

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

Appeal from a 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

APPELLANT/CROSS RESPONDENT'S
REPLY TO CITY OF RENO'S ANSWER TO APPEAL
AND
RESPONSE TO CITY OF RENO'S CROSS-APPEAL

NEVADA ATTORNEY FOR INJURED WORKERS

Evan Beavers, Esq.
Nevada State Bar. No. 3399
ebeavers@naiw.nv.gov
1000 E. William Street, Suite 208
Carson City, Nevada 89701
(775) 684-7555

Attorneys for Appellant
Laura DeMaranville

Electronically Filed
Nov 20 2018 08:36 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

NRAP 26.1 DISCLOSURE

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.

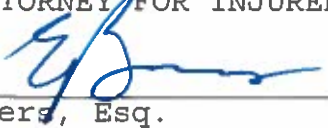
Appellant's parent corporations: None.

Firms having appeared: Nevada Attorney for Injured Workers.

Appellant's pseudonyms: None.

Submitted this 19th day of November, 2018.

NEVADA ATTORNEY FOR INJURED WORKERS



Evan Beavers, Esq.
Nevada State Bar No. 3399
Attorney for Appellant Laura DeMaranville

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	iii
II.	JURISDICTIONAL STATEMENT	1
III.	ROUTING STATEMENT	1
IV.	STATEMENT OF THE ISSUES	1
	A. Does <u>Howard</u> preclude using actual earnings at the date of death when calculating death benefits? . . .	1
	B. Does NAC 616C.435 preclude using actual earnings at the date of death when calculating death benefits? .	1
	C. Does the 2015 amendment to NRS 617.457 have any effect on the appellant's claim for death benefits? .	2
	D. Does substantial evidence support the appeals officer's determination that Daniel DeMaranville died of heart disease?	2
V.	STATEMENT OF THE CASE	2
VI.	STATEMENT OF FACTS	2
VII.	SUMMARY OF THE ARGUMENT	3
VIII.	ARGUMENT	4
IX.	CONCLUSION.	14

CERTIFICATE OF COMPLIANCE (NRAP 28.2)

CERTIFICATE OF SERVICE

I.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Howard v. City of Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005)	3, 5-9
Jerry's Nugget v. Keith, 111 Nev. 49, 888 P.2d 921 (1995)	7
Mirage v. Nevada Dep't of Administration, 110 Nev. 257, 871 P.2d 317 (1994)	7
Nassiri v. Chiropractic Physicians' Bd. of Nev., 130 Nev. Adv. Rep. 27, 327 P.3d 487 (2014)	14
Public Agency Comp. Trust v. Blake, 127 Nev. 863, 265 P.3d 694 (2011)	7

NEVADA REVISED STATUTES

NRS 233B.135(4)	14
NRS 617.457	3-9, 14
NRS Chapter 617	3
NRS Chapters 616A to 616D	3

OTHER AUTHORITIES

NAC 616C.435	6, 7, 9
Nevada Industrial Insurance Act	3
Nevada Occupational Diseases Act	3
NRAP 28.1(c)(3)	1, 2
NRAP 28(b)(1)	1

II.
JURISDICTIONAL STATEMENT

Appellant/Cross-Respondent restates the jurisdictional statement in her opening brief. The jurisdictional statement set out in the Respondent's Answering Brief and Cross-Appellant's Opening Brief is also accurate. NRAP 28(b)(1).

III.
ROUTING STATEMENT

Appellant/Cross-Respondent restates the routing statement in her opening brief. The routing statement set out in the Respondent's Answering Brief and Cross-Appellant's Opening Brief is also accurate. NRAP 28.1(c)(3).

IV.
STATEMENT OF THE ISSUES

A. In reply to City of Reno's answer to Mrs. DeMaranville's appeal, does Howard v. City of Las Vegas preclude calculating death benefits on actual earnings at the date of death?

B. In reply to City of Reno's answer to Mrs. DeMaranville's appeal, can regulations promulgated for determining wage benefits in the Industrial Insurance Act be used in such a way as to reduce to zero the death benefits owed under the Occupational Diseases Act?

C. In reply to City of Reno's answer to Mrs. DeMaranville's appeal, can the Legislature's act in 2015 limiting benefits for retired police officers to medical benefits be interpreted to preclude Mrs. DeMaranville's claim for death benefits based on actual wages earned at the date of disability?

D. In answer to the City of Reno's cross-appeal, was the appeals officer presented with substantial evidence by which she properly concluded Daniel DeMaranville died of heart disease?

V.
STATEMENT OF THE CASE

Appellant/Cross-Respondent restates the statement of the case in her opening brief. The statement of the case set out in the Respondent's Answering Brief and Cross-Appellant's Opening Brief is accurate except where restated or revised below in Appellant/Cross-Respondent's argument. NRAP 28.1(c)(3).

VI.
STATEMENT OF FACTS

Appellant/Cross-Respondent restates the statement of facts in her opening brief. The statement of facts set out in the Respondent's Answering Brief and Cross-Appellant's Opening Brief is accurate except where restated or revised below in Appellant/Cross-Respondent's argument. NRAP 28.1(c)(3).

VII.
SUMMARY OF THE ARGUMENT

The City's reliance on Howard v. City of Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005), stretches the ruling in that case beyond its limits when applied to the facts presented in Mrs. DeMaranville's appeal. Howard must be limited to its facts-temporary total disability payments are not due a retired beneficiary under NRS 617.457 because the retiree has no wage requiring substitution.

The City's use of regulations promulgated to calculate wage benefits for accident claims under the Nevada Industrial Insurance Act (NIIA) (NRS Chapters 616A to 616D) must not be applied in such a way as to preclude the substantive right to death benefits to which Mrs. DeMaranville is entitled under the Nevada Occupational Diseases Act (ODA) (NRS Chapter 617).

The Legislature's amendment of NRS 617.457 in 2015 and the Howard decision in 2005 pre-dated Mr. DeMaranville's death and Mrs. DeMaranville's claim for benefits. The City's use of the amendment as a legislative confirmation that Howard was intended to prohibit death benefits to the widows of retired police officers grossly misinterprets the intent of the Legislature.

. . .

The evidence upon which the appeals officer relied to find that Mr. DeMaranville died of heart disease, and that his widow is entitled to benefits under NRS 617.457, was substantial evidence. The expert opinion proffered by the claimant at the administrative hearing, when viewed in conjunction with the medical records admitted into evidence, was given more weight by the appeals officer than the expert opinions proffered by the City. Weighing Dr. Ruggeroli's opinions over that of the other cardiologists giving opinions on the cause of death was not an abuse of discretion.

VIII. ARGUMENT

A. The appeals officer did not err by refusing to apply Howard v. Las Vegas when she calculated benefits based upon Mr. DeMaranville's actual earnings at the time of his death.

In advance of Appeals Officer Ward's decision dated December 10, 2015, in which it was determined that Mrs. DeMaranville's benefits should be based upon the earnings of her deceased husband at the time of his death, the appeals officer received briefing from the claimant, the City of Reno and Employers Insurance Company of Nevada (EICON). 6 JA 965-974 and 980-1003. The City and EICON both took that opportunity to put forth the

argument that Howard v. Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005), stands for the proposition that retired members of the class of beneficiaries in NRS 617.457 are not entitled to compensation benefits, just medical benefits. The appeals officer favored the argument of the claimant instead and limited Howard to its facts. The appeals officer did not apply the Howard rule to preclude the surviving spouse of a police officer who died of heart disease from receiving compensation benefits. 6 JA 1146-1149. Both the City and EICON renewed their Howard arguments to the district court and the court accepted their analysis. 8 JA 1492. Mrs. DeMaranville has appealed the district court's decision on this point. In its answer to the appeal the City renews its expansive use of the ruling in Howard.

Howard does not support the City's position that because Daniel DeMaranville was not earning a wage from the City at the time of his disability and death his surviving spouse is not entitled to monthly death benefits. In the Howard case the Court was considering the payment of temporary total disability payments to a retired firefighter. At the time he sought disability benefits Howard was not earning a wage so no wage substitution was required. In the case now on appeal, at the time Daniel DeMaranville died he was earning a wage and the

appeals officer correctly used that wage to calculate the death benefit due his surviving spouse. Mr. Howard lost no wages due to his impairment whereas Mr. DeMaranville did, and thus did his widow. The Howard Court did recognize that under the ODA compensation was due from the date of disability and that the date of the firefighter's heart attack was the date on which to calculate benefits. *Id.* at 694,695. The district court below in this appeal acknowledged that authority, but when the court borrowed from the NIIA to calculate the wage benefit owed the result wiped out Mrs. DeMaranville's substantive rights under NRS 617.457.

B. The district court erred applying regulations promulgated for application in the Nevada Industrial Insurance Act in such a way as to negate the appellant's substantive right to death benefits under the Occupational Diseases Act.

In its answer to the appeal, the City argues the district court properly applied NAC 616C.435 to reach its conclusion that because the decedent's wages paid to him by the City were zero at the time of his disability, no monthly death benefits are owing. The district court's analysis, though, presumes a required nexus between disability benefits and the liable employer in a way that simply does not exist in NRS 617.457. Seeking to apply Howard

and NAC 616C.435 the district court determined that because there were no wages "from the covered employment" at the time of Mr. DeMaranville's death, the average monthly wage is zero and the benefit to be calculated from the average monthly wage must be zero. 8 JA 1491.

Nothing in the Howard decision supports such a conclusion. In Mirage v. Nevada Dep't of Administration, 110 Nev. 257, 260, 871 P.2d 317 (1994), the Court explained the need to refer to the NIIA for the method of calculating benefits after a finding of compensability under the ODA. The Court did not rule that the NIIA, or regulations promulgated to facilitate application of the Act, could be used to wipe out a claim deemed compensable under NRS 617.457. Even if the regulation relied upon by the district court (NAC 616C.435) was promulgated specifically for calculating monthly death benefits under NRS 617.457, it could not be applied in such a fashion as to render the appellant's compensation zero. See Public Agency Comp. Trust v. Blake, 127 Nev. 863, 869, 265 P.3d 694 (2011) (administrative regulations cannot contradict the statute they are designed to implement) (citing Jerry's Nugget v. Keith, 111 Nev. 49, 54, 888 P.2d 921 (1995)).

. . .

C. The Legislature's 2015 amendment to NRS 617.457, limiting retired members of the class of beneficiaries to medical benefits only, has no retroactive application and the Howard ruling cannot be used to create retroactive application.

In its answer to the appeal, the City reaffirms its commitment to the ruling in Howard as controlling law and suggests that our State Legislature's 2015 amendment to NRS 617.457 should be interpreted as approval of the City's rationale of Howard. The City offers no legislative history to show the Legislature intended to bar compensation claims retroactive to 2005 when Howard was decided. What is apparent, from the reading of the amendment itself, is that the Legislature intended no retroactive application of the termination of compensation benefits owed to retired police officers.

What is now subsection 14 of NRS 617.457 reads as follows:

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 section of the statute became effective June 8, 2015. See 2015 Nev. Stat., ch. 420, § 7, at 2431 and 2433. However, the Court should take note of an additional amendment to NRS 617.457. The Legislature took the opportunity to further define who was

entitled to benefits under the statute. A firefighter, arson investigator or police officer is entitled to benefits for heart disease:

if the disease is diagnosed and causes disablement:
(a) During the course of that employment;
(b) If the person ceases employment before completing 20 years of service as a police officer, firefighter or arson investigator, during the period after separation from employment which is equal to the number of years worked; or
(c) If the person ceases employment after completing 20 years or more of service as a police officer, firefighter or arson investigator, at any time during the person's life.

2015 Nev. Stat., Ch. 420, § 2, 2427-2428.

Thus, the Legislature expressed its intention to maintain life-time medical benefits for police officers who completed 20 years of service. Daniel DeMaranville was in that special class of beneficiaries for whom the Legislature recognized a life-long commitment to provide both medical benefits and compensation benefits. Even if, after the passage of the act, benefits to retirees were limited to medical benefits, compensation benefits owing to career police officers with proven disability claims prior to the 2015 amendment were still life-time benefits. By use of the Howard decision and a misdirected interpretation of NAC 616C. 435, the City seeks to deny Mrs. DeMaranville the compensation benefits Mr. DeMaranville had already earned at the end of his life. The district court was in error to adopt the City's misinterpretation of the 2015 amendment to NRS 617.457.

. . .

. . .

D. The appeals officer's findings that Daniel DeMaranville died of heart disease are supported by substantial evidence.

The primary factual determination by the appeals officer was that Dr. Ruggeroli's opinion, after review of all the others, was more persuasive and credible. In its cross-appeal the City attacks this ultimate finding by arguing the other physicians whose opinions were considered by the appeals officer indicated it was not possible to determine the cause of death.

In her decision the appeals officer shows she carefully reviewed the reports of each physician who was asked to give an opinion on the cause of death. 4 JA 638-641. The City proffered the opinion of Dr. Betz who stated that from the partial medical record he reviewed he was unable to determine the actual cause of death, but the particular records he reviewed do not accompany his report. 1 JA 70-72. The appeals officer noted Dr. Betz did say in this opinion "it is most likely he [Mr. DeMaranville] suffered a significant myocardial infarction" and that it was much less likely he died of pulmonary embolus or anesthesia related complications from the gall bladder surgery. 4 JA 638.

EICON proffered the opinion of Dr. Pemmaraju who noted the presence