

20180383

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
DECEMBER 3, 2018  
STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Supreme Court No. 20180383  
Burleigh County District Case No. 08-2018-CV-01061

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JACK ROBINSON,

*Appellant,*

v.

NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE.,

*Appellee,*

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APPEAL OF ORDER AFFIRMING HEARING OFFICER'S DECISION ENTERED  
AUGUST 21, 2018, BY THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT,  
BURLEIGH COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE THOMAS J. SCHNEIDER, DISTRICT JUDGE

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BRIEF OF APPELLANT JACK ROBINSON

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## STATEMENT OF ISSUES

[¶1.]

- E. The Administrative Law Judge erred as a matter of law by determining that the service requirements of the governing statutes and rules were met by WSI.**
- F. The Administrative Law Judge erred as a matter of law by concluding that WSI could maintain an administrative proceeding against Jack Robinson without having served or mailed notice of WSI's Administrative Order to Robinson.**
- G. The Administrative Law Judge erred as a matter of law by determining that personal jurisdiction had been established over Jack Robinson in the administrative proceeding when he has not been personally served or mailed WSI's Administrative Order.**
- H. Jack Robinson's due process rights were violated in the proceedings by failure to serve him with WSI's Administrative Order.**

## STATEMENT OF THE CASE

[¶2.] The underlying case is the second of two actions wherein North Dakota Workforce Safety and Insurance ("WSI") has sought personal liability for unpaid WSI premiums, assessments, penalties, and interest against Jack Robinson, a former officer of Dalton Logistics, Inc., a now-defunct corporation.

[¶3.] The first action was commenced by WSI on June 17, 2015, at the administrative level, when it issued a "Notice of Decision" determining Robinson to be personally liable for Dalton Logistics, Inc.'s unpaid WSI premiums, penalties, and interest. App. 5. WSI asserts that it mailed the Notice of Decision to Robinson's last known address. Id. Robinson did not submit a request for reconsideration or appeal within the prescribed time period. On September 21, 2015, WSI initiated an action in Burleigh County District Court, *State of North Dakota by Workforce Safety & Insurance v. Jack Robinson, Individually*, Case No. 08-2015-CV-02656, wherein WSI asserted that its Notice of Decision had

become *Res Judicata* and that WSI was entitled to judgment against Robinson in the amount reflected in its decision, \$134,527.08. App. 6. Robinson answered in district court, denying that he had received the Notice of Decision from WSI. App. 9. The issue of effective service on Robinson was litigated in district court. The action was ultimately dismissed without prejudice, pursuant to stipulation of the parties, on December 9, 2016. App. 17.

[¶4.] On or about March 30, 2017, WSI sent an “Administrative Order” by certified mailing to Erich Grant, the undersigned attorney, who had represented Robinson in the district court action. App. 18. WSI did not mail or otherwise serve the Administrative Order directly on Robinson. App. 34. The Administrative Order asserted that WSI had determined Robinson to be personally liable for the sum of \$184,639.01, consisting of unpaid WSI premiums, penalties, and interest accrued by Dalton Logistics, Inc. App. 32.

[¶5.] Robinson, through counsel, requested that the matter be dismissed until such time as Robinson was properly served the Administrative Order. App. 36. Undersigned counsel provided notice that he had not been authorized by Robinson to accept service of process on his behalf. App. 35. On April 28, 2017, counsel for Robinson submitted a Request for Hearing and Specification of Error to WSI. Id. The initial specification of error set out that Robinson had not been properly served with notice of WSI’s Administrative Order. Id. The service issue notwithstanding, WSI requested an administrative hearing through the Office of Administrative Hearings. A hearing was scheduled for January 25, 2018 before ALJ Reed Soderstrom. App. 38.

[¶6.] The issue of proper service of process was raised by Robinson at the outset of the administrative hearing. App. 44-51. Robinson reiterated the lack of service on him.

Robinson motioned for dismissal on these grounds. Id. The administrative law judge reserved ruling on the motion until the hearing was completed. Evidence was presented on the merits of WSI's claims against Dalton Logistics, Inc. and Robinson, but no additional evidence relating to proper service on Robinson was presented.

[¶7.] On March 18, 2018, the hearing officer issued findings of fact, conclusions of law, and a final order affirming WSI's Administrative Order. There was limited analysis devoted to the issue of proper service on Robinson. App. 52.

[¶8.] Robinson served his Notice of Appeal to District Court and Specification of Error on April 18, 2018. App. 62. Following briefing by both parties, the District Court issued an order affirming the hearing officer's decision on August 21, 2018. App. 90. The current appeal follows.

#### **STATEMENT OF THE FACTS**

[¶9.] The Appellant, Jack Robinson, was employed by Dalton Logistics, Inc. beginning in August, 2011. App. 97. He was terminated in or about April, 2015. Id. During his employment with Dalton, Robinson's job responsibilities were related to oilfield operations in North Dakota. Id. He did not have control of or supervision over the filing of WSI premium reports nor making payment of WSI premiums. Id. Robinson held no ownership interest in the company. Dalton Logistics employed a safety director in their Houston office, who the company's president placed in charge of all WSI activity. App. 99. Robinson had no knowledge of any unpaid WSI premiums until September 21, 2015, when the Summons and Complaint in WSI's initial action was served on him. App. 65. By that time, Dalton Logistics had shut down operations and had no income and Robinson had no means to compel Dalton to pay the balance owed to WSI. Id.

