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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Tracie K. Lindeman
Clerk of Supreme Court
Supreme Court No. 66888
Dist. Ct. Case No. A-698184

APPELLANT'S REPLY BRIEF

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I.
REPLY

A. Introduction

This case is a workers compensation case. Appellant is William Poremba, an injured worker, and Respondent is S&C Claims Services, an insurer, on behalf of Southern Nevada Paving, an employer. In this case Poremba also received third-party compensation from a work related accident. Poremba's workers compensation claim is closed and his third-party funds have been exhausted. Poremba exhausted his funds on both medical and living expenses. Poremba's medical condition related to his work-accident has worsened and has been confirmed by his doctors. Poremba has lifetime reopening rights and is trying to reopen his workers compensation claim.

B. Updated Course of Proceedings

After the District Court's decision was made in chambers in this case, Poremba appealed his case to the Nevada Supreme Court and filed his opening

1 brief. (*See* Appellant’s Opening Br. in Ct. R.). The Insurer, after an extension of
2 time was granted, filed its answering brief (*See* Resp’t Answering Br. in Ct. R.).
3
4 Poremba now submits this Reply to the Insurer’s answering brief.

5 **C. Clarification of Respondent’s Facts**

6 In its answering brief the Insurer made some factual allegations requiring
7 clarification.
8

9 **1. Poremba did provide medical evidence supporting the request for**
10 **reopening as required by NRS 616C.390.**

11 The Insurer states “[t]here was no medical evidence submitted to support
12 the request for reopening as required by NRS 616C.390.” (Resp’t Answering
13 Br. p. 1). And the insurer further incorrectly states “[t]here are no new medical
14 reports since the last denial of reopening was made.” (Resp’t Answering Br. p.
15 8). First, however, this was the excuse given by the Insurer to deny reopening in
16 2012. (App. p. 134 (“After review it appears there is no evidence of an
17 objective change in circumstance to warrant reopening. There was no reporting
18 enclosed from any physician with the request.”)). But after he appealed this
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1 determination Poremba re-provided in his opposition to summary judgment a
2 2010 letter from Dr. Khemka outlining Poremba's worsening condition of
3 Poremba and requesting Poremba's workers compensation case be reopened.
4 (App. p. 181). This was enough to satisfy the appeals officer to survive
5 summary judgment, which was denied. (App. p. 191). But to withstand the
6 Insurer's arguments about the adequacy of Dr. Khemka's letter the scheduled
7 appeals hearing was reset for Poremba to consult with another doctor and
8 provide a second doctors certificate. (*See generally* App. p. 2010 and 227).
9 Poremba met with Dr. Lipshutz who detailed the following in a doctor's
10 letter/certificate:
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15 This letter is in regards to William Poremba who has been my
16 patient for several years following an accident which occurred at his
17 workplace. The accident occurred July 22, 2005 resulting in neck, left
18 leg/knee and low back pain. He has undergone left knee arthroscopy for
19 meniscus repair as well as a cervical spine fusion. His pain has worsened
20 over the last two years and his low back pain has not been addressed. Mr.
21 Poremba reports pain now involving the thoracic region as well as a
22 bilateral upper extremity and hand weakness. He has difficulty holding a
23 full cup and cannot exercise without severe pain. Most of his activities of
24 daily living require modifications or help to complete. These new
25 symptoms are directly attributable to his 2005 work injury.
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2 Due to his worsening symptoms, Mr. Poremba is currently unable
3 to work in any capacity. He will need new cervical, thoracic and lumbar
4 imaging to determine the extent of his physical incapacity as well as a
5 bilateral upper extremity nerve conduction study with electromyography
6 (please see prior imaging reports revealing steady worsening of his spinal
7 degeneration). Cervical and lumbar bilateral medial branch blocks are
8 warranted at his time as well as initiation of physical therapy 3 x weekly
9 for 12 weeks.

10 Poremba provided this letter in his Claimant's Appeal Memorandum on January
11 28, 2014. (App. p. 222 and 227).

12 Since January 28, 2014 the Insurer has had the Dr. Lipshutz certificate
13 and since this time Poremba has at nausea relied upon, referenced, cited to,
14 analyzed, and applied to the elements of NRS 616C.390. (App. p. 220 (Appeal
15 Mem.), 227 (Appeal Mem. Ex), 309 (Appeal Hr'g), 380 and 384-385 (Pet'r
16 Br.), 416-418 (Pet'r Reply), 424-425 (Pet'r Br. Ex. 1), Appellant Opening Br. p.
17 29-33, and this Reply p. 7-9. Obviously the Dr. Lipshutz certificate and its
18 application to NRS 616C.390 cannot be ignored. Yet, the Insurer has failed to
19 even address the certificate or NRS 616C.390 which gives Poremba his
20 statutory right to reopen his claim anywhere in its answering brief.
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1 **2. No oral argument was heard on the Petition for Judicial Review.**

2 Second, the Insurer sates that “District Court Judge Valorie J. Vega heard
3 oral argument on the Petition for Judicial Review on September 29, 2014.”
4 (Resp’t Answering Br. p. 2). However, after briefs were filed with the District
5 Court and Poremba requested a hearing (426-427) the District Court’s decision
6 was made in chambers without the attorneys for the parties present and no oral
7 arguments were made, nor was a transcript made (APP p. 430-433).
8
9

10
11 **3. The Insurer’s counsel did not re-raise the Motion for Summary
12 Judgment which the appeals officer had previously denied.**

13 The Insurer states “[a]t the appeal hearing, Respondents’ Counsel again
14 raised the Motion for Summary Judgment which the Judge had previously
15 denied.” (Resp’t Answering Br. p. 6). However, looking to the Insurer’s citation
16 in the record we see the Insurer’s counsel’s statement at the appeals hearing as:
17 “And, Your Honor, I can almost make a Motion for Summary Judgment--
18 everything that--.” (App. p. 319:16-17) To which the appeals officer replied
19 “You did, didn’t you? You made a motion to dismiss?” (App. p. 319:18-19);
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1 clearly referencing the motion for summary judgment already denied.

2 Obviously, making the statement that you “can almost” make a motion
3
4 for summary judgment and being reminded of the one you did make that was
5 denied is not indicative of bringing a new summary judgment. Moreover,
6
7 assuming *arguendo*, that the Insurer’s counsel did try to re-raise the motion for
8 summary judgment she did so in opening statements of the hearing (akin to the
9 beginning of a civil trial). Such a time and method is procedurally improper for
10 asking a motion for summary judgment to be reconsidered. *Coray v. Hom*, 389
11 P.2d 76, 80 Nev. 39 (Nev. 1964) (stating summary judgment “is to be utilized
12 before trial, not during, or after trial”). Nor is it evident anywhere that the facts
13 and evidence were viewed by the appeals officer under the motion for summary
14 judgment standard (the non-moving party in a summary judgment motion is
15 entitled to have all of the inferences and evidence construed in its favor,
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19 *Johnson v. Steel, Inc.*, 100 Nev. 181, 678 P.2d 676).

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1 **D. Clarification of Respondent’s Citation’s**

2 In its answering brief the Insurer’s arguments cited to cases or statutes
3
4 requiring clarification.

5 **1. The language of NRS 616C.215 does not prohibit reopening**
6 **workers compensation claims.**

7 The Insurer emphasizes “the language of NRS 616C.215 is clear that all
8
9 future workers’ compensation benefits must be reduced by the amount of
10 money a claimant receives from a third-party settlement.” (Resp’t Answering
11 Br. p. 15). However, with the emphasis to look at the clear language of the NRS
12 616C.215, the Insurer fails to note that it is also clear that NRS 616C.215 does
13 not preclude the mandatory reopening of a workers compensation claim
14 pursuant to NRS 616C.390. This statutory provision does not exclude injured
15 workers from reopening, it merely requires any compensation provided to the
16 injured worker through the workers compensation statute to be reduced, not
17 denied.
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1 NRS 616C.215(1)(a) (emphasis added):

2 The injured employee, or in case of death the dependents of the employee,
3 may take proceedings against that person to recover damages, but the amount
4 of the compensation the injured employee or the dependents of the employee
5 are entitled to receive pursuant to the provisions of chapters 616A to 616D,
6 inclusive, or chapter 617 of NRS, **including any future compensation, must**
7 **be reduced by the amount of the damages recovered**, notwithstanding any
8 act or omission of the employer or a person in the same employ which was a
9 direct or proximate cause of the employee's injury.

10 **2. Respondent's citations to non-authoritative case law other states**
11 **are either inapposite or show the principal of reduction and not**
12 **the argument of denying reopening.**

- 13 i. *Tobin v. Department of Labor & Industries*, 187 P.3d 780,
14 145 Wn.App. 607 (Wash.App. Div. 2 2008).

15 The Insurer cites to the appellate court decision of *Tobin* from Washington
16 (Resp't Br. p. 16). However, Washington's statute authorizing a workers
17 compensation lien on third-party claims outlined in *Tobin* is different than NRS
18 616C.215. For example, in Washington pain and suffering damages are not
19 subject to distribution under the lien statute (which in fairness was the true issue
20 before the Wash. Ct. and what *Tobin* is most cited for (also noting *Tobin* does not
21 address the issue of reopening nor the issue of how third party funds must be
22

1 exhausted)). *Tobin* at ¶17 (reasoning if the insurer did not compensate *Tobin* for
2 his pain and suffering, it cannot be “reimbursed” from that portion of *Tobin's*
3 award). Here, Poremba welcomes the Insurer’s wish to introduce the reasoning
4 from *Tobin*, particularly that pain and suffering damages are not subject to NRS
5 616C.215.
6

- 7
8 ii. *Associated Steel Workers, Ltd. v. Miyashiro*, 104 P.3d 945,
9 106 Hawai'i 358 (Hawai'i 2005)

10 *Associated Steel* is an uncited case from Hawaii, which also has a lien
11 statute different than NRS 616C2.15. Although *Associated Steel* reasons liens
12 subject the employee to “exhaust all necessary future workers' compensation
13 payments from that remainder prior to requesting future compensatory payments
14 from the employer or its insurance carrier for the compensable injuries arising
15 out of the same incident” it fails to address the issue of how third party funds
16 should be exhausted; nor does it even discuss reopening. *Id.* Making *Associated*
17 *Steel* inapposite to the evaluation of our case.
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1 iv. *Polito v. Industrial Com'n of Arizona*, 828 P.2d 182, 171
2 Ariz. 46 (Ariz.App. Div. 2 1992).

3 *Polito* appears to be the most relevant outside case law to the issues of
4 our case here and does specifically discuss reopening a workers compensation
5 claim after a third party recovery. In *Polito* the petitioner sought to reopen a
6 workers compensation claim based on new, additional or previously
7 undiscovered disability. *Id.* The claim was re-opened, however, the insurer
8 claimed a credit against future liability in the amount of its lien from a third
9 party suit by petitioner. *Id.* The only issue in dispute was whether medical
10 benefits for allegedly needed surgery should be paid by the insurer
11 notwithstanding the existence of the lien. *Id.* It was reasoned that an insurer is
12 required to pay any benefits while the employee is pursuing his third party
13 claim but when the employee does collect from a third party the insurer only
14 has to make up the difference between what the employee has recovered and the
15 amount of compensation benefits for which the carrier is responsible. *Id.*
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1 And it was also noted that, "**allowing the credit does not deprive him of his**
2 **right to reopen. It merely gives the carrier credit against any reopening**
3 **benefits to the extent of the settlement proceeds received by the employee.**"

4
5 *Id.* Here, in fairness since the Insurer argues for the position of the *Polito* case,
6 Poremba calls for the Insurer to at least be held to *Polito's* reasoning and
7 Poremba's claim should be re-opened with a credit to the Insurer against any re-
8 opening benefits to the extent of the settlement proceeds netted by Poremba.
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II.

CONCLUSION

Based on the foregoing and upon Appellant's Opening Brief, Appellant respectfully asks this Court to reverse the appeals officer's decision to grant summary judgment in favor of the Insurer and permit Appellant to reopen his workers compensation claim pursuant to NRS 616C3.90.

DATED this 26th day of August, 2015.

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2 **CERTIFICATE OF COMPLIANCE**

3 I hereby certify that this brief complies with the formatting requirements of
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
5 requirements of NRAP 32(a)(6) because it has been prepared in a proportionally
6 spaced typeface using Microsoft Word, Version 7, size 14, Times New Roman. I
7 further certify that this brief complies with the type-volume limitations of NRAP
8 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C),
9 it is proportionately spaced, has a typeface of 14 points, and contains 2,168 words.

10 Finally, I hereby certify that I have read this reply brief, and to the best of
11 my knowledge, information, and belief, it is not frivolous or interposed for any
12 improper purpose. I further certify that this brief complies with all applicable
13 Nevada Rules of Appellate procedure, in particular NRAP 28(e)(1), which requires
14 every assertion in the brief regarding matters in the record to be supported by a
15 reference to the page and volume number, if any, of the transcript or appendix
16 where the matter relied on is to be found. I understand that I may be subject to
17 sanctions in the event that the accompanying brief is not in conformity with the
18 requirements of the Nevada Rules of Appellate Procedure.

19 DATED this 26th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 26th day of August, 2015, the foregoing APPELLANT'S
REPLY BRIEF was submitted by electronic means by e-filing a true copy of the same
through this Court's electronic filing system. Electronic notification will be sent to the
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