received from BSC. *Tr.* at 52:16-23. Darling testified she had mistakenly not set a diary for September 10, 2015, to end Brown's rehabilitation benefits, based on the NOID. *App.* at 65 (Finding 43); *Tr.* at 55:14-25. As a result, Brown received an overpayment of rehabilitation benefits from WSI in the amount of \$2,558.57. *Id.* at 65 (Finding 43); *Tr.* at 56:1-57:18.

[¶ 15] Brown testified he did not trust WSI, which is the reason he requested all communication with WSI go through his attorney. *Id.* at 65 (Finding 44); *Tr.* at 66:20-67:17, 74:25-75:1. Brown testified it was his understanding of the Amended Stipulation that, if he did not timely complete the program, any courses remaining would be his responsibility. *Id.*; *Tr.* at 64:18-65:15. Further, Brown believed that the only participants in his program plan would be him, the school, his advisors, and his professors, and he could rely on the advice of his advisors and teachers without WSI involvement. *Id.*; *Tr.* at 65:20-68:5.

[¶ 16] Brown asserted he did not violate the terms of the Amended Stipulation because he conferred with his advisor and professors before dropping courses and he maintained a 2.0 grade point average. *Id.* at 65 (Finding 45); *Tr.* at 71:20-72:24. Brown stated he had to drop a nine-month long math course because he was unable to obtain the course book through the bookstore four to five months into the course. *Id.*; *Tr.* at 68:6-70:16. However, dropping this class was not related to dropping the two summer courses and the fall semester courses in 2015. *Tr.* at 86:20-87:25. Regarding the fall semester courses, CAD 211 and GIS 105, Brown stated he had to drop these classes because of technical issues with his computer and the required software programs for the courses. *App.* at 65 (Finding 45); *Tr.* at 73:6-74:12, 75:12-77:19, 84:14-86:5. Brown never communicated these technological issues to WSI. *Id.*; *Tr.* at 74:13-75:11, 86:6-19.

[¶ 17] Brown also testified that he had registered for two classes in the summer of 2015, Fundamentals of Public Speaking and Ethics, and subsequently dropped both courses. *Id.* at 65-66 (Finding 46); *Tr.* at 87:13-22. Brown stated he did not drop these classes due to a book issue. *Id.*; *Tr.* at 88:1-3. Rather, Brown's first reason for dropping the

summer courses was he made a judgment call with his advisors that he would be able to add those classes back in over the upcoming semesters, so dropping them would not pose a problem with completing the program. Id.; *Tr.* at 89:8-90:5. Brown then testified that he dropped the summer courses due to having some personal family issues, which he said was a sick relative that he wanted to be involved in helping. Id.; *Tr.* at 89:8-90:10.

[¶ 18] The ALJ's Decision was issued on May 23, 2016. App. at 68. The ALJ determined "the greater weight of the evidence established Mr. Brown agreed to take summer classes under the Stipulation and he did not do so. WSI has met its burden of showing noncompliance. The burden shifts to Mr. Brown to show good cause for noncompliance." Id. at 66 (Finding 47). The ALJ also specifically found:

Mr. Brown provided insufficient evidence to show good cause for dropping the fundamentals of public speaking and ethics 2015 summer classes. Mr. Brown's veracity as to the basis for dropping these classes is questionable. WSI was advised he dropped the summer classes because he could not obtain a book he needed. Mr. Brown testified extensively about the book he was not able to get for the math class that he dropped, and he finally admitted that math class had been dropped in January 2015. His evasiveness while testifying, his repeated attempts to deflect the issue of the summer classes, and the vagueness of the circumstances he claimed required him to drop the summer classes all call into question his credibility. Mr. Brown has not met his burden of showing good cause for noncompliance.

Id. at 66 (Finding 48).

[¶ 19] The ALJ concluded WSI demonstrated Brown's noncompliance with the Amended Stipulation for dropping the summer courses, Brown failed to demonstrate good cause for the noncompliance, and Brown failed to come back into compliance because he did not provide verification that he could timely complete the program. Id. at 66-67 (Finding 47-49, Conclusions 1-4). Further, the ALJ found Brown dropped two core classes in the fall of 2015, making it impossible for him to timely complete the retraining program.

Id. at 66-67 (Finding 50, Conclusion 4). The ALJ also concluded Brown received \$2,558.57 in vocational benefits he was not entitled to. Id. at 66-67 (Finding 51, Conclusion 5). Therefore, the ALJ's Decision upheld WSI's administrative order that Brown was not entitled any further disability or vocational benefits after September 10, 2015, and he must repay \$2,558.57 to WSI. Id. at 67-68 (Conclusion 6).

### **III. APPLICABLE LAW AND ARGUMENT**

#### **A. Standard of Review**

[¶ 20] The standard of review is set forth in N.D.C.C. § 28-32-46, and provides a court shall affirm an ALJ's Order unless:

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 procedure 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.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

The court does not substitute its judgment for that of the agency and “it is the province of the ALJ to resolve conflicts of evidence and weigh the credibility of witnesses.” Landrum v. WSI, 2011 ND 108, ¶ 11, 798 N.W.2d 669. The appellate court determines only “whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record.” Id. Issues of law are fully reviewable. Bachmeier v. N.D. Workers Comp. Bur., 2003 ND 63, ¶ 10, 660 N.W.2d 217.

**A. The ALJ’s Decision Should be Affirmed.**

[¶ 21] Settlement of claims between WSI and a claimant is authorized by N.D.C.C. § 65-05-25, which provides, in pertinent part:

The organization and an employee may compromise to resolve a disputed claim. The contract of settlement made is enforceable by the parties. The contract may provide that the employee shall utilize the funds to engage in certain rehabilitation programs. If the employee breaches the contract, the organization may require the employee to repay the benefits received under the agreement.

N.D.C.C. § 65-05-25(2). Here, Brown and WSI entered into a stipulation that provided Brown vocational rehabilitation benefits for retraining. The Amended Stipulation required Brown to participate, attend, and complete the Technical Studies program at BSC by or before December 23, 2016. Regarding summer classes, the Amended Stipulation required Brown to “[a]ttend these classes as a student, as dictated by circumstances and based on advice of school advisors and teachers, including the summer sessions, keep up with the coursework, and maintain himself as a registered student without dropping out from August 24, 2014, through December 23, 2016.” App. at 34, 62-63 (Finding 25-26) (emphasis added). The Amended Stipulation further provided that if Brown failed to meet these requirements without good cause, then he would be “deemed to be in noncompliance with



vocational rehabilitation and a Notice of Decision will be issued discontinuing vocational rehabilitation benefits and establishing [Brown's] noncompliance with vocational rehabilitation." Id. at 35.

[¶ 22] "The purpose of vocational rehabilitation is to return a disabled employee to substantial gainful employment with a minimum of retraining, as soon as possible after an injury occurs." Hoffman v. N.D. Workers Comp. Bureau, 2002 ND 138, ¶ 14, 651 N.W.2d 601 (citing N.D.C.C. § 65-05.1-01(3)). Noncompliance with vocational rehabilitation is governed by N.D.C.C. § 65-05.1-04, which provides, in pertinent part:

In all cases of noncompliance by the employee, the organization shall discontinue disability and vocational rehabilitation benefits. If the period of noncompliance continues for thirty days following the date benefits are discontinued, or a second instance of noncompliance occurs without good cause, the organization may not pay any further disability or vocational rehabilitation benefits, regardless of whether the employee sustained a significant change in medical condition due to the work injury.

N.D.C.C. § 65-05.1-04(6).

[¶ 23] "Due process requires a participant in an administrative proceeding be given notice of the general nature of the questions to be heard, and an opportunity to prepare and to be heard on those questions." Buchmann v. N.D. Workers Comp. Bureau, 2000 ND 79, ¶ 12, 609 N.W.2d 437 (quoting Saakian v. N.D. Workers Comp. Bureau, 1998 ND 227, ¶ 11, 587 N.W.2d 166). As to proper due process in termination of benefits, the North Dakota Supreme Court has stated that "[n]otice is adequate if it apprises the party of the nature of the proceedings so there is no unfair surprise." Id. "Additional considerations come into play when the Bureau proposes to terminate benefits without first conducting a hearing." Id. "The pretermination procedure must include, at a minimum, pretermination notice of the contemplated action, a summary of the evidence supporting

the proposed termination, and a pretermination opportunity to respond in writing to the alleged grounds for termination.” Id. ¶ 13 (quoting Stewart v. N.D. Workers Comp. Bureau, 1999 ND 174, ¶ 12, 599 N.W.2d 280). Specifically:

The pretermination notice must be sufficiently detailed to frame the precise issues, delineate the Bureau's theories and rationale for terminating benefits, and summarize the significant evidence supporting the Bureau's conclusions.” However, a pretermination notice need “not provide the equivalent of a full evidentiary hearing. . . . The notice need only disclose the evidence in a summary fashion, sufficient to allow meaningful response.

Id. (quoting Stewart, ¶ 19).

[¶ 24] Here, the NOID issued by WSI indicated Brown was required to complete the program prior to December 23, 2016, and in doing so, was required to attend summer classes. App. at 39. It further stated that because Brown dropped his only two summer classes, he was in noncompliance with the Amended Stipulation. Id. The NOID also provided that Brown could come back into compliance by maintaining a 2.0 GPA, register for required classes, attend registered classes, including summer session, keep up with coursework, maintain himself as a registered student, complete coursework before December 23, 2016, and provide verification that he could complete the program by December 23, 2016. Id.

[¶ 25] Once WSI establishes that a claimant is noncompliant with a rehabilitation plan, the claimant bears the burden to establish good cause for the noncompliance. Hoffman, ¶ 15. “[A] ‘claimant has good cause for failing to attend a rehabilitation program if the claimant has a reason that would cause a reasonably prudent person to refuse to attend the rehabilitation program under the same or similar circumstances.’” Id. ¶ 14 (quoting Fuhrman v. N.D. Workers Comp. Bureau, 1997 ND 191, ¶ 9, 569 N.W.2d 269). “Whether a claimant has ‘good cause’ under the statute is determined under an objective, reasonable

person standard.” Id. In addition, a claimant is required to abide by a non-final order of an administrative agency during the pendency of an appeal, including a pending request for reconsideration and a pending request for hearing from the non-final order. Inwards v. N.D. Workforce Safety & Ins., 2014 ND 163, ¶¶ 1, 20-29, 851 N.W.2d 693. However, Brown failed to abide by the terms of the Amended Stipulation and he failed to come back into compliance. He never provided verification to WSI that he could complete the program by December 23, 2016, and he also dropped an additional two courses in the fall semester making it impossible for him to complete the stipulation. Subsequently, WSI issued its administrative order terminating Brown’s benefits.

[¶ 26] At the hearing, the parties had different views of the terms of the Amended Stipulation. Brown’s position was that the Amended Stipulation did not require him to take summer classes, and as long as his academic advisors approved his class registration and schedule, then he was in compliance. Brown also stated his understanding that if he did not complete his program by December 23, 2016, then he would be financially responsible for any additional classes he needed to take. However, Brown’s position is not supported by the language of the Amended Stipulation, which is clear that Brown needed to take summer classes and he needed to complete his program by December 23, 2016. The Amended Stipulation is clear that a failure to meet these requirements results in noncompliance with vocational rehabilitation, and without good cause and returning to compliance within thirty days, vocational rehabilitation and disability benefits are discontinued.

[¶ 27] The ALJ was not persuaded by Brown’s position. The ALJ found that dropping the summer courses violated the Amended Stipulation and placed Brown in noncompliance with vocational rehabilitation. App. at 66 (Finding 47). The ALJ then found

Brown failed to demonstrate good cause for dropping the summer classes, as his vagueness, evasiveness, and deflections over his reasons for dropping the summer classes called his credibility in question. Id. (Finding 48). Next, the ALJ determined the evidence failed to establish Brown came back into compliance within thirty days following the September 10, 2015, notice of noncompliance. Id. (Finding 49). Brown continued to be noncompliant when he failed to provide verification to WSI that he was capable of completing the program by December 23, 2016. Id. Further, the ALJ found that Brown's noncompliance lasted longer than thirty days. Id. (Finding 50). Based on his noncompliance from September 10, 2015, lasting longer than thirty days, Brown was not entitled to the benefits he erroneously received between September 11 to September 28, 2015, which were paid due to a clerical error. Id. (Finding 51). The ALJ also recognized Brown dropped two more courses in the fall semester, making it impossible for him to complete the program by December 23, 2016. Id. (Finding 50).

[¶ 28] The ALJ's Decision on these issues correctly applied the law and is based on the evidence discussed above. Thus, the evidence supports the ALJ findings, and the governing law was correctly applied. Brown was noncompliant, did not have good cause for the noncompliance, failed to come back into compliance, and continued to be noncompliant. Accordingly, his disability and vocational rehabilitation benefits were appropriately discontinued. Further, Brown was erroneously paid benefits during his period of noncompliance due to a clerical error, and those benefits must be repaid in the amount of \$2,558.57 pursuant to N.D.C.C. § 65-05-29(1)(c)(1). Therefore, the ALJ's Decision follows the law and is based on a reasoned view of the evidence. WSI requests the ALJ's

Decision be affirmed. Brown's arguments to the contrary misinterpret the stipulation, evidence, the applicable law, and ask this Court to re-weigh the evidence.

**B. Brown Misinterprets the Amended Stipulation, NOID, and WSI's Administrative Order**

[¶ 29] Brown's interpretation of the stipulation in his brief—that he had no obligation to take summer courses and could decide to withdraw from any class “as dictated by circumstances and based on advice of school advisers”—ignores the actual terms of the Amended Stipulation. A plain reading of the provisions from the Amended Stipulation contradicts this assertion, and demonstrates that Brown was required to take summer classes. The Amended Stipulation states Brown agreed to “[r]egister for the required classes that will allow Claimant to complete the training program on or before December 23, 2016, [and] [a]ttend these classes as a student, as dictated by circumstances and based on advice of school advisors and teachers, including the summer sessions . . .” App. at 34 (emphasis added).

[¶ 30] In addition to misreading the terms of the Amended Stipulation, Brown omits or ignores portions of the relevant NOID and subsequent administrative order. In his brief, Brown asserts that WSI failed to give him a realistic way of returning to compliance, as the summer 2015 session was already over when the NOID was issued. However, Brown ignores that the NOID did not require him to go back in time and complete the summer 2015 semester. It merely informed him to attend, register for, and keep up with required courses, complete the program by December 23, 2016, and provide verification that he could timely complete the program. Brown failed to provide such verification. Brown also ignores that he did not demonstrate good cause for dropping the summer courses.

[¶ 31] The record demonstrates Brown's assertion of due process issues is misplaced. He was fully advised of the reasons for WSI's decision, and those reasons are consistent with the ALJ's Decision. As a result, these assertions by Brown should be rejected. Put simply, he engaged in noncompliance without good cause, and that noncompliance continued. Because of the continued noncompliance, he was unable to complete the program by December 23, 2016, as required by the Amended Stipulation. Neither WSI nor the ALJ's Decision deprived Brown of any due process.

[¶ 32] Likewise, even though Brown contended he had been compliant, he was still required to abide by WSI's NOID while his request for reconsideration and hearing request were pending. See Inwards, ¶¶ 1, 20-29 (concluding the ALJ erred as a matter of law when she ruled the claimant had good cause for failing to comply with a retraining program because WSI's previous orders had been appealed and had not been finally resolved at the time she withdrew from the retraining program). Under the reasoning applied in Inwards, even if Brown contended WSI's decision that he was noncompliant was erroneous, he was still required to comply while he litigated that issue. Instead, he took further actions which foreclosed any chance he could successfully complete the retraining program in accordance with the Amended Stipulation. See App. at 34, ¶ 4 (requiring Brown to register and attend classes "to complete the training program on or before December 23, 2016.")

[¶ 33] Brown essentially requests the Court reweigh the evidence contrary to the applicable standard of review. The terms of the Amended Stipulation, as outlined and discussed at length above, required Brown to be enrolled in summer courses and to complete the program by December 23, 2016. His arguments misinterpret the language of

the Amended Stipulation. The Amended Stipulation does not state that his advisors can dictate whether Brown could withdraw from all classes for a semester or when Brown can complete the program. App. at 34.

[¶ 34] Nevertheless, Brown dropped his only two classes in the 2015 summer semester without good cause. While Brown previously asserted he dropped the summer classes due to a book issue, at the hearing, he testified the book issue related to a spring 2015 course, and that he dropped the summer classes because he had a sick relative. However, none of this information was provided to WSI prior to Brown dropping the courses, and the ALJ determined his testimony lacked credibility.

[¶ 35] In addition, Brown provided no verification he could complete the program by December 23, 2016, in response to the noncompliance NOID. He then dropped two more classes in the fall 2015 semester making it absolutely impossible to complete the program by December 23, 2016. As a result, Brown's argument that the terms of the Amended Stipulation allowed him to withdraw from summer courses and complete the program whenever he wanted is meritless and simply a request for the Court to reweigh the evidence. The Amended Stipulation plainly provided Brown's "vocational rehabilitation allowance and school costs will be discontinued prior to December 23, 2016, if he does not satisfy the requirements in paragraph 4 and he will be deemed to be in noncompliance with vocational rehabilitation." App. at 145, ¶ 3. The evidence and the applicable law support the ALJ's Decision, and it should be affirmed.

#### **IV. CONCLUSION**

[¶ 36] For the foregoing reasons, WSI requests the ALJ's Decision be affirmed.

Dated this 11th day of May, 2017.

By /s/ Mitchell D. Armstrong  
Mitchell D. Armstrong, ND ID #05892  
[marmstrong@smithbakke.com](mailto:marmstrong@smithbakke.com)  
Sarah E. Kuntz, ND ID #07822  
[skuntz@smithbakke.com](mailto:skuntz@smithbakke.com)  
Special Assistant Attorneys General for  
Workforce Safety and Insurance  
122 East Broadway Avenue  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630

**CERTIFICATE OF SERVICE**

[¶ 37] I hereby certify that a true and correct copy of the foregoing **APPELLEE'S**

**BRIEF** was sent on the 11th day of May, 2017, and served on the following:

**VIA EMAIL**

Stephen D. Little  
2718 Gateway Avenue Suite 302  
Bismarck, ND 58501

[littlelaw@btinet.net](mailto:littlelaw@btinet.net)

**U.S. MAIL**

Chippewa Resources Incorporated  
Attn: HR Dept.  
1408 20<sup>th</sup> Avenue SW, Suite 6  
Minot, ND 58701

By /s/ Mitchell D. Armstrong  
MITCHELL D. ARMSTRONG