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20010030

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20010030

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

****

BRIEF OF APPELLANT DAROLD B. SHIEK

****

Appeal from Judgment dated November 20, 2000
Cass County District Court Civil No. CV-00-00604
The Honorable Michael O. McGuire, Presiding

Mark G. Schneider, ND ID #03188
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Attorney for Appellant

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Attachments:

A. Shiek v. North Dakota Workers' Comp. Bureau, 1998 ND 139, 582 N.W.2d 639;

B. N.D.C.C. § 65-05-09.3 (1991).

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STATEMENT OF THE ISSUE

Having proven, on remand by the Supreme Court on the issue, that he was "permanently and totally disabled" on and before the date of his otherwise "voluntary" retirement, is Shiek entitled to disability benefits accordingly? See, Shiek v. North Dakota Workers' Comp. Bureau, 1998 ND 139, ¶ 21, 582 N.W.2d 639.[1]

STATEMENT OF THE CASE

This case returns to this Court on appeal, after remand, from the North Dakota Supreme Court in Shiek v. North Dakota Workers' Comp. Bureau, 1998 ND 139, 582 N.W.2d 639. The central issue is the interpretation of the "retirement presumption" statute (N.D.C.C. § 65-05-09.3 (1991)).[2]

Section 65-05-09.3 was first enacted in 1991 (N.D. Sess. Laws ch. 714, § 46). It stood unchanged until amendments in 1995 (N.D. Sess. Laws ch. 623, § 1). The 1991 version (Attachment B) is the extant statute, as both of Shiek's injuries (7-30-91

[1]A copy of the Shiek decision is Attachment A to this brief

[2]See Attachment B.

for right extremity and 8-22-92 for left knee) occurred after the 1991 law was enacted and before its amendment in 1995.

After reversal and remand in Shiek, an administrative hearing was held on October 14, 1999 with Administrative Law Judge (ALJ) Daniel L. Hovland issuing his "Recommended Findings of Fact, Conclusions of Law and Order" on January 5, 2000. App. 37-56. See "Stipulated Abstract of Record on Appeal to District Court." Docket Entry 6 (App. 1).[3].

On January 27, 2000, the Bureau issued its "Final Order" (App. 56) adopting the recommended decision of ALJ Hovland (App. 37-55)) in its entirety. Shiek timely filed Notice of Appeal to the District Court on February 25, 2000. App. 3. He also contemporaneously filed his "Specifications of Error."[4] App. 5.

Shiek timely appealed to the District Court by filing of Notice of Appeal (App. 3) and Specifications of Error (App. 5-9) on February 25, 2000. Judge McGuire issued his "Order on Appeal from Administrative Agency" on November 2, 2000. App. 57-59. Judgment was entered on November 20, 2000 (App. 60), with Notice of

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[3]Pursuant to the procedure outlined at N.D.C.C. § 28-32-17 counsel for the Bureau and Shiek stipulated to an "abstract" of the record rather than burden the Court with the entire agency record. See index to the abstract of record in the Appendix, at 10-35.

[4]There is an error in Shiek's Specifications of Error VII; the reference should be to Mr. Shiek's left knee injury.

Entry of Judgment filed on November 29, 2000. App. 61. Shiek timely appealed to this Court by filing Notice of Appeal dated January 22, 2001. App. 62.

STATEMENT OF THE FACTS

In Shiek v. North Dakota Workers' Comp. Bureau, 1998 ND 139, 582 N.W.2d 639, this Court made the following statements and conclusions (which constitute the "law of the case", see argument, infra) as follows:

> "On July 30, 1991, Shiek injured his right shoulder while working as a boiler operator at North Dakota State University (NDSU). Shiek was 60 years old at the time. He filed a claim with the Bureau on August 2, 1991, and the Bureau accepted liability. Shiek had surgery on his right shoulder, did not work from July 31, 1991 through March 2, 1992, and received disability benefits for that period.
>
> Shiek's surgeon, Dr. Charles Hartz, released Shiek to return to work 'with restrictions on lifting and overhead work, that is to make it light duty for the right arm.' NDSU accommodated these restrictions, and Shiek returned to work in a modified light duty position on March 3, 1992. In April 1992, Shiek told Hartz his only problem at work related to painting, which required him 'to reach up as high as he can." Hartz recommended Shiek 'work at waist level or below,' and NDSU accommodated this restriction and modified Shiek's light duty cleaner/painter position.
>
> On August 22, 1992, Shiek filed a separate claim for injury with the Bureau regarding his left knee. Shiek explained the injury to his left knee occurred when he injured his right shoulder on July 30, 1991, but his knee 'didn't get bad for about 4 or 5 months . . .' The Bureau consolidated the claim for the left knee injury with the original claim for the right shoulder injury. Shiek had missed work from August 4, 1992, when Dr. David Humphrey operated on his left knee, through August 16, 1992. Humphrey, who examined Shiek's knee on August 10, 1992, told Shiek he could go back to work 'in one week with advice that it be light work and no ladder climbing, etc.' Shiek received

disability benefits from the Bureau for August 4 through August 16, 1992 period.

When Shiek returned to work on August 17, 1992, he submitted his voluntary resignation to NDSU effective September 25, 1992, Shiek's 62nd birthday. Shiek worked from August 17, 1992 until August 31, 1992, when Humphrey took him off of work through September 3, 1992, because of swelling in his knee. Shiek saw Humphrey again on September 21, 1992, and Humphrey advised him to keep off of work for the rest of the week. Shiek did not return to work that week, and in accordance with his earlier plans, retired from NDSU on September 25, 1992. NDSU never modified Shiek's work to accommodate his left knee injury. Shiek received disability benefits for the work he missed through September 3, 1992, because of his left knee injury." Shiek, ¶ ¶ 2-5; emphasis added.

September 21, 1992 was a Monday and Dr. Humphrey's instruction that he be "off of work for the rest of the week" covers the period from Monday, September 21, 1992 through Friday, September 25, 1992 (September 25, 1992 being "Shiek's 62nd birthday"; Shiek, ¶ 5).

Despite the fact that Shiek was indisputably off work on the advice of Dr. Humphrey from September 21 through September 25, 1992, Shiek was never paid disability benefits for this time frame.[5]

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[5]The last payment of disability benefits to Shiek was on September 3, 1992 when his disability benefits were terminated. App. 36. The date of the notice informing him of his termination of disability benefits was April 26, 1993 (id.), i.e., over seven months after the benefits were terminated. This untimely notice violates Shiek's statutory and due process rights. See, Flink v. North Dakota Workers Comp. Bureau, 1998 ND 11, ¶¶ 15, 16, 574 N.W.2d 784; citing Beckler v. North Dakota Workers Comp. Bureau, 418 N.W.2d 770, 775 (N.D. 1988). Id., ¶ 15. Until proper notice is given, the disabled worker is ". . . entitled to the benefits he seeks." Flink, ¶ 19; citing Beckler at 775.

It is significant that Shiek ". . . submitted his voluntary resignation to NDSU . . ." after he ". . . returned to work on August 17, 1992. . ." Shiek, ¶ 5. Shiek had not worked since August 3 because of the knee surgery and subsequent disability. Id., ¶ 4. Also the fact that "NDSU never modified Shiek's work to accommodate his left knee injury" (id., ¶ 5) is highly indicative of the reason Shiek "voluntarily retired" effective September 25, 1992.

This Court specifically found that:

> "A reasoning mind reasonably could have determined from this evidence that Shiek's retirement was voluntary." Shiek, supra, ¶ 22.[6]

After determining that Shiek's retirement was "voluntary", this Court's next statement is as follows:

> "That finding [of voluntary retirement], however, does not give rise to a presumption of retirement from the labor market under N.D.C.C. § 65-05-09.3 (1993) if Shiek is permanently and totally disabled. What is missing from the Bureau's findings in this case is a clear determination whether Shiek in fact was permanently and totally disabled as defined in Title 65." Shiek, ¶ 23; emphasis added.

