ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20010319

20010319

Darold B. Shiek,

Appellant,

v.

North Dakota Workers' Compensation Bureau and North Dakota State University,

Appellees.

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BRIEF OF APPELLANT DAROLD B. SHIEK

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Appeal from Judgment dated November 28, 2001
Cass County District Court Civil No. 09-01-C-2277
The Honorable Cynthia Rothe-Seeger, Presiding

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STATEMENT OF THE ISSUE

In ignoring the cumulative "whole body" impairment caused by the several work-related permanent partial impairments suffered by Shiek, did the Bureau err as a matter of law by misconstruing the permanent impairment benefit statute (N.D.C.C. § § 65-05-12.2(7) and (10) (1999))?[1]

STATEMENT OF THE CASE

The Bureau issued an Amended Order Awarding Permanent Partial Impairment Benefits dated January 22, 2001. App. 31; AR[2] 95-100. Shiek, through counsel, requested rehearing on January 26, 2001 (AR 101-102) and incorporated by reference his previous Request for Rehearing letter dated June 7, 2000 (AR 67-72). Because counsel agreed that the issue was "purely one of law" (AR 93), ALJ Hovland agreed that the matter would be submitted on briefs of counsel based upon stipulated hearing exhibits. See, AR 102.

ALJ Hovland issued his Recommended Findings of Fact, Conclusions of Law and Order on June 21, 2001. App. 35. On July 2, 2001, the Bureau issued its Final Order adopting the recommended decision and order of ALJ Hovland ". . . as the Bureau's final Order in this matter." App. 48.

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[1]N.D.C.C. § 65-05-12.2 (1999) is Attachment A to this brief; subsections (7) and (10) are highlighted. AR 173-177.

[2]See "Abstract of Record on Appeal to District Court" (consecutively paginated 1-245) served and filed on August 7, 2001. App. 3. The Abstract of Record was stipulated according to N.D.C.C. § 28-32-17(2).

Shiek timely filed Notice of Appeal to the District Court (App. 15), together with Specifications of Error (App. 17), on July 18, 2001. District Judge Cynthia Rothe-Seeger was designated per Order of presiding Judge, Michael O. McGuire, on July 26, 2001. Doc. Entry 10. Judge Rothe issued the Court's Memorandum Opinion and Order on Appeal from Administrative Agency on November 16, 2001 (App. 49), affirming the Bureau's "... July 21 (sic), 2001 Order..." (App. 52). Judgment (App. 53) was entered on November 28, 2001, and timely Notice of Appeal (App. 55) was taken to this Court on December 21, 2001.

STATEMENT OF THE FACTS

The essential facts are not in dispute, i.e., there is agreement that each of Shiek's separate impairment ratings are correct. See five separate impairment orders at App. 20-34. Rather, the issue in this case is whether the Bureau properly interpreted and applied N.D.C.C. §§ 65-05-12.2(7) and (10) to Mr. Shiek's most recent permanent partial impairment (PPI) award of January 22, 2001. App. 31.

The most recent PPI Order awarded, for the first time, "whole body" impairment benefits for Shiek's right leg injuries. App. 33. Rather than calculate the cumulative "whole body" impairment caused by the additional "whole body" impairment to Shiek's right leg, the Bureau isolated the right leg impairment as if Shiek had no other prior permanent impairments. Id. The effect was to dramatically reduce the cumulative "whole body" award Shiek would have had because, as a new

and separate permanent impairment award addressing only the right leg injury, it subjected Shiek to the 15 percent threshold where no monetary award is allowed. N.D.C.C. § 65-05-12.2(10); see Attachment A. The practical effect was to reduce Shiek's most recent PPI award by over $30,000 had, as Shiek asserts, the right leg impairment been added to his prior cumulative "whole body" impairments. See calculations at Law and Argument I(B), infra, pp. 11-13.

The January 22, 2001 PPI award (App. 31) provides as follows:

"28% WHOLE BODY FOR RIGHT KNEE – GAIT DISORDER

AND CHRONIC VENOUS INSUFFICIENCY
[RIGHT LOWER EXTREMITY] 40 WEEKS

LESS PRIOR AWARD FOR GAIT DISORDER - 20 WEEKS

TOTAL ADDITIONAL AWARD - 20 WEEKS." Id. at 33.

The Bureau concluded that "such award is equal to 20 weeks at $146 per week, calculated to total award of $2,920." Id.

However, the Bureau totally ignored the prior PPI awards to Shiek that are summarized in the "Order Awarding Permanent Partial Impairment Benefits" dated January 4, 2000 (App. 23) as follows:

15.5%	Right Arm at Shoulder	38.75 weeks
25.0%	Additional for Master Hand	9.69 weeks
54.0%	Left Leg at Hip for Knee	126.36 weeks

10.0%	Whole Body for Venous Insufficiency [left lower extremity]	50.00 weeks
	Total Equals	244.80 weeks[3]

Shiek contends that the Bureau dealt with Shiek's "28% whole body for right knee - gait disorder and chronic venous insufficiency" impairment (App. 33) in isolation, i.e., ignoring the cumulative "whole body" impairment Shiek indisputably suffers from. Shiek argues that under N.D.C.C. § § 65-05-12.2(7) and (10), the Bureau must: (1) first, determine the current extent of Shiek's entire cumulative "whole body" impairment; (2) second, determine the prior impairments in "whole body" terms; and (3) third, subtract the prior whole body impairment from the current total whole body impairment, using the "schedule" of awards found at N.D.C.C. § 65-05-12.2(10). See Request for Rehearing letter of January 26, 2001 (AR 101-102), which incorporated by reference Shiek's previous "Request for Rehearing" letter of July 7, 2000, located at AR 67-72.

