IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM POREMBA,
Appellant,
vs.
SOUTHERN NEVADA PAVING; AND S&C CLAIMS SERVICES, INC.,
Respondents.

No. 66888

FILED

MAY 26 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Douglas, J.
Douglas

Cherry, J.
Cherry

Gibbons, J.
Gibbons

cc: Hon. Valorie J. Vega, District Judge
Dunkley Law
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

16-16610

132 Nev., Advance Opinion 24

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FILED

APR 07 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Reversed and remanded with instructions.

Dunkley Law and Mark G. Losee and Matthew S. Dunkley, Henderson, for Appellant.

Lewis Brisbois Bisgaard & Smith, LLP, and Daniel L. Schwartz and Jeanne P. Bawa, Las Vegas, for Respondents.

BEFORE DOUGLAS, CHERRY and GIBBONS, JJ.

OPINION

By the Court, CHERRY, J.:

NRS 616C.215(2)(a) provides that when an injured employee who receives workers' compensation also recovers damages from the responsible party, the amount of workers' compensation benefits must be reduced by the amount of the damages recovered. We held in *Employers Insurance Co. of Nevada v. Chandler*, 117 Nev. 421, 23 P.3d 255 (2001), that an insurer may refuse to pay additional funds via reopening a

workers' compensation claim until the claimant demonstrates that he or she has exhausted any third-party settlement funds and that medical expenses are considered to be compensation that an insurer may withhold until the recovery amount has been exhausted.

In this appeal, we clarify that while a claimant *may* exhaust his or her settlement funds on medical benefits, he or she is not restricted to using settlement funds on medical benefits. Although workers' compensation funds may only be spent on specific expenses, such as medical treatment, Nevada law does not preclude settlement funds from being used to cover typical household expenses.

FACTS AND PROCEDURAL HISTORY

Appellant William Poremba worked for respondent Southern Nevada Paving as a construction driver. On July 22, 2005, in the course of his duty, Poremba was driving a truck when another driver struck the truck with his backhoe. Poremba suffered injuries to his head, neck, back, and knee. Poremba filed a workers' compensation claim, which Southern Nevada Paving, through respondent S&C Claims (collectively S&C), accepted. S&C eventually closed the claim, sending Poremba a letter with instructions on how to reopen the claim should his condition worsen.

Poremba also sued the backhoe driver and his employer. That lawsuit was settled on July 30, 2009, for $63,500, with a significant amount of that settlement paid directly to cover health-care providers' liens. Poremba personally received $34,631.51. He spent approximately $14,000 of the money he received on additional medical treatment. Poremba claims to have spent the remaining settlement money on personal living expenses, such as mortgage payments and food for his family.

Poremba attempted to return to work, but he was unable to do so. Additionally, his doctors instructed him not to go back to work. On January 10, 2013, Poremba sought to reopen his claim, but S&C denied his request. Poremba administratively appealed, and S&C filed a motion for summary judgment, arguing that our decision in *Chandler* precluded Poremba from reopening his claim because he spent settlement funds on expenses other than medical costs. After an evidentiary hearing, an appeals officer summarily granted S&C summary judgment. Poremba petitioned the district court for judicial review. The district court denied the petition, and this appeal followed.

DISCUSSION

Poremba asserts that the appeals officer erred in granting summary judgment because, legally, he is not required to prove that he spent his excess recovery on medical expenses and because factual issues exist as to whether his injury had worsened, necessitating additional compensation. S&C argues that *Chandler* "clearly stands for" the proposition that a claimant who receives a third-party settlement may not spend any of that money on home loans or family expenses and reopen his or her workers' compensation claim when his or her medical situation changes. S&C argues that the point is to prevent a double recovery, asserting that double recovery means simply to recover from two sources for the same injury. We disagree. Although *Chandler* requires a claimant to exhaust all settlement funds before seeking additional funds by reopening his or her workers' compensation claim, we never required that those settlement funds be spent solely on medical expenses. Workers' compensation is a limited-scope benefit while personal injury recoveries are designed not only to pay for medical bills, but to compensate for pain and suffering and provide for lost wages.

