

THE SUPREME COURT
STATE OF NORTH DAKOTA

BRIAN BROWN)	WARD COUNTY
)	NORTH CENTRAL JUDICIAL DISTRICT
)	
APPELLANT,)	CIVIL NO.: 51-2016-CV-01293
)	
vs.)	APPELLANT'S BRIEF
)	NORTH DAKOTA SUPREME COURT
)	
NORTH DAKOTA)	
WORKFORCE SAFETY INSURANCE)	
FUND,)	
)	
APPELLEE.)	

.....

APPEAL FROM DISTRICT COURT JUDGMENT ENTERED JANUARY 17, 2017, WITH
NOTICE OF ENTRY OF JUDGMENT SERVED JANUARY 18, 2017, AND ORDER
AFFIRMING ADMINISTRATIVE DECISION DATED JANUARY 14, 2017.

COUNTY OF WARD
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE GARY H. LEE

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I. Issues Presented

[1] Whether the Administrative Law Judge misapplied the law in determining that the Appellant was in noncompliance with the terms of a rehabilitation stipulation with Workforce Safety and Insurance.

[2] Whether the Administrative Law Judge misapplied the law in interpreting the terms of the contractual stipulation between the Appellant and Workforce Safety and Insurance.

II. Statement of the Case

[3] On February 11, 2012, Brian Brown submitted a First Report of Injury (FROI) to Workforce Safety and Insurance (WSI) for a work-related injury that occurred the previous day (ROA 19). On February 27, 2012, WSI issued a Notice of Decision Accepting Claim and Awarding Benefits (ROA 21). WSI accepted liability for a closed fracture of the pubis.

[4] On February 10, 2015, Brown and WSI entered into an Amended Stipulation which outlined the terms of a two-year retraining program (ROA 60). On August 20, 2015, WSI issued a Notice of Intention to Discontinue/Reduce Benefits (NOID) asserting that Brown was in noncompliance with his vocational rehabilitation obligations as outlined in the Stipulation because he had withdrawn from Summer sessions at Bismarck State College (ROA 65). The NOID explained that, in order to come back into compliance, within thirty days from the date benefits were discontinued (September 10, 2015), Brown needed to maintain a 2.0

GPA, register for the required classes, attend those classes, including the Summer session, keep up with the coursework, maintain himself as a registered student, complete the coursework on or before December 23, 2016, and provide verification that he could complete the program contemplated in the Stipulation by December 23, 2016. Brown submitted a Request for Reconsideration dated August 26, 2015, asserting that he was in full compliance with his vocational rehabilitation obligations as contemplated by the Stipulation (ROA 66).

[5] On November 16, 2015, WSI issued a formal Order finding Brown in noncompliance with vocational rehabilitation and terminating vocational rehabilitation and disability benefits after September 10, 2015 (ROA 70). Brown submitted a Demand for Hearing on January 12, 2016, asserting that he had fully complied with the terms of the Stipulation and had acted at all times with the knowledge and approval of his instructors and faculty advisor (ROA 71).

[6] A formal administrative hearing was held on May 17, 2016 before Administrative Law Judge (ALJ) Jeanne Steiner (ROA 74). ALJ Steiner issued Findings of Fact, Conclusions of Law and Order on May 23, 2016 (ROA 13). Brown submitted a Petition for Reconsideration and Rehearing on June 21, 2016 (ROA 15). WSI submitted its Reply on June 21, 2016 (ROA 16). ALJ Steiner issued

an Order Denying Petition for Reconsideration on July 7, 2016 (ROA 18).

III. STATEMENT OF THE FACTS

[7] Brian Brown suffered fractured vertebrae and a fractured pelvis when he was pinned between two vehicles at work (ROA 21,30). Brown was able to return to part-time, modified work by April 2, 2012 (ROA 23). Brown reapplied for disability benefits on August 22, 2012 because he was experiencing bilateral leg weakness and numbness (ROA 24). WSI accepted Brown's reapplication (ROA 25) and WSI assigned vocational rehabilitation services (ROA 26).

[8] Brown was initially found in noncompliance with his vocational rehabilitation obligations on February 4, 2013 for failing to return telephone calls and meet with his vocational case manager (ROA 27). Brown went to a formal administrative hearing on December 19, 2013 before ALJ Patrick Ward (ROA 30). ALJ Ward issued Findings of Fact, Conclusions of Law and Order dated December 27, 2013 reversing WSI's Order and finding that Brown had good cause for the alleged noncompliance (Id).

