IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY FELTON,

Appellant,

vs.

Case No.: 70497

DOUGLAS COUNTY; PUBLIC AGENCY COMPENSATION TRUST; and APPEALS OFFICE of the DEPARTMENT OF ADMINISTRATION,

Respondents.

Appeal from a District Court Order
Denying Petition for Judicial Review
First Judicial District Court, Carson City
Department I
Case No. 15 OC 00048 1B

CORRECTED APPELLANT'S REPLY BRIEF

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DISCLOSURE STATEMENT

(NRAP 26.1(a))

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Appellant's parent corporations:

None.

Firms having appeared:

Nevada Attorney for Injured Workers.

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Appellant's pseudonyms:

None.

Submitted this 13th day of June, 2017

NEVADA ATTORNEY FOR INJURED WORKERS

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II.

ARGUMENT

A. The respondents' claim administrator, Alternative Service Concepts, chose a deemed wage under NRS 616A.157.

At issue is a November 11, 2013, determination wherein the workers' compensation claim administrator Alternative Service Concepts ("ASC") chose to calculate Mr. Felton's average monthly wage under NRS 616A.157, using only the deemed average monthly wage for search and rescue volunteers. Appellant's Appendix ("AA") p. 287.

The respondents erroneously argue that NRS 616A.130 is the controlling statute when calculating Mr. Felton's average monthly wage. Whether NRS 616A.130 sets forth the correct deemed average monthly wage is not relevant to whether Mr. Felton is entitled to the sum of his deemed wage and his actual wage because the deemed wage in NRS 616A.130 was not before the appeals officer. However, the appellant, erring on the side of caution, addresses the issue.

In workers' compensation, a worker may become injured and may file a claim. NRS 616C.015 requires that the injured

employee give his employer notice of the injury within seven (7) days. NRS 616C.020 requires that the employee file a request for compensation within ninety (90) days. The parties do not dispute that Mr. Felton made a timely notice of injury and request for compensation.

An appeals officer obtains jurisdiction over a matter after a party, aggrieved by an insurer or employer's determination, requests a hearing with the hearings division within seventy (70) days of such a determination. NRS 616C.315. A party aggrieved by the decision of the hearing officer then must file an appeal with the appeals officer within thirty (30) days after the date of the decision. NRS 616C.345.

Mr. Felton timely appealed the November 11, 2013, average monthly wage determination to the Department of Administration's Hearing's Division, and an informal hearing was set before a hearing officer on February 10, 2014. AA, 15. A February 20, 2014, hearing officer's decision affirmed the calculation of Mr. Felton's wage based upon the deemed wage in NRS 616A.157 only. AA, 1. Mr. Felton disagreed with the

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decision, and he timely appealed to the appeals officer on March 18, 2014. AA, 23.

There is nothing in the November 11, 2013, determination stating that Mr. Felton's average monthly wage was calculated under NRS 616A.130. Thus, the matter was not properly before the appeals officer, and the appeals officer did not have jurisdiction to consider matters outside of the November 11, 2013, determination.

Moreover, the appeals officer in her February 4, 2014, decision and order considered the applicability of NRS 616A.130. Per that decision and order, with regard to NRS 616A.130, the appeals officer found that neither the Public Agency Compensation Trust ("PACT") or the employer Douglas County appealed the November 11, 2013, determination. AA, p.392 Fn.2. Generally, the Court will not consider an issue that was not properly before a court on appeal. *See* Kahn v. Dodds (In re AMERCO Derivative Litig.), 127 Nev. 196, 217, 252 P.3d 681, 697 (2011). More importantly, the appeals officer's decision and order (AA, p.392 Fn.2) cited to Browning v. Young Elec. Sign Co., 113 Nev. 420, 421, 936 P.2d 322, 323 (1997). The Browning case confirmed that

an employer who had failed to timely appeal the decision of its third party administrator lost its right to challenge the validity of the determination granting benefits on appeal to the Nevada Supreme Court. Id., at 424 and 325. Neither of the two respondents, the PACT or Douglas County, filed a petition for judicial review challenging the appeals officer's decision and order. More importantly, the Court has spoken on considering matters not properly before an appeals officer in other authority. Day v. Washoe Cty. Sch. Dist., 121 Nev. 387, 390 n.8, 116 P.3d 68, 70 (2005). In Day the Court citing to Browning confirmed that, "once a third-party administrator accepts an insurance claim, the insurer must timely appeal the decision or it loses its right to challenge the validity of the award." Id.

The respondents failed to appeal the November 11, 2013 determination to the appeals officer. Therefore the Court should not consider the deemed wage under NRS 616A.130 argument, because the issue was not properly before the appeals officer at the time of the hearing and is not properly before the Court now.

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B. Neither Larson's, case law from other jurisdictions or statutory construction prohibit the summing of wages earned or deemed to have been earned when an employee has concurrent employment under NAC 616C.447.

The appeals officer (AA p. 374) and respondents cite generally to Larson's Workers' Compensation Law, arguing that concurrent employment must be related or similar before wages may be summed in an average monthly wage calculation. The appeals officer's order, currently under review, fails to include a factual finding about the similarity of Mr. Felton's concurrent employment. The Supreme Court has opined about this problem recently stating, "[h]ere, under the plain and unambiguous language of NRS 233B.125, the appeals officer's order should have 'include[d] findings of fact and conclusions of law, separately stated.'" Elizondo v. Hood Mach., Inc.,129 Nev. Adv. Rep. 84, 3, 312 P.3d 479, 482 (2013)(citation omitted). A proper order cannot simply opine about a legal issue with no finding of fact about the issue. Id.

Although the appeals officer and respondent rely upon Larson's, they omit pertinent language from the summary of law found in Larson's which states:

> The majority rule, **by a very narrow numerical margin** is that the earnings may be combined if, but only if, the employments were "related" or "similar." A substantial **and growing** minority rule is that the earnings may be combined whether or not the employments were related or similar. 5 Larson's Workers' Compensation Law § 93.03 [1][a] (Emphasis added).

If Larson's is accurate, the very narrow margin will soon be eclipsed by the growing rule that concurrent jobs do not need to be related or similar for an injured worker to have the concurrent wages included in the average monthly wage calculation. It is arbitrary that the appeals officer's order cites to Larson's for the idea that a given position is held by a majority, but then specifically ignore Larson's where the similar employment requirement is criticized as unfair. *See* Larson's § 93.03[1][c]-[1][g].

Respondents cite to cases from other jurisdictions involving volunteer firemen and whether a fireman's deemed and actual wages may be combined. The Appellant is not a volunteer fireman. Moreover, the legislature with the passage of NRS 616A.010(3) renounced the rights and defense of employers and employees recognized at common law. The courts in different

states arrive at very different outcomes regarding average monthly wage calculations. See the list of jurisdictions rejecting the employment related or similar rule at Larson's Digest Ch. 93 §93.03D[1][a]. Each court is interpreting the very different statutes and laws which locally control the combination of concurrent wages. In Nevada, the legislature placed responsibility over the average monthly wage calculation methods with the Administrator of the Division of Industrial Relations via NRS 616C.420, and the Administrator in regards to concurrent employment promulgated NAC 616C.447.

To this point, there is no reason to look to a secondary source or other case law when NRS 616C.420 required the administrator to provide by regulation for a method of calculating an average monthly wage. The regulation, NAC 616C.447, clearly states that concurrent wages are to be summed with no reference to the similarity of the concurrent employment.

The respondents cite to a footnote containing dictum in Ayala v. Caesars Palace, 119 Nev. 232, 240, 71 P.3d 490, 495, FN. 14 (2003), and then speculate that the Supreme Court might adopt a related employment rule where the legislature has not done so.

The Court will not adopt a related employment rule, because workers' compensation is uniquely legislative. "The Court will not disturb-refused to disturb the delicate balance created by the legislature by implying provisions not expressly included in the legislative scheme." Weaver v. State Indus. Ins. Sys., 104 Nev. 305, 305-306, 756 P.2d 1195, 1195 (1988). In Weaver the Court refused to imply that a claimant was entitled to an award of interest on workers' compensation benefits prior to the passage of an interest on compensation statute in the legislative scheme. The Court has repeatedly refrained from implying provisions in workers' compensation. In Ransier v. State Indus. Ins. Sys., 104 Nev. 742, 745-746, 766 P.2d 274, 276 (1988) the Court refused to imply that an insurer or employer could recover when there is no statutory authority within the workers' compensation act that authorizes suits by the insurer to recover erroneously paid benefits. More recently in Silvera v. Emplrs Ins. Co., 118 Nev. 105, 108, 40 P.3d 429, 431 (2002) the Court reiterated that it has "repeatedly refused to imply provisions into the workers' compensation scheme that have not been expressly included by the legislature." The Court should

not imply an employment related rule, given the Court's long history of precedent refraining from implying provisions not expressly included in the legislative scheme.

In addition, "dictum is not controlling." St. James Vill., Inc. v. Cunningham, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009)(citation omitted). "A statement in a case is dictum when it is "unnecessary to a determination of the questions involved.'" Id., citing Stanley v. Levy & Zentner Co., 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941). The Ayala Court's FN 14 was appended to the Court's holding that the matter be remanded because the agency ruling was without substantial evidence. Ayala, at 240. The issue of related employment was not necessary to the Ayala Court's determination. However, Ayala is helpful in clarifying that NAC 616C.447 requires an employee must have jobs with two employers on the date of injury in order to be considered concurrent employment when calculating an average monthly wage. *See also* NRS 616C.425.

The appeals officer did not make a finding that Mr. Felton's two jobs were not alike. In accordance with Elizondo v. Hood Mach., Inc.,129 Nev. Adv. Rep. 84, 3, 312 P.3d 479, 482

(2013), the appeals officer was required to make such a factual finding when she imposed a related employment requirement.

The question whether the current Nevada Court might create a similar employment rule does not arise in the current matter because NRS 616C.420 and NAC 616C.447 are not ambiguous.

There is no conflict between the general statute, NRS 616A.065 and NAC 616C.447. As described in Mr. Felton's opening brief, NRS 616A.065 is a general definition statute requiring wages either paid or deemed be included in an average monthly wage calculation. NRS 616A.065 also limits maximum average monthly wage amount. NRS 616A.065 does not address or contemplate the concept of concurrent employment. Under the respondent's construction of NRS 616A.065, when calculating an average monthly wage they get to choose between the actual wage received or a deemed wage. If you are injured and unable to work, then you are unable to work both jobs not just the volunteer job.

The Legislature in NRS 616C.420, a more specific statute, required the Administrator to provide by regulation a method of determining an average monthly wage. The Administrator

did so in enacting NAC 616C.420 through NAC 616C.447. NAC 616C.447 sets forth the method for calculating wages from concurrent employment. NAC 616C.447, clearly states that concurrent wages are to be summed with no reference to the similarity of the concurrent employment. "The average monthly wage of an employee . . . on the date of the disabling accident or disease is equal to the sum of wages earned or deemed or deemed to have been earned at each place of employment. NAC 616C.447 (emphasis added)." Under NAC 616C.447, wages deemed or earned from each place of employment are required to be summed when an average monthly wage is to be calculated. Statutes dealing specifically with a subject prevails over a general provision. State Indus. Ins. v. Surman, 97 Nev. 366, 368, 741 P.2nd 1357, 1359 (1987). The resulting regulation specifically requires the combining of deemed and received wages for concurrent employment when calculating average monthly wage.

The Legislature first enacted NRS 616C.420, which was substituted in revision for NRS 616.624, in 1981, and NRS 616C.420 was last amended in 1983. NAC 616C.447 has been in effect since 1982 and was last amended in 1999. If there was a

conflict of law between the statutes and the average monthly wage regulations, the Legislature certainly could have acted in 2013 when the Legislature enacted NRS 616A.157. As the Supreme Court has stated, "[i]t is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." Boulder City v. General Sales Drivers, Local Union No. 14, 101 Nev. 117, 118-119, 694 P.2nd 498, 500 (1985).

It must be presumed that when the Legislature required the Administrator to promulgate regulations for determining average monthly wages in NRS 616C.420, the Legislature was aware of the language in NRS 616A.065. Likewise, the Legislature did not intend for NRS 616A.065 to control the calculation of average monthly wage when the Legislature in NRS 616C.420 required the Administrator by regulation to determine the method for calculating average monthly wages. The resulting regulation, NAC 616C.447, requires deemed and received wages for concurrent employment be summed when calculating an average monthly wage. It cannot be argued the more specific NAC 616C.447 does not prevail over the general definitions found in NRS 616A.065.

The appeals officer stated that NAC 616C.447 might be deemed to exceed, modify and conflict with NRS 616A.065 and the search and rescue statute NRS 616A.157. ROA 376. Respondents argue that NAC 616C.447 expands the scope of NRS 616A.065 violating Public Agency Comp. Turst v. Blake, 127 Nev. Adv. Rep. 77, 265 P.3d 694 (2011). In Blake, the Court stated, "administrative regulations cannot contradict the statute they are designed to implement." Id., (citation omitted). NAC 616C.447 implements the method of determining an average monthly wage as required by NRS 616C.420. Nothing in NRS 616A.065 or NRS 616A.157 prohibits the summing of concurrent employment wages whether earned or deemed. In addition, in light of Blake it cannot be argued that NAC 616C.447 contradicts the implementation statute of NRS 616C.420.

C. Public policy and Nevada law are not factors preventing the inclusion of deemed and earned concurrent wages when calculating an average monthly wage.

The appellant addressed these arguments in his opening brief. In addition, the respondents also fail to address the appellant's statutory construction arguments contained within his opening brief. Since these are not new matters set forth in

respondent's answering brief, in compliance with NRAP 28(c), Mr. Felton refers the Court to his opening brief.

III.

CONCLUSION

Thus, the Court should REVERSE the district court's denial of judicial review with instructions to remand the matter to the appeals officer requiring that Mr. Felton's average monthly wage shall be based upon the sum of his deemed wage as a search and rescue volunteer as well as his Hewlett Packard wage earned at the time of his injury.

RESPECTFULLY SUBMITTED this 13th day of June, 2017.

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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 Word Perfect X3 in Times Roman font size 14; or

__X__ This brief has been prepared in a monospaced typeface using Word Perfect X3 with 10.5 characters per inch in Courier New Font size 12.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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__X__ Does not exceed 15 pages.

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 13th day of June, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(C)(1)(a-d)(2)(3), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on this date, the foregoing was electronically filed with the clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered with the Eflex as users will be served by the Eflex system as follows:

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And, pursuant to NRCP 5(b), I deposited for mailing at Carson City, Nevada, a true and correct copy of the within and foregoing CORRECTED APPELLANT'S REPLY BRIEF:

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DATED: June 13, 2017

SIGNED: Nancy L. Sherwood