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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.)
)

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Tracie K. Lindeman
Clerk of Supreme Court
Case No.: 66888

APPENDIX
VOLUME IV

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APPENDIX TO APPELLANT'S OPENING BRIEF

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FILED
APR 17 2013
APPEALS OFFICE

NEVADA DEPARTMENT OF ADMINISTRATION
BEFORE THE APPEALS OFFICER

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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 89014,

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

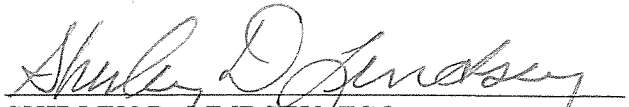
Claimant.

ORDER DENYING INSURER'S MOTION FOR SUMMARY JUDGMENT

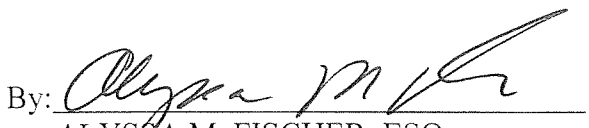
After careful review and consideration of the Insurer's Motion for Summary Judgment and good cause appearing,

IT IS HEREBY ORDERED that the Insurer's Motion for Summary Judgment is DENIED.

DATED this 17th day of April, 2013.


SHIRLEY D. LINDSEY, ESQ.
Appeals Officer

Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH LLP

By: 
ALYSSA M. FISCHER, ESQ.
Nevada Bar No. 5709
400 S. Fourth Street, Ste. 500
Las Vegas, Nevada 89101
Phone: (702) 893-3383
Fax: (702) 366-9689
Attorneys for Insurer

30833-117
4823-6545-3065.1

APR 18 2013
APR 16 2013

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **ORDER DENYING INSURER'S MOTION FOR SUMMARY JUDGMENT** was duly mailed, postage prepaid **OR** placed in the appropriate addressee runner file maintained by the Division, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada, to the following:

Alyssa M. Fischer, Esq.
Lewis, Brisbois, Bisgaard & Smith LLP
400 S. Fourth Street, Ste. 500
Las Vegas, NV 89101

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

Julie Wood
S&C Claims Service
9075 W. Diablo Drive, #140
Las Vegas, NV 89148

William Poremba
168 Red Arches Court
Henderson, NV 89012

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

DATED this 17th day of April, 2013.


An employee of the State of Nevada

1 NEVADA DEPARTMENT OF ADMINISTRATION

2 BEFORE THE APPEALS OFFICER

3 In the Matter of the Contested
4 Industrial Insurance Claim

Claim No.: 739255

5 of

Appeal No.: 1306201-SL

6 WILLIAM POREMBA,

Employer:
SOUTHERN NV PAVING

7 Claimant.

DOH: 10/30/13 at 11:00 A.M.

8 INSURER'S APPEAL MEMORANDUM

9
10 COMES NOW the Insurer, BUILDERS INSURANCE COMPANY, by and
11 through its counsel, ALYSSA M. FISCHER, ESQ., and LEWIS BRISBOIS BISGAARD &
12 SMITH LLP, and submits its Appeal Memorandum for the hearing on the instant matter currently
13 set to be heard on October 30, 2013 at 11:00 A.M. In support of its position, the Insurer states as
14 follows:

15 That there is no medical, legal or factual basis upon which to order claim
16 reopening in this matter and the Claimant cannot prove that he has spent his third party proceeds
17 on medical treatment in this case.

18 WHEREFORE, the Insurer, BUILDERS INSURANCE COMPANY, respectfully
19 requests that the Appeals Officer provide the following relief:

- 20 1. That the Appeals Officer affirm the November 8, 2012 determination
21 denying claim reopening.

22 DOCUMENTS TO BE INTRODUCED AT HEARING

23
24 The Insurer shall rely upon its Index of Documents, filed separately herein and
25 any supplements filed by the Insurer thereto. The Insurer may rely upon any documents
26 produced by the Claimant, subject to objection and may supplement it documents between this
27 date and the date of hearing.

28 ///

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). Several MRIs were performed.

11 Dr. Thomas recommended physical therapy.

12 On November 7, 2005, Dr. LaTourette opined that Claimant would need knee
13 surgery in the future. (Insurer's Document Packet, p. 42-43).

14 **The Insurer sent a claim closure letter on January 27, 2006. (Insurer's**
15 **Document Packet, p. 46). The claim closed.**

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

18 On November 3, 2010 Claimant sought to reopen his claim, more than one year
19 after it closed. Claimant provided a one page letter from Sudir Khenika MD which did not have
20 ANY medical records attached. The letter asks for reopening since the Claimant has had
21 increased pain complaints. (Insurer's Document Packet, p. 50).

22 **On November 8, 2010 the Insurer denied reopening as the Claimant has not**
23 **proven that he has exhausted his third party recovery which he must do before the Insurer**
24 **would be responsible to pay for reopening and future medical treatment.** (Insurer's
25 Document Packet, p. 51).

26 In November 2010 Claimant returned to the Las Vegas Pain Institute for neck and
27 low back pain. (Exhibit p. 53). He was told to continue home exercises. (Exhibit p. 55).

1 The Claimant received a settlement of \$63,500 from a responsible third party who
2 caused his accident. (Exhibit p. 59). **Claimant received close to \$20,000 personally, there is**
3 **no evidence that said money has been exhausted prior to this reopening request as is**
4 **required in Nevada.** (Exhibit pp. 59-60).

