IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 70497

GREGORY FELTON,
Appellant,

vs.

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

APPELLANT'S ANSWER TO PETITION FOR REHEARING

NEVADA ATTORNEY FOR INJURED WORKERS
EVAN B. BEAVERS, ESQ.
Nevada State Bar No. 3399
Samantha Peiffer, Esq., Deputy
Nevada State Bar No. 13269
1000 E. William Street, Suite 208
Carson City, Nevada 89701
(775) 684-7555
ebeavers@naiw.nv.gov
speiffer@naiw.nv.gov
Attorneys for Appellant, Gregory Felton

I.
ARGUMENT

A. Standard of review

Petitions for rehearing may be considered when "the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or . . . the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2). Additionally, "[m]atters 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." NRAP 40(c)(1). Respondents contend that this Court has overlooked a material fact in the record and a material question of law. These arguments lack merit.

B. Respondents' contention that an injured worker must demonstrate wage loss from all employment is being raised for the first time in the Petition for Rehearing, so it must be disregarded

Respondents assert that NAC 616C.447 permits aggregation of wages actually earned and deemed to have been earned only if the work-related injury has disabled the employee from working at both employment locations. Importantly, NRAP 40(c)(1) prohibits a point

from being "raised for the first time on rehearing." However, that is precisely what Respondents are attempting to do. Respondents' argument that disablement from working in both places of employment must be shown in order for the wages to be aggregated was not made before the Appeals Officer, the District Court Judge, or this Court. In fact, Respondents previously argued that "based on Nevada law alone, the aggregation of earned and deemed wages was not mandated or clearly required when calculating the [average monthly wage] for a volunteer." Respondents' Answering Brief, p. 19. Respondents' argument has transformed from contending that aggregation is prohibited to contending that aggregation is allowed only when certain conditions have been met.[1] This adjustment in argument demonstrates the novelty of Respondents' current argument. Accordingly, because new points are disallowed from being raised in a petition for rehearing (NRAP 40(c)(1)), this Court should decline to consider Respondents' current contention.

[1]It is worth noting that although Respondents' first contention in their Petition for Rehearing centers on there being an added condition which must be met before aggregation is possible, Respondents' second argument in their Petition reverts back to their initial contention: aggregation should be disallowed.

Moreover, Respondents assert that allowing aggregation of wages from concurrent employment without requiring disablement from working at both employment locations would be contrary to the legislative purpose of Nevada's average monthly wage calculation. Respondents point out that average monthly wage 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. Respondents cite generally to 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, and NAC 616C.577 for this contention. In addition to being raised for the first time in the Petition for Rehearing in violation of NRAP 40(c)(1), this Court should find that this argument lacks merit.

First, there is no statute or regulation within Nevada's workers' compensation scheme that prohibits the aggregation of wages if the injured worker fails to demonstrate a disablement from working at both employment locations. In fact, if such a condition were required, it is logical that it would be found in NAC 616C.447, the regulation discussing concurrent employment. However, NAC 616C.447 provides for no such requirement. Further,

there is no statute or regulation within Nevada's workers' compensation scheme which defines the purpose of the average monthly wage calculation as Respondents do.[2] In fact, Respondents' citations are to statutes and regulations that merely reference average monthly wage. 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, and NAC 616C.577 do not discuss wage loss or diminishment in wage earning capacity.[3] Because Respondents have failed to demonstrate that this Court "has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly

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[2]Respondents also cite Fronczak v. Workmen's Compensation Appeals Board, 629 A.2d 1060 (Pa. Commw. Ct. 1993) and Katsoris v. South Jersey Publishing Co., 622 A.2d 219 (N.J. Sup. Ct. 1993) to support their contention that aggregation is disallowed unless the injured workers shows a disablement from working at both employment locations. However, these cases are not controlling decisions. See generally Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987). Because these cases are not "directly controlling" as is required by NRAP 40(c)(2)(B), this Court should decline to consider them. Further, the facts of Fronczak are distinguishable. In Fronczak, the claimant waived the issue of concurrent wages because she failed to inform her employer of her concurrent employment. 629 A.2d at 1063 n.1. Moreover, the Commonwealth Court of Pennsylvania has clarified its position regarding aggregation of wages since its holding in Fronczak. Two years after the decision in Fronczak, the Commonwealth Court of Pennsylvania "h[e]ld that where a claimant holds more than one job at the time of a work-related injury, the average weekly wage must be calculated based on the wages from *all* of his or her jobs, whether the claimant is disabled from the other jobs or not." Miller v. Workmen's Comp. Appeal Bd., 661 A.2d 916, (Pa. Commw. Ct. 1995) (emphasis in original).