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev., Adv. Op. 84, 312 P.3d 479, 482 (2013). Although we defer to an agency's findings of fact, we review legal issues de novo, including matters of statutory interpretation. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev., Adv. Op. 99, 314 P.3d 949, 951 (2013). We defer to an agency's interpretations of its governing statutes or regulations only if the interpretation "is within the language of the statute." *Id.* (internal quotations omitted). "It is unquestionably the purpose of worker's compensation laws 'to provide economic assistance to persons who suffer disability or death as a result of their employment.'" *Breen v. Caesars Palace*, 102 Nev. 79, 83, 715 P.2d 1070, 1072-73 (1986) (quoting *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 694, 709 P.2d 172, 175 (1985)). "This court has a long-standing policy of liberally construing these laws to protect workers and their families." *Id.* at 83, 715 P.2d at 1073 (quoting *State Indus. Ins. Sys.*, 101 Nev. at 694, 709 P.2d at 175).

Whether NRS 616C.215(2) allows a claimant to reopen his or her workers' compensation claim after exhausting his or her settlement funds on nonmedical expenses

Nevada law allows an insurer to claim an offset when the claimant receives money from a lawsuit against the party responsible for the injury. NRS 616C.215(2). In pertinent part, the statute provides as follows:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:

> (a) The injured employee . . . may take proceedings against that person to recover damages, but the amount of the compensation the injured employee . . . [is] entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, *must be reduced by the amount of the damages recovered* . . . .
>
> (b) If the injured employee . . . receive[s] compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer . . . has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of the employee's dependents to recover therefor.

Id. (emphasis added). On its face, this statute does not foreclose a claimant from pursuing reopening of his or her workers' compensation claim, but merely entitles the insurer to an offset based on the settlement the claimant received.

In 2001, this court held that an insurer may withhold payment of medical benefits until the claimant has exhausted any funds received from a third-party settlement. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. *Chandler* did not limit how the claimant may exhaust the settlement funds, despite S&C's assertions to the contrary. Accordingly, it is important to clarify *Chandler* and settle this issue moving forward. In *Chandler*, we held that "compensation," as specified in NRS 616C.215, included medical benefits. *Id.* We never ruled that wage replacement, or any other type of specific payments, were to be excluded. We concluded

that Chandler had to exhaust his settlement proceeds, but we did not decide how he had to exhaust those proceeds. *Id.*[1]

We conclude that it is prudent to clarify whether, according to *Chandler*, medical treatment is the only expense on which one is permitted to exhaust his or her settlement funds. We hold that it is not.

When a person is injured, he or she may sue the responsible party for payment to cover a variety of costs. Restatement (Second) of Torts § 924 (1979). While medical treatment is certainly among those costs, a plaintiff may also recover damages for lost wages if the defendant's actions prevented the plaintiff from working. *Id.* These lost wages, naturally, are meant to cover expenses that one's paycheck would normally cover, such as rent or mortgage, utilities, and groceries.

S&C is correct that the policy behind NRS 616C.215 is to prevent a double recovery. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. S&C, however, mischaracterizes double recovery. Double recovery is characterized based not on the event necessitating the compensation, but on the nature of the compensation provided. S&C cites to *Tobin v. Department of Labor & Industries*, 187 P.3d 780 (Wash. Ct. App. 2008), for the proposition that a claimant should not receive a double recovery as well. *Tobin*, however, explains that double recovery prevents the claimant from receiving compensation from the insurer and "retain[ing] the portion of damages which would include those same elements." 187 P.3d at 783

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[1]In 2007, we again held that compensation, for the purposes of workers' compensation laws, includes medical benefits. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 177, 162 P.3d 148, 152 (2007). We did not limit the term "compensation" to medical benefits.