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[3]The Bureau subsequently issued an "Order Awarding Permanent Partial Impairment Benefits" on June 1, 2000. App. 28. That award also ignored the prior PPI awards and was exclusively for "20% Whole Body for Right Knee - Gait Derangement. 20.00 weeks." Id. App. 29. Shiek requested rehearing from that Order, preserving his contention that ". . . all permanent partial impairment awards must be converted to a 'whole body impairment basis' and the previous PPI award(s) subtracted accordingly." AR 67-72. The most recent PPI award of January 22, 2001 (App. 31), and the subject of this appeal, awarded an additional award for "whole body for chronic venous insufficiency in the right lower extremity" (App. 33) but otherwise ignored the dramatic extent of Shiek's permanent impairments as awarded on April 3, 1996 (App. 20) and January 4, 2000 (App. 23).

The Bureau, however, argues that based upon the language contained in § 65-05-12.2(7) ("for that same member or body part") it is "completely inappropriate to combine and reduce impairments" for any of Shiek's impairments that are not for the "same member or body part", i.e., because Shiek had not previously had a PPI award for his "whole body for right knee - gait disorder and chronic venous insufficiency" (App. 33), it was proper under the statute to ignore the cumulative effects of Mr. Shiek's entire "whole body" impairment that would have paved the way for a much higher permanent impairment award. AR 78-79.

LAW AND ARGUMENT

I. History of Past and Current Permanent Partial Impairment (PPI) Law Supports Shiek's Contention That He is Entitled to the Higher Benefits He Seeks.

A. Past and Current PPI Law.

One of the fundamental benefits available to qualified injured workers is "permanent impairment" compensation. See, e.g., the applicable statute, N.D.C.C. § 65-05-12.2 (1999) at Attachment A. The concept of a separate award of compensation for impairment - - as opposed to disability - - began with the case of Buechler v. North Dakota Workmen's Comp. Bureau, 222 N.W.2d 858 (N. D. 1974). In Buechler, this Court, referencing the nomenclature of the time, stated an injured worker is entitled to both a permanent total disability award and a permanent partial disability award. Id. at 862. In 1977, the legislature changed the designation of the

"permanent partial disability" benefit to "permanent partial impairment." 1977 N.D. Sess. Laws ch. 579, § § 11, 12, 13. This Court subsequently explained that, "The reason for the change was to reflect a distinction between 'disability,' which relates only to inability to work, [and] 'impairment,' which relates to loss of . . . or loss of use of limbs or functions.'" Effertz v. North Dakota Workers Comp. Bureau, 481 N.W.2d 218, 219, n.1 (N.D. 1992).

Until 1995, permanent partial impairment (PPI) benefits were paid under two distinctly separate statutes: (1) the so-called "scheduled injuries" statute for PPI compensation for "loss of a member", i.e., N.D.C.C., § 65-05-13 (1989);[4] and (2) the so-called "total impairment" statute that paid PPI compensation for "impairment of function", i.e., N.D.C.C. § 65-05-12 (1989).[5]

The amount of the cash award has always been determined on the concept of "number of weeks, depending upon the percentage of impairment." See, e.g., N.D.C.C. § 65-05-12 (1989). The amount of each "week" of benefit is determined ". . . by multiplying thirty-three and one-third percent of the average weekly wage in this state rounded to the next highest dollar, on the date the impairment is determined." Id. Thus, in Shiek's case, the amount of each "week" of benefits for PPI paid under the January 22, 2001 Amended PPI Order is $146 per week. App. 33.

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[4]See Attachment B.

[5]See Attachment C.

While PPI benefits historically had been paid over time based upon the weekly compensation rate (See, e.g., N.D.C.C. § 65-05-12 and § 65-05-13 (1983)), as of 1989, all PPI awards were paid in a "lump sum." § 65-05-12, N.D.C.C. (1989).

In order to preclude ". . . a double recovery for an injury . . ." (Buechler, at 861), both the "scheduled injuries" and the "total impairment" statutes[6] provided that if the Bureau had previously given a PPI award for that same part of the body then, of course, the prior award must be deducted from the subsequent one.[7]

In 1995, the Legislature dramatically changed permanent partial impairment law by repealing N.D.C.C. § 65-05-12 and § 65-05-13 and enacting an entirely new statute, N.D.C.C. § 65-05-12.2.[8] See Attachment D (AR 184-188). Several fundamental changes were made regarding both the scheme of calculating permanent impairments and the amount of permanent impairment awards to be made.

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[6]See Attachments B and C, respectively.

[7]The "total impairment" statute (N.D.C.C. § 65-05-12 (1989)) provided that: "Any subsequent award for impairment must be made minus any previous award given on any earlier claim or the same claim for that same member or body part." The "scheduled injuries" statute (N.D.C.C. § 65-05-13 (1989)) provided that: "An impairment award made by the bureau in the past under this section or section 65-05-12 must be deducted from a subsequent impairment award for the injury to the same part of the body."

[8]While the statute was to become effective August 1, 1995, it became the subject of a referral election held in June of 1996 and, in the referral election, the statute was affirmed and thus became effective 30 days after the referral election, i.e., on July 10, 1996. McCabe v. North Dakota Workers Comp. Bureau, 1997 ND 145, ¶ 6, n.1, 567 N.W.2d 201.

With regard to the scheme, the 1995 law required that all PPI awards be "whole body impairment" awards, i.e., thus doing away with separate "scheduled injuries" awards. N.D.C.C. § 65-05-12.2(15) (1995).[9]

Significantly, however, the dramatic 1995 change in the PPI statutes otherwise carried over the gist of the repealed statutes that prior awards should be deducted from current ones, to wit:

> "The bureau shall deduct, from a subsequent award for impairment, any previous award given or calculated on an earlier claim or the same claim for that same member or body part." N.D.C.C. § 65-05-12.2(7) (1995); emphasis added.

Even more significantly - - and crucial to the proper adjudication of Shiek's case - - is that, in 1999, the Legislature amended this subsection of the law to read as follows:

> "The bureau shall deduct, on a whole body impairment basis, from an award for impairment under this section, any previous impairment award for that same member or body part under the workers' compensation laws of any jurisdiction." N.D.C.C. § 65-05-12.2(7) (1999); emphasis added.

The 1999 version of the PPI statute retained the directive that ". . . a permanent impairment award must be based on the percentage of whole body impairment . . ."

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[9]One minor exception with respect to "amputation of a finger or toe" was made to the "whole body impairment" rule, but it is otherwise irrelevant to Shiek's case. N.D.C.C. § 65-05-12.2(16) (1995).

N.D.C.C. § 65-05-12.2(10) (1999) (Attachment A; emphasis added). Compare with N.D.C.C. § 65-05-12.2(15) (1995) (Attachment D).

With regard to benefits, the dramatic change in the PPI law was decidedly a two-edged sword for impaired workers. First, the new law eliminated entirely any award for workers who are impaired from ". . . one to fifteen percent . . ." N.D.C.C. § 65-05-12.2(10) (1999). The denial of impairment to injured workers suffering 15 percent "whole body" impairment or less was made with the knowledge that ". . . approximately 90 percent of all injured employees with functional impairments will be denied a PPI award" under the new law. Anderson & DeLoss, Are Employees Obtaining "Sure and Certain Relief" Under the 1995 Legislative Enactments of the North Dakota Workers' Compensation Act?, 72 N.D. L. Rev. 349, 369 (1996); cited with approval in Gregory v. North Dakota Workers Comp. Bureau, 1998 ND 94, ¶ 27, 578 N.W.2d 101.

The Bureau has loudly trumpeted the fact that the "new" PPI law "dramatically" increases the awards furnished to employees having impairment ratings above 51 percent. Compare N.D.C.C. § 65-05-12 (1989) with N.D.C.C. § 65-05-12.2(10) (1999); see Saari v. North Dakota Workers Comp. Bureau, 1999 ND 144, 598 N.W.2d 174 (Docket Entry 3, Appellant Brief, at p. 8).

Under the new law, the benefit amounts above 50 percent rise by ever increasing increments of weeks. Indeed, under the old law, the maximum amount of

benefits a 100 percent totally impaired worker could receive was 500 weeks. N.D.C.C. § 65-05-12 (1989). However, under the current statute, the threshold of 500 weeks of benefits is exceeded at 62 percent impairment (515 weeks) and goes all the way up to 1,500 weeks of benefits for a 100 percent impairment. N.D.C.C. § 65-05-12.2(10), 1999.

Shiek hastens to add that he is among the minute percentage of workers that has a combined "whole body" impairment of over 50 percent. See calculations at Law and Argument I(B), infra, pp. 12-13. As pointed out in the North Dakota Law Review Article, "Less than 1% of injured employees have a functional impairment rating of 51% or over." Anderson & DeLoss, supra, at 369. Thus, as perverse as it may appear, the clear legislative intent of the dramatic changes in PPI laws in 1995 was to eliminate permanent partial impairment awards for the vast majority of injured workers but generously award those minute amount of injured workers - - such as Shiek - - who have impairment ratings of over 50 percent. And see, Saari v. North Dakota Workers Comp. Bureau, 1999 ND 144, ¶ 8, 598 N.W.2d 174. This undeniable legislative scheme - - to dramatically increase benefits for these few severely impaired workers - - is crucial to the construction of N.D.C.C. § § 65-05-12.2(7) and (10), as argued, infra.[10]

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[10]This argument is but one of several arguments made by Shiek in his administrative hearing brief (AR 143-188) that was ignored by ALJ Hovland when he issued his recommended decision, was subsequently rubber stamped by the Bureau (continued...)

B. Analysis of Shiek's Entitlement to PPI Benefits Under Correct Application of N.D.C.C. §§ 65-05-12.2(7) and (10) (1999).