## LAW AND ARGUMENT

[¶10.] Under N.D.C.C. § 28-32-46, the district court must affirm an order of an administrative agency unless it finds any of the following are present:

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.

[¶11.] On appeal from the district court's decision on an administrative appeal, the Supreme Court reviews the agency order in the same manner. N.D.C.C. § 28-32-49; Ringsaker v. Workforce Safety & Ins. Fund, 2005 ND 44, ¶ 9, 693 N.W.2d 14.

**A. The Administrative Law Judge erred as a matter of law by determining that the service requirements of the governing statutes were met by WSI.**

[¶12.] N.D.C.C. § 65-04-32 establishes specific service of process rules for WSI to follow when initiating administrative actions over premium liability issues:

- (1) The organization may issue a notice of decision based on an informal internal review of the record and shall serve notice of the decision on the parties by regular mail...
- (3) Within sixty days after receiving a petition for reconsideration, unless settlement negotiations are ongoing, the organization shall serve on the parties by certified mail an administrative order including its findings of fact,

conclusions of law, and order, in response to the petition for reconsideration. The organization may serve an administrative order on any decision made by informal review without first issuing a notice of decision and receiving a request for reconsideration.

[¶13.] In their second action against Robinson, WSI elected to proceed directly by administrative order. Therefore, under N.D.C.C. § 65-04-32(3), WSI was required to serve the order on Robinson by certified mail. It is undisputed that the undersigned attorney, who had represented Robinson in the first action, was served with the order by certified mail. However, WSI did not serve Robinson directly in either the initial administrative proceeding or in this second proceeding. App. 34.

[¶14.] The hearing officer's written decision devoted minimal analysis to the service issues raised by Robinson. On appeal, the district court determined that WSI's service on Robinson's counsel, in lieu of Robinson himself, was allowable under N.D.R.Civ.P. 5(b)(2)(A) because the attorney served had represented Robinson in the initial district court action. However, the initial district court action was a distinctly different proceeding from the administrative proceeding that WSI sought to initiate after dismissal of the district court action.

[¶15.] Service on a party through their attorney under Rule 5 applies to service of documents other than "process". N.D.R.Civ.P. 5, Explanatory Note ¶1. "When a statute or rule requiring service does not pertain to service of process, nor require personal service under Rule 4, nor specify how service is to be made, service may be made as provided in Rule 5(b)." Id. "Process" is defined generally as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property." Black's Law Dictionary Fifth Ed. N.D.C.C. § 65-04-32 provides that "process" in a WSI action of this nature is accomplished through service of either a Notice of Decision or an Administrative Order.



Neither “process” document has ever been directly served on Robinson under N.D.R.Civ.P. 4 or by certified mailing as directed by N.D.C.C. § 65-04-32.

[¶16.] The governing statute in this WSI proceeding, N.D.C.C. § 65-04-32, sets out specific rules for service of process. It provides that “the organization *shall* serve on the parties by certified mail an administrative order...” (emphasis added). There is no provision allowing service of process to be completed on an attorney who represented the party in a previous action. Moreover, N.D.R.Civ.P. 5(b)(2)(A) cannot supersede or supplement N.D.C.C. § 65-04-32 because Rule 5 does not apply to service of process. If WSI sought to initiate the action following the rules of civil procedure, N.D.R.Civ.P. 4 would dictate the method of service.

[¶17.] Since there has been no effective service of process under N.D.C.C. § 65-04-32 or N.D.R.Civ.P. 4, the hearing officer’s order is subject to dismissal.

**B. The Administrative Law Judge erred as a matter of law by concluding that WSI could maintain an administrative proceeding against Jack Robinson without having served or mailed notice of WSI’s Administrative Order to Robinson.**

[¶18.] Robinson submitted a Request for Hearing and Specification of Errors in response to the Administrative Order mailing to his attorney. App. 35. The threshold issue identified by Robinson was the lack of effective service, representing that his attorney had not been authorized to accept service on his behalf. Despite this, WSI proceeded with its administrative hearing without service on Robinson. Robinson motioned for dismissal at the outset of the administrative hearing, citing the lack of service. App. 44-51.

[¶19.] The Administrative Agencies Practice Act provides that “a hearing may not be held under this subsection unless the parties have been properly served with a copy of the notice of hearing as well as a written specification of issues for hearing or other document

indicating the issues to be considered and determined at the hearing.” N.D.C.C. § 28-32-21(3)(c). The methods of proper service in an administrative proceeding conducted under N.D.C.C. Chapter 65-04 are set out in N.D.C.C. § 65-04-32.

[¶20.] The lack of proper service of process on Robinson dictate that the hearing officer’s order be vacated and this action dismissed until such time as Robinson is properly served with WSI’s Administrative Order or a Notice of Decision under N.D.C.C. § 65-04-32.

