

THE SUPREME COURT

STATE OF NORTH DAKOTA

EDDIE SALVADOR GIL,)	COUNTY OF WILLIAMS
)	
Appellant,)	Supreme Court No: 20200253
)	Claim No. 53-2020-CV-00298
vs.)	
)	
)	
NORTH DAKOTA WORKFORCE)	
SAFETY INSURANCE FUND,)	
)	
Appellee.)	

APPELLANT’S BRIEF TO THE NORTH DAKOTA SUPREME COURT

ADMINISTRATIVE LAW JUDGE’S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, INDEX #10 AND WSI’S MOTION TO DISMISS APPEAL # 13 AND ORDER FOR JUDGMENT, BY THE HONORABLE BENJAMEN J. JOHNSON, DISTRICT COURT JUDGE, INDEX #26 AND JUDGMENT TO DISMISS, INDEX #27 ENTERED ON JULY 24, 2020 WITH THE NOTICE OF ENTRY OF JUDGMENT INDEX #28 SERVED ON THE 27TH DAY OF JULY, 2020.

**COUNTY OF WILLIAMS
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON**

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I. STATEMENT OF ISSUE

1] Did the District Court lack subject matter jurisdiction over Eddie Salvador Gil's appeal?

II. STATEMENT OF THE CASE

2] Eddie Salvador Gil filed a claim for workers compensation after a March 2, 2019 slip and fall at work (App. 7; 9). Workforce Safety and Insurance denied Mr. Gil's claim in an order dated July 18, 2019 (Id.). A formal administrative hearing was held at the Williams County Courthouse on November 5, 2019. Mr. Gil appeared in person and without counsel; he had requested and was provided a Spanish-speaking translator by telephone (Id.). Mr. Gil could not read WSI's exhibits. There is no record of the translator having WSI's exhibits. He had thought that he had an attorney who would represent him at the hearing, but no attorney appeared. Mr. Gil explained, through the translator, that he had a witness who was unavailable on the date of the hearing, that he was surprised to have no legal representation, and that he could not read WSI's exhibits (Id.). The hearing went forward, and Mr. Gil testified along with WSI's Medical Director, Dr. Mandy Johnson (App. 17-F of F 29-31).

3] The ALJ determined that Mr. Gil had not met his burden of proving that he had suffered a compensable injury in a slip and fall on March 2, 2019 and issued his decision affirming WSI's denial. Although the ALJ's decision was dated December 9, 2019, it was not mailed to Mr. Gil until January 21, 2020 (App. 7). Mr. Gil's Notice of Appeal is dated February 24, 2020, thirty-one days after issuance of the ALJ's decision (App. 23) Along

with the Notice of Appeal, Mr. Gil filed Specifications of Error in which he explained his disagreement with the ALJ's decision. It is apparent that Mr. Gil did not prepare the hand-printed portions of his appeal documents since those portions are in different handwriting. The Register of Actions indicates that Mr. Gil's Notice of Appeal was filed by the District Court on February 21, 2020. A Notification of Assignment and Case Number was issued the same day, listing the Appellee as WSI appearing pro se (App. 24).

4] On April 24, 2020, the District Court issued an Order to Show Cause, telling Mr. Gil that he had not prosecuted his appeal and that it would be dismissed unless he filed proof of service (App. 25). Mr. Gil's response was to serve the ALJ and himself (App. 26). As a result of a telephone status conference on June 1, 2020, both counsel for WSI and Mr. Gil made appearances (App. 27-28). WSI used its Notice of Appearance to argue for the dismissal of Mr. Gil's appeal for lack of subject matter jurisdiction. Following the status conference, WSI moved to dismiss Mr. Gil's appeal, the parties briefed the matter, and District Court Judge Benjamin J. Johnson granted WSI's motion to dismiss for lack of subject matter jurisdiction (App. 30). Mr. Gil has appealed to this Court.

III. STATEMENT OF FACTS

5] Note: The facts available to the Court are not derived from the administrative hearing record inasmuch as no transcript was prepared.

6] Eddie Salvador Gil was working for Select Energy Services, LLC on March 2, 2019 when he was found on the ground following a fall (App.10-F of F 1). Mr. Gil had experienced two prior falls at work, once in January of 2018 and again on December 5, 2018 (Id.). Medical records following the December fall indicated that Mr. Gil was having

short-term memory difficulties, but he had an unremarkable CT scan, and he was released to regular work (App. 11-F of F 2). Mr. Gil was taken to McKenzie County Healthcare on March 2, 2018 when he became confused and disoriented following a slip and fall at work (App. 11-F of F 3). He was diagnosed with seizure, prolonged postictal state and concussion (App. 12-F of F 5).

7] Mr. Gil saw Dr. Bahram Nico for a neurological consultation on March 4, 2019 (App. 12-F of F 8). Dr. Nico found that Mr. Gil had fallen and hit his head, and had then suffered a prolonged seizure (App. 13-F of F 10). Dr. Paul Olson, an emergency and trauma specialist, gave Mr. Gil differential diagnoses of: grand mal seizures, seizure - new onset, psychomotor seizure, cerebral vascular accident, alcohol withdrawal, pseudo seizure, central nervous system tumor, noncompliance, Post-Concussion Syndrome (App. 13-F of F 14). Dr. Kelly Turneau, a hospitalist, noted an unremarkable EEG and assessed Mr. Gil with a concussion and possible seizure activity (App. 14-F of F 16). Mr. Gil was restricted from operating heavy equipment and from working alone on March 13, 2019 (App. 14-F of F 19).

8] The Administrative Law Judge summarized Mr. Gil's testimony:

9] Claimant was 57 as of the day of the hearing. He worked in a variety of positions before starting with the Employer 8/5/18. He described how he was injured 12/5/18, while working in below zero temperatures, when he slipped and fell under the front of a truck. He stated that he hit his head and lower back, and received medical treatment, returning to work after a two week vacation, although he claimed he still had head pain. WSI accepted this claim as a compensable injury to his lumbar spine. Claimant returned to work in January, and claims he was injured again when he was hit in his back by some metal equipment or apparatus and rolled into a hole. Claimant stated he was hurt but didn't report the incident to his supervisor. Claimant stated that on 3/2/19 he was back at the site of his first fall, when he tripped over a hose, fell and hit his head. He testified he could not hear or focus, that while he was wearing a hard hat, he hurt his head. Claimant stated that his coworkers helped him up and got him to the hospital, although he was

not sure who they were. He stated that coworkers saw the fall (but other records did not agree). Claimant stated that when released he was limited in his activities; he went back to work but was not allowed to drive a vehicle. He stated that he had a later fall at his home and has experienced dizzy spells. He denied that he had epilepsy. He stated he was fired after he was prevented from driving at work (App. 16-F of F 28).

IV. LAW AND ARGUMENT

10] Eddie Gil went through an administrative hearing process in which the attorney he thought was representing him did not show up at the hearing, Mr. Gil had not read and could not read WSI's exhibits, and the witness who could confirm his injury was unavailable. Following the November 5, 2019 hearing, the ALJ prepared Findings of Fact, Conclusions of Law and Order dated December 9, 2019 but not sent to the parties until January 20, 2020 (App. 7). Presumably, Mr. Gil, who had not been able to read WSI's hearing exhibits, was also unable to read the ALJ's decision without translation.

11] Unquestionably, Mr. Gil failed to file his appeal within thirty days after issuance of the ALJ's decision and failed to serve WSI and the Attorney General, both as required under N.D.C.C. Section 28-32-42. It is readily apparent that Mr. Gil was as hopelessly lost in pursuing his appeal as he was in representing himself in the underlying administrative hearing. When the District Court Judge ordered Mr. Gil to serve WSI and the Attorney General as required by statute, he managed to serve himself (App. 26). Mr. Gil contends that his inability to read English, the unavailability of expected legal representation at hearing, and his unfamiliarity with the hearing appeals process constitute good cause for his technical noncompliance with statutory requirements. WSI has not suffered and has not claimed to have suffered any prejudice caused by Mr. Gil's lack of understanding.

12] As noted, Mr. Gil's Notice of Appeal is dated February 21, 2020, thirty-one days after issuance of the ALJ's decision. In Ellis v. WSI, 2020 ND 14; 937 N.W.2d 513, this Court held that the thirty-day appeal period begins after the date the notice of decision is mailed, the provisions of the North Dakota Rules of Civil Procedure and North Dakota Rules of Appellate Procedure notwithstanding. Mr. Gil's adjudicative process has been governed by substantive statutes and administrative rules, as well as judicial rules. The Office of Administrative Hearings has determined that, "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period of time after service of a document upon the party and the document is served upon the party by mail, other than certified mail, three days must be added to the prescribed period of time." N.D.A.C. Section 98-02-02-04. Nothing in N.D.C.C. Chapter 28-32 invalidates OAH's promise of three additional days for mailing.

13] In Inwards v. Workforce Safety and Insurance, 2014 ND 163; 851 N.W.2d 693, a Special Assistant Attorney General for WSI failed to serve WSI's appeal on Ms. Inwards' counsel. The District Court noted Ms. Inwards' lack of prejudice, found WSI's counsel's "misunderstanding" of service requirements to be good cause for not adhering to the statute and allowed WSI to belatedly obtain proper service (Id. Para 13). This Court found WSI's human error to be a "technical problem" under Rule 3.5(f), N.D.R.Ct. in affirming the District Court opinion.

14] The issue before the Court is whether a WSI lawyer can have good cause for "misunderstanding" the statutory requirements for an administrative appeal but a non-English-reading, non-law-trained, pro-se litigant cannot have good cause for that same misunderstanding. Mr. Gil should not be held to a higher standard in understanding the

requirements of law than an attorney representing WSI. Following WSI's Motion to Dismiss Mr. Gil's appeal (App. 32), Mr. Gil, through counsel, filed and served an Amended Notice of Appeal, Specification of Errors asserting that the ALJ's decision was in error and that the ALJ's hearing process had not provided due process (App. 33-34). WSI has not been prejudiced by Mr. Gil's misunderstanding of appellate procedure. He submits that he has demonstrated good cause for allowing him to proceed with the substance of his appeal.

15] In the context of injured workers' claims for workers compensation, this Court has defined "good cause" as what a reasonably prudent person would do under the same or similar circumstances. See: Fuhrman v. North Dakota Workers Comp. Bur., 1997 ND 191, 569 N.W.2d 269, paras. 8-9; Hoffman v. North Dakota Workers Comp. Bur., 1999 ND 66, 592 N.W.2d 533; para.15. The same standard has been applied to Job Service determinations in unemployment compensation claims. Lambott v. Job Service North Dakota, 498 N.W.2d 157 (N.D. 1993). In the instant case, Mr. Gil was left to conduct his hearing pro se with a telephone interpreter, with no way to read WSI's exhibits and no way to call his only witness to corroborate his testimony.

16] When Mr. Gil finally received the ALJ's decision, he presumably could not read it. When he learned what the decision said, he used on-line appeal forms which someone else had to fill out for him. He failed to serve both WSI and the Attorney General even after the District Court Judge ordered him to do so. If a lawyer's misunderstanding is good cause for not complying with statutory requirements in perfecting an administrative appeal, surely a pro se litigant – with no ability to read the appeal documents and no understanding of the appellate process – has good cause, also.

V. CONCLUSION

17] Appellant Eddie Gil was forced, at the last minute, to represent himself in the administrative hearing. He did not have a fair opportunity to respond to WSI's case or to prepare his own case. Nevertheless, Mr. Gil did his best. Following receipt of the ALJ's decision, Mr. Gil was, once again, left to represent himself and, once again, he did his best. WSI, despite spending much effort to prevent the substance of Mr. Gil's appeal from being reviewed, has not been prejudiced by Mr. Gil's unfamiliarity with legal requirements. Mr. Gil has demonstrated good cause for the errors made in his appeal of the ALJ's decision. He only asks that he be allowed to obtain a substantive review of the administrative decision.

18] Dated this 26th day of October, 2020.

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VI. CERTIFICATE OF COMPLIANCE

19] The undersigned, as attorney for the Appellant, Eddie Salvador Gil, in the above-captioned matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that the total

number of pages of the above brief does not exceed 38.

20] Dated this 26th day of October, 2020

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NORTH DAKOTA WORKFORCE)	CERTIFICATE OF SERVICE
SAFETY INSURANCE FUND,)	
)	
Appellee.)	

1] I, Stephen D. Little certify that on the 26th day of October, 2020, I caused to be filed an Appellant’s Brief to The ND Supreme Court and Certificate of Service with the North Dakota Supreme Court through the ND Supreme Court E-File Portal and served the following:

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1] I, Stephen D. Little certify that on the 26th day of October, 2020, I caused to be filed an Appellant’s Appendix and Certificate of Service with the North Dakota Supreme Court through the ND Supreme Court E-File Portal and served the following:

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