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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Vicki Lewis,)	Supreme Court No. 990300
)	
Appellant,)	
)	
v.)	
)	
The North Dakota Workers)	
Compensation Bureau and)	
Investment Centers of America,)	
)	
Appellees.)	

**BRIEF OF APPELLEE
NORTH DAKOTA WORKERS COMPENSATION BUREAU**

ON APPEAL FROM ORDER DENYING APPELLANT'S RULE 60(b)
MOTION FOR RELIEF FROM JUDGMENT DATED JUNE 28, 1999,
BURLEIGH COUNTY DISTRICT COURT, CIVIL NO. 98-C-2169,
THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING

ATTORNEY FOR APPELLEE
N.D. WORKERS COMPENSATION BUREAU

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STATEMENT OF THE ISSUES

1. Whether a Rule 60(b) motion under the North Dakota Rules Of Civil Procedure is available in an administrative proceeding.
2. Whether the trial court erred when it denied Lewis' Rule 60(b) motion.

STATEMENT OF THE CASE

This case involves an appeal from a district court order denying Vicki Lewis' (Lewis) Rule 60(b) motion for relief from judgment. Lewis also appealed from a district court judgment affirming an order by the North Dakota Workers Compensation Bureau (Bureau) that accepted Lewis' claim for injury and awarded her medical expense benefits and a closed period of disability benefits. Lewis' appeal from the judgment was dismissed because it was not timely. The court subsequently invited briefing on Lewis' appeal from the district court order denying her Rule 60(b) motion. The court specified the issues for briefing, which are set forth in the Bureau's Statement Of The Issues.

Lewis requested rehearing of a Bureau decision that did not accept her claim for a work injury. (Bureau's Addendum 2 (Certificate Of Record On Appeal To District Court 29-36) (hereinafter CR)). A formal administrative hearing was held May 4, 1998. (CR 100). After the hearing, the administrative law judge recommended reversing the Bureau's decision and ordered "that appropriate action be taken to determine the benefits to which Claimant may be entitled." (CR 114). The Bureau accepted the recommended decision by order dated June 23, 1998. (CR 117-120).

As the ALJ ordered, the Bureau also determined the benefits to which Lewis was entitled, awarding her medical expense benefits for treatment related to her work injury and disability benefits for the period she was disabled due to her work injury. (CR 117-120). The award of disability benefits included Lewis' dates of

disability after the work injury on June 23, 1996, and until November 18, 1996, when Lewis left her employment for reasons unrelated to her work injury. Id.

On July 22, 1998, Lewis petitioned the Bureau for reconsideration of its final order, claiming she was entitled to disability benefits after November 18, 1996. (CR 121-22). The Bureau did not accept Lewis' petition. (CR 134-36).

On September 1, 1998, Lewis appealed the Bureau's June 23, 1998, order to district court. (Lewis Appendix 106-07). Lewis specified the following error:

"Conclusion of Law III is incorrect. The Claimant's entitlement to disability benefits does not depend on her reasons for terminating employment. Furthermore, the issue of the Claimant's entitlement to disability benefits should have been raised in the Bureau's order of Dismissal dated June 20, 1997. The Bureau's denial of disability benefits without affording the Claimant an opportunity for an evidentiary hearing has deprived the Claimant of due process. Finally, the Bureau's use of Jeff Bitz, Director of Claims/Rehabilitation, as the ultimate adjudicator has deprived the Claimant of due process in violation of N.D.C.C., Section 28-32-12.2."

Id. (citations omitted). On December 28, 1998, the district court affirmed the Bureau's order. Id. at 3. Judgment was entered January 13, 1999, and Notice of Entry of Judgment was filed January 19, 1999. Id. at 5-6.

