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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM POREMBA)
)
 Petitioner,)
)
 vs.)
)
 SOUTHERN NEVADA PAVING;)
 S&C CLAIMS SERVICE and)
 DEPARTMENT OF ADMINISTRATION,)
 APPEALS OFFICER,)
)
 Respondent.)
)

Electronically Filed
Mar 27 2015 08:45 a.m.
Tracie K. Lindeman
Clerk of Supreme Court
Case No.: 66888

APPENDIX
VOLUME I

MATTHEW S. DUNKLEY, ESQ.
Nevada Bar No. 6627
MARK G. LOSEE, ESQ.
Nevada Bar No. 12996
DUNKLEY LAW
2450 St. Rose Parkway, Suite 210
Henderson, Nevada 89074
Telephone: (702) 413-6565
Facsimile: (702) 570-5940
Attorneys for Appellant William Poremba

APPENDIX TO APPELLANT'S OPENING BRIEF

TITLE	PAGE NO.
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Order Transferring Hearing to Appeals Office	APP003
Notice of Appeal and Order to Appear	APP004-005
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Petitioners Opening Brief	APP375-388
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Respondents S&C Claims Service, Inc., and Southern Nevada Paving's Answering Brief	APP391-411
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REQUEST FOR HEARING - CONTESTED CLAIM

(Pursuant to NAC 616C.274)

STATE OF NEVADA
DEPT. OF ADMINISTRATION
HEARINGS DIVISION

13 JAN 10 PM 2:36

RECEIVED
AND
FILED

REPLY TO: Department of Administration
Hearings Division
1050 E. William Street, Ste. 400
Carson City, NV 89701
(775) 687-5966

OR Department of Administration
Hearings Division
2200 S. Rancho Drive, Suite 21036
Las Vegas, NV 89102
(702) 486-2525

EMPLOYEE INFORMATION		
Employee's Name: William Proemba		
Address: 168 Red Arches Court		
City: Henderson	State: NV	Zip: 89012
Employee's Telephone Number: (702)263-2936		
Claim No.: 739255	Date of Injury: 7/22/2005	
INSURER INFORMATION		
Insurer's Name:		
Address:		
City:	State:	Zip:
Insurer's Telephone Number:		

EMPLOYER INFORMATION		
Employer's Name: Southern Nevada Paving		
Address: 440 Frehner Road		
City: North Las Vegas	State: NV	Zip: 89030
Employer's Telephone Number: (702)649-6250		
THIRD-PARTY ADMINISTRATOR (TPA) INFORMATION		
TPA's Name: Schreiner & Company		
Address: 3380 West Sahara Avenue, Suite 100		
City: Las Vegas	State: NV	Zip: 89102
TPA's Telephone Number: (702) 873-5115		

Do Not Complete or Mail This Form Unless You Disagree With the Insurer's Determination.

YOU MUST INCLUDE A COPY OF THE DETERMINATION LETTER OR A HEARING WILL NOT BE SCHEDULED PURSUANT TO NRS 616C.315.

Briefly explain the basis for this appeal:

DISAGREE WITH DETERMINATION LETTER OF
NOVEMBER 8, 2012

This request for hearing is filed by, or on behalf of:

- The Injured Employee
- The Employer

and is dated this 10 day of January, 2013.

Signature of Injured Employee/Employer

Injured Employee's/Employer's Rep. (Advisor)



9075 W. Diablo Drive, Suite 140
Las Vegas, NV 89148

Main - (702) 873-5115
Toll Free - (800) 362-5198
Fax - (702) 876-5584

November 8, 2012

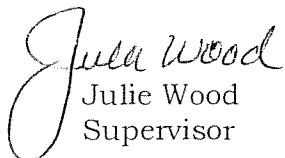
Matthew Dunkley Esq.
2450 St Rose Pkwy #210
Henderson NV 89074

Re: Claimant: William Poremba
Claim No: 739255
DOI: 07/22/2005
Employer: Aggregate Industries

Dear Mr. Dunkley,

S&C Claims Services, Inc. has reviewed your request for reopening. After review, it appears there is no evidence of an objective change in circumstance to warrant reopening. There was no reporting enclosed from any physician with the request. Therefore, your request for reopening is denied.

If you disagree with this determination, you may request a Hearing before a Hearing Officer. If you wish to appeal, complete the Request for Hearing form and mail it to the address on the top of the form within seventy (70) days of the date of this letter. If you do not appeal within seventy (70) days, you lose your appeal rights.


Julie Wood
Supervisor

Enclosures

cc: Aggregate Industries
William Poremba
File

NOV 13 2012

11/17/13
APP002

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
HEARINGS DIVISION

In the matter of the Contested
Industrial Insurance Claim of:

Hearing Number: 1305062-TH
Claim Number: 739255

WILLIAM PROEMBA
168 RED ARCHES CT
HENDERSON, NV 89012

SOUTHERN NEVADA PAVING
440 FREHNER RD
NORTH LAS VEGAS, NV 89030

ORDER TRANSFERRING HEARING TO APPEALS OFFICE

The Claimant's Request for Hearing was filed on January 10, 2013 and scheduled for February 7, 2013. The requesting party appealed the Insurer's determination dated November 8, 2012. The hearing was scheduled for February 7, 2013.

The parties have filed a stipulation to waive a hearing at the Hearing Officer level and to proceed directly to the Appeals Officer level.

NRS 616C.315(7) provides that the parties to a contested claim may, if the Claimant is represented by counsel, agree to forego a hearing before a Hearing Officer and submit the contested claim directly to an Appeals Officer.

Therefore, good cause appearing, the Hearing Officer Proceeding shall be and is hereby transferred to the Appeals Officer for further proceedings.

IT IS SO ORDERED this 11th day of February, 2013.



Tracey Hagan
Hearing Officer

NOTICE: If any party objects to this transfer to the Appeals Office, an objection thereto must be filed with the Appeals Office at 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102, within 15 days of this order.

FEB 12 2013
APP003

1 CERTIFICATE OF MAILING

2
3 The undersigned, an employee of the State of Nevada, Department of Administration,
4 Hearings Division, does hereby certify that on the date shown below, a true and correct copy of
5 the foregoing NOTICE OF APPEAL AND ORDER TO APPEAR was duly mailed, postage
6 prepaid **OR** placed in the appropriate addressee runner file at the Department of Administration,
7 Hearings Division, 2200 S. Rancho Drive, #220, Las Vegas, Nevada, to the following:

8
9 WILLIAM PROEMBA
10 168 RED ARCHES CT
11 HENDERSON NV 89012

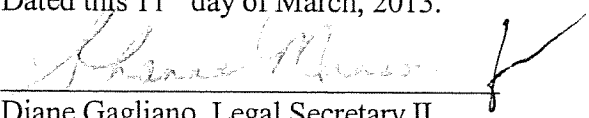
12
13 MATTHEW S DUNKLEY ESQ
14 DUNKLEY LAW
15 2450 ST ROSE PKWY STE 210
16 HENDERSON NV 89074

17
18 SOUTHERN NEVADA PAVING
19 440 FREHNER RD
20 NORTH LAS VEGAS NV 89030

21
22 S & C CLAIMS SERVICES INC
23 9075 W DIABLO DR STE 140
24 LAS VEGAS NV 89148

25
26 ALYSSA M FISCHER ESQ
27 LEWIS BRISBOIS BISGAARD & SMITH LLP
28 400 S FOURTH ST STE 500
LAS VEGAS NV 89101

Dated this 11th day of March, 2013.

29
30 
31 Diane Gagliano, Legal Secretary II
32 Employee of the State of Nevada
33
34
35
36
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NEVADA DEPARTMENT OF ADMINISTRATION

BEFORE THE APPEALS OFFICER

In the Matter of the Contested
Industrial Insurance Claim

Claim No.: 739255

Appeal No.: 1306201-SL

of

WILLIAM POREMBA
168 RED ARCHES COURT
HENDERSON, NV 89012

Employer:
SOUTHERN NEVADA PAVING
3101 E. CRAIG ROAD
N. LAS VEGAS, NV 89030

Claimant.

DOH: 4/23/13 at 10:30 A.M. stack

INSURER'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Insurer, BUILDERS INSURANCE COMPANY, by and through their attorneys of record, ALYSSA M. FISCHER, ESQ. and LEWIS, BRISBOIS, BISGAARD & SMITH, LLP, and hereby moves this Honorable Court for an Order granting this Motion for Summary Judgment because there are no material facts in dispute the Claimant cannot prevail in reopening his claim. Claimant appealed from the Insurer's November 8, 2012 determination which the denial of reopening of his claim. The parties agreed to by-pass the hearing officer and submit the issue directly to the Appeals Officer for a final determination.