This Court went on to state that it was in "no position to make independent findings of fact from a Bureau record" and, therefore, "On this record, reasoning minds could disagree on whether Shiek was permanently and totally disabled under

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[6]Indeed, Shiek conceded this point in his December 17, 1997 Appellant brief before this Court: "For the purpose of this appeal, it is undisputed that Shiek 'retired' on September 25, 1992, on his 62nd birthday." Id. at 14.

the requirements of the Workers Compensation Act." Shiek, ¶ 25. Therefore, this Court:

> ". . . reverse[d] the judgment and remand[ed] 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., ¶ 26.

After an administrative hearing, the following finding by ALJ Hovland (and subsequently adopted by the Bureau as its own (App. 56)), disposed of this central issue on remand in Shiek's favor:

> "The testimony of vocational rehabilitation specialist Brumwell and Mathias was unrebutted and establishes, by a preponderance of the evidence, that the claimant, Darold Shiek, was totally and permanently disabled as of September 25, 1992, as defined under Section 65-01-02(12)(a), N.D.C.C. (1991)." Finding 21 (App. 44-45). See also Conclusions of Law 7 and 8 at App. 52-53. For definition of "permanent total disability", see App. 42, Finding 17.

Despite the fact that this Court in Shiek had already found that Shiek's resignation was "voluntary" (Shiek, ¶ 22), the ALJ redundantly made the same findings and conclusion. See Findings 22-40 and Conclusion 9 (App. 45-49 and 53-54).

Thus, the conclusions by the ALJ -- and adopted by the Bureau -- are as follows: (1) "The fact that Shiek is permanently and totally disabled as of September 25, 1992 has been established by a preponderance of the evidence"; and (2) "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."! Conclusions 7 and 9, respectively (App. 52-54).

In his Specifications of Error, Shiek cites this "non-sequitur of finding Shiek 'voluntarily retired' despite the fact that, by virtue of his permanent and total disability status, he was indisputably incapable of working" as allowing the same "absurd and ludicrous result" that this Court in Shiek said must be avoided. Specification of Error V (App. 7-8); citing Shiek at ¶ 17.

LAW AND ARGUMENT

I. Summary Of The Argument.

Shiek indisputably had plans, as virtually every laborer does, to retire. On August 17, 1992, after he returned from a period of temporary total disability due to surgery to his work-related left knee injury, he gave specific notice to his employer of his intention to retire. His subjective intention, therefore, was to retire on his 62nd birthday which fell on September 25, 1992. However, he has now conclusively proven, upon remand by this Court to decide the issue, that he was permanently and totally disabled at all times from and after Monday, September 21, 1992 on. Thus, he has ". . . been forced from [the labor] market by [his] disability . . ." his earlier subjective intention to retire notwithstanding. Shiek, ¶ 21. Any other construction of the "retirement presumption" statute flies in the face of reason, violates the

construction of the Act that avoids forfeiture and affords relief, and ignores the law of the case made by this Court in the Shiek decision.

II. Scope Of Review: Questions Of Law Are Fully Reviewable On Appeal.

On this second judicial appeal, after remand from the Supreme Court in Shiek, supra, the sole issue before the Court is the interpretation of the "retirement presumption" statute based upon the now undisputed fact of this case that Shiek was permanently and totally disabled on and before the effective date of his "voluntary" retirement. As such, the question on appeal 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").

Moreover, the normal deference to a ". . . reasonable interpretation of a statute by the agency enforcing it. . ." (Shiek, ¶ 16) is not permitted here because, far from being "reasonable", the Bureau's interpretation is "absurd and ludicrous." Shiek, ¶ 17.

III. The North Dakota Workers' Compensation Act Is Remedial And Must Be Construed to Afford Relief And To Avoid Forfeiture.

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 (N.D. 1992). Further, and irrespective of the repeal of the so-called "liberal construction" of the Act,[7] this Court has consistently, and unanimously, made it clear that it will continue its construction of the Act to "avoid forfeiture and afford relief." See, Zueger v. North Dakota Workers Comp. Bureau, 1998 ND 175, ¶ 12, 584 N.W.2d 530 (citing Kallhoff, supra). More recently, in Ash v. Traynor, 2000 ND 75, ¶ 8, 609 N.W.2d 96, this Court reaffirmed and held as follows:

> "The purpose of the Workers Compensation Act is to provide sure and certain relief for workers injured in their employment, and we construe the Act with the view of extending its benefit provisions to all who can fairly be brought within them. Holmgren v. North Dakota Workers Comp. Bureau, 455 N.W.2d 200, 202 (N.D. 1990). The Act is remedial, and we construe it to afford relief and to avoid forfeiture. Zueger v. North Dakota Workers Comp. Bureau, 1998 ND 175, ¶ 12, 584 N.W.2d 530." Emphasis added.

On this review after remand, the Bureau would have this Court hold that a proper construction of the "retirement presumption" statute would allow forfeiture of benefits on the undisputed conclusion that Shiek intended to "voluntarily" retire from work, despite the fact that he was permanently and totally disabled on and before his "voluntary" retirement date. This non-sequitur turns the liberal interpretation of the Act in favor of the injured worker on its head, i.e., it strives to avoid relief and afford

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[7]See N.D.C.C. § 65-01-01 (1995), N.D. Sess. Laws ch. 605, § 1.

forfeiture. Indeed, such twisted logic affords only "absurd and ludicrous results." Shiek, ¶ 17.

IV. Having Proven, On Remand By The Supreme Court On The Issue, That He Was "Permanently And Totally Disabled" On And Before The Date Of His Otherwise "Voluntary" Retirement, Is Shiek Entitled To Disability Benefits Accordingly? See, Shiek v. North Dakota Workers' Comp. Bureau, 1998 ND 139, ¶ 21, 582 N.W.2d 639.

Shiek has provided "what is missing" as cited by this Court in Shiek, ¶ 23, i.e., that ". . . Shiek is permanently and totally disabled." Id. Therefore, because it is undisputed that Shiek was permanently and totally disabled on the effective date of his otherwise "voluntary" retirement, his earlier stated subjective intent to retire is irrelevant in the face of the indisputable conclusion that he subsequently became permanently and totally disabled. In other words, due to his status of being "permanently and totally disabled", he was totally, permanently, and unconditionally unable to work, thus precluding any conclusion that he ". . . retired from the labor market voluntarily, rather than having been forced from that market by the disability . . ." Shiek, ¶ 21.

A. The Supreme Court's Decision In Shiek Is The "Law Of The Case."

As a threshold matter, this Court addressed several factual issues and conclusions in the Shiek case which are binding upon the parties upon remand.

Neither Shiek nor the Bureau gets a "second crack" on the facts or law determined by the Supreme Court in Shiek.

In the recent Workers' Compensation case of Hopfauf v. North Dakota Workers Comp. Bureau, 2000 ND 94, ¶ 11, 610 N.W.2d 60, this Court referenced the "law of the case" doctrine, citing Tom Beuchler Constr. Inc. v. City of Williston, 413 N.W.2d 336, 339 (N.D. 1987). In Tom Beuchler, this Court, adopting a broad view of the doctrine, stated that, "Thus the law of the case includes 'questions which were actually presented and considered at the formal trial, or in appeal from the judgment thereon.'" Id., 339; citation omitted.

"Generally, the law of the case is defined as ''the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.''" Robertson v. North Dakota Workers' Comp. Bureau, 2000 ND 167, ¶ 18, 616 N.W.2d 844. See also Fandrich v. Wells County Board of County Commissioners, 2000 ND 181, ¶ 28, 618 N.W.2d 166; Interest of SJF, 2000 ND 158, ¶ 17, 615 N.W.2d 533.

B. Under The "Law Of The Case", The Undisputed Fact That "Shiek's Retirement Was Voluntary" Cannot Support A Conclusion Of Denial Of Permanent And Total Disability Benefits.