[3]Respondents also cite to pages 314-19 of the Appendix. However, this citation is merely to Appellant's testimony and the beginning of Appellant's closing argument before the Appeals Officer. There is no testimony or argument found within these pages discussing Appellant's disablement from his employment with Hewlett-Packard. Therefore, this Court has not "overlooked or misapprehended a material fact in the record." NRAP 40(c)(2)(A).

controlling a dispositive issue in the case" (NRAP 40(c)(2)(B)), Respondents' Petition for Rehearing should be denied.

Additionally, an injured worker does not need to demonstrate that he or she is disabled from working in order for his or her average monthly wage to be calculated. NRS 616C.425(1) provides that "[t]he amount of compensation and benefits . . . must be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date."[4] As a reminder, the underlying issue in this appeal is the calculation of Appellant's average monthly wage because it was needed to calculate his permanent partial disability award. See generally NRS 616C.490(7)(a-d). A permanent partial disability award compensates an injured worker for a disability, but there is no requirement that an injured worker demonstrate an inability to work due to that disability in order to be entitled to a permanent partial disability award. Instead, he or she must simply have a rateable impairment. Because the calculation of Appellant's average monthly wage is fixed as of the date of his injury, it is

[4]Compensation is defined as "the money which is payable to an employee." NRS 616A.090.

usually calculated at the time of claim acceptance. Accordingly, it is nonsensical that Appellant would be required to demonstrate a disablement, which can fluctuate with treatment, from working in order to obtain this calculation.

In sum, Respondents are requesting that this Court read a requirement into Nevada's workers' compensation statutory scheme that the Legislature has not authorized. Because Respondents are raising this point for the first time on rehearing and because Respondents fail to cite to any statute, rule, regulation or decision requiring such a reading, this Court should decline to grant the Petition for Rehearing.

C. Respondents' contention that this Court's decision will result in a financial disincentive for volunteer programs was previously presented in the briefs, so the Petition for Rehearing must be denied

Respondents next contend that aggregating earned and deemed wages creates a financial disincentive for the continuance of volunteer programs, thereby undermining the public policy represented by legislatively sanctioned volunteer programs. This contention should be disregarded.

First, public policy arguments do not fit within the limited requirements for this Court to consider rehearing. Compare NRAP 40(c)(2)(A-B), with NRAP 40A(a) (explaining that public policy issues are applicable in petitions for en banc reconsideration). In fact, a public policy argument is not a material fact, a material question of law, a statute, a procedural rule, a regulation, or a decision. Accordingly, because there is no method by which this Court can consider a public policy argument on rehearing, Respondents' petition should be denied.

Second, even if public policy issues could be considered, they are better left for the Legislature. This Court has determined that it "may refuse to decide an issue if it involves policy questions better left to the Legislature." Renown Health, Inc. v. Vanderford, 126 Nev., Adv. Op. 24, 235 P.3d 614, 616 (2010); see also Cauble v. Beemer, 64 Nev. 77, 96, 177 P.2d 677, 686 (1947) ("The [L]egislature, and not the courts, is the supreme arbiter of public policy and of the wisdom and necessity of legislative action."). In Renown Health, Inc., this Court explained that because "[t]he Legislature has heavily regulated hospitals," the issue of an absolute duty was a public policy issue best left to

the Legislature. Id. Similarly, because this Court has "'consistently upheld the plain meaning of the statutory scheme in workers' compensation laws'" (Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 545, 2 P.3d 850, 852 (2000) (quoting SIIS v. Prewitt, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997))), this Court should also determine that any public policy dispute be left to the Legislature.

Third, this Court is concerned about public policy when "ascertain[ing] the Legislature's intent in the absence of plain, clear language." Baldonado v. Wynn Las Vegas, LLC, 124 Nev. 951, 958, 194 P.3d 96, 101 (2008). There is no ambiguity present with regard to NAC 616C.447, as this Court previously determined that the plain language of NAC 616C.447 provides for the "aggregation of 'different categories of wages.'" Felton v. Douglas Cty., 134 Nev., Adv. Op. 6, 6 (2018). Therefore, Respondents' public policy concerns should not be a concern to this Court in light of the clear language of NAC 616C.447.

Fourth, NRAP 40(c)(1) prohibits "[m]atters presented in the briefs" from being "reargued in the petition for rehearing." However, Respondents previously made a substantially similar

argument to the one at hand: "there is no evidence of any public policy adopted by the Legislature showing an intention that Nevada counties, municipalities, and towns, etcetera, to take on immeasurable and unforeseen liabilities based on possible alternative employment by its volunteers." Respondents' Answering Brief, p. 19-20. It is noted that Respondents have previously made this same argument before the First Judicial District Court and before the Appeals Office. See Appellant's Appendix 198, 333 (briefing before the First Judicial District Court with the same language presented in Respondents' Answering Brief and argument before the Appeals Officer that ruling in Appellant's favor "would discourage volunteerism; that is to say that the public entities will simply try to eliminate them. They're not going to take on that risk if they have to pay for both. That is -- that would be a policy that would attempt to discourage volunteerism because ultimately the public's going to not get a -- want to share that or take on that burden"). Accordingly, because Respondents have already raised this financial disincentive argument before this Court, this Court should not allow it to be reargued.

Fifth, the average monthly wage cap in NRS 616A.065(1)(b) acts to limit the liability faced by an employer. See also State Indus. Ins. Sys. v. Harrison, 103 Nev. 543, 547, 746 P.2d 1095, 1098 (1987) (acknowledging the concept of a wage cap). This cap ensures that employers can adequately predict potential workers' compensation benefits regardless of an injured worker's concurrent employment. Accordingly, this cap ensures financial exposure is not immeasurable and unforeseen, as Respondents assert.

Finally, if this Court decides to consider Respondents' public policy argument at this stage, it should also consider the inverse argument. Disallowing aggregation of wages from concurrent employment would be a disincentive for volunteers. For example, if, as a result of volunteering, a volunteer dies or incurs a serious injury resulting in an inability to work at his concurrent employment, it is only equitable that the volunteer's heirs get some sort of death benefit or the volunteer gets appropriate compensation. Otherwise, volunteers may decide donating their time and effort is not worth the risk of financial ruin if they are not going to be justly compensated for potential, serious injuries or

death. Accordingly, public policy favors this Court's decision to allow aggregation because it encourages volunteerism.[5]

To conclude, Respondents' attempt to have this Court reconsider its decision due to a public policy argument that has already been presented throughout the duration of litigation should be disregarded. If Respondents desire to have Nevada workers' compensation scheme modified to only allow aggregation of wages when an injured worker demonstrates a disablement from working at both concurrent employment locations, then Respondents should address their concerns before the Legislature. A petition for rehearing is not the proper place for such matters to be raised.

II.
CONCLUSION

Because Respondents' first contention that aggregation of wages is prohibited unless certain conditions have been met is being raised for the first time and is not supported by any statute or regulation, and Respondents' second contention that aggregation of wages violates a public policy concern has been argued

[5]It is also worth noting that the employer already benefits from trained volunteer labor by not paying wages. Therefore, in weighing the public policy concerns of aggregating wages, any financial sympathy should be given to the injured workers over the employer.

previously and is the domain of the Legislature, Appellant requests that this Court deny Respondents' Petition for Rehearing.

RESPECTFULLY SUBMITTED this 2nd day of April, 2018.

NEVADA ATTORNEY FOR INJURED WORKERS

/s/ Samantha Peiffer

Evan B. Beavers, Esq.
Nevada Bar No. 3399
Samantha Peiffer, Esq., Deputy
Nevada Bar No. 13269
1000 East William, Suite 208
Carson City, Nevada 89701
Attorneys for Appellant Felton

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

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2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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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 2nd day of April 2018.

NEVADA ATTORNEY FOR INJURED WORKERS

/s/ Samantha Peiffer

Evan B. Beavers, Esq.
Nevada Bar No. 3399
Samantha Peiffer, Esq., Deputy
Nevada Bar No. 13269
1000 East William, Suite 208
Carson City, Nevada 89701
Attorneys for Appellant Felton

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:

rbalkenbush@thorndal.com
ROBERT F BALKENBUSH ESQ
THORNDAL ARMSTRONG ET AL
6590 S MCCARRAN BLVD #B
RENO NV 89509-6112

And, pursuant to NRCP 5(b), I deposited for mailing at Carson City, Nevada, a true and correct copy of the within and foregoing APPELLANT'S ANSWER TO PETITION FOR REHEARING:

GREGORY FELTON
PO BOX 2130
STATELINE NV 89449

DATED: April 2, 2018

SIGNED: /s/ Roberta Wilson