[9] Brown agreed to participate in retraining on April 15, 2014 (ROA 31). The Vocational Case Manager's Report identified 104 weeks of retraining as the first appropriate rehabilitation option (ROA 34). After eight separate proposals and counter-proposals, WSI's withdrawal of its proposed stipulation and its accusation of

noncompliance (ROA 39-58) Brown and WSI entered into an Amended Stipulation on February 10, 2015 which provided, in part:

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 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 the Income and Work Status Reports to WSI as requested (ROA 60).

The Amended Stipulation extended the vocational program an entire semester from WSI's initial proposal due to the delays in getting WSI's agreement to Brown's proposed program and allowed Brown to attend classed "as dictated by circumstances and based on advice of school advisors and teachers."

[10] Mr. Brown withdrew from the 2015 Summer Session COMM 110 and PHIL 210 classes on June 12, 2015 (LIX). The withdrawal had no effect on his ability to complete the program by December 23, 2016 and was made with the approval of his Academic Advisor at BSC (Id). Brown's withdrawal from the two Summer classes triggered WSI's August 20, 2015 NOID asserting noncompliance (ROA 65). Brown registered for the Fall semester, which started classes on August 24, 2015 (LVI-LVIII). Brown soon encountered two problems: The CAD 211 and GIS 105 classes required a certain type of software which

was incompatible with Brown's computer, causing it to "crash" repeatedly. To make matters worse, Brown was issued the wrong book for the GIS 105 class. Because of these problems, Brown fell behind in both classes and it became impossible for him to catch up and pass the classes with either an "A" or "B" grade. Brown decided that it was preferable to withdraw from the CAD 211 and GIS 105 classes rather than risk lowering his GPA. Brown's Academic Advisor, Mary J. Sennert, agreed with his decision and helped him withdraw from the two classes. Because the classes had to be taken in a particular order, Brown was unable to complete his chosen program by December 23, 2016 (Id).

[11] Brown understood that WSI would only fund his program through December 23, 2016 (ROA 74; p. 72, l. 25-p. 73, l. 5). When WSI terminated Brown's disability and rehabilitation benefits after September 10, 2015, it had already paid for the Fall semester. That explains WSI's demand for Brown to repay \$2,558.57 in rehabilitation expenses (ROA 70). When WSI's funding ceased, Brown was only able to take one on-line class before discontinuing his vocational rehabilitation program (ROA 74; p. 77, l. 18-p. 78, l. 7).

LAW AND ARGUMENT

[12] In Wherry v. North Dakota State Hospital, 498 N.W.2D 139,139 (1993) this Court stated:

To participate in worker's compensation fund, N.D.C.C. § 65-01-11 requires a claimant prove a compensable injury by a preponderance of the evidence. Moses v. North Dakota Workers Compensation Bureau, 429 N.W.2D 436 (N.D. 1988). The claimant must prove a causal connection between employment and an injury. Id. The Bureau does not have the burden of proving that the s injury is unrelated to employment. Howes v. North Dakota Workers Compensation Bureau, 429 N.W.2D 730 (N.D. 1988), cert. denied, 489 U.S. 1014, 109 S.Ct. 1126, 103 L.Ed.2d189 (1989); Gramling v. North Dakota Workmen's Compensation Bureau, 303 N.W.2d 323 (N.D. 1981).

[13] The scope of review of an administrative law judge's decision is set out in N.D.C.C. § 28-32-46. Bishop v. North Dakota Workforce Safety and Ins., 2012 ND 217, 823 N.W.2d 257. "When an independent ALJ issues final findings of fact, conclusions of law and order under N.D.C.C. § 65-02-22, courts apply the same deferential standard of review to the ALJ's factual findings as used for agency decisions." Id. at ¶5 (citing Sloan v. N.D. Workforce Safety and Ins., 2011 ND 194 ¶5, 804 N.W.2d 184; Auck v. North Dakota Workforce Safety and Ins., 2010 ND 126 ¶9, 785 N.W.2d 186). However, no deference is given to an ALJ's legal conclusions, and questions of law are fully reviewable on appeal. Id. at ¶6; Sloan, at ¶5; Auck, at ¶9. Brown has identified a number of Findings of Fact and Conclusions of Law with which he takes exception.

[14] As noted, WSI's NOID was premised on its position that Brown's withdrawal from the two Summer courses in 2015 was somehow noncompliant with the terms of the final Stipulation. Brown withdrew from those courses with the approval of his Academic

Advisor, as expressly permitted by the terms of the Stipulation. Furthermore, Brown withdrew early enough that it was not reflected on his transcript, as verified by his Advisor, Mary J. Sennert. Consequently, WSI was not prejudiced or even inconvenienced by Brown's withdrawal. Thus, even if WSI could somehow construe Brown's withdrawal from the two Summer courses to be noncompliance, and a breach of the Stipulation, it was not material. Ms. Sennert verified that Brown's withdrawal did not affect his ability to complete his academic program by the December 23, 2016 date set by WSI.

[15] The August 20, 2015 NOID provided Brown with prior notice of WSI's claimed noncompliance (withdrawal from the two Summer courses) and an opportunity to respond before benefits were discontinued. That recognition of Brown's property right to continued benefits is mandated by this Court's decisions. See, e.g., Beckler v. N.C. Workers Compensation Bureau, 418 N.W. 2d 770 (N.D. 1988).

[16] Clearly, Brown's withdrawal from the two Summer courses was "dictated by circumstances and based on advice of school advisors." Consequently, he was not in noncompliance with the terms of the Stipulation as asserted in WSI's August 20, 2015 NOID. Furthermore, there was no evidence presented that WSI's suggested remedy by which Brown could come back into compliance (register for the required (Summer) classes, attend these (Summer) classes,

and keep up with the (Summer) coursework) before September 10, 2015 was even possible. Presumably, Brown could not register for, attend and keep up with Summer classes that were no longer being offered on September 10, 2015.

[17] Following Brown's Request for Reconsideration in which he denied being in noncompliance (ROA 66), WSI issued an Order asserting noncompliance and terminating vocational rehabilitation and disability benefits of all kinds after September 10, 2015 (ROA 70) as had been threatened in the NOID. In its Order, WSI noted that Brown had registered for Fall classes on September 1, 2015. The Order also noted that, on October 30, 2015, "Claimant's BSC School Advisor emailed WSI's School Consultant indicating she met with Claimant on October 28, 2015, and helped Claimant withdraw from CAD 211 and GIS 105. Claimant was having some technology issues with his computer and got too far behind in his classes to catch up. They mapped out Claimant's remaining classes to take to graduate in the program. The School Advisor attached Claimant's curriculum planning sheet and a copy of his unofficial transcript." The School Advisor notified WSI on November 13, 2015 that Brown would not be able to complete the program by December 23, 2016 because GIS 105 and GIS 107 were prerequisites to GIS 201 and GIS 215; GIS 105 and GIS 107 were only offered in the Spring and Fall semesters - not Summer, and GIS 215 was only offered in the Spring semester. In other words, Brown's "technology issues" with his

computer had prevented him from being able to complete the program within the timeframe set by WSI.

[18] WSI's Order asserted that, "Claimant has not successfully come back into compliance with 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."

[19] There are a number of problems with WSI's Order. Clearly, the allegations of noncompliance contained in the Order go beyond those contained in the NOID. Consequently, WSI's Order fails to provide the due process required by this Court. There is simply no legal theory to support WSI's evolving grounds for noncompliance. Brown was forced to respond to new allegations and new evidence. The ludicrous nature of WSI's evolutionary approach to noncompliance is easily demonstrated: In the instant case, WSI terminated Brown's vocational rehabilitation and disability benefits on September 10, 2015, based in part on a withdrawal from classes which did not occur until October 30, 2015.

[20] Not only does WSI's Order deprive Brown of due process, the circumstances that triggered his withdrawal from the CAD 211 and GIS 105 classes on October 30, 2015 were clearly outside of his control, and his withdrawal was done with the knowledge and approval of his School Advisor. As Brown's Academic Advisor, Mary J. Sennert, explained,

"During the fall 2015 semester, in late September, I became Brian's new academic advisor. I had a phone conversation with him on September 28 and he stated that he was having troubles with his GIS and CAD 211 classes because of technology issues. I met with Brian on October 2, 2015, and we discussed his classes again. At that time, he was receiving a failing grade in his CAD 211 and GIS 105 classes and a "B" grade in the BIOL 150 and BIOL 150 lab classes. The CAD 211 and GIS 105 required certain software to be installed on Brian's Computer and he had a difficult time acquiring and installing the correct software and then getting it to run/work properly on his computer. His computer crashed many times as he was working to resolve the problems and finally after about six weeks, he was able to run the software correctly for the two courses. Unfortunately, he was about three to four weeks behind in both classes and could not catch up to pass the classes successfully (LVI).

Another problem that happened to Brian during this same time was that he was issued the wrong book for the GIS 105 class. He was issued a book for GIS 205 instead (LVII).

[21] WSI's allegations of noncompliance contained in its Order and forming the basis of its termination of vocational rehabilitation and disability benefits are based on two actions by Brown: withdrawal from two Summer classes which was known by and

approved by his School Advisor, had no effect on his ability to complete his vocational program by December 23, 2016, and could not be remedied in the manner and timeframe set by WSI; and withdrawal from two Fall classes because of "technological issues" over which he had no control and which did not form any part of WSI's decision making in its NOID.

As the District Court pointed out, the Stipulation entered into between WSI and Brown (after eight attempts, WSI's withdrawal of its settlement offer and a totally separate allegation of noncompliance) was simply a contract by another name. See: Olson v. North Dakota Workers Compensation Bureau, 453 N.W. 2d 606 (N.D. 1990). Brown has insisted throughout these proceedings and continues to insist that his withdrawals from class, both in the Summer of 2015 and the Fall semester of 2015, were dictated by circumstances with the knowledge and approval of his Academic Advisors, exactly as envisioned and provided for by the executed final Stipulation. Furthermore, it is unquestionable that his withdrawal from Summer classes had no effect on his ability to complete his program on time and his withdrawal from the Fall classes was caused by circumstances beyond his control. As such, either the doctrine of frustration or the doctrine of impossibility dictate that Brown's actions do not constitute noncompliance/breach of contract.

As this Court has said:

[T]he doctrine of frustration of purpose [and] the doctrine of impossibility . . . are closely related. Frustration of purpose "occurs when 'after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.'" The doctrine of impossibility or impracticality is similarly described as "[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Neither doctrine applies if either the frustration or the impossibility is caused by a party to the contract.

Huber v. Farmer Union Service Association, 2010 ND 151, 787 N.W.2d 268; citing Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, Para. 56, 751 N.W.2d 206.

[22] In the instant case, neither the college's failure to give Brown the correct textbook nor the inability of Brown's computer to load the course software without crashing were caused by Brown. The fact that the correct book was not available and the software was incompatible with Brown's computer made his completion of his vocational program by the date envisioned in the Stipulation an impossibility. That did not create a noncompliance with the Stipulation or a breach of contract.

IV. Conclusion

[23] Brian Brown went through months of negotiations with WSI and several different iterations before arriving at a Stipulation which contained sufficient guarantees that he would be allowed to pursue the vocational program of his choosing without unwarranted interference by WSI. Having already been accused of noncompliance twice before, he wanted to make sure that he had the authority to make academic decisions as dictated by circumstances and with the advice of his Academic Advisor. Brown did not intend for WSI to have any role in academic decisions and nothing in the Stipulation allows anyone representing WSI to have such a role.

[24] In speaking of the "technological issues" which led to his withdrawal from the CAD 211 and GIS 105 classes in the Fall semester of 2015, Brown said:

Vicki Betz (WSI's School Coordinator), to me, was not a computer expert. She wasn't in any position to do anything I didn't do already or that the school resources hadn't done anything. When I had a computer issue, I went to the computer resources support at BSC or at UND. When I had an issue with books, I went directly to the source, directly to the people she would have had to go to. . . . I contacted the school. They said, "You got to contact the vendor." I contacted the vendor. . . . So by the time we got that problem resolved, again, I was eight weeks into the course and setting myself up for catch-up work that was not going to be realistic (ROA 74, p. 75 l.2-p. 76 l. 24).

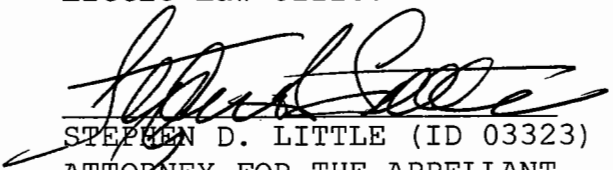
[25] As has been shown, Brown complied with the terms of the Stipulation. That agreement did not contemplate that WSI would have the authority to determine if Brown had good cause either to

withdraw from a particular class or to make any other academic decisions. That authority was reserved to Brown and his Academic Advisor.

[26] Brian Brown respectfully requests that the decision of the Administrative Law Judge finding him in noncompliance with the Stipulation be reversed, that his vocational rehabilitation and disability benefits be reinstated and that he be allowed to, once again, pursue his chosen vocational program.

[27] Respectfully Submitted this 13th day of April, 2017.

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I, Stephen D. Little certify that on the 13th day of April, 2017, I caused to be filed the following:

**Appellant's Brief To The North Dakota Supreme Court; and
Certificate of Service.**

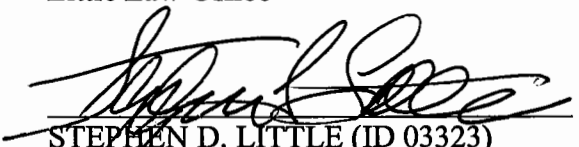
Were filed with the North Dakota Supreme Court and electronically served the following:

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Dated this 13th day of April, 2017.

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