On February 9, 1999, Lewis moved the district court under Rule 60(b) of the North Dakota Rules Of Civil Procedure for relief from the judgment, alleging "fraud, misrepresentation, or misconduct of the Workers Compensation Bureau in allowing improper ex parte contact, whether direct or indirect, between the Director of Claims and Rehabilitation" for the Bureau and the Bureau's outside counsel, the

undersigned attorney. (Lewis Appendix 8-9). The relief requested by Lewis was reinstatement of the ALJ's recommended decision based on this court's decision in Scott v. N.D. Workers Compensation Bureau, 1998 ND 221, 587 N.W.2d 153 (N.D. 1998). Id. at 9, 19.

The Bureau responded to Lewis' motion, arguing Lewis did not show the Bureau obtained the district court judgment through fraud, misrepresentation, or misconduct, Scott did not support Lewis' requested relief, and Lewis failed to preserve for appeal the issue of ex parte contacts. (Lewis Appendix 22-26). On February 24, 1999, the district court ordered that "any ex-parte contacts between the Bureau's decision-maker and the Bureau's litigation counsel should be disclosed and made part of the certified record." Id. at 33.

On March 15, 1999, the Bureau amended the certificate of record and disclosed communications that occurred between Bureau counsel, the undersigned attorney, and Dave Thiele, Bureau in-house senior claims counsel. (CR 142-153). The disclosures revealed that Bureau counsel recommended accepting the ALJ's decision and questioned whether res judicata required the Bureau address Lewis' eligibility for specific benefits, such as disability, because Lewis' counsel had identified disability as an issue for hearing. Id. at 143-44. Specifically, in his opening statement at the hearing, Lewis' counsel identified the following issues:

"The issue is whether the vocal cord nodules which Ms. Lewis developed after working at Investment Centers were causally related to her employment and whether the subsequent surgery for those nodules was causally related to her employment and whether her subsequent

disability from those nodules and surgery were related to her employment. That's really the issue."

(Lewis Appendix 121) (underlining added). Bureau counsel was subsequently instructed to prepare a proposed order. (CR 142, 145-49). After Lewis petitioned the Bureau for reconsideration of its final order, Bureau counsel again was instructed to prepare a proposed order. (CR 142, 150-53).

After the communications were disclosed, Lewis accused the Bureau and its counsel of not disclosing all communications, claiming the Bureau could not "be trusted to provide a full accounting of its ex parte contacts even when expressly directed to do so by this court." (Lewis Appendix 39-40). The Bureau requested hearing. Id. at 41.

At the hearing and in written correspondence, the undersigned attorney represented to the district court that all communications between Bureau counsel and the Bureau had been disclosed. (Lewis Appendix 42-43). Lewis alleged otherwise, seeking not only communications between the Bureau and its counsel but any staff person at the Bureau who potentially had a communication internally about Lewis' matter after the administrative law judge's recommended decision. Id. The district court rejected Lewis' argument about ex parte communications as "much too broad in scope" and denied Lewis' Rule 60(b) motion "because it is based on an issue not raised and not preserved for appeal to the district court." Id. at 44. The district court further explained Lewis "did not allege improper ex parte contacts in her specifications of error" and "Lewis' counsel . . . was well aware of the

issue [because] he had raised the issue in another case.” Id. Lewis appealed to the supreme court on September 30, 1999. Id. at 48.

LAW AND ARGUMENT

I. **The Rules Of Civil Procedure Apply On Appeal To District Court From A Decision Of An Administrative Agency Unless The Rules Are Inconsistent With Other Statutory Procedures.**

The court specified the first issue for briefing as “whether a Rule 60(b) is available in an administrative proceeding.” The Bureau points out Lewis did not move for relief under Rule 60(b) in an administrative proceeding before the Bureau, rather she moved for relief on appeal to the district court after judgment had been entered affirming the Bureau’s order. Accordingly, the Bureau addresses the availability of Rule 60(b) in both an administrative proceeding and on appeal to district court from an administrative decision.