POINTS AND AUTHORITIES

I.

UNDISPUTED FACTS

Claimant was involved in a vehicle-heavy equipment accident on or about July 22, 2005. He sought medical treatment and filled out a C-4 three days later on July 25, 2005. He was diagnosed with thoracic, cervical strains; a face contusion and a knee contusion. (Insurer's Document Packet, p. 4).

A follow up appointment at Concentra on July 29, 2005 produced the same diagnosis. (Insurer's Document Packet, p. 9).

Claimant treated on his own outside of worker's compensation arena on August 2, 2005. (Insurer's Document Packet, p. 11-12).

30833-117

APR 26 2013
WFP006

1 Claimant was informed by the Insurer that he could not treat with non-preferred
2 providers and could only have one treating physician. (Insurer's Document Packet, p. 13-15).
3 Care was transferred to Dr. Angela Thomas. (Insurer's Document Packet, p. 16).

4 On August 12, 2005, the claim was accepted for cervical strain, lumbar strain and
5 left knee sprain. (Insurer's Document Packet, p. 20). The scope of the claim was never appealed.

6 On August 12, 2005, Dr. Thomas documented that claimant had a non-industrial
7 history of chronic low back pain. (Insurer's Document Packet, p. 22). Physical therapy was
8 recommended.

9 **Claimant and his counsel were informed of the Insurer's lien in August 2005.**
10 **(Insurer's Document Packet, p. 24).** Appropriate treatment was provided and on January 27,
11 2066 the Insurer sent a claim closure letter. (Insurer's Document Packet, p. 46). There was no
12 appeal and the claim closed.

13 **On October 5, 2010, the Insurer sought recovery of its worker's compensation**
14 **lien.** (Insurer's Document Packet, p. 45).

15 On November 3, 2010 Claimant sought to reopen his claim, more than one year
16 after it closed. Claimant provided a one page letter from Sudir Khenika MD which does not have
17 ANY medical records attached. The letter purports to say that the doctor compared MRIs but does
18 not provide any of the alleged reports or films. Finally, the doctor's letter asks for reopening since
19 the Claimant has had increased pain complaints. (Insurer's Document Packet, p. 50).

20 On November 8, 2010 the Insurer denied reopening as the Claimant has not proven
21 that he has exhausted his third party recovery which he must do before the Insurer would be
22 responsible to pay for reopening and future medical treatment. (Insurer's Document Packet, p.
23 53).

24 The Claimant received a settlement of \$63,500 from a responsible third party who
25 caused his accident. **Claimant received close to \$20,000 personally, there is no evidence that**
26 **said money has been exhausted prior to this reopening request as is required in Nevada.**

27 Claimant appealed the denial of reopening and the hearing officer affirmed it.
28 (Exhibit pp. 103-107).

1 Claimant appealed the denial of reopening. The Insurer filed a Motion for
2 Summary Judgment which was granted on May 17, 2011. (Exhibit pp. 108-116).

3 On November 8, 2012 the Claimant, through counsel, sought reopening of his
4 claim. (Exhibit p. 117). The request for reopening did not have any medical evidence attached to
5 the letter.

6 On November 8, 2012, the Insurer denied the request for reopening. (Exhibit p.
7 118). Claimant appealed and the parties agreed to by-pass the hearing officer. This Appeal
8 follows.

9 II.

10 STANDARD OF REVIEW

11 Summary judgment is appropriate where no genuine issue of fact remains for trial
12 and one party is entitled to judgment as a matter of law. See NRCP 56(c) and Pacific Pools
13 Construction Co. v. McClain's Concrete, Inc., 101 Nev. 557, 706 P.2d 849 (1985).

14 When a motion for summary judgment is made and supported as required by
15 NRCP 56, the adverse party must, by affidavit or otherwise, set forth facts demonstrating the
16 existence of a genuine issue for trial. See NRCP 56(e) and Bird v. Casa Royale West, 97 Nev. 67,
17 628 P.2d 17 (1981).

18 The non-moving party's documents must be admissible evidence and that party "is
19 not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture".
20 Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250, 849 P.2d 320 (1993) (citation omitted).