5 Claimant previously appealed the denial of reopening of his claim. On March 7,
6 2011 the Hearing Officer properly denied the request for reopening. (Exhibit pp. 91-95).

7 Claimant appealed to the Appeals Office. (Exhibit p. 103).

8 **On May 6, 2011 the Insurer filed a Motion for Summary Judgment in the**
9 **matter on appeal. (Exhibit pp. 108-114).**

10 **On May 17, 2011, the Appeals Officer GRANTED the Insurer's Motion for**
11 **Summary Judgment. (Exhibit p. 115-116).**

12 Claimant waited over a year and on November 8, 2012 his counsel once again
13 requested claim reopening. **There is no new medical reporting to support this request and**
14 **again the Claimant has not proven that he has exhausted his third party proceeds before**
15 **asking the Insurer to pay for more benefits under the industrial claim.**

16 Not surprisingly, on November 8, 2012 the Insurer denied the request for
17 reopening. (Exhibit p. 118).

18 The Claimant appealed and the parties agreed to by pass the Hearing Officer.

19 The Insurer filed a Motion for Summary Judgment, which this Appeals Officer
20 denied. This hearing follows.

21 ARGUMENT

22 I.

23 CLAIMANT BEARS THE BURDEN

24 It is the claimant, not the Employer who has the burden of proving his case, and
25 that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100
26 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div.,
27 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

28 ///

1 In attempting to prove his case, the Claimant has the burden of going beyond
2 speculation and conjecture. That means that the claimant must establish the work connection of
3 his injuries, the causal relationship between the work-related injury and his disability, the extent
4 of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail,
5 a claimant must present and prove more evidence than an amount which would make his case
6 and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993);
7 SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29
8 (1983); 3, A. Larson, The Law of Workmen's Compensation, § 80.33(a).

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

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

15 Based upon the present information, the Insurer's determination to deny reopening
16 is proper.

17 II.

18 REOPENING WAS PROPERLY DENIED

19 First and foremost, the Claimant has failed to prove that he has expended the
20 money he received from his third party settlement on medical care and treatment before he
21 sought reopening. The case of EICON v. Chandler, 23 P.3d 255 (Nev. 2001) case clearly stands
22 for this proposition. The Nevada Supreme Court held in Chandler that: "**An insurer is entitled**
23 **to withhold payment of medical benefits for a work-related injury until an employee has**
24 **exhausted any third-party settlement proceeds...**" Id. at 258. A copy of the Chandler case
25 is provided in the Insurer's evidence packet at 96-99).

26 In this case Claimant hasn't even paid the worker compensation insurer's
27 lien. In Chandler that lien was paid back and still benefits were denied until he exhausted
28 the money he received from his third party case. The present facts are even stronger in the
Insurer's favor. Thus, the denial of reopening is proper.

///

1 Furthermore, even assuming arguendo that the merits of the reopening could be
2 addressed, Claimant has not met his burden of proof to prove reopening. He has a letter from his
3 counsel, that is it! There is not even a letter from a doctor this time—nothing but subjective
4 complaints of pain. This falls well below the Claimant’s legal burden of proof.

5 Claimant’s own assertions prove that he cannot prevail. He admits that he
6 recovered close to \$64,000 in his third party settlement. He claims that he has spent \$14,000 in
7 medical treatment relating to his industrial accident. First, this is not enough. He has to show
8 that he spent ALL of the money he got in the third party case and he has to prove that he spent it
9 on medical treatment that the Insurer would otherwise be liable for. Secondly, he has to show
10 that he **spent** this money AFTER he got it. Claimant’s assertion that he is going to need a
11 surgery in the future does NOT meet the requirement because he has not spent that money yet.

12 Moreover, the Claimant admits that he spent his third party settlement on
13 “mortgage payments and living expenses for himself and his family.” While noble, this does not
14 meet the requirements for reopening. He has to spend the money he got on medical benefits that
15 the Insurer would otherwise be liable for if the claim were reopened. He clearly cannot show
16 this.

17 Finally, the bills that the Claimant did produce to this court are mostly for
18 services incurred BEFORE the third party settlement. These monies are not considered for the
19 offset before reopening is proper. The letter to Mr. Poremba regarding his settlement is dated
20 September 25, 2009. Thus, any medical bill incurred BEFORE this date does not count for the
21 offset. The offset proves that the money was spent AFTER the settlement.

22 Additionally, Claimant previously appealed the denial of reopening of his claim.
23 On March 7, 2011 the Hearing Officer properly denied the request for reopening. (Exhibit pp.
24 91-95). This appeal is based on the same OLD medical evidence that was insufficient in the last
25 attempt to reopen. **On May 17, 2011, the prior Appeals Officer GRANTED the Insurer’s**
26 **Motion for Summary Judgment. (Exhibit p. 115-116).**

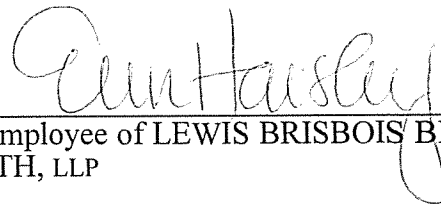
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Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 22nd day of October, 2013, service of the foregoing **INSURER'S APPEAL MEMORANDUM** was made this date by depositing a true and correct copy of the same for mailing, postage prepaid thereon, in an envelope to the following:

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

Danny Thorn
S & C Claim Services
9075 W. Diablo Drive, Ste 140
Las Vegas, NV 89148


An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP

