IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 72737

LAURA DEMARANVILLE,
SURVIVING SPOUSE OF DANIEL DEMARANVILLE (DECEASED),
Appellant/Cross-Respondent

v.

EMPLOYERS INSURANCE COMPANY OF NEVADA, and
CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Respondents

And

CITY OF RENO
Respondent/Cross-Appellant

FILED
SEP 18 2018
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Appeal from District Court Order Granting in Part and Denying in Part Petition for Judicial Review
First Judicial District Court
Department II
Case No. 15 OC 00092 1B

RESPONDENT EMPLOYERS INSURANCE COMPANY OF NEVADA'S ANSWERING BRIEF

SERTIC LAW LTD.
MARK S. SERTIC, ESQ.
Nevada Bar No. 403
5975 Home Gardens Drive
Reno, Nevada 89502
(775) 327-6300
msertic@serticlaw.

SUPREME COURT OF THE STATE OF NEVADA

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record, in compliance with NRAP 26.1, 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 judge or judges of this court may evaluate possible disqualification or recusal.

1. There are no corporations that must be disclosed pursuant to this Rule.

2. Employers Insurance Company of Nevada was represented in all of the administrative and district court proceedings below, and is represented before this Court, by Mark S. Sertic of Sertic Law Ltd.

Dated this 18th day of September, 2018.

SERTIC LAW LTD.

By: _____

Mark S. Sertic, Esq.
Nevada Bar No. 403
5975 Home Gardens Drive
Reno, Nevada 89502
(775) 327-6300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this appeal pursuant to NRS 233B.150 which grants this Court appellate authority over a final district court decision regarding a petition for judicial review. The Appellant, the City of Reno and Employers Insurance Company of Nevada all timely filed Notices of Appeal of the district court's March 9, 2017 Order Granting in Part and Denying in Part Petition for Judicial Review. Volume 8, Joint Appendix, pages 1486-1493, (hereinafter: X JA XX). Notice of Entry of that Order was filed and served on March 13, 2017. 8 JA 1495-1506. Appellant filed a Notice of Appeal on March 29, 2017. 8 JA 1508-1523. Employers Insurance Company of Nevada filed a Notice of Appeal On April 5, 2017. 8 JA 1580-1592. The City of Reno filed a Notice of Appeal on April 7, 2017. 8 JA 1604-1616.

II. ROUTING STATEMENT

This matter is presumptively assigned to Court of Appeals under NRAP 17(b)(10) since it involves an appeal from an administrative agency. This matter should remain at the Court of Appeals since all of the issues presented herein are governed by the application of existing statutory, regulatory and case law.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented to the Supreme Court in this case are: (1) Whether a valid claim exists under the police officer's heart disease statue, NRS 617.457? (2) If a valid claim exists,

is the City of Reno or Employers Insurance Company of Nevada liable for it? and, (3) If a valid claim exists, what is the appropriate monthly death benefit?

By its Order Dismissing Cross-Appeal and Reinstating Briefing dated January 25, 2018, this Court dismissed the cross-appeal by Employers Insurance Company of Nevada which sought to challenge the district's court order to the extent it affirmed the appeals officer's finding that a valid claim exists. The Court held that the district court order did not adversely affect Employers Insurance Company of Nevada's personal or property rights. Therefore, this brief will be limited to the issues of what the appropriate monthly benefit is and which insurer is liable for the claim, if it is in fact valid. It thus follows that since Employers Insurance Company of Nevada cannot contest the validity of the claim, it cannot, as a matter of due process, be held liable for the claim.

IV. STATEMENT OF THE CASE

Mr. DeMaranville worked as a police officer for the City of Reno, retiring in 1990. 1 JA 0019. Twenty-two years later, on August 5, 2012, Mr. DeMaranville died while in the recovery room after undergoing gall bladder surgery. 4 JA 599-600.

Mr. DeMaranville's wife submitted claims to both the City of Reno and Employers Insurance Company of Nevada. Employers Insurance Company of Nevada, (sometimes hereinafter, "Employers"), was the workers' compensation insurer for the City of Reno, (sometimes hereinafter, "City"), until 1992 when the City became self-insured. The City has been self-insured since 1992. 4 JA 636; 2 JA 228.

The City denied the claim on May 23, 2013. Ms. DeMaranville appealed to the hearing officer and that appeal was bypassed directly to the appeals officer. 1 JA 1-7.