Simply put, Shiek merely contends what the Legislature obviously intended, as follows: That first, as a real flesh and blood human being, Shiek's entire cumulative "whole body impairment" must be determined (in accordance with the schedule set forth at N.D.C.C. § 65-05-12.2(10)); and then "on a whole body impairment basis" his previous impairment awards must be deducted (pursuant to § 65-05-12.2(7)) and, finally, the net amount of weeks (from the § 65-05-12.2(10) schedule) be awarded. See Attachment A.

The following is an analysis of the award that Shiek claims that he is entitled to under a proper construction of the new "whole body" PPI law. The purpose for the exercise of this argument is to illustrate the nature and extent of the dramatic difference in PPI awards when comparing Shiek's interpretation of the law versus the Bureau's. This exercise is not intended to be a definitive accounting of the exacting process of converting and calculating prior and current PPI awards ("total impairment" and "scheduled injuries"). Nor is it necessary to be so because all that Shiek urges is that his interpretation of the statute, in accordance with the formula set forth, supra, (this page) is the correct one. If so, arriving at the actual correct amount

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[10](...continued)
(App. 48) and further ignored by the District Court (App. 49). And see Shiek's Specification of Error III. App. 18.

will be determined by the Bureau and subject to challenge by Shiek in due course. The point is that Shiek wishes to illustrate the nature and extent of the differences in the construction of the law between Shiek and the Bureau but, at the same time, seeks to impress that no actual net additional dollar award need be found by this Court. The actual amount of the additional award will follow automatically if the current PPI statute is construed as Shiek contends it must:

1. Calculation of Current Cumulative Total "Whole Body" Impairment.

   (a) Conversion of "scheduled injuries" (N.D.C.C. § 65-05-13 (1989)) previously awarded to Shiek to "whole body impairment" basis:[11]

15.5% upper extremity for right shoulder	=	9.5% whole body
25.0% for master hand	=	2.38% whole body
54.0% lower extremity for left knee	=	21.6% whole body

   (b) Previously awarded "total impairment" awards (N.D.C.C. § 65-05-12 (1989)):

Venous insufficiency for left leg	=	10.0% whole body
(SUBTOTAL	=	37.38% whole body)

[11]See Statement of Facts, supra, pp. 2-5 for reference to PPI Orders and the previous "schedule" and "total impairment" awards given. See also, all five PPI Orders at App. 20-34, inclusive. PPI awards are calculated, in substantial part, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment. N.D.C.C. § 65-05-12.2(6). The AMA Guides provide tables to convert impairments to parts of the body to impairments of the "whole person." See, e.g., AMA Guides (4th ed.) ("Table 3. Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person" at p. 20) which converts 15.5 percent "upper extremity" for right shoulder to 9.5 percent "whole person").

(c) Additional impairments awarded pursuant to "Amended Order Awarding Permanent Partial Impairment Benefits" of January 22, 2001 (App. 31):

Right knee - gait disorder and chronic venous insufficiency [right leg]	=	28% whole body
TOTAL:		56% whole body.[12]

2. Calculation of net benefits due:

(a) Current Cumulative total "whole body" impairment of 56% (pursuant to § 65-05-12.2(10) (1999): 380 weeks

(b) Minus the combined "whole value" values of all previous impairment awards (as required by § 65-05-12.2(7) (1999)) of 37.38% (pursuant to § 65-05-12.2(10)) equals: - 123.8 weeks

(c) Minus 40 weeks of benefits paid pursuant to Amended Order Awarding Permanent Partial Impairment Benefits (App. 31) - 40 weeks

Net Total Weeks of Benefits Due (380 weeks minus 123.8 weeks minus 40 weeks) equals 216.2 weeks

3. Total net additional lump sum cash award due Shiek (216.2 weeks times $146 per week) equals $31,565.20.

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[12]Recognizing that ". . . whole-person impairment estimates for . . . two [or more] separate conditions . . ." may result in a total impairment less than simply adding of the impairments of the separate conditions, the Guides contain a "combined values" concept. AMA Guides (4th ed.), p. 8.See also "Combined Values Chart" at pp. 322-24 (Attachment E). For example, a 30 percent "whole body" impairment (e.g., for impairment to arm) combined with a 20 percent "whole body" impairment (e.g., for impairment to leg) equals a combined value of 44 percent - - not 50 percent. Id. The 56 percent total accumulated "whole body" impairment of Shiek was calculated using the "Combined Values Chart."

II. The Sole Issue Before the District Court Involves Purely a Question of Law, Requiring a De Novo Review.

The sole issue before this Court is construction of the permanent partial impairment benefits statute, i.e., N.D.C.C. § § 65-05-12.2(7) and (10) (1999). As such, the question is purely a matter of law. "Questions of law are fully reviewable on appeal." Hopfauf v. North Dakota Workers Comp. Bureau, 2000 ND 94, ¶ 7, 610 N.W.2d 60. See also Buchmann v. North Dakota Workers Comp. Bureau, 2000 ND 79, ¶ 10, 609 N.W.2d 437 ("Questions of law are fully reviewable on appeal from a Bureau decision"). See also Shiek v. North Dakota Workers Comp. Bureau, 1998 ND 139, ¶ 16, 582 N.W.2d 639 ("Interpretation of a statute is a question of law fully reviewable by this Court") ("Shiek I"). The fact that the Bureau's counsel and Shiek's counsel agreed that the matter involves purely an issue of law was incorporated as a finding by ALJ Hovland and adopted by the Bureau as its own. See Specifications of Error II (App. 17-18) and ALJ Finding 22 at App. 42.

As argued, infra, the only "rational" interpretation of § § 65-05-12.2(7) and (10) - - and one that fully embraces the remedial purpose of the Act to avoid forfeiture and afford relief, as well as complies with all other pertinent rules of statutory construction - - requires that Shiek be paid the additional PPI benefits he seeks.

III. The North Dakota Workers Compensation Act Is Remedial and Must Be Construed to Afford Relief and to Avoid Forfeiture.[13]

It was for the benefit of the injured worker that the Act was passed. Kallhoff v. North Dakota Workers Comp. Bureau, 484 N.W.2d 510, 513 (N.D. 1992). Further, and irrespective of the repeal of the so-called "liberal construction" of the Act (see N.D.C.C. § 65-01-01 (1995), N.D. Sess. Laws ch. 605, § 1), this Court has consistently made it clear that it will continue its construction of the Act to "avoid forfeiture and afford relief." See Shiek v. North Dakota Workers Comp. Bureau, 2001 ND 166, ¶ 26, 634 N.W.2d 493 (Shiek II), wherein this Court reaffirmed that, "The Workers' Compensation Act is remedial legislation, and we construe it to afford relief and avoid forfeiture with a view of extending its benefits to all who fairly can be brought within its provisions"; citing Ash v. Traynor, 2000 ND 75, ¶ 8, 609 N.W.2d 96. See also Zueger v. North Dakota Workers Comp. Bureau, 1998 ND 175, ¶ 12, 584 N.W.2d 530 (citing Kallhoff, supra). In fact, "Perhaps the greatest travesty of the 1995 amendments was to deny the injured employee liberal construction under the Workers Compensation Act. Anderson & DeLoss, supra, 72 N.D. L. Rev. 349,

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[13]Again, despite the undisputed application of this remedial rule of construction to the case at bar - - and despite the fact that this argument was amply made by Shiek - - it was totally ignored by the Bureau and the District Court. See Shiek administrative brief at AR 160-62 and District Court brief at pp. 12-13 (Doc. Entry 18). And see note 10, supra, pp. 10-11.

378 (1996). This law review article was cited, with approval, in Gregory v. North Dakota Workers Comp. Bureau, 1998 ND 94, ¶ 27, 578 N.W.2d 101.

The remedial construction pronouncements by this Court are underscored by the fact that they are most recently found in a 2001 case (Shiek II, supra at ¶ 26), i.e., over six years after the Legislature amended N.D.C.C. § 65-05-01 regarding "liberal construction" in 1995. Again, whether it be called "liberal construction" or construction as required by the "remedial" nature of the Act, the result is the same: The Act must be construed to extend its benefit provisions to all whom can fairly be brought within them. The date that any Court rules otherwise is the date that the same Court will be required to rule the Act unconstitutional. Baldock v. North Dakota Workers Comp. Bureau, 554 N.W.2d 441, 446, n.4 (N.D. 1996); and Svedberg v. North Dakota Workers Comp. Bureau, 1999 ND 181, ¶ 19, n.2, 599 N.W.2d 323.

The Bureau's interpretation of Shiek's statutory mandated PPI benefits turns the remedial construction of the Act in favor of the injured worker on its head, i.e., it strives to avoid relief and afford forfeiture.

IV. The Bureau's Most Recent Permanent Partial Impairment Order Violates Clear Legislative Intent to Calculate All Impairments of Injured Workers on a "Whole Body" Basis and Pay Benefits Accordingly.

A. There Can Only Be One "Rational" Interpretation of N.D.C.C. § § 65-05-12.2(7) and (10) (1999) Given the Construction of the Act to Afford Relief and Avoid Forfeiture.

It is axiomatic that the primary objective of statutory construction is to ascertain the intent of the legislature." Ash v. Traynor, 2000 ND 75, ¶ 6, 609 N.W.2d 96. Then, "In ascertaining legislative intent, we look first to the words used in the statute, giving them their ordinary, plain-language meaning." Id.

Fundamentally, only where, "A statute . . . is susceptible to different but rational meanings is [it] ambiguous." Id.; emphasis added.

The threshold question, therefore, is whether the Bureau's interpretation of § 65-05-12.2(7) and (10) is "rational." Shiek submits that not only is the Bureau's interpretation not "rational" but it results in statutory interpretation that is "absurd and ludicrous" and, therefore, must be avoided. Shiek I, ¶ 17.

Fundamentally, Shiek is a flesh and blood human being who indisputably must suffer the combined effects of his various physical impairments for the remainder of his life. This anatomical truism parallels the obvious legislative intent of not only paying all impairments in terms of "whole body" awards (§ 65-05-12.2(10) (1999)) but also ensuring that all prior awards are subtracted on the same "whole body impairment" basis (§ 65-05-12.2(7) (1999)). This common sense analysis of clear legislative intent shows that Shiek, who has suffered dramatic cumulative "whole body" work-related impairment, should have his benefits based upon that reality. Contrast this simple truism with the Bureau's tortured interpretation in its "Amended Order Awarding Permanent Partial Impairment Benefits" of January 22, 2001. App.

31. Conceding that Shiek has suffered an additional "28 percent whole body" impairment, the Bureau nonetheless ignored his entire prior combined 37.38 percent "whole body" impairment.[14]

By ignoring all prior PPI awards, and issuing an award of 28 percent "whole body" in isolation (App. 31), the Bureau applied § 65-05-12.2(10) as if Shiek had no prior permanent impairments. Under the Bureau's analysis, of course, this means that the additional "28 percent whole body" impairment Shiek unquestionably suffered (App. 33) equals only 40 weeks of benefits because the schedule under the statute does not allow any impairment award, "For one percent to fifteen percent impairment." N.D.C.C. § 65-05-12.2(10) (1999). Attachment A.

The Bureau's interpretation ignores the cumulative effects of permanent impairment upon Mr. Shiek's whole body and strains to arrive at a result that would allow the Bureau to pay the lowest amount of permanent impairment benefit possible. This brings to mind the admonition of this Court that: "At some point the Bureau must recognize it is dealing with real people, not merely statistics and notations in a file." Svedberg v. North Dakota Workers Comp. Bureau, 1999 ND 181, ¶ 19, 599 N.W.2d 323.

Again - - plainly and simply - - the PPI statute requires that all impairment awards be calculated on "whole body" terms and paid in accordance with the

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[14]See Law and Argument, I(B), supra, pp. 11-13.

schedule set forth at N.D.C.C. § 65-05-12.2(10) (1999). Following the same logic, the legislature clearly stated that - - of course - - prior awards need to be subtracted but also on the same "whole body impairment" basis that the total awards were calculated (N.D.C.C. § 65-05-12.2(7)). Subdivision seven (id.) merely commands the Bureau to "deduct" prior awards "on a whole body basis" and adamantly does not give the Bureau authority to ignore a subsequent new impairment that adds to the cumulative whole body impairment of the flesh and blood injured worker.

Shiek's interpretation of the law not only makes sense but it fully embraces the mandatory construction of the Act to avoid forfeiture and afford relief. E.g., Ash, supra. By the same token, the Bureau's "absurd and ludicrous" interpretation of the statute provides a result exactly contrary to this oft-repeated rule of remedial construction - - the Bureau's interpretation avoids relief and affords forfeiture.

Because the Bureau's interpretation of the statute is not rational, and violates the mandatory remedial construction afforded the benefits provisions of the Act, it cannot stand. Rather, Shiek's construction of the statute is rationally based upon clear legislative intent and embraces the remedial nature of the Act and is, therefore, compelling and controlling.

B. Because Only One "Rational" Interpretation of N.D.C.C. § § 65-05-12.2(7) and (10) (1999) Is Permissible, No Deference to the Bureau's Interpretation of the Statute Is Permitted.

As argued, infra, the Bureau's interpretation of the statute is simply not "rational" and flies in the face of the remedial purpose of the Act. While this Court has recognized deference to an administrative agency's interpretation of a statute it administers, it has specifically added the following caveat with respect to the Bureau:

> "Normally we will defer to a reasonable interpretation of the statute by the agency enforcing it when that interpretation does not contradict clear and unambiguous statutory language. Lende v. North Dakota Workers Comp. Bureau, 1997 ND 178, ¶ 12, 568 N.W.2d 755. However, an interpretation that does contradict clear and unambiguous statutory language cannot be called reasonable." Shiek I, supra, ¶ 16.

Far from being given deference, Shiek asserts that the Bureau's interpretation of the permanent impairment statute is no less a "tortuous construction," then that which the Bureau previously embraced in Shiek I, at ¶ 17, regarding the retirement presumption statute.

Simply put, the Bureau has erred, as a matter of law, in construing the PPI statutes to ignore the cumulative effects of Mr. Shiek's "whole body" impairments and the concomitant statutorily mandated increase in benefits accordingly. Succinctly, far from any "deference", the Bureau's interpretation should be dismissed as "absurd and ludicrous." Cf., Shiek I, ¶ 17.

C. All Pertinent Rules of Statutory Construction Otherwise Support Shiek's Argument That the Bureau Must: (1) Determine His Current Total Impairment in "Whole Body" Terms; (2) Subtract All Prior Permanent Impairment Awards in "Whole Body" Terms; and (3) Pay the Net Award According

to the Schedule Set Forth at N.D.C.C. § 65-05-12.2(10) (1999).

The pertinent rules of statutory construction were amply and succinctly summarized by this Court in Ash at ¶ 6, as follows:

> The primary objective of statutory construction is to ascertain the intent of the legislature. Lende, 1997 ND 178, ¶ 12, 568 N.W.2d 755. In ascertaining legislative intent, we look first to the words used in the statute, giving them their ordinary, plain-language meaning. State v. Burr, 1999 ND 143, ¶ 12, 598 N.W.2d 147. A statute which is susceptible to differing but rational meanings is ambiguous. Werlinger v. Champion Healthcare Corp., 1999 ND 173, ¶ 44, 598 N.W.2d 820. When a statute is ambiguous, we look to the object sought to be obtained and to the circumstances under which the statute was enacted to determine the legislative intent. Haff v. Hettich, 1999 ND 94, ¶ 44, 593 N.W.2d 383. We construe statutes as a whole to give each provision meaning and effect. Little v. Traynor, 1997 ND 128, ¶ 37, 565 N.W.2d 766.

Shiek submits that all of the above rules of statutory construction, when properly applied in his case, require the construction of the PPI benefits statutes that he forwards.

First, the legislative intent is clear that the "new" PPI statute requires that all PPI awards be based on "whole body" terms. N.D.C.C. § 65-05-12.2(10) (1999). The language could not be clearer: "If the injury causes permanent impairment, the award must be determined based on the percentage of whole body impairment. . ." Id.; emphasis added.

Secondly, in 1999 the Legislature specifically added the phrase "on a whole body impairment basis"[15] to that portion of the PPI statute that requires deduction of prior PPI awards from current ones. § 65-05-12.2(7) (1999). On the face of these two subdivisions of the new PPI statute, therefore, it is clear that the Legislature intended to harmonize all awards of PPI benefits on an "apples to apples" rather than an "apples to oranges" approach. In other words, in order to properly calculate the current net award, the total combined "whole body" impairment of the worker must be determined and then the prior awards based on a "whole body impairment basis" must also be determined and subtracted.

Further, as shown, in Law and Argument I(A), supra, pp. 7-10 it was the clear legislative intent to reward the few most severely impaired workers with substantially higher benefits than that afforded less impaired workers. And see, Saari, ¶ 8. Once

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[15]As Shiek believes the Bureau's counsel will concede, there is nothing specific in the legislative history as to why the language in the 1999 statute was changed to add the "on a whole body impairment basis" reference, i.e., a reference that was not included in the 1995 edition of N.D.C.C. § 65-05-12.2(7). Shiek submits, moreover, that because the phrase "on a whole body impairment basis" is clear and unambiguous, it supports his construction of § § 65-05-12.2(7) and (10). "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded in the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. Also "words and phrases must be construed according to the context and rules of grammar and the approved usage of language." N.D.C.C. § 1-02-03. Finally, "words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears . . ." N.D.C.C. § 1-02-02.

again, although this argument was made by Shiek and not rebutted by the Bureau, it was completely ignored by ALJ Hovland and the District Court.

In fact, the obvious intent was to do away with altogether the vast majority of impairment awards for injured workers but, by the same token, substantially increase awards for the most severely impaired workers, such as Shiek.

The bottom line is that the Bureau does not - - and cannot - - dispute the fact that Shiek has a combined whole body impairment of at or about 56 percent. See calculations, Law and Argument, I(B), supra, pp. 12-13. The Bureau also cannot ignore the fact that the legislature intended to pay injured workers who had 56 percent impairment an amount equal to 380 weeks of benefits. § 65-05-12.2(10) (1999). Shiek concedes - - as he must - - that his prior combined impairments must be subtracted from his cumulative impairment based upon the same "whole body impairment basis" that his total impairment has been calculated, to wit: A deduction of his previous impairments ". . . on a whole body impairment basis, from an award for impairment under [§ 65-05-12.2(10)]. . ." as mandated by § 65-05-12.2(7) (1999). See "Calculation of net benefits due" at Law and Argument I(B), supra, at 13.

Indeed, subdivision 7 of § 65-05-12.2 clearly deals only with the requirement to "deduct" (id.) prior awards from the current one. It does not, in any manner, give the Bureau authority to ignore the cumulative "whole body" effect of an additional impairment on the wholly irrational basis that there wasn't a previous award to that

part of the body! Rather, subdivision 10 of § 65-05-12.2 is the substantive benefits portion of the statute which, without question, requires all impairment awards to be calculated and paid on a "whole body" basis.

Construing § § 65-05-12.2(7) and (10) "as a whole to give each provision meaning and effect" (Ash, ¶ 6), clear legislative intent requires the Bureau to calculate the total "whole body" impairment and subtract the previous "whole body impairment . . . from an award for impairment under this section . . ." § 65-05-12.2(7) and (10). By so doing, the dual purpose of the Legislature with respect to "whole body" impairment awards under the new law is served, i.e., the most severely impaired workers, such as Shiek, get the benefit of the additional benefits obviously mandated by subdivision 10 while, at the same time, and on the same basis, his prior awards are subtracted.

The Bureau's sole argument rests upon the dubious phrase at subdivision 7 of § 65-05-12.2 as follows: ". . . for that same member or body party under the Workers Compensation law of any jurisdiction." The Bureau interprets this language to mean that, despite the fact all prior awards must be determined "on a whole body impairment basis" (id.), unless the prior award was for the "same member or body" the prior impairment awards can be ignored and subsequent new impairments be issued subject to the 15 percent impairment exclusion of § 65-05-12.2(10).

Far from being "rational" (and flying in the face of the remedial purpose of the Act) the Bureau's argument also simply doesn't make any sense. Shiek was previously given awards under both the "scheduled injuries" and "total impairment" statutes. See Law and Argument, I(A) and (B), supra, pp. 5-13. Now the law indisputably requires that these prior awards must be deducted "on a whole body impairment basis, from an award for impairment under [§ 65-05-12.2(10) (1999)]." N.D.C.C. § 65-05-12.2(7).

Again, ALJ Hovland and the District Court completely ignored the 1999 amendment that - - clearly and unambiguously - - requires calculation of PPI awards on "whole body" terms. § 65-05-12.2(7). This flies in the face of the oft repeated rules of statutory construction. E.g., Little v. Traynor, 1997 ND 128, ¶ 37, 565 N.W.2d 776 ("We construe statutes as a whole to give each provision meaning and effect"). Compare this mandated rule of construction with the Bureau's (ALJ Hovland's) syllogistic conclusion that ". . . the plain and ordinary language of the statute requires the Bureau to deduct 'any previous impairment award' only 'for the same member or body part under the Workmen's Compensation laws of any jurisdiction.'" Conclusion 6 at App. 45. Again, ALJ Hovland completely ignores the argument that it is simply irrational to focus upon one portion of the statute that speaks to the "same member or body part" while completely ignoring the other - - and

more recently added - - portion of the statute that mandates that all PPI awards be based on "whole body terms." § 65-05-12.2(7).

Indeed, the phrase upon which Shiek's argument is based ("on a whole body basis") was added to the statute in 1999 and thus is ". . . last in order of date . . ." for purposes of the rule of statutory construction found at N.D.C.C. § 1-02-08 ("Except as otherwise provided in section 1-02-07, whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail"; emphasis added). Therefore, the most recently enacted clause ("on a whole body impairment basis") "shall prevail" over the anachronistic phrase ("same member or body part"). Id.[16]

Once the prior awards have been converted to "whole body impairment" for purpose of deduction from the subsequent award, what difference does it make if the prior awards were "for that same member or body part"? Is it rational to believe that the legislature, in including the language "for that same member or body part" intended the result that the Bureau seeks in Shiek? It is not. Such result "fractionalizes" a living human being into separate and distinct - - but irrational - - parts for purposes of award of permanent impairment. How does it make sense for an injured worker - - for example - - who has hurt his arm, obtained an impairment

[16]Yet again, despite this argument having been made to the ALJ and the District Court, it was completely ignored by both.

award, and subsequently has an increase in impairment in that arm, to get additional benefits, while a worker who has had a similar injury to an arm, but suffers a separate injury to a leg, gets no additional benefits? It doesn't make sense.

Shiek concedes that the language "for that same member or body part" is inept but it cannot rise to a level of creating an ambiguity because it simply is not rational. Ash, supra, ¶ 6. Rather, the logical explanation for the inclusion of this language is that it is an anachronism carried over from the "old" separate "scheduled injury" and "total impairment" statutes. See discussion at Law and Argument I(A), supra at 5-7 and n. 7

If one steps back from the arcane language and calculations of permanent impairment regarding the permanent impairment statutes, the analysis is actually quite simple - - the legislature intended to treat injured workers as the real flesh and blood human beings they are and calculate total "whole body" impairments and subtract prior "whole body" impairments accordingly. The legislature clearly did not intend to create two classes of impaired workers - - those who had only prior awards to the "same member or body part" and those that had separate awards to different parts of their body. Again, such a classification is anatomically "absurd and ludicrous." Cf., Shiek I at ¶ 17.

Finally, it must be emphasized that the common sense construction of the PPI statute that Shiek contends is required cannot dramatically impact the Bureau or the

Fund. Again, less than one percent of injured workers, such as Shiek, have impairments of 51 percent or over. Anderson & DeLoss, supra, 369. This is but another reason to reject the "torturous construction" of the PPI benefits statute by the Bureau in Shiek's case and embrace the clear and compelling legislative intent to calculate and pay benefits as Shiek contends.

CONCLUSION

Because the Bureau's Final Order is not in accordance with the law, the Judgment of the District Court must be reversed, the Bureau's Final Order vacated, and the matter remanded to the Bureau with instructions for the Bureau to: (1) determine Shiek's current total impairment in "whole body" terms; (2) subtract all prior permanent impairment awards in "whole body" terms; and (3) pay the net award according to the schedule set forth at N.D.C.C. § 65-05-12.2(10) (1999), as argued by Shiek. Shiek is confident that this will result in a net cash award to him in the sum of $31,565.20 as analyzed and calculated by Shiek in this brief. See Law and Argument I(B), supra, pp. 12-13.

Respectfully submitted this 22nd day of January, 2002.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20010319

Darold B. Shiek,	)
	)
Appellant,	)
	)
v.	)
	)
North Dakota Workers' Compensation Bureau and North Dakota State University,	)
	)
Appellees.	)

Andrea Starr, being first duly sworn, deposes and says that she is of legal age and that on January 22, 2002, served the attached:

Brief of Appellant Darold Shiek

Appellant's Appendix

by placing a true and correct copy thereof in an envelope addressed as follows:

Jacqueline S. Anderson
Attorney at Law
P. O. Box 2626
Fargo, ND 58108-2626

NDSU
Payroll Office
NDSU University Station
Fargo, ND 58105

and depositing the same, with postage prepaid, in the United States mail at Fargo, North Dakota.

Andrea Starr

Subscribed and sworn to before me this 22nd day of January 2002.

Notary Public
County of Cass, State of ND
My Commission Expires:

Notary P... My Com... ...NORTON ...DAKOTA ...2003