(internal quotations omitted). The *Tobin* court held that the insurer was only entitled to the portion of proceeds from the third-party suit that correlate to the benefits it provided as a worker's compensation insurer. *Id.* at 784. The *Tobin* court continued:

> [The insurer]'s position would give it an "unjustified windfall" at [the claimant]'s expense. Under [the insurer]'s interpretation, it would be entitled to share in damages for which it has not provided and will never pay compensation. We do not interpret these statutes to require such a fundamentally unjust result. *[The insurer] did not, and will never, compensate [the claimant] for his pain and suffering, therefore it cannot be "reimbursed" from funds designated to compensate him for his pain and suffering.*

Id. (internal citations omitted) (emphasis added).

A worker should not receive funds from two sources to pay for the same lost wages or the same medical treatment. The worker, however, should be permitted to use settlement funds for some medical treatment, or reasonable lost wages expenses, and use workers' compensation funds for other medical treatments.[2] Poremba was hurt in July 2005, has been unable to work since, and sought to reopen his claim in January 2013. This means that he only needed to spend approximately $384.79 per month for the 90 months between the accident and his attempt to reopen his claim to exhaust the $34,631.51 in funds. Poremba does not appear to be trying to achieve a windfall, but to be properly using the system designed to pay for his workplace injuries. To deny him the opportunity to

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[2]The record is silent as to whether Poremba's third-party settlement was specifically allocated to cover medical expenses, pain and suffering, and/or lost wages or if it was simply a general lump sum.

use a system designed to protect injured workers because he used some of his settlement money to feed himself and his family is patently unjust and not supported by the statute.

Accordingly, we conclude that while S&C is entitled to an offset based on the settlement funds received, that offset must include any reasonable living expense for which the settlement funds were used. Whether the funds were used for reasonable living expenses is a factual determination best made by the hearing officer, or in this case, the appeals officer.

Because Poremba was not required to choose between reasonable living expenses, such as paying for housing and food for himself and his family, and seeking workers' compensation to pay for his medical treatment, we must reverse the district court's denial of judicial review and instruct the district court to remand to the appeals officer for further proceedings consistent with this opinion.

Whether the appeals officer erred when issuing a decision without detailed findings of fact and conclusions of law

Poremba argues that the district court erred when it found no improper procedure because Nevada statutes require the appeals officer's order to contain findings of fact and conclusions of law, and they were absent in the appeals officer's order. He further argues that without these findings, it is more difficult for a court to conduct a meaningful review. S&C does not refute Poremba's arguments, but merely suggests that if correct, the remedy would be a remand for a more detailed order. We agree that a more detailed order is required.

Without detailed factual findings and conclusions of law, this court cannot review the merits of an appeal; thus, administrative agencies

are required to issue orders that contain factual findings and conclusions of law. NRS 233B.125. In pertinent part, the statute reads:

> A decision or order adverse to a party in a contested case *must* be in writing or stated in the record. . . . [A] final decision *must include findings of fact and conclusions of law, separately stated.* Findings of fact and decisions *must* be based upon substantial evidence. Findings of fact, if set forth in statutory language, *must* be accompanied by a concise and explicit statement of the underlying facts supporting the findings.[3]

Id. (emphases added). Each and every clause in this statute contains mandatory instruction for the appeals officer, leaving no room for discretion.

The requirements for a claimant to reopen a workers' compensation claim are contained within NRS 616C.390:

> 1. If an application to reopen a claim to increase or rearrange compensation is made in writing more than 1 year after the date on which the claim was closed, the insurer *shall* reopen the claim if:
>
> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
>
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and

[3]This statute was amended in 2015 and changed the standard from "substantial evidence" to "a preponderance of the evidence." 2015 Nev. Stat., ch. 160, § 7, at 708. This change does not affect this opinion.

> (c) The application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.