Employers denied the claim on September 19, 2013. 2 JA 231-233. Ms. DeMaranville filed an appeal and the hearing officer reversed the claim denial. 2 JA 273-275. Employers then appealed that decision to the appeals officer who granted a stay of the hearing officer's decision. 2 JA 278.

The appeals officer, in her decision of March 18, 2015, found that Ms. DeMaranville had established a valid workers' compensation claim for death benefits as the result of the death of her husband under the police officer's heart disease statute, (NRS 617.457), and that full liability therefor rested with the City of Reno under its self-insurance plan and not with Employers Insurance Company of Nevada. 4 JA 635-645.

The City of Reno filed a petition for judicial review in the First Judicial District Court on April 14, 2015 regarding the decision of the appeals officer dated March 18, 2015. Employers Insurance Company of Nevada filed a cross-petition for judicial review of that same decision on April 17, 2015. Those matters were filed as Case No. 15 0C 00092 1B in the First Judicial District Court of the State of Nevada. 4 JA 647-662; 4 JA 686-702.

A second appeal before the appeals officer involved the correct amount of the monthly benefit. In her decision of December 10, 2015 the appeals officer determined that the monthly benefit under the claim should be based, not on the wages Mr. DeMaranville earned as a police officer, but, rather, on the wages he earned at the time of his death from a private company some twenty-two years after he retired as a police officer. 6 JA 1007-1014.

Employers and the City filed petitions for judicial review of this decision. Employers filed its petition in the First Judicial District Court where the prior petitions were being heard and the City filed its petition in the Second Judicial District Court. 6 JA 1023-1033; 6 JA 1053-1064. The petition in the Second Judicial District Court was transferred to the First Judicial District Court and all of the petitions for judicial review were ultimately consolidated under Case No. 15 0C 00092 1B. 7 JA 1324-1325.

The district court in its Order Granting in Part and Denying in Part Petition for Judicial Review, affirmed the

appeals officer's decision that the claim was valid and that all liability therefore rested with the City of Reno and reversed the appeals officer decision that the monthly benefit should be based on the wages Mr. DeMaranville earned at the time of his death. The district court found that the monthly benefit should be zero since Mr. DeMaranville was not earning any wages as a police officer at the time of his death. 8 JA 1486-1493.

All parties appealed to the Nevada Supreme Court. The Supreme Court dismissed the cross-appeal by Employers Insurance Company of Nevada which sought to contest the finding by the district court that a valid claim exists. In its Order dated January 25, 2018 this Court found that Employers Insurance Company of Nevada was not aggrieved by the district court's order since the district court did not hold it liable for the claim.

V. STATEMENT OF FACTS

This case involves two separate claims for workers compensation benefits and two separate insurers. Mr. DeMaranville worked as a police officer for the City of Reno, retiring in 1990. 1 JA 0019. Twenty-two years later, on August 5, 2012 Mr. DeMaranville died while in the recovery room after undergoing gall bladder surgery. 4 JA 599-600. At the time of his death, Mr. DeMaranville was working as a private security guard. 1 JA 75.

Employers Insurance Company of Nevada was the workers' compensation insurer for the City of Reno until 1992 when the

City became self-insured. 5 JA 727, lines 15-21. Ms. DeMaranville submitted claims under the police and firefighters heart disease statute, (NRS 617.457), to both the City and Employers. The City denied Ms. DeMaranville's' claim on May 23, 2013. I JA 73-74. Ms. DeMaranville appealed and that appeal was bypassed directly to the appeals officer. 1 JA 1-7. Employers denied Ms. DeMaranville's claim on September 19, 2013. 2 JA 231-233. Ms. DeMaranville filed an appeal and the hearing officer reversed the claim denial. 2 JA 273-275. Employers then appealed that decision to the appeals officer who granted a stay of the hearing officer decision. 2 JA 278.

On March 18, 2015 the appeals officer issued her decision in which she found that Mr. DeMaranville died as the result of heart disease and that full liability for the claim rests with the City of Reno under its self-insurance plan which was in place when Mr. DeMaranville died. 4 JA 635-645.

The City of Reno filed a petition for judicial review of that decision and Employers filed a cross-petition for judicial review of that Decision. 4 JA 647-662; 4 JA 686-702.

On April 15, 2015 the City of Reno issued its determination which established the monthly death benefit at $1,683.85 based upon his wages Mr. DeMaranville was earning at the time of his retirement in 1990 from the City. 5 JA 830. Ms. DeMaranville appealed to the hearing officer who affirmed the City. 5 JA 851-853.

Ms. DeMaranville appealed that decision to the appeals officer seeking to have the monthly death benefit calculated

based upon the wages that Mr. DeMaranville was receiving from his private employer at the time of his death twenty-two years after retiring from the City. The appeals officer, in a decision dated December 10, 2015, reversed the decision of the hearing officer and found the monthly benefit should be based on his wages earned from the private employer twenty-two years after his retirement. 6 JA 1007-1014. Both the City of Reno and Employers Insurance Company of Nevada filed Petitions for Judicial Review of the appeals officer's decision. 6 JA 1023-1033; 6 JA 1053-1064. On March 9, 2017 the district court entered its Order Granting in Part and Denying in Part Petition for Judicial Review finding that the claim was valid, that full liability rested with the City of Reno and that the monthly death benefit was zero since Mr. DeMaranville was not earning any wages from his employment as a police officer with the City of Reno at the time of his death. 8 JA 1486-1493.

Ms. DeMaranville filed her appeal in this matter seeking to reverse the district court's order to the extent it reversed the appeals officer's December 10, 2015 decision which awarded monthly death benefits based on Mr. DeMaranville's wages at the time of his death. 8 JA 1508-1523. The City filed its cross-appeal seeking to reverse the district court's order which affirmed the appeals officer's March 18, 2015 decision holding that the claim was valid and that liability rested with the City. 8 JA 1604-1616. Employers filed its cross-appeal seeking to reverse the district court's order which affirmed the appeals officer's March 18, 2015 decision holding that the claim was

valid. 8 JA 1580-1592. As set forth above Employers' cross-appeal was dismissed by this Court.

VI. SUMMARY OF ARGUMENT

The monthly benefit for the dependents of a worker who dies due to an occupational disease is, by statutory, regulatory and case law, based upon the earnings of the worker from the employment from which the claim arose. The benefit is calculated on the earnings from that employment in the 12 week period immediately prior to the worker's injury or, in this case, death. In this case the employment on which the benefit must be based is Mr. DeMaranville's employment with the Reno Police Department. However, when he died he was not working for the police department, having retired in 1990. He was working for a private company at the time of his death. The appeals officer set the monthly benefit based upon what he was earning at the time of his death from this unrelated employment, rather than what he was earning as a police officer, which was nothing. This finding is contrary to law and the district court properly granted the petitions for judicial review with respect to this issue and reversed the appeals officer's decision. That part of the district court order should be affirmed.

The district court's order affirming the appeals officer's decision that liability for the claim rests with the City was appropriate and should be affirmed. Under the applicable statutory and case law a claim for benefits under the police officer's heart disease statute, NRS 617.457, does not arise

until the claimant becomes disabled. In this case that occurred in 2012 when Mr. DeMaranville died. At that time the City of Reno was self-insured and is therefore responsible for the claim.

VII. ARGUMENT

A. The district court properly found that the monthly death benefit was zero. This result is required under the applicable law.

1. Standard of review.

In reviewing a decision of an administrative agency, it is the function of the court to determine if the agency acted arbitrarily, capriciously or contrary to law. Turk v. Nevada State Prison, 94 Nev. 101, 102, 575 P. 2d 599, 600 (1978). The standard of review for the Supreme Court is the same as that of the district court. A de novo standard of review is applied to issues of law including the agency's construction of statutes. Elizondo v. Hood Machine, Inc., 129 Nev. Adv. Op. 84, 312 P.3d 479, 482 (2013). The facts in this case as to the issue of the appropriate monthly benefit are not in dispute; this issue involves solely a legal question. Therefore, the standard of review for this issue is de novo, without deference to the decision of the administrative agency. SIIS v. United Exposition Services, Co., 109 Nev. 28, 30, 846 P.2d 294 (1993).

Additionally, and of significant importance to the issue of the appropriate monthly benefit, a reviewing court will not

defer to an agency's interpretation of its governing statutes or regulations when that interpretation is not "within the language of the statute." Poremba v. Southern Nevada Paving, 133 Nev. Adv. Op. 2, 388 P.3d 232, 235 (2017), citing and quoting Taylor v. State, Dep't of Health & Human Services., 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). As set forth below, the appeals officer's decision ignores and is contrary to NAC 616C.435(9), which is directly on point with respect to the issue at hand.

2. The applicable law mandates that the monthly death benefit in this case be set at zero.

This claim was brought under the police officer's heart disease statue, NRS 617.457. That statute provides, under certain circumstances, benefits to police officers who contract heart disease and also provides benefits to their dependents if they die as a result of heart disease. As set forth below, since Mr. DeMaranville had retired from the police force twenty-two years before his death and was not earning any wages from his police officer's job, the proper monthly benefit under the claim is zero. The appeals officer's determination to set the monthly benefit based on his employment with a private company, wholly unrelated to his police officer career, is incorrect as a matter of law. The district court's decision setting the monthly benefit at zero was correct as a matter of law.

Pursuant to NRS 617.430 dependents of employees who die as a result of an occupational disease are entitled to death benefits as provided by chapters 616A to 616D of the NRS.

Additionally, NRS 617.015 provides that employees and their dependents "shall be entitled to all the applicable rights, benefits and immunities and shall be subject to all the applicable liabilities and regulations provided for injured employees and their employers by chapters 616A to 616D, inclusive, of NRS unless otherwise provided in this chapter." Therefore, the provisions of chapters 616A to 616D and their corresponding regulations apply in determining the benefits to which a claimant may be entitled under the police officer's heart disease statute.

NRS 616C.505(2) provides that a surviving spouse of deceased employee is entitled to a monthly death benefit of 66 2/3 percent of the employee's average monthly wage. The issue here is therefore what was Mr. DeMaranville's average monthly wage?

NRS 616A.065 defines average monthly wage to be the "wage actually received ... on the date of the accident or injury to the employee…."

NRS 616C.420 requires the Administrator to provide by regulation a method for determining the average monthly wage.

NAC 616C.420 and NAC 616C.423 define what items of compensation are included in the average monthly wage.

NAC 616C.435 is dispositive of the issue in this case. That regulation sets forth the period of the employee's earnings that are to be used to calculate the average monthly wage. Generally, with some exceptions not relevant here, that period is the 12 week period immediately preceding the date on which the accident

or disease occurred. Most important for this case is subsection 9 of that regulation which states: "As used in this section, 'earnings' means earnings received from the employment in which the injury occurs and in any concurrent employment."[1] In this case the employment which is the basis of the award of benefits is Mr. DeMaranville's employment as a police officer with the City of Reno. That is the employment from which the claim under NRS 617.457, (heart disease of a police officer), was made by Ms. DeMaranville and granted by the appeals officer. The wages earned by Mr. DeMaranville from that employment in the 12 week period prior to his death were zero since he had retired from that employment twenty-two years earlier.

The appeals officer's decision ignores and is directly contrary to NAC 616C.435 and specifically NAC 616C.435(9) which provides that "earnings" are those that are received from the employment which resulted in the injury or disease. The appeals officer did not even cite, much less discuss, this regulation in her decision. Therefore, the interpretations given by the appeals officer to the applicable statutes and regulations are not entitled to any deference. Poremba v. Southern Nevada Paving, 133 Nev. Adv. Op. 2, 388 P.3d 232, 235 (2017).

The fact that Mr. DeMaranville was working for a private company at the time of his death is irrelevant. His widow is not seeking benefits from an occupational disease that arose from

[1] Although this regulation speaks to an "injury", NRS 617.430 and 617.015 make it clear that the same provision is applicable to an occupational disease.

that employment. The wages from that employment cannot be used to calculate the average monthly wage.

NRS 617.457 provides that upon completion of a certain period of continuous employment a police officer is entitled to the presumption that his heart disease is an occupational disease. Mr. DeMaranville did work the requisite number of years as a police officer and therefore, at the time of his retirement he was entitled to the benefits of that statute although he could not file a claim until such time as he was disabled as a result of the occupational disease. He became disabled from the occupational disease when he died at which time Ms. DeMaranville was entitled to claim compensation under the heart disease statute. However, that does not change the period of the earnings on which the average monthly wage is determined. The presumption of NRS 617.457 arose from his employment as a police officer; it did not arise from, and has no connection with, his work for the private company.

The case of Howard v. City of Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005), while not directly on point, is quite instructive for this case. In that case a firefighter suffered a heart attack eight years after he retired. The Supreme Court held that he was not entitled to collect temporary total disability benefits since he was not earning any wages and thus had no calculable average monthly wage. The Supreme Court based its decision on the "Legislature's method for calculating the average monthly wage." 120 P.3d at p. 411. While in that case the claimant was not working at an unrelated non-firefighter job

and the Supreme Court did not address the precise issue presented in this case, the holding supports the conclusion that benefits must be calculated in accordance with, and as limited by, the applicable statutes and regulations and that the average monthly wage must be based on the employment from which the heart disease claim arose.

NAC 616C.444 provides additional support for the conclusion that the average monthly wage in this case is zero dollars. That regulation provides:

> The average monthly wage of an employee who permanently or temporarily changes to a job with different duties, rate of pay, or hours of employment, must be calculated using only information concerning payroll which relates to his or her primary job at the time of the accident. The preceding sections apply in calculating the average monthly wage for such an employee.

The primary job this refers to is clearly the job in which the employee suffers an injury or contracts an occupational disease. This regulation prohibits the use of payroll information from a subsequent employment. This is entirely logical, as the benefits to which an injured employee is entitled must be determined based on the employment from which the claim is made. The entire statutory and regulatory scheme show that benefits are to be calculated based on the employment from which the claim arose.

Ms. DeMaranville's reliance upon NAC 616C.441 is misplaced. That regulation provides: "The earnings of an injured employee on the date on which an accident occurs or the date on which an injured employee is no longer able to work as a result of

contracting an occupational disease will be used to calculate the average monthly wage." This begs the question of what constitute "earnings". As set forth above, Mr. DeMaranville's earnings for this claim are those he earned as a police officer with the City of Reno and not those he was receiving as a private security guard at the time of his death. Thus, his earnings at the time he became disabled were zero. NAC 616C.435(9) specifically defines "earnings" as those that are received from the employment which resulted in the injury or disease. As set forth above, the appeals officer failed to address this regulation in her decision.

The statutes and regulations discussed above are clear and require that the monthly death benefit under this claim be set at zero. If there was any doubt about the Legislature's intent under these statutes, that was resolved by the Legislature's passage of Senate Bill 153 in the 2015 legislative session. That bill added section 14 to NRS 617.457 which reads: "A person who files a claim for a disease of the heart specified in this section after he or she retires from employment as a firefighter, arson investigator or police officer is not entitled to receive any compensation for that disease other than medical benefits." That new section only applies to cases with a date of disablement after the effective date of the Bill and is therefore not controlling in this case. SB 153, Section 6(1). However, it does clearly show that the "sense of the legislature" has consistently been to limit retired police officers and firefighters to only medical benefits under an

occupational heart disease claim. It is appropriate for courts to ascertain the "sense of the legislature" in interpreting the effect of statutes. J.E. Dunn Nw. Inc. v. Corus Constr. Venture LLC, 127 Nev. 72, 249 P.3d 501, 506 (2011).

As a matter of law, the monthly benefit under this claim must be set at zero. The district court's finding was correct and its order on appeal herein reversing the appeals officer's determination of the proper monthly benefit should be affirmed.

B. The appeals officer and the district court properly assigned full liability for the claim to the city of Reno.

1. Standard of review.

With respect to the issue of which insurer is potentially liable for the claim, the correct standard of review is one of deference to the appeals officer's conclusions of law which established that the City of Reno is liable for the claim. "While it is true that the district court is free to decide pure legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). Substantial evidence has been defined as "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion."

Jourdan v. SIIS, 109 Nev. 497, 499, 853 P.2d 99, 101 (1993), citing State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, n.1, 729 P.2d 497, 498, n.1 (1986) (quoting Robertson Transp. Co. v. P.S.C., 159 N.W.2d 636, 368 (Wis. 1968)). The Decision of the appeals officer that full liability for the claim should rest with the City of Reno is supported by substantial evidence, is in accord with applicable law and should be affirmed.

2. The City of Reno is liable for this claim under the applicable law.

In this case there was but a single disabling incident which resulted in the claim. That disablement occurred in 2012. Prior to that date there was not, and could not be, a claim. The City was the responsible insurer at that time and is liable for the claim. This result is mandated by both statutory and case law. This is true under the clear application of the governing statutes and case law and is also true even if, as the City now contends, the last injurious exposure rule applies.

The City's position has been inconsistent throughout this case. Before the appeals officer the City argued that the last injurious exposure rule did not apply to this case. Indeed, its argument heading in that brief is entitled: "1. Daniels and the LIER do not apply to this case." The first sentence under that heading reads: "This is not a successive employer/carrier case." 4 JA 617. Having argued below that the last injurious exposure

rule does not apply, the City cannot now raise this argument on appeal. Edgington v. Edgington, 119 Nev. 577, note 28, 80 P.3d 1282 (2003); Lubin v. Kunin, 117 Nev. 107, note 3, 17 P.3d 422 (2001). Nevertheless, and as set forth below, even if this matter is analyzed under the last injurious exposure rule the City is liable for this claim, assuming the claim is found to be valid.[2]

This claim was brought under the police officer's heart disease statue, NRS 617.457. That statute provides a conclusive presumption that heart disease is a compensable occupational disease for anyone who worked as a police officer for five consecutive years. It is undisputed that Mr. DeMaranville worked

---

[2] The City's suggestion at page 24 of its brief that it would be entitled to reimbursement by Employers for the sums it has paid to date is rather odd. First, even if Employers were found to be liable for the claim, if the monthly wage is deemed to be zero it is difficult to understand why the City would be entitled to reimbursement for the sums it previously paid pursuant to the erroneously decided appeals officer's decision. Second, this issue has not been litigated is not before this Court. Third, the City's citation to NRS 616C.165 is both inapposite and incomplete. That statute only applies to claims that are undisputed. This claim has been disputed from the very beginning. The entire text of that statute reads: "If responsibility for an undisputed claim for compensation by an injured employee is contested, the insurer to which the employee first submits the claim is responsible for providing the required compensation to the employee pending final resolution of the issue regarding which insurer is responsible for the claim. If the insurer that initially provides compensation to the injured employee is not held responsible for payment of the claim, the insurer that is held responsible shall reimburse that insurer within 30 days after final resolution of the issue of responsibility for payment of the claim."

as a police officer for the City of Reno for more than five years and retired in 1990. 1 JA 0019. It is also undisputed that Mr. DeMaranville did not become disabled, as defined in the statutes, until his death on August 5, 2012. 4 JA 599-600.

The conclusion by the appeals officer, as affirmed by the district court, that the City is responsible for the claim is both appropriate and mandated by the controlling statutes and Nevada Supreme Court decisions. The argument put forth by the City is both misplaced and contrary to Nevada law.

While there is no specific definition of "claim" in NRS Chapter 617, a review of the statutes and case law show that a claim for an occupational disease does not arise until the claimant both acquires the occupational disease and is disabled as a result of it. In this case that occurred in 2012 when the City was self-insured.

NRS 617.344(1) provides in part: "an employee who has incurred an occupational disease, or a person acting on behalf of the employee, shall file a claim for compensation with the insurer within 90 days after the employee has knowledge of the disability and its relationship to his or her employment" (Emphasis added).

NRS 617.060 defines "disablement" as: "the event of becoming physically incapacitated by reason of an occupational disease …."

NRS 617.430 provides: "Every employee who is disabled or dies because of an occupational disease. . ." is entitled to compensation. (Emphasis added).

In the present case Mr. DeMaranville was not disabled, and therefore no claim for compensation arose, until August 2012 when the City was self-insured. The fact that the conclusive presumption set forth in NRS 617.457, (that Mr. DeMaranville's heart disease arose out of and in the course of his employment), attached at the end of his first five years of employment, which would have been when the City was insured by Employers, is not determinative of the issue since a valid claim does not exist until there is both an occupational disease and a disablement. Nevada Supreme Court case law makes this clear.

In Mirage Casino-Hotel v. Nevada Dept. of Administration, 110 Nev. 257, 871 P.2d 317 (1994) this Court held that the provisions of NRS Chapter 617 provide "sufficient guidance for determining the date of eligibility for such benefits," which it went on to show is the date the claimant becomes disabled and not when the claimant first contracts the occupational disease. 110 Nev. at 260.

The case of Manwill v. Clark County, 123 Nev. 238, 162 P.3d 876 (2007) is quite instructive with respect to this issue. In that case a firefighter suffered from a congenital heart condition which was first diagnosed before he completed five

years of employment. Subsequently, after the five year period had run, he filed a claim. The claim was denied. In remanding the matter, this Court held that a claimant seeking benefits under NRS 617.457 must show two things: (1) heart disease; and, (2) five years' qualifying employment before disablement. 123 Nev. at p. 242. Again, in the present case both of those conditions were not satisfied until 2012.

In Manwill the Court also held, quoting Employers Insurance Company of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d 1024 (2006), (discussed more fully below), that:

> [T]o receive occupational disease compensation, a firefighter must be disabled by the heart disease: "[a]n employee is not entitled to compensation `from the mere contraction of an occupational disease. Instead, compensation . . . flows from a disablement resulting from such a disease.'" [Citations omitted]. 162 P.3d at 880.

Howard v. City of Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005) is in accord. In that case a firefighter suffered a heart attack eight years after he retired. The Court held:

> Here, Howard's heart disease first manifested itself in the form of a heart attack eight years after he retired from his employment as a firefighter. While under NRS 617.457(1)'s presumption, Howard's heart attack was an occupational disease arising out of and in the course of his employment entitling him to occupational disease benefits, the date of disability under Mirage is the date of the heart attack. 120 P.3d at 412.

Thus, Mr. DeMaranville was not entitled to compensation merely from his five years of employment which triggered the

presumption of NRS 617.457; rather, his entitlement to benefits, and the corresponding liability of the insurer, did not arise until 2012 when he was disabled. There could be no claim until that date. The responsible insurer at that time was the City under its self-insurance program. As is more fully discussed below, the City's entire argument is based upon a misapprehension of the statutes and case law and an erroneous assumption that liability flows from some exposure to heart disease. See, e.g., City's opening brief at p. 27.

The case of Employers Insurance Company of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d 1024 (2006) is slightly different from the present case since it involves the application of the last injurious exposure rule between two different employers involving two different manifestations of heart disease. In the present case there is but one employer and, more importantly, only one manifestation of heart disease. Nevertheless, that case shows that the appeal officer in this case correctly assigned liability to the City.

In Daniels, the claimant worked as a firefighter for the City of North Las Vegas for fifteen years. After a break of several years he went to work as a firefighter at the Nevada Test Site. He became disabled after suffering a heart attack while working at the test site. Just as in this case, claims were filed against the both the Test Site employer and the City of North Las Vegas. The appeals officer assigned liability to the claimant's first employer, the City of North Las Vegas, and the district court affirmed this finding. In reversing, and

finding that liability rested with the second employer, the Nevada Supreme Court described the issue as:

> Which of Daniels' two firefighting employers bears responsibility for his disability necessarily turns on the date that he became disabled. 145 P.3d at 1027.

The Court found that liability could not attach until the date of the disabling event, which occurred during his employment at the Test Site. The Court therefore held that the first employer could not be liable for the claim. As set forth above, the Court held "An employee is not entitled to compensation from the mere contraction of an occupational disease. Instead, compensation ... flows from a disablement resulting from such a disease." [Citations and internal quotations omitted]. 145 P.3d at 1027. Similarly, in this case liability appropriately rests with the City since it was self-insured when Mr. DeMaranville became disabled.

The City's argument concerning the applicability of the last injurious exposure rule is, on the merits, erroneous. The City's entire premise is that the statute is based upon a police officer's "exposure to heart disease," and that such exposure occurred while Employer's was the insurer for the City. See City's opening brief at page 27. This is incorrect. NRS 617.457(1) has nothing to do with any such exposure and makes no mention of any such exposure. The statute simply creates a conclusive presumption that a police officer's heart disease, whenever it may occur and from whatever cause, is an occupational disease providing he or she worked for five

continuous years as a police officer. The legislature certainly knows how to address liability based on exposure to harmful agents as it specifically did so in NRS 617.455(1) regarding lung diseases. That statute specifically discusses exposure to "heat, smoke, fumes, tear gas or any other noxious gases…."

The City then relies on this erroneous assertion to argue that the last date of some fictitious "exposure" to heart disease establishes the date for determining which insurer is liable. However, this Court has rejected the notion that some exposure from the employment must cause or contribute to the heart disease. "[T]he conclusive presumption under NRS 617.457(1) applies even when a claimant's occupation as a firefighter is not a contributing factor to the progression of the disease…." Manwill v. Clark County, 123 Nev. 238, 243, 162 P.3d 876, 879-880 (2007) (internal quotations omitted). In Manwill the claimant wasn't exposed to "heart disease" as a result of his employment; his heart condition was congenital and his employment did not contribute to it at all. As stated above, in order to claim benefits under NRS 617.457 a police officer must show only two things: (1) heart disease; and, (2) five years' qualifying employment before disablement. Manwill, 123 Nev. 238, at p. 242. There is no requirement for, or reference to, any exposure to heart disease. These two requirements for a valid claim were not met in this case until 2012 when the City was self-insured. Notably, the City does not cite, much less discuss, the Manwill case in its brief.

Even assuming for the sake of argument that the last

injurious exposure rule is applicable here, the Daniels case establishes that the City remains liable for the claim.

The Court in Daniels, in determining which employer was liable, stated:

> Consequently, the last injurious exposure rule applies in such circumstances and places responsibility for disability compensation on the employer in closest temporal proximity to the disabling event. 145 P.2d at 1027. (Emphasis added).

This holding directly contradicts the City's argument that liability in this case should be determined by the date of the "last exposure" rather than the date of disability. See City's opening brief at page 30. The only disabling event occurred in August 2012 when the City was self-insured and that is when liability attaches. The Daniels' Court reversed the appeals officer and the district court for doing exactly what the City is requesting this Court do: assign liability to Employers as the first insurer even though Mr. DeMaranville did not become disabled until the City was self-insured. In order to rule in the City's favor on this issue, this Court will have to overrule its Daniels precedent.[3]

---

[3] Because Nevada case law is directly opposed to the City's position, the City resorts to citing cases from foreign jurisdictions. This is problematic for two reasons. First, the cited authorities all involve exposure to some type of harmful agent; e.g. asbestos, noise, dust and hepatitis. However, The Manwill case makes clear that exposure to harmful conditions plays no role under the heart disease statute. Second, and most importantly, all of those cases are easily distinguishable since those jurisdictions do not have the Daniels or Manwill decisions, which are controlling in this case, in their jurisprudence.

C. Employers Insurance Company of Nevada cannot, as a matter of due process, be held liable for this claim.

As discussed above, by its Order Dismissing Cross-Appeal and Reinstating Briefing dated January 25, 2018, this Court dismissed the cross-appeal by Employers Insurance Company of Nevada which sought to challenge the district's court order that affirmed the appeals officer's finding that a valid claim exists. The Court held that Employers Insurance Company of Nevada was not aggrieved by the district court's order since its personal or property rights were not adversely affected as it has not been held to be liable for the claim.

Thus, Employers Insurance Company of Nevada's cannot contest the validity of the claim in this appeal. Therefore, it cannot be held liable for the claim if the claim is found to be valid as that would adversely affect its property rights. Due process requires that a party be afforded an opportunity to be heard before it is deprived of its property rights. Callie v. Bowling, 123 Nev. 181, 160 P.3d 878 (2007).

VIII. CONCLUSION

The district court's order finding that the monthly death benefit in this case is zero is appropriate under the applicable statutory, regulatory and case law. Therefore, Employers respectfully requests that that this Court affirm the district court's order to the extent it granted the petitions for judicial review and reversed the appeals officer's December 10,

2015 decision.

The district court's order finding that the City is liable for the claim is appropriate under the applicable statutory and case law. Therefore, Employers respectfully requests that that this Court affirm the district court's order to the extent it denied the City's petition for judicial review and affirmed the appeals officer's March 18, 2015 decision finding that the City is liable for the claim.

Dated this 18th day of September, 2018.

SERTIC LAW LTD.

By: _____
Mark S. Sertic
Attorneys for Respondent
Employers Insurance Company
of Nevada

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 [state name and version of word-processing program] in [state font size and name of type style]; or

[X] This brief has been prepared in a monospaced typeface using Courier New typeface and Microsoft Word 2007 with 10.5 characters per inch.

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:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 30 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 18th day of September, 2018.

SERTIC LAW LTD.

By: _____
Mark S. Sertic
Attorneys for Respondent
Employers Insurance
Company of Nevada

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated on this 18th day of September, 2018.

SERTIC LAW LTD.

By: _____
Mark S. Sertic
Attorneys for Respondent
Employers Insurance
Company of Nevada

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c) and NRAP 31(c), I hereby certify that I am an employee of Sertic Law Ltd., and that on the 18th day of September, 2018, a true and correct copy of the foregoing document was served by Reno-Carson Messenger Service, addressed to the following persons:

McDonald Carano LLP
Tim E. Rowe, Esq.
100 West Liberty Street, 10th Floor
Reno, Nevada 89501

NAIW
Evan Beavers, Esq.
1000 E William Street #208
Carson City, Nevada 89701