ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20010030

Darold B. Shiek,	)	Supreme Court No. 20010030
	)	
Appellant,	)	
	)	
vs.	)	
	)	
North Dakota Workers' Compensation Bureau and North Dakota State University,	)	
	)	
Appellees.	)	

++

PETITION FOR REHEARING

++

APPEAL FROM JUDGMENT OF NOVEMBER 20, 2000
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE MICHAEL O. McGUIRE

++

Andrew L. B. Noah (ID# 05119)
Jacqueline S. Anderson (ID # 05322)
Special Assistant Attorney Generals
for the ND Workers Compensation Bureau
NILLES, HANSEN & DAVIES, LTD.
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
(701) 237-5544

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PETITION FOR REHEARING	1
DISCUSSION	1
I. THE COURT HAS MISAPPLIED ITS PREVIOUS HOLDING IN SHIEK I WHEN IT CONSTRUED N.D.C.C. § 65-05-09.3 AND REMANDED THE CASE TO THE BUREAU WITH INSTRUCTIONS ON HOW TO APPLY THE STATUTE.	1
II. A PREPONDERANCE OF THE EVIDENCE SUPPORTS THE ALJ'S FINDING THAT SHIEK VOLUNTARILY RESIGNED AND RETIRED FROM THE LABOR MARKET.	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES CITED:

Bruns v. North Dakota Workers Compensation Bureau, 1999 ND 116, 595 N.W.2d 298 7

Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177, 569 N.W.2d 1 7

Grotte v. North Dakota Workers Compensation Bureau, 489 N.W.2d 875 (N.D. 1992) 8

Haggard v. Meier, 368 N.W.2d 539 (N.D. 1985) 5

Haider v. Montgomery, 423 N.W.2d 494 (N.D. 1988) 5

Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489 (N.D. 1989) 5

Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40, 575 N.W.2d 436 8

Inglis v. North Dakota Workmen's Compensation Bureau, 312 N.W.2d 318 (N.D. 1981) 8

Johnson v. North Dakota Workers Compensation Bureau, 496 N.W.2d 562 (N.D. 1993) 8

Negaard –Cooley v. North Dakota Workers Compenastion Bureau, 2000 ND 122, 611 N.W.2d 898 7

Peterson v. Heitkamp, 442 N.W.2d 219 (N.D. 1989) 5

Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459 (N.D. 1992) 8

S & S Landscaping Company v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80 (N.D. 1995) 8

Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179 (N.D. 1990) 5

Page

Shiek v. North Dakota Workers Compensation Bureau, 1998 ND 139, 582 N.W.2d 639 1,2,3,6,7

Shiek v. North Dakota Workers Compenastion Bureau, 2001 ND 166..... 5,9

State v. Beilke, 489 N.W.2d 589 (N.D. 1992)..... 5

State v. Grenz, 437 N.W.2d 851 (N.D. 1989) 5

Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174, 599 N.W.2d 280 8

Tangen v. North Dakota Workers Compensation Bureau, 2000 ND 135, 613 N.W.2d 490 7

In Re Claim of Vail, 522 N.W.2d 480 (N.D. 1994)..... 8

Wright v. North Dakota Workers Compensation Bureau, 2001 ND 72, 625 N.W.2d 256 8,9

Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175, 584 N.W.2d 530..... 5,6

STATUTES CITED:

N.D.C.C. § 65-05-09.3..... 1,2 5,6.9

PETITION FOR REHEARING

The North Dakota Workers Compensation Bureau ("Bureau") respectfully submits its Petition for Rehearing, pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure. Rehearing should be granted for the following reasons:

1. The Court has misconstrued and misapplied its previous construction and application of N.D.C.C. § 65-05-09.3 and instructions for remand outlined in Shiek v. North Dakota Workers Compensation Bureau, 1998 ND 139, 582 N.W.2d 639 (hereinafter Shiek I).

2. The Court has overlooked the fact that the record supports the Bureau's finding that Shiek voluntarily retired from the work force and labor market on September 25, 1992, in accordance with his long-standing plan.

DISCUSSION

I. THE COURT HAS MISAPPLIED ITS PREVIOUS HOLDING IN SHIEK I WHEN IT CONSTRUED N.D.C.C. § 65-05-09.3 AND REMANDED THE CASE TO THE BUREAU WITH INSTRUCTIONS ON HOW TO APPLY THE STATUTE.

In Shiek I, 1998 ND 139, 582 N.W.2d 639, this Court considered and construed the "retirement presumption" statute codified at N.D.C.C. § 65-05-09.3. Id. at ¶ 11, 17 582 N.W.2d at 642-43. This Court unanimously stated that "[t]he meaning of the retirement presumption statute is clear and unambiguous on its face." Id. at ¶ 17, 582 N.W.2d at 643. The Court then went on to hold that the Bureau had erred as a matter of law in ruling that whether Shiek was permanently and totally disabled was irrelevant to the application of that statute. Id. Instead, the Court provided specific instructions on remand as to what the Bureau must prove, stating:

> We conclude once the claimant has established by a preponderance of the evidence that he or she is totally and permanently disabled, the Bureau must prove, without the aid of a presumption, the claimant is retired from the labor market. In other words, if the claimant demonstrates that he or she is permanently and totally disabled, the burden shifts to the Bureau to prove the claimant is not permanently and totally disabled **OR** that the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability, if the Bureau seeks to hold the claimant ineligible for further benefits. . . .

Id. at ¶ 21, 582 N.W.2d at 644 (emphasis supplied). In accordance with the Court's opinion in Shiek I, the matter was remanded to the Bureau "for the proper application of the retirement presumption law, the admission of any necessary evidence, and the preparation of findings necessary to properly adjudicate Shiek's claim for benefits." Id. at ¶ 26, 682 N.W.2d at 645.

The matter was renoticed for hearing, with the issue specified directly quoting from Court's opinion in Shiek I. (App. p. 37) Additional evidence was taken at the hearing regarding both the issue of permanent total disability and whether Shiek voluntarily withdrew from the labor market. (See App. p. 38) The ALJ issued a recommended decision in accordance with this Court's instructions in Shiek I, finding:

> Section 65-05-09.3, N.D.C.C. (1993) states that an employee who "has retired or voluntarily withdrawn from the labor force is presumed

retired from the labor market and is ineligible for receipt of disability benefits under this title." The statute specifies how the presumption may be rebutted and provides that the presumption "does not apply to any employee who is permanently and totally disabled as defined under this title." Id. The Supreme Court in Shiek held that once the claimant has established by a preponderance of the evidence that he is totally and permanently disabled, the Bureau must prove, without the aid of a presumption, that the claimant is retired from the labor market. 582 N.W.2d 639, 644. In other words, if the claimant establishes that he is permanently and totally disabled, the burden then shifts to the Bureau to prove that the claimant is not permanently or totally disabled or that the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability, if the Bureau seeks to hold the claimant ineligible for further benefits. 582 N.W.2d 639, 644.

. . .

The ALJ also concludes, as a matter of law, that Darold Shiek voluntarily withdrew from the labor force and retired from the labor market effective September 25, 1992, the date of his 62nd birthday. See Shiek, 582 N.W.2d 639, 644 (the North Dakota Supreme Court specifically held that, "The Bureau's finding that Shiek voluntarily retired on September 25, 1992, in accordance with his long-standing plan to retire is supported by a preponderance of the evidence.") This

voluntary retirement was in accordance with his long-standing plans to retire upon reaching the age of 62 and not because of his work-related injury or injuries. Although the claimant has established by the preponderance of the evidence that he was totally and permanently disabled as of September 25, 1992, the Bureau has proven, by the greater weight or a preponderance of the evidence, and without the aid of a statutory presumption, that Darold Shiek voluntarily retired from the labor market on September 25, 1992. The Bureau has met its burden of proof and clearly established that the claimant retired from the labor market voluntarily rather than having been forced from the market by a disability. As such, the claimant is ineligible from further benefits. A preponderance of the evidence has clearly shown that Shiek voluntarily retired from his position at NDSU on September 25, 1992, in accordance with his long-standing plans to retire at that time and not because of any disability. Shiek told employees years before his retirement date that he planned to retire at age 62 years of age. He made notations in his log book and kept a calendar at work counting down the days left until retirement. Shiek also told vocational specialists and his treating physicians of his planned retirement at age 62. The greater weight or preponderance of the evidence is overwhelming on this issue. Any reasonable person would conclude from the evidence that Shiek's retirement was voluntary rather than forced due to his disability.

(App. p. 52-54) (Emphasis supplied.).

In this Court's opinion in Shiek v. North Dakota Workers Compensation Bureau, 2001 ND 166, (hereinafter Shiek II) the Court now states that N.D.C.C. § 65-05-09.3 is ambiguous, susceptible of differing, rational meanings, and resorts to extrinsic aids to construe the statute once again. Shiek II, 2001 ND 166 ¶¶ 17, 20, 21. The Court goes on to hold that if an employee is permanently and totally disabled, he cannot voluntarily retire or withdraw from the labor force and N.D.C.C. § 65-05-09.3 has no application. Shiek II, 2001 ND 166 ¶ 26.

Having held that N.D.C.C. § 65-05-09.3 was "clear and unambiguous on its face" in Shiek I, the Court has misapplied its prior interpretation of the statute and instructions on remand. Furthermore, by declaring in Shiek II that N.D.C.C. § 65-05-09.3 is susceptible to different meanings and attributing a wholly different and completely contradictory interpretation of the statute in Shiek II, the Court has overlooked long-standing precedent. Specifically, this Court has stated:

> When a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442 N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). See also Zueger v. North Dakota Workers

Compensation Bureau, 1998 ND 175 ¶ 19, 584 N.W.2d 530, 535 (J. VandeWalle, dissenting).

Pursuant to this Court's unanimous opinion in Shiek I, even if Shiek was permanently and totally disabled, as the ALJ found, the Bureau could still prove that he "retired from the labor market voluntarily, rather than having been forced from that market by the disability." Shiek I, 1998 ND 139 ¶ 21, 582 N.W.2d at 644. In Shiek II, the Court has directly contradicted this holding by now declaring N.D.C.C. § 65-05-09.3 is ambiguous and construing it to preclude a finding of voluntary withdrawal from the labor market if an individual is permanently and totally disabled. Shiek II, 2001 ND 166 ¶ 17, 20, 22. The Court then goes on to conclude that the Bureau erred as a "matter of law" in determining Shiek was not entitled to further disability benefits.

With due respect to the Court's opinion in Shiek I, the Bureau strictly adhered to the language of that opinion and applied the construction given, by that unanimous Court, to the "retirement presumption statute," N.D.C.C. § 65-05-09.3. The Bureau utilized the language of the opinion in its specifications of issue, (App. p. 37) and the ALJ strictly adhered to the letter, spirit and intent of the Court's opinion in considering the evidence upon remand. (App. p. 41, 49-54) By now holding that that the Bureau erred "as a matter of law" in applying N.D.C.C. § 65-05-09.3, the Court misapplies its previous construction of what it noted to be the "clear and unambiguous" language of that statute.

The Bureau respectfully submits that this Petition for Rehearing be granted. Concluding that the Bureau erred as a matter of law in applying N.D.C.C. § 65-05-

09.3 under these circumstances, is wholly unjust given the Bureau's unequivocal reliance on the language of the Court's opinion in Shiek I. The ALJ explicitly found, in accordance with the Court's instructions on remand in Shiek I, that Shiek "voluntarily withdrew from the labor force and retired from the labor market" on September 25, 1992. (App. p. 53) If there are discrepancies in the Bureau's findings relating to Shiek's retirement from the labor market or those findings are obscured by the evidence he voluntarily left his employment at NDSU, the proper remedy is a remand for clarification of record on that sole issue. See, e.g., Negaard-Cooley v. North Dakota Workers Compensation Bureau, 2000 ND 122, 611 N.W.2d 898 (finding Bureau's decision not supported by preponderance of the evidence and remanding for clarification of discrepancies on medical issues); Tangen v. North Dakota Workers Compensation Bureau, 2000 ND 135, 613 N.W.2d 490 (reversing district court order for payment of benefits and remanding for further proceedings consistent with interpretation of statute).

II. A PREPONDERANCE OF THE EVIDENCE SUPPORTS THE ALJ'S FINDING THAT SHIEK VOLUNTARILY RESIGNED AND RETIRED FROM THE LABOR MARKET.

The standard for this Court's review of the Bureau's decision is well-established. The Bureau's decision must be affirmed unless its "findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, or its decision is not in accordance with the law." Feist v. North Dakota Workers Compensation Bureau, 1997 ND 177 ¶ 8, 569 N.W.2d 1, 3-4. The Court should not make independent findings of fact or substitute its judgment for that of the agency.

Wright v. North Dakota Workers Compensation Bureau, 2001 ND 72 ¶ 12, 625 N.W.2d 256, 260; Hopfauf v. North Dakota Workers Compensation Bureau, 1998 ND 40 ¶ 8, 575 N.W.2d 436 (N.D. 1988). Rather, the Court need determine "only whether or not a reasoning mind could have reasonably determined that the Bureau's factual determinations were supported by the evidence." Wright, 2001 ND 72 ¶ 12, 625 N.W.2d at 260; Johnson v. North Dakota Workers Compensation Bureau, 496 N.W.2d 562, 564 (N.D. 1993); Pleinis v. North Dakota Workers Compensation Bureau, 472 N.W.2d 459, 462 (N.D. 1992).

This Court has made it clear that matters which go to the weight and credibility of witnesses are within the province of the Bureau, not the courts. Inglis v. North Dakota Workmen's Compensation Bureau, 312 N.W.2d 318, 323 (N.D. 1981); Grotte v. North Dakota Workers Compensation Bureau, 489 N.W.2d 875, 878 (N.D. 1992); see Stewart v. North Dakota Workers Compensation Bureau, 1999 ND 174 ¶ 7, 599 N.W.2d 280, 292; Bruns v. North Dakota Workers Compensation Bureau, 1999 ND 116 ¶ 20, 595 N.W.2d 298, 304. This Court may not substitute its judgment for that of the Bureau in evaluating the credibility of witnesses. S & S Landscaping Company v. North Dakota Workers Compensation Bureau, 541 N.W.2d 80, 82 (N.D. 1995). On appeal, the question is not whether this Court would have weighed the evidence differently or reached a different conclusion than that which was reached by the Bureau. In Re Claim of Vail, 522 N.W.2d 480, 482 (N.D. 1994). Rather, the issue is whether a reasoning mind could find that the weight of the evidence supports the Bureau's findings. Id.

In this case, a reasoning mind could find that the weight of the evidence supports the Bureau's finding that Shiek retired from the labor force and labor market, and its decision therefore should be affirmed, avoiding the necessity of an additional remand. See Shiek II, 2001 ND 166 ¶¶ 49, 50, J. Kapsner dissenting.

The Bureau does not believe it is necessary to recapitulate all of the evidence that support's its finding that when Shiek retired from his position at NDSU, he retired from the labor market as well. Rather, placing all of that evidence in context of Shiek's actions compels the conclusion that Shiek's "retirement" on September 25, 1992, was from the labor market. At the time Shiek began the vocational rehabilitation process, the vocational rehabilitation consultant reported: "Mr. Shiek stated quite emphatically during my initial review with him on December 10, 1993, that 'I have no desire to return to work as I have retired.'" (R. 284. Ex. 13. p. 2) These are not the words of an individual who had any intention to return to the labor market at some point in the future. There is no need to utilize the presumption of N.D.C.C. § 65-05-09.3 to make this determination. Indeed, the ALJ specifically noted in his findings that he so found "without the aid of a statutory presumption." (App. p. 54) Accordingly, because a reasoning mind could reasonably conclude that Shiek voluntarily retired from the labor market on September 25, 1992, the Bureau's decision must be affirmed. Wright, 2001 ND 72 ¶ 12, 625 N.W.2d at 260.

In his concurring opinion, Justice Neumann states that the Bureau did not draw an appropriate distinction between withdrawal from the "labor force" and retirement from the "labor market." In fact, the administrative law judge stated repeatedly that Shiek had retired from the "labor market" (App. p. 49, 53, 54). This

finding was based on Shiek's testimony at hearing and his comments to his employer and treating physician -- evidence which was weighed carefully by the finder of fact. For this Court to now rule that there was insufficient evidence that Shiek retired from the labor market -- in addition to withdrawing from the labor force (i.e. his job at NDSU) -- is to adopt the position, in disregard of established precedent in dozens of previous cases involving review of findings of administrative agencies, that this Court can make independent findings of fact and can substitute its judgment for that of the agency. The Bureau respectfully submits that the Court should not make this departure from the established rule of law.

CONCLUSION

For the foregoing reasons, the Bureau respectfully petitions the court for rehearing in this matter.

DATED this 30th day of October, 2001.

Andrew L. B. Noah (ND ID # 05119)

Jacqueline S. Anderson (ND ID # 05322)
Special Assistant Attorney Generals
for the ND Workers Comp. Bureau
NILLES, HANSEN & DAVIES, LTD.
1800 Radisson Tower
201 North Fifth Street
P. O. Box 2626
Fargo, North Dakota 58108-2626
(701) 237-5544