(Emphasis added.) The statute is silent as to funds that the claimant receives from any other source. *See id.*

Here, not only did the appeals officer fail to issue detailed findings of fact or conclusions of law, the appeals officer precluded Poremba from introducing evidence supporting reopening his case when he admitted that he spent settlement money on expenses beyond medical treatment. This illustrates that the appeals officer had the same false impression of the law as do the insurers. Therefore, not only did the administrative agency err when it failed to comply with NRS 233B.125's mandate for detailed findings and conclusions, but because the appeals officer's misunderstanding of the law prevented Poremba from presenting the required evidence to reopen his claim, we are unable to review the facts in this appeal. Accordingly, we must reverse and remand for an evidentiary hearing and subsequent order containing detailed findings of fact and conclusions of law as to whether Poremba meets the requirements of NRS 616C.390, and if so, how much of an offset may S&C claim based on the amount of settlement funds that Poremba used on reasonable living expenses, including but not limited to medical treatment, housing, and food for himself and his family.

CONCLUSION[4]

Accordingly, the judgment of the district court is reversed, and we remand to the district court with instructions to remand to the appeals officer for a new hearing and determination, consistent with this opinion.

Cherry, J.
Cherry

We concur:

Douglas, J.
Douglas

Gibbons, J.
Gibbons

[4]Poremba argued that the appeals officer improperly revived S&C's motion for summary judgment. Because we conclude both that *Chandler* does not prevent a claimant from exhausting his or her third-party settlement funds on reasonable living expenses and that the appeals officer's order must contain detailed factual findings and conclusions of law, we decline to address this issue.

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM POREMBA,

Appellant,

v.

SOUTHERN NEVADA PAVING; AND S&C CLAIMS SERVICES, INC.,

Respondents.

Supreme Court No.: 66888

District Court No.: A-14-698184-J

RESPONDENTS' SOUTHERN NEVADA PAVING'S AND S & C CLAIMS SERVICES, INC.'S PETITION FOR EN BANC RECONSIDERATION

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I.

BRIEF SUMMARY OF ARGUMENT FOR RECONSIDERATION

The underlying Opinion in the instant case, filed on April 7, 2016 (attached hereto as **Exhibit A**)(hereinafter the "Opinion"), presents an unworkable formula for calculating how a third-party settlement can be exhausted prior to accessing additional worker's compensation benefits. The major flaw in the Opinion is the failure to account for potential wage replacement benefits, such as temporary total disability (hereinafter "TTD"), while the settlement funds are being exhausted. As will be shown below, by excluding TTD benefits from the exhaustion calculation, a claimant could spend settlement funds that he would not have been able to spend were he on workers' compensation benefits and thus reach exhaustion faster than appropriate, resulting in a double recovery. Put simply, if a worker's compensation claimant is allowed to use funds beyond pure medical expenses to exhaust a third party settlement, that claimant should be limited to using funds that he would have received were his claim being actively administered.

Second, the Opinion utilizes a standard of review that has not been applicable in this state since 1993, namely the liberal interpretation of workers' compensation statutes. By liberally construing the Opinion in favor of claimants, this Court has either applied an inappropriate legal standard, contrary to clear legislative intent, or expressed an intention to overrule the Nevada Legislature. NRS 616A.010. In either

case, a rehearing is necessary to account for the standard of review that the Court is using to decide the instant matter.

Further, the Opinion expresses a misapprehension of how Petitioner's settlement was to be allocated. As explained in Respondent's underlying brief, and at oral argument, a portion of Petitioner's settlement funds was clearly allocated to be repaid to Respondent Insurer. However, to date, Petitioner has not repaid Respondent a single penny. Thus, not only is the Opinion allowing Petitioner a double recovery by not addressing wage replacement benefits, in fact it is allowing a triple recovery by not accounting for the funds that Petitioner previously agreed to repay.

Finally, the Opinion did not address the fact that Petitioner had attempted to reopen his claim once before the instant attempt, using the exact same evidence, and was denied reopening. This prior attempt was affirmed by an Appeals Officer. As such, the instant appeal should be barred by res judicata. A rehearing is necessary to address this issue.

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II.

STANDARD OF REVIEW

Establishing the necessity of reconsideration en banc by this Honorable Court is governed by NRAP 40 and NRAP 40A, which provide in pertinent part:

> **Rule 40. Petition for Rehearing**
> (a) Procedure and limitations.
> (1) Time. Unless the time is shortened or enlarged by order, a petition for rehearing may be filed within 18 days after the filing of the appellate court's decision under Rule 36. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule.
> (2) Contents. The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue....
>
> (c) Scope of application; when rehearing considered.
> (1) Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing.
> (2) The court may consider rehearings in the following circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case....

Rule 40A. Petition for En Banc Reconsideration

(a) Grounds for en banc reconsideration. En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). Petitions for en banc reconsideration in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).

(b) Time for filing; effect of filing on finality of judgment. Any party may petition for en banc reconsideration of a Supreme Court panel's decision within 10 days after written entry of the panel's decision to deny rehearing. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule. No petition for en banc reconsideration of a Supreme Court panel's decision to grant rehearing is allowed; however, if a panel grants rehearing, any party may petition for en banc reconsideration of the panel's decision on rehearing within 10 days after written entry of the decision. If no petition for rehearing of the Supreme Court panel's decision is filed, then no petition for en banc reconsideration is allowed.

(c) Content of petition. A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases. If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved. The petition shall be supported by points and authorities and shall contain such argument in support of the petition as the petitioner desires to present. Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time.

(d) Form of petition and answer; number of copies; length; certificate of compliance. A petition for en banc reconsideration of a Supreme Court panel's decision, or an answer to such a petition, shall comply in form with Rule 32, and an original and 8 copies shall be filed with the clerk unless the court by order in a particular case shall direct a different number. One copy shall be served on counsel for each party separately represented. Except by permission of the court, a petition for en banc reconsideration, or an answer to such a petition, shall not exceed 10 pages. Alternatively, the petition or answer is acceptable if it contains no more than 4,667 words, or if it uses a monospaced typeface, and contains no more than 433 lines of text. The petition or answer shall include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms.

(e) Answer and reply. No answer to a petition for en banc reconsideration or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court, the answer to a petition for en banc reconsideration shall be filed within 15 days after entry of the order requesting the answer. A petition for en banc

> reconsideration will ordinarily not be granted in the absence of a request for an answer.
>
> (f) Action by court if granted. Any two justices may compel the court to grant a petition for en banc reconsideration. If a petition for en banc reconsideration is granted, the court may make a final disposition of the cause without reargument or may place it on the en banc calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Here, Respondent requested Rehearing of the underlying Opinion. On May 26, 2016, Rehearing was denied. (Attached hereto as **Exhibit B**) The instant Petition has been filed within 10 days of the denial of Rehearing and is therefore timely. As for the content of this Petition, as will be explained below, in the Opinion, the Court has: (1) either failed to utilize the proper standard of review or overruled the Nevada State Legislature; (2) failed to account for how statutory wage replacement benefits should be factored into its exhaustion calculation; (3) failed to properly apprise itself of the record on appeal with regard to the status of Petitioner's settlement funds; and (4) has not addressed whether the instant issue is barred by res judicata. Reconsideration en banc is necessary to address these issues.

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III.

ARGUMENT

1. The Court Misapprehends The Legal Parameters Of Nevada's Workers' Compensation System

Before addressing the ultimate holding of the Opinion and the actual subject matter at hand, a review of the standard utilized in reaching that holding may shed light on the inherent flaw therein. In the opening paragraphs of the Opinion, the Court cites to Breen v. Caesars Palace, 102 Nev. 79, 83, 715 P.2d 1070, 1072-73 (1986) for the proposition that "this court has a long-standing policy of liberally construing these laws to protect workers and their families." However, this citation, and indeed the entire premise of the Opinion, does not reflect the current status of the application of the law as it relates to the workers' compensation system in Nevada.

As this Court noted in Mitchell v. Clark Cty. Sch. Dist., 121 Nev. 179, 183, 111 P.3d 1104, 1107 (2005), "NRS 616A.010(2)[1] specifically abrogates the common-law requirement that workers' compensation statutes be construed liberally because they are remedial in nature. Instead, NRS 616A.010(4) requires a neutral interpretation of the workers' compensation laws."

By utilizing a liberal construction of the workers compensation statutory scheme, the Court has either expressed an intention to overrule NRS 616A.010 on

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[1] NRS 616A.010 was passed into law in 1993, seven years after the Breen decision.

some grounds that are not discussed in the Opinion, or the Court has simply used the wrong standard. In either case, en banc reconsideration is necessary so that the Court may address the standard to which the Opinion is adhering so as to maintain uniformity of decision of the Supreme Court.

2. Funds Used For Exhaustion Must Be Analogous To Actual Worker's Compensation Benefits To Avoid A Double Recovery

In the Opinion, the Court correctly opines that "NRS 616C.215(a) provides that when an injured employee who receives workers' compensation also recovers damages from the responsible party, the amount of workers' compensation benefits must be reduced by the amount of damages recovered." Indeed, the Court is also correct that "Nevada law does not preclude settlement funds from being used to cover household expenses." However, by extending these principles to the Court's conclusion that the "offset must include reasonable living expenses for which the settlement funds were used," the Court has erroneously equated settlement funds with workers' compensation benefits and therefore provided Petitioner with a double recovery. Put simply, reasonable living expenses should not exceed the benefit the claimant would receive if the claimant was receiving workers' compensation benefits, such as TTD.

As noted above, the Court's holding is premised on the Court's misapprehension that the statutes governing the worker's compensation system should be liberally construed. With that faulty basis, the Court goes on to opine that the

workers compensation is "designed to protect injured workers" and because of that design, Petitioner should be able to use "reasonable living expenses" to exhaust his settlement under NRS 616C.215(a). However, protecting injured workers is not the purpose of workers compensation.

The Nevada Legislature clearly stated that the purpose of workers' compensation in Nevada is to "ensure the quick and efficient payment of compensation to employees who are injured or disabled employees at a reasonable cost to the employers who are subject to the provisions of those chapters." NRS 616A.010. Nevada currently has a "neutral interpretation of the workers' compensation laws." Mitchell, id. As such, the premise that workers' compensation is somehow a shield for injured workers is an incorrect interpretation of the entire system and sets an unworkable precedent for future cases which cannot be reconciled with the provisions of chapters 616A to 617.

Further, as is also clearly laid out in NRS 616A.010, workers' compensation is limited to the provisions of chapters 616A to 617. Nowhere in those provisions does the Nevada Legislature allow injured workers to obtain "reasonable living expenses." As space for the instant Petition is limited, it is sufficient to note that workers' compensation generally provides two basic types of benefits: (1) accident benefits, i.e.

reasonable medical expenses; and (2) wage replacement benefits.[2] There is no third category for living expenses such as mortgage, groceries, car payments, tuition, etc.

The way the Opinion is currently constructed, the Court has removed workers' compensation from the constraints of chapters 616A to 617 and created a third category for "reasonable living expenses" which will need to somehow be regulated within the boundaries of chapters 616A to 617. This sort of liberal interpretation is exactly what NRS 616A.010 was enacted to prevent.

At a practical level, claimants could spend their settlement funds on something such as a new house, claim the expense as reasonable, and then reach their workers' compensation funds. However, what is a reasonable expense for a house? The answer differs for almost every single person and is certainly not found within the confines of chapters 616A to 617. Further, what must a claimant submit to prove this allotment for "reasonable living expenses?" Tax returns? Car payments? Grocery bills? Fast food receipts? Gambling losses? None of this is clear in the Opinion.

The correct approach would be what is espoused in Tobin v. The Dept. of Labor and Industries, 145 Wn. App. 607, 613, 187 P.3d 780, 783 (Wn. Ct. App. 2008), which was cited in the Opinion with no rationale for why its holding is invalid. The Opinion

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[2] In their Answering Brief, Respondents mentioned several times that Petitioner could only exhaust his third-party settlement funds via medical expenses before worker's compensation benefits are reachable. However, as was explained at oral argument, Respondents do concede that their theory should be expanded to include wage replacement benefits. Further, this position was advocated for explicitly at page 15 lines 20-27 of Respondents' Answering Brief.

summarizes Tobin as holding that **"the insurer was only entitled to the portion of the proceeds from the third-party suit that correlate to the benefits it provided as a worker's compensation insurer."** This should have been the holding of the Opinion. However, after citing Tobin, the Opinion then jumps into a discussion about the plight of Petitioner and how Nevada has avowed to protect injured workers such as he. This Court has provided no justification for why the approach in Tobin should not be adopted other than an incorrect interpretation of the purpose of workers' compensation in Nevada.