Again, the fact that, "A reasoning mind reasonably could have determined from this evidence that Shiek's retirement was voluntary" (Shiek, ¶ 22) is the "law of the case." However, what was "missing" from the Bureau's previous findings was ". . . whether Shiek in fact was permanently and totally disabled." Id., ¶ 23. That "missing" finding has been found, i.e., Shiek indisputably is permanently and totally disabled.

Furthermore, it is the law of the case that there is absolutely nothing untoward about a disabled worker receiving disability benefits into a period of time that would otherwise have been his "retirement." The following quote from Shiek, ¶ 17, is illustrative and compelling:

> "We have recognized the right of a permanently and totally disabled employee to have disability benefits 'continue into retirement years is built into the very idea of workmen's compensation as a self-sufficient social insurance mechanism.' Gregory v. North Dakota Workers Comp. Bureau, 1998 ND 94, ¶ 18 n. 5, 578 N.W.2d 101 (quoting 5 Larson, **Workers' Compensation Law** § 60.21(f) (1997)). The ALJ and the Bureau erred as a matter of law in ruling whether Shiek was permanently and totally disabled was irrelevant to the application of the retirement presumption statute."

In fact, the current version of the section that this Court quoted from Professor Larson's treatise states, in its entirety, as follows:

> "One final caution must be entered in applying the concept of estimating future loss due to injury. If permanent disability or death benefits become payable, they are not limited to the period of what would have been claimant's active working life. In other words, if a person becomes totally permanently disabled at age twenty-five, and is awarded benefits for life, they obviously do not stop when he or she is

> sixty-five, but extend on into the period of what probably would have been retirement. This being so, if a person is permanently and totally disabled at age sixty, it is not correct to say that benefits should be based on the theory that his or her probable future loss of earnings was only five years of earnings. The right to have compensation benefits continue into retirement years is built into the very idea of workers' compensation as a self-sufficient social insurance mechanism. This point was expressly decided by the Arizona court. The deceased worker, aged sixty-four, had planned to retire. In any event, he would have had difficulty in securing union approval to work elsewhere. It was held that full benefits were payable to his widow." 5 Larson's, **Workers Compensation Law** § 93.02(2)(f) (2000); emphasis added.

This just result is underscored by the facts of Shiek's case. Here, both the employer and NDSU were on contemporaneous notice of Shiek's -- at least -- temporary total disability and nonetheless did not seek to clarify the duration of the disability or offer any vocational rehabilitation, relying rather upon his alleged "retirement" date on his 62nd birthday. In Shiek, ¶ 19, this Court cited its prior decision in Frohlich v. North Dakota Workers' Comp. Bureau, 556 N.W.2d 297 (N.D. 1996) recognizing that the claimant has the burden of proving his or her right to continue receiving benefits. In Frohlich, this Court also discussed the Bureau's obligations under N.D.C.C. § 65-05-08.1 (1993).[8] That statute, in its relevant parts, provided as follows: "The claimant's doctor shall certify the period of temporary total disability upon request of the Bureau." N.D.C.C. § 65-05-08(1); emphasis added. In Frohlich, this Court stated that:

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[8]N.D.C.C. § 65-05-08.1 was substantially modified in 1997. N.D. Sess. Laws ch. 542, § 2.

> "Construing NDCC 65-05-08.1 as a whole in conjunction with the Bureau's pretermination obligations and its limited adversarial role in deciding claims, we believe the onus is on the Bureau to request medical certification of the duration of the claimant's disability, and thereafter the claimant must ensure that the requested reports are filed." Frohlich, at 302.

In Shiek's case, of course, the record is bereft of any action by the Bureau to determine the "duration of the claimant's disability." Therefore, as a matter of law, the Bureau breached its "limited adversarial role in deciding claims" in Shiek's case by failing to "request medical certification of the duration" of Shiek's disability, within the clear meaning of the unanimous Supreme Court in Frohlich, Id.

An otherwise undisputed fact cited in Shiek, but one not cited by the Bureau/ALJ, is that Shiek was indisputably off work during the entire last five days prior to his "voluntary" retirement, on the specific orders of his treating physician, Dr. Humphrey, i.e., from Monday through Friday, September 21, 1992 through the date of "voluntary" retirement on Friday, September 25, 1992. See, Shiek, ¶ 5. This fact, coupled with the undisputed conclusion of the ALJ/Bureau that Shiek was "permanently and totally disabled" ". . . at the time of his retirement on September 25, 1992" dictates that, as a matter of law, he is entitled to benefits by virtue of his permanent and total disability status and could not, as a matter of law, have ". . . retired from the labor market voluntarily, rather than having been forced from that market by the disability. . ." Shiek, ¶ 21.

This inescapable conclusion embraces the explicit statement of this Court in Shiek that the ". . . right of a permanently and totally disabled employee to have disability benefits 'continue into retirement years is built into the very idea of workmen's compensation as a self-sufficient social insurance mechanism.'" Shiek ¶ 17.

In short, virtually every worker has a subjective intention to "retire" but a subjective intention is irrelevant, as a matter of law, where, as here, that injured worker is permanently and totally disabled on or before the intended "voluntary" retirement date.[9]

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[9]There should be no impression that Mr. Shiek would be obtaining a "windfall" if disability benefits are allowed to continue beyond "retirement." It is undisputed that Shiek, from the date of his "retirement" on September 25, 1992 (his 62nd birthday) has been determined to be totally disabled for Social Security disability purposes. See App. 53, Conclusion of Law 8 ("The finding that Shiek was 'permanently and totally disabled' on the date of his retirement is further supported in part by the fact that he qualified for, and is still receiving, Social Security disability benefits effective September 1992 . . ."). Therefore, Shiek's PTD benefits will, automatically, be "offset" because of his receipt of Social Security disability benefits ("by an amount equal as nearly as practical to one-half of such federal [disability] benefit") pursuant to N.D.C.C § 65-05-09.1. Furthermore, once he turns 65 and his disability benefits convert to "Social Security retirement benefits", he is subject to "retirement offset" (an "offset which . . . cannot exceed 40 percent of the employee's weekly Social Security retirement benefit"). N.D.C.C. § 65-05-09.2 (1989). The point is that the legislature already has incorporated into the scheme of the Workers' Compensation Act methods to reduce Workers' Compensation disability benefits to workers who are "disabled" or "retired." Mr. Shiek, despite his "permanent and total disability" status will be subject to these "offset" provisions the same as any other similarly situated disabled worker.

C. Irrespective Of Shiek's "Voluntary Retirement", He Was "Forced From [The Labor] Market By [His Permanent And Total] Disability." Shiek, ¶ 21.

The Bureau has not met its shifted burden of proof to show that Shiek is not "permanently and totally disabled." Shiek, ¶ 21. That leaves the Bureau with the impossible burden, according to the facts and law of this case, to prove ". . . that the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability . . ." Id. The Bureau has misconstrued this direction from the Supreme Court in its entirety. The Bureau's "tortuous construction" (Shiek, ¶ 17) of this direction from the Supreme Court results in the utter non-sequitur of finding that Shiek "voluntarily retired" on his 62nd birthday despite the fact that, by virtue of his permanent and total disability status, he was at that time indisputably incapable of working! Put in question form, how can anyone be said to have "voluntarily retired" at a time when the person was otherwise "permanently and totally disabled" from work? To state that a person can retire simultaneously with being "permanently and totally disabled" (Shiek, ¶ 21) results in the same "ludicrous and absurd" construction that this Court, in Shiek, stated point blank must be rejected. Shiek, ¶ 17.

What, then, does the statement of this Court that the Bureau may show ". . . claimant retired from the labor market voluntarily, rather than having been forced

from that market by the disability. . ." mean? Shiek, ¶ 21. There are several hypotheticals that come to mind that illustrate what this statement means.

One hypothetical is as follows: An injured worker applies for permanent total disability benefits and is, in fact, permanently and totally disabled at the time of the application; however, the injured worker is unable to prove that he was permanently and totally disabled on the effective date of his voluntary retirement. In such a scenario, there would be no doubt that the Bureau will have met is proof that ". . . the claimant retired from the labor market voluntarily, rather than having been forced from that market by the disability. . ." Shiek, ¶ 21.

Another hypothetical would be an injured worker who has had a period of being "temporarily totally disabled", and a subjective intention to retire on his 62nd birthday but, when his 62nd birthday arrived, he could not demonstrate that he was "permanently and totally disabled" thereby allowing the Bureau to meet its burden that the claimant had not "been forced from the market by the disability."

In Shiek's case, however, we have nothing more than the subjective intention to "voluntarily retire" on his 62nd birthday. In short, virtually every worker has a subjective intention to "retire" but a subjective intention is irrelevant as a matter of law where, as here, that injured worker is permanently and totally disabled on or before the "voluntarily" retirement date. Of course Shiek intended to retire and, on August 17, 1992, after returning from a period of temporary total disability due to

surgery on his knee, ". . . he submitted his voluntary resignation to NDSU effective September 25, 1992, Shiek's 62nd birthday." Shiek, ¶ 5.

If this Court intended that all the Bureau needed to show on remand was that Shiek "voluntarily retired", then there would have been no need for the remand! The fact that Shiek intended to voluntary resign is unassailable and accepted by Shiek as a proven fact. Therefore, what was the purpose of the remand in Shiek by the Supreme Court? The answer is obvious -- to determine whether Shiek was permanently and totally disabled and, if so, as a matter of law he would be entitled to benefits, despite his subjective "voluntary resignation." Shiek, ¶ 5.

The Court can imagine the "absurd and ludicrous" results that could otherwise be obtained by the Bureau's "tortuous" interpretation of this Court's remand in Shiek. For example, is a 25 year old laborer who is "on record" of stating that he intends to retire when he turns 62 precluded from benefits by virtue of that statement despite the fact that the next day he becomes "permanently and totally disabled" because of a construction accident? Of course not. Such result would be, indeed, "absurd and ludicrous." The fact that Shiek was approaching his 62nd birthday when he gave his notice of "voluntary retirement" makes this a "tougher" case on its facts but the rule of law is nonetheless the same. Again, this Court has specifically ". . . recognized the right of a permanently and totally disabled employee to have disability benefits 'continue into retirement years is built into the very idea of workmen's compensation

as a self-sufficient social insurance mechanism.'" Shiek, ¶ 17. Further, Shiek will be subject to both "disability" and "retirement" offset of his Workers' Compensation benefits, irrespective of his permanent and total disability status.[10]

CONCLUSION

Shiek, on Supreme Court remand to address the issue, has proven that he became permanently and totally disabled before and on the effective date of his otherwise "voluntary" retirement. Therefore, his earlier stated subjective intent to retire is irrelevant in the face of the indisputable conclusion that he became permanently and totally disabled. In other words, due to his status of being "permanently and totally disabled", he was totally, permanently, and unconditionally unable to work, thus precluding any finding or conclusion that he ". . . retired from the labor market voluntarily rather than having been forced from that market by the disability . . ." Shiek, ¶ 21.

Therefore, the Judgment of the District Court affirming the Bureau's Final Order of January 27, 2000 must be reversed and this matter remanded to the Bureau for the purpose of the Bureau calculating and paying permanent total disability

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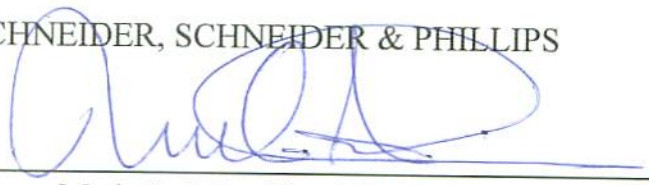
[10]See footnote 9, supra, explaining the "disability" and "retirement" "offset" statutes.

benefits to Shiek from the onset of his permanent disability status of Monday, September 21, 1992, through the present time and ongoing.[11]

Respectfully submitted this 1st day of March 2001.

SCHNEIDER, SCHNEIDER & PHILLIPS



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[11]In his Notice of Appeal (App. 3) Shiek asked the District Court to retain jurisdiction for the purpose of awarding attorney's fees and costs under N.D.C.C. § 65-10-03.