21 The U.S. Supreme Court has held the moving party's burden in such situations is
22 simply to identify the elements of its adversary's case with respect to which it considers there to be
23 a deficiency in proof. If a district court agrees as to the existence of the deficiency, summary
24 judgment should follow as a matter of course.

25 ///
26 ///

III.

NEVADA CASE LAW IS CLEAR THAT A CLAIMANT MAY NOT REOPEN HIS CLAIM UNTIL HE PROVES HE HAS EXHAUSTED HIS THIRD PARTY SETTLEMENT PROCEEDS

It is the claimant, not the Employer who has the burden of proving his case, and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

In attempting to prove his case, the claimant has the burden of going beyond speculation and conjecture. That means that the claimant must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, § 80.33(a).

NRS 616A.010(2) makes it clear that:

A claim for compensation filed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS must be decided on its merit and not according to the principle of common law that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature.

Here, the law in Nevada is clear that a Claimant must first prove that he expended any third party settlement proceeds on his own subsequent medical care and treatment before he can request reopening. The case of EICON v. Chandler, 23 P.3d 255 (Nev. 2001) case clearly stands for this proposition. (Insurer's Document Packet, pp. 96-99). The Nevada Supreme Court held in Chandler that: "An insurer is entitled to withhold payment of medical benefits for a work-related injury until an employee has exhausted any third-party settlement proceeds..." Id. at 258.

1 The worker's compensation insurer properly asserted its lien in this case.
2 Regardless, it has never been paid its lien out of the settlement proceeds in spite of the legal
3 obligation to notify it within fifteen days of recovery of those funds. See NRS 616C.215.

4 In this case, upon information and belief, Claimant hasn't even paid the
5 worker compensation insurer's lien! In Chandler that lien was paid back and still benefits
6 were denied until he exhausted the money he received from his third party case. The present
7 facts are even stronger in the Insurer's favor.

8 It is represented that the Claimant has received \$19,667.61 in settlement
9 proceeds to date. (Insurer's Document Packet, p. 59). It is unclear whether this figure could
10 go up since proceeds were withheld pending insurance payments and lien reductions. Id.
11 Thus, at a minimum, according to Chandler Claimant must prove that SINCE September
12 2009 when he received his settlement money that he spent in excess of \$19,667.71 on his own
13 related health care.

14 There was no documentation provided with the request for reopening. (Exhibit p.
15 117). Therefore based upon the evidence in the record the Claimant has neither proven that he has
16 expended all of his proceeds from his third party recovery, nor has he submitted any medical
17 evidence to support reopening under NRS 616C.390.

18 Therefore, even taking the facts in a light MOST favorable to the Claimant it is
19 clear that there are no facts in dispute and that the Claimant has failed to prove that he has
20 exhausted the approximately \$20,000 he received as third party settlement funds. Under this set of
21 undisputed facts, summary judgment is warranted in favor of the Insurer.

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CONCLUSION

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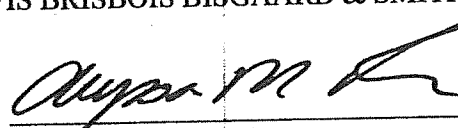
For the foregoing reasons, the Insurer respectfully request an Order Granting its Motion for Summary Judgment and vacating the appeal hearing scheduled for April 23, 2013.

DATED: March 26, 2013.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By:



Alyssa M. Fischer, Esq.
Attorneys for the Insurer
BUILDERS INSURANCE COMPANY

CERTIFICATE OF MAILING

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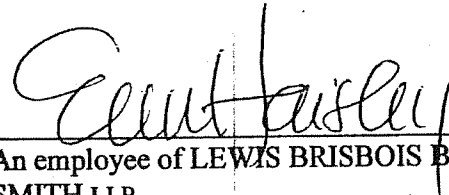
Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the ^{20th} day of March, 2013, service of the foregoing **INSURER'S MOTION FOR SUMMARY JUDGMENT** was made this date by depositing a true copy of the same for mailing, postage prepaid thereon, in an envelope to the following:

Matthew Dunkley, Esq.
1522 W. Warm Springs Rd.
Henderson, NV 89014

VIA FACSIMILE
(702) 531-6777

Southern NV Paving
3101 E. Craig Road
N. Las Vegas, NV 89030

Julie Wood
S & C Claims Services, Inc.
3380 West Sahara, Suite 100
Las Vegas, NV 89102



An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP