Case No. 70497

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY FELTON,
Appellant
vs.
DOUGLAS COUNTY, PUBLIC AGENCY COMPENSATION TRUST, and ALTERNATIVE SERVICE CONCEPTS, LLC,
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

RESPONDENTS' PETITION FOR REHEARING

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Service Concepts, LLC,

I. Introduction

It is within the discretion of the Court to consider a petition for rehearing is under the circumstances set forth in NRAP 40. Specifically, the court may rehear a case in the following circumstances: (1) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case; or (2) 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.

As hereafter discussed, in this matter, the Court has overlooked a material fact in the record and a material question of law, which in turn caused the Court to misapply the regulation which it found controlling in this case, namely NAC 616C.447.

II. Aggregation of wages actually earned and deemed to have earned is contrary to public policy, unless the work-related injury has resulted in a wage loss (or diminution in earning capacity) on either a temporary or permanent basis in all jobs constituting the concurrent employment.

The average monthly wage (AMW) is used to calculate the sum of monetary compensation for a wage loss or diminishment in wage earning capacity from a work-related injury on either a temporary or permanent basis. *See generally*, NRS 616A.065; NRS 616C.440(1)(a); NRS 616C.475(1); NRS 616C.490(1)(7); NRS 616C.505(1)(2); NRS 616C.575; NAC 616C.577. In this

case, there is no record evidence proving that the work-related knee injury (from work as a search and rescue volunteer) disabled or will disable Mr. Felton from working (or caused a diminution in his wage earning capacity) at Hewlett-Packard. *See generally*, App. Vol. 2. at pp. 314-317, 319.

In the initial opinion of this Court, the concurrent employment regulation was interpreted as permitting aggregation of wages actually earned and deemed to have earned **without regard** to whether the work-related injury disabled the employee from working (or caused a diminution in the employee's wage earning capacity) at both the employment at which earned wages were derived and the employment at which the deemed wage was derived. Indeed, the concurrent employment regulation was interpreted by the Court as permitting aggregation of wages actually earned and deemed to have earned by the mere fact of concurrent employment. In the light of existing Nevada law concerning the purpose of the AMW, it is respectfully submitted that the concurrent employment regulation (NAC 616C.447) permits aggregation of wages actually earned and deemed to have earned **only if** the work-related injury has disabled (or will disable) the employee from working (or caused a diminution in the employee's wage earning capacity) at both the employment from which earned wages are derived and the employment at which the deemed wage is derived.

Indeed, if the Court adopts as law its current interpretation of the concurrent employment regulation, namely that aggregation of wages actually earned and deemed to have earned is permitted by the mere fact of concurrent employment, the result can (and will under the circumstances of this case) be contrary to the legislative purpose of the AMW, namely to only pay monetary compensation to the employee for a wage loss (or diminution in wage earning capacity) on either on a temporary or permanent basis that has resulted from a work-related injury. More specifically, if the work-related injury has not resulted in a wage loss (or diminution in earning capacity) on either a temporary or permanent basis in all jobs constituting the concurrent employment, it would be contrary to public policy to aggregate wages actually earned and deemed to have earned. Indeed, in the foregoing circumstance, the injured employee would be paid for a wage loss (or diminution in wage earning capacity) that the employee did not incur from the work-related injury. In contrast, it is consistent with existing law (i.e. public policy) concerning the legislative purpose of the AMW to permit aggregation of wages actually earned and deemed to have earned **only if** the work-related injury has disabled the employee from working (or caused a diminution in wage earning capacity) at both the employment at which earned wages are derived and the employment at which the deemed wage is derived. *See generally, Fronczak v. Workmen's Comp. Appeals Bd.*, 629 A.2d 1060, 1062- 63 (Pa.Commw. Ct. 1993)

(notwithstanding language of concurrent employment statute, it is unjust to permit the injured employee to receive benefits based upon wages from her concurrent job, when she was not disabled from that job); *Katsoris v. South Jersey Publishing Co.*, 622 A.2d 219 (N.J. Sup. Ct. 1993) (critical inquiry is whether petitioner has demonstrated that her injuries, which disable her from engaging in part-time employment, have disabled or will disable her with respect to her earning capacity in contemporary or future full time employment).

In accordance with the foregoing, because there is no record evidence that the work-related knee injury disabled or will disable Mr. Felton from working (or caused a diminution in his wage earning capacity) at Hewlett-Packard, aggregation of wages actually earned at Hewlett Packard and wages statutorily deemed to have earned as a search and rescue volunteer is not permitted under the concurrent wage regulation, because aggregation would be contrary to existing public policy concerning the purpose of the AMW. *See generally*, App. Vol. 2. at pp. 314-317, 319.

III. Permitting aggregation of wages actually earned and deemed to have earned based upon the mere fact of concurrent employment creates a financial disincentive for continuation of volunteer programs

The Nevada Legislature has sanctioned a number of volunteer programs under the umbrella of the industrial insurance act. *See e.g.s.*, NRS 616A.130, NRS 616A.135, NRS 616A.145, NRS 616A.155, NRS 616A.157, NRS 616A.160, NRS

616A.205, NRS 616A.207. To encourage volunteer participation in such programs, the legislature provided statutory deemed wages for volunteers in the event of work-related injury while performing volunteer service.[1] Permitting aggregation of wages actually earned and deemed to have earned based upon the mere fact of concurrent employment creates a financial disincentive for the continuation of volunteer programs, thereby undermining the public policy represented by legislatively sanctioned volunteer programs.

IV. CONCLUSION

In accordance with the foregoing, Douglas County, the PACT, and ASC respectfully request this Court to grant its Petition for Rehearing, and affirm the District Court's February 2, 2016, order denying Felton's petition for judicial review, and to affirm the Appeals Officer's February 4, 2015, decision and order, that rejected Felton's request for aggregation of his wages from concurrent employment at Hewlett Packard (wages earned or received) with his statutory deemed wage as a volunteer.

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[1] Volunteers also receive as a benefit under the industrial insurance act medical care for work-related injuries.

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 it has been prepared in a proportionally spaced typeface using Word, Version 7, size 14, Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and is ten pages in length or less.

3. Finally, I hereby certify that I have read this petition for rehearing, 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 petition 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

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with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This 5th day of March, 2018.

THORNDAL ARMSTRONG
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By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of the law firm of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, and on this date, I caused to be served via the Supreme Court's e-filing system, a true and correct copy of the foregoing document, addressed to the following:

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DATED this 5th day of March, 2018.