Chapter 28-32, the Administrative Agencies Practices Act, governs the procedure for administrative proceedings before an administrative agency. E.g., Evanson v. Wigen, 221 N.W.2d 648, 652 (N.D. 1974). An administrative agency, like the Bureau, also is permitted to “adopt specific agency rules of procedure not inconsistent with [chapter 28-32].” N.D.C.C. § 28-32-05.2. A review of the statutes in chapter 28-32 and title 65, the workers compensation statutes, reveals that five statutes, N.D.C.C. § 28-32-05, § 28-32-07, § 28-32-09, § 28-32-13, and § 65-01-16, expressly provide for application of the rules of civil procedure in an administrative proceeding, but limit the application to the rules governing service and discovery. E.g., N.D.C.C. § 28-32-05(1)(c) (providing that “notice of hearing” shall be “in the manner allowed for service under the North Dakota Rules Of Civil Procedure”); N.D.C.C. § 28-32-09 (providing that “[i]n an adjudicative proceeding, discovery may

be obtained in accordance with the North Dakota Rules Of Civil Procedure”); N.D.C.C. § 65-01-16(5) (requiring service of an administrative order “in accordance with the North Dakota Rules Of Civil Procedure”); see N.D.C.C. § 65-02-11 (directing that “process and procedure under [title 65] is governed by chapter 28-32” unless otherwise provided by title 65).

No statutes in either chapter 28-32 or title 65 provide for application of other rules of civil procedure, such as Rule 60(b). See Colgate-Palmolive Co. v. Dorgan, 225 N.W.2d 278, 282 (N.D. 1975) (rejecting that a hearing examiner in an administrative hearing “should have powers comparable to those granted a judge under the North Dakota Rules Of Civil Procedure”). An opportunity for somewhat similar relief as Rule 60(b) is provided, however, under N.D.C.C. § 28-32-14, which allows a party to petition an administrative agency for reconsideration of a final order. See Boger v. N.D. Workers Compensation Bureau, 1998 ND 131, ¶ 12, 581 N.W.2d 463 (N.D. 1998). Because chapter 28-32 and title 65 govern the procedure in administrative proceedings and do not provide for post-trial relief under Rule 60(b), it appears the rule is not available in an administrative proceeding before the Bureau.

It appears the rule also is not available when an administrative decision is appealed to district court. The rules of civil procedure govern the procedure on appeal before the district court, “provided the Rules are not inconsistent with the statutory procedures.” Lende v. N.D. Workers Compensation Bureau, 1997 ND 178, ¶ 30, 568 N.W.2d 755, 762 (N.D. 1997) (underlining added) (applying Rule

77(d), N.D. R. Civ. P., on a district court appeal of a Bureau decision); Reliance Ins. Co. v. Public Svc. Comm., 250 N.W.2d 918, 920-22 (N.D. 1977) (applying Rules 5 and 6, N.D. R. Civ. P., on a district court appeal of an administrative decision); see Schroeder v. Burleigh Cty. Bd. Of Comm., 252 N.W.2d 893, 895 (N.D. 1977) (applying Rule 19, N.D. R. Civ. P., to a district court appeal of a county board decision); see also Evanson, 221 N.W.2d at 652, 656 (accepting, without comment, application of Rules 43 and 55, N.D.R. Civ. P., to a district court appeal of an administrative decision).

Rule 81(b), N.D. R. Civ. P., also provides the rules “do not supersede the provisions of statutes relating to appeals to or review by the district courts, but shall govern procedure and practice relating thereto insofar as the rules are not inconsistent with such statutes.” Rule 81(a), N.D. R. Civ. P., however, excepts certain “special statutory proceedings . . . from the[] rules.” Chapter 28-32 is not one of the “special statutory proceedings” excepted from the rules of civil procedure under Rule 81. N.D. R. Civ. P. 81, Table A; e.g., Schroeder, 252 N.W.2d at 895.

A review of the statutes in chapter 28-32 and title 65 reveals that no statutes expressly address whether the rules of civil procedure apply on appeal from an administrative decision. See Lende, 1997 ND 178, ¶ 30, 568 N.W.2d at 762 (applying Rule 77(d), N.D. R. Civ. P., because N.D.C.C. § 28-32-15 did not provide when the appeal period began). It appears, however, a Rule 60(b) motion in an

appellate proceeding before a district court would be inconsistent with the statutory procedures set forth in N.D.C.C. § 28-32-19.

N.D.C.C. § 28-32-19 governs appeals to district court of an administrative decision. It sets forth the scope of review and the procedure on appeal for a district court. See Emery v. N.D. Workers Compensation Bureau, 477 N.W.2d 202, 203 (N.D. 1991). A district court is exercising appellate jurisdiction when reviewing an administrative decision appealed under N.D.C.C. § 28-32-19, and appellate jurisdiction, which “is derived from constitutional or statutory provisions[,] can be exercised only in the manner prescribed.” Center State Bank, Inc. v. State Banking Bd., 276 N.W.2d 132, 134 (N.D. 1979).

N.D.C.C. § 28-32-19 does not provide a district court with authority to award post-trial relief under Rule 60(b), rather it limits a district court to review of the “record filed with the court” and to affirming, modifying, reversing, or remanding an administrative decision. A district court also may order an administrative agency to consider additional evidence accepted by the court on appeal that was not part of the record on appeal. N.D.C.C. § 28-32-18; but see Reliance Ins. Co., 250 N.W.2d at 922 (recognizing a district court’s “inherent power” to take actions which are not available to the administrative agency); see also Schroeder, 252 N.W.2d at 898 (reversing a district court’s denial of a Rule 60(b) motion made on appeal to district court of a county board decision). If Rule 60(b) was not available to Lewis, she would be limited to an appeal of the district court judgment and the judicial review

afforded by an appeal. See Davis v. State Job Svc., 365 N.W.2d 497, 499 (N.D. 1985) (stating “the right of appeal in this state is governed by statute”).

Even if Rule 60(b) was available to Lewis, the district court order denying Lewis’ motion is not reviewable on appeal. Like the district court, the supreme court’s scope of review on appeal is limited. N.D.C.C. § 28-32-21 provides the supreme court’s review is the same as the district court’s under N.D.C.C. § 28-32-19. However, N.D.C.C. § 28-32-21 only provides for review of a “judgment of the district court in an appeal from an order . . . of an administrative agency” Lewis did appeal from a district court judgment, but the appeal was dismissed because it was not timely. N.D.C.C. § 28-32-21 does not provide for review of the district court’s order denying her Rule 60(b) motion. As the court has determined in other administrative agency cases seeking review of an order, not a judgment, the court is without jurisdiction because there is no statutory authorization for the appeal. Sowatzki v. N.D. Workers Compensation Bureau, 1997 ND 137, ¶¶ 10-12, 567 N.W.2d 189, 192 (N.D. 1997); Davis, 365 N.W.2d at 499 (stating “[i]t is the duty of this Court to dismiss an appeal on our own motion if the attempted appeal fails for lack of jurisdiction”); Center State Bank, 276 N.W.2d at 134 (indicating N.D.C.C. § 28-32-21 “only authorizes appeals from judgments”) Langer v. Gray, 24 N.W.2d 339, 340 (N.D. 1946) (stating the legislature “saw fit to provide for appeals from the district court to the Supreme Court from judgments only”). Similarly, the court is without jurisdiction to review Lewis’ appeal of the district court order denying her Rule 60(b) motion.

II. **The Trial Court Did Not Abuse Its Discretion When It Denied Lewis' Rule 60(b) Motion Because Lewis Failed To Preserve The Issue For Appeal.**

If the court determines Rule 60(b) was available to Lewis and the order denying her motion is reviewable under N.D.C.C. § 28-32-21, the district court did not err when it denied Lewis' Rule 60(b) motion.

A district court's denial of a Rule 60(b) motion is "purely discretionary." Frafjord v. Ell, 1997 ND 16, ¶ 5, 558 N.W.2d 848, 849 (N.D. 1997). The supreme court "will not disturb [a district court's] decision on appeal unless there is an affirmative showing of a manifest abuse of discretion." Id.

"An abuse of discretion is never assumed; the burden is upon the party seeking relief to affirmatively establish it. A trial court abuses its discretion only when it acts in an arbitrary, unconscionable, or unreasonable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination."

Id. (citations omitted).

The district court denied Lewis' Rule 60(b) motion "because it is based on an issue not raised and not preserved for appeal to the district court." (Lewis Appendix 44). Lewis first raised the issue about alleged ex parte contacts when she moved for relief under Rule 60(b) on February 9, 1999. Id. at 8-9. Previously, Lewis had identified no issue about ex parte contacts during the rehearing process, in her specifications of error on appeal to the district court, or in her district court brief. (Lewis Appendix 106-07); (Lewis Appendix 1 (Register Of Actions Docket Entry 6)); (CR 33-36); (CR (Hearing Transcript)).

In a case procedurally identical to Lewis', Vernon v. N.D. Workers Compensation Bureau, the court declined to address an issue about ex parte contacts that was first raised in a Rule 60(b) motion and, therefore, had not been preserved for appeal. 1999 ND 153, ¶ 27, 598 N.W.2d 139, 147 (N.D. 1999). The district court had denied the claimant's Rule 60(b) motion because the claimant "failed to raise the issue in proceedings before the Bureau, or in his appeal." Id. In other cases as well, the court has clearly established that an issue not raised in the specification of error is not properly before the court. Unser v. N.D. Workers Compensation Bureau, 1999 ND 129, ¶ 14, 598 N.W.2d 89, 94 (N.D. 1999); Hopfauf v. N.D. Workers Compensation Bureau, 1998 ND 40, ¶ 40, 575 N.W.2d 436, 439 (N.D. 1998); Dean v. N.D. Workers Compensation Bureau, 554 N.W.2d 455, 455-56 (N.D. 1996); Vetter v. N.D. Workers Compensation Bureau, 554 N.W.2d 451, 454 (N.D. 1996). Accordingly, like the district court in Vernon, the district court did not abuse its discretion when it denied Lewis' Rule 60(b) motion.

Lewis concedes she did not preserve the issue for appeal. (Lewis' Brief 11). However, she places blame on the Bureau and its counsel for not "properly" responding to an issue she had never previously raised. Id. at 12-13. She also apparently argues she could not raise the issue based on another district court decision that she included as an addendum to her brief and that she claims constituted a "warn[ing] by other district court judges that such allegations border on frivolous (with the 'implicit threat of sanctions')." Id. at 13. The court rejected a similar argument in Vernon. 1999 ND 153, ¶ 27, 598 N.W.2d at 147.

Like the counsel in Vernon, the district court found Lewis' counsel was "well aware of the issue [because] he had raised the issue in another case." (Lewis Appendix 44); see Prod. Credit Assoc. v. Dobrovolny, 415 N.W.2d 489, 492 (N.D. 1987) (stating "[a] 60(b) motion is not to be used to relieve a party from free, calculated, and deliberate choices"). As the record reveals, Lewis' counsel had raised the issue of ex parte contacts in another case in the spring 1998, months before Lewis appealed to district court on September 1, 1998. (Lewis Appendix 25-29). Accordingly, the court should affirm the district court's order.