If this Court is going to allow more than medical expenses to offset a third party recovery, the proper way to do so would be to confine that offset to whatever wage replacement benefits a claimant would be entitled to under chapters 616A to 617, i.e., TTD benefits. If a claimant can prove that they are entitled to TTD benefits subsequent to receiving a settlement, then using that claimant's TTD calculation in conjunction with medical benefits would be the proper way to determine when a settlement has been exhausted. Anything that the claimant spends above and beyond the TTD rate would be a personal expense to the claimant just as it would if his/her claim was currently being administered.

Allowing the present "reasonable living expenses" standard as espoused in the Opinion would completely invalidate the purpose of workers' compensation in the state, allow for double recoveries by claimants, and present the administrative courts

with an issue they are not equipped to handle. A reconsideration en banc on this matter is certainly necessary.

3. The Opinion As Written Has Allowed Petitioner Poremba A Triple Windfall

Not only does the Opinion create the unworkable standard of "reasonable living expenses" which allows Petitioner to access funds from his workers' compensation insurer that a non-settlement claimant would not be able to do, the Court has also chosen to over look the fact that the third-party settlement, executed in 2009, provided that Petitioner was to reimburse Respondent Insurer almost $15,000. (Record on Appeal at p. 187) (hereinafter "ROA at p.__") NRS 616C.215. Needless to say, since 2009, Petitioner has provided Respondent Insurer with exactly zero dollars out of the almost $15,000 which claimant was obligated to pay.

At footnote two, the Court claims the "record is silent" as to how Petitioner's settlement funds were allocated. Respondent would refer the Court to page 187 of the Record on Appeal for a complete breakdown of the settlement provided by Petitioner's counsel. Based on the Court's seeming rubber stamp of Petitioner's choice to refrain from honoring his debts, Petitioner has now received a triple windfall simply because he had a third party settlement. Reconsideration en banc is required.

4. The Matter Is Res Judicata

As a final point, the Opinion is silent on the issue of res judicata regarding the reopening of Petitioner's claim. On May 17, 2011, an Appeals Officer granted

Respondent's Motion for Summary Judgment regarding Petitioner's prior attempt to reopen his claim. (ROA at pp. 243-244) Then after waiting one year, Petitioner submitted the same medical evidence he had submitted previously and requested reopening. As was discussed in Respondents' Answering Brief[3] and at oral argument, this Court should have held that claimant's second attempt to reopen was barred by res judicata. State Indus. Ins. Sys. v. Partlow-Hursh, 101 Nev. 122, 696 P.2d 462, (1985). At the very least the matter should have been addressed in the Opinion.

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...

[3] See page 7:27-8:3 of Respondents' Answering Brief.

V.

CONCLUSION

Based upon the foregoing, Respondents respectfully contend that the Opinion filed by this Court on April 7, 2016 needs to be reevaluated to comport with Nevada law. Accordingly, reconsideration en banc on this matter is warranted. Wherefore, Respondents respectfully ask this Honorable Court to Grant this Motion for Reconsideration En Banc.

DATED this 31 day of May, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft WORD software in 14 point Times New Roman font.

2 I further certify that this brief complies with the page limitations of NRAP 40A(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), pursuant to the word count provided by Microsoft WORD, the document type volume limitation does not exceed 4,667 words.

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

Dated this 27 day of May, 2016.

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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 18th day of May, 2016, service of the foregoing **RESPONDENTS' SOUTHERN NEVADA PAVING'S AND S & C CLAIMS SERVICES, INC.'S PETITION FOR EN BANC RECONSIDERATION** was made this date by depositing a true copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed as follows:

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