**C. The Administrative Law Judge erred as a matter of law by determining that personal jurisdiction had been established over Jack Robinson in the administrative proceeding when he has not been personally served or mailed WSI’s Administrative Order.**

[¶21.] Generally, personal jurisdiction over a party is acquired by service of process in compliance with N.D.R.Civ.P. 4. Alliance Pipeline, L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464. "Absent valid service of process, even actual knowledge of the existence of a lawsuit is insufficient to effectuate personal jurisdiction over a defendant." Olsrud v. Bismarck-Mandan Orchestral Ass'n, 2007 ND 91, ¶ 9, 733 N.W.2d 256. A Plaintiff has the burden to establish that the authority to receive service of process exists between the defendant and the individual served. Id. ¶18. In this action, N.D.C.C. § 65-04-32 sets out specific rules which supersede the general rules of the North Dakota Rules of Civil Procedure. See Johnson v. NoDak Mut. Ins. Co., 2004 ND 293, ¶ 12, 699 N.W.2d 45 (a specific statute controls a general statute).

[¶22.] WSI has argued it acquired personal jurisdiction over Robinson through certified mailing of its Administrative Order to the undersigned attorney. They have argued that the governing statute “does not specify that the Administrative Order may not be served on an attorney who has appeared on behalf of the individual in connection with the matter before the agency.” App. 77. This argument is flawed in several respects.

[¶23.] First, the attorney served did not appear at any point in WSI's initial administrative proceeding. No appearance was made by either Robinson or his counsel until WSI brought a direct district court action against Robinson in Case No. 08-2015-CV-02656. Noteworthy in that action was conflicting evidence over whether WSI's Notice of Decision, served by regular mail, had made its way to Robinson. That action was dismissed on December 9, 2016. WSI issued an Administrative Order to Robinson's counsel on March 30, 2017, 111 days after the dismissal in district court. App. 34. The Administrative Order issued after dismissal constituted a new action, requiring service of process in order to obtain personal jurisdiction over Robinson. This requirement has not been met.

[¶24.] Second, WSI's argument that § 65-04-32(3) does not specify that an attorney cannot be served in place of the party is conceptually flawed. N.D.C.C. § 65-04-32(3) expressly sets out who must be served to initiate the proceedings; specifically, "the parties". The statute positively states who must be served. The statute is not constructed to negatively limit who may not be served. Allowing WSI's interpretation that any person not explicitly excluded by the statute may be served and effect service would mean that literally any person is an effective recipient of service for Robinson. That is clearly not intended.

[¶25.] WSI did not effect service of process on Robinson and did not obtain personal jurisdiction over him by serving his former attorney with its Administrative Order. The hearing officer's order should be vacated and this action dismissed until such time as Robinson is properly served and personal jurisdiction is obtained by WSI.

**D. Jack Robinson's due process rights were violated in the proceedings by failure to serve him with WSI's Administrative Order.**

[¶26.] Agency decisions made by WSI with respect to unpaid premium assessments are entitled to the same credit as a judgment of a court of record under N.D.C.C. § 65-05-03. WSI's Administrative Order holding Robinson liable for \$184,639.01 therefore implicates his property interests under the state and federal constitutions. Accordingly, WSI is obligated to provide Robinson with appropriate due process. See Rojas v. Workforce Safety & Ins., 2005 ND 147, ¶11, 703 N.W.2d 299.

[¶27.] In Rojas, WSI sought to discontinue disability benefits to a previously-approved claimant. WSI sent notice of termination to the claimant by regular mail and did not receive a timely response. The claimant's benefits were then terminated. Upon learning of the termination, the claimant denied having received WSI's notice of termination. WSI argued that the termination statute required regular mailing only, and that its obligations were met upon mailing. Id. ¶ 14. This Court disagreed, holding that compliance with the statute did not relieve WSI of its duty to comport with due process, and finding that the effective lack of notice to the claimant deprived him of a meaningful opportunity to respond to WSI's decision. Id. ¶ 15. The Court ordered reinstatement of the claimant's disability benefits. Id. ¶ 19.

[¶28.] The Rojas case illustrates that even full compliance with a governing service statute may be insufficient to provide sufficient due process. Certainly, notice of the action through service on the affected party is a fundamental element. WSI's argument that it can maintain its administrative action against Robinson without *ever* having served him directly with any notice of decision or administrative order is antithetical to the due process

requirements outlined in Rojas. Just as in Rojas, the appellant has not been served with WSI's order, and the action is therefore invalid and subject to dismissal.

### CONCLUSION

[¶29.] For all of the reasons stated above, Jack Robinson respectfully requests this Court vacate the hearing officer's order and dismiss WSI's action against Robinson until such time as Robinson is properly served consistent with the governing rules and statutes and is afforded appropriate due process.

DATED this 3<sup>rd</sup> day of December, 2018.

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**CERTIFICATE OF SERVICE**

[¶30] I hereby certify that, on December 3, 2018, I served the foregoing document on the following by electronic mail transmission:

Jacqueline S. Anderson  
Email – [janderson@nilleslaw.com](mailto:janderson@nilleslaw.com)

DATED this 3<sup>rd</sup> day of December, 2018.

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