Although the legal precedent clearly supports the district court did not abuse its discretion in denying Lewis' Rule 60(b) motion, if the court entertains the merits of Lewis' argument, Lewis did not establish she was entitled to relief from the judgment. Lewis did not show "by clear and convincing evidence" her serious allegation that the Bureau "committed fraud on the District Court." (Lewis Brief 13); Gajewski v. Bratcher, 240 N.W.2d 871, 889 (N.D. 1976) (discussing fraud as "the most egregious conduct involving a corruption of the judicial process itself"); 12 Moore's Federal Practice § 60.21(4)(a) (3rd Ed. 1999) (indicating fraud includes bribery of a judge, jury tampering, conduct "so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases"). The record does not support the Bureau "obtained [the district court judgment] through fraud." Gajewski, 240 N.W.2d at 889.

Lewis also did not show the judgment should be set aside and she was entitled to the relief requested, reinstatement of the ALJ's decision. The language

under Rule 60(b) is permissive, “the court may relieve a party . . . from a final judgment.” N.D. R. Civ. P. 60(b) (underlining added); Gajewski, 240 N.W.2d at 890 (stating a finding of fraud “does not automatically require that the previous judgment be set aside”). As “[a] precondition to relief from a judgment,” Lewis was required to “convince the court ‘that vacating the judgment [would] not be an empty exercise.’” Moore’s, § 60.24(1) (underlining added).

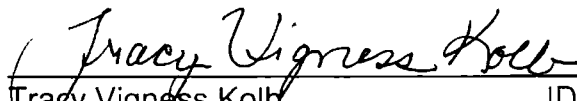
Granting the relief requested by Lewis, reinstatement of the ALJ’s decision, would be an empty exercise. Unlike Scott, the Bureau accepted the ALJ’s decision about Lewis’ claim and awarded Lewis medical expense benefits and a closed period of disability benefits, which was an award beyond the ALJ’s decision. Compare (CR 100-114) with (CR 117-120). The Bureau addressed Lewis’ eligibility for disability because Lewis raised disability as an issue for hearing and res judicata would have precluded the Bureau as well as Lewis from addressing it in a subsequent proceeding. Saakian v. N.D. Workers Compensation Bureau, 1998 ND 227, 587 N.W.2d 166 (N.D. 1998). Lewis accepted the benefits of the Bureau’s final order; her dispute involves disability benefits after November 18, 1996. (Lewis Appendix 91-92, 106-07). Reinstating the ALJ’s decision would not provide Lewis this relief and res judicata would preclude another determination of disability as she now requests. Zundel v. Zundel, 146 N.W.2d 896, 902 (N.D. 1966) (affirming trial court’s denial of Rule 60(b) motion because movant “failed to show the court how the result would be different if the judgment were reopened”); Moore’s, § 60.25

(indicating "a court may not use Rule 60 to grant affirmative relief in addition to the relief contained in the prior order or judgment").

CONCLUSION

For the foregoing reasons, the North Dakota Workers Compensation Bureau respectfully requests the court dismiss Lewis' appeal of the district court order denying her Rule 60(b) motion and, alternatively, requests the court affirm the order.

Dated this 6th day of January, 2000.



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Vicki Lewis,)
)
 Appellant,)
)
 v.) **AFFIDAVIT OF SERVICE**
)
 The North Dakota Workers)
 Compensation Bureau and)
 Investment Centers of America,)
)
 Appellees.)

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

Kathy Carufel, first duly sworn upon oath, deposes and says: That she is a citizen of the United States over the age of eighteen years and not a party to nor interested in the above entitled action, and that on January 6, 2000, she placed in the United States mail at Bismarck, North Dakota, a true and correct copy of the following document(s):

1. Brief of Appellee North Dakota Workers Compensation Bureau.

That copies of the above papers were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

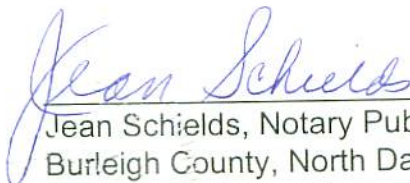
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That to the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party to be served.


Kathy Carufel

Subscribed and sworn to before me today, January 6, 2000.


Jean Schields, Notary Public
Burleigh County, North Dakota
My commission expires: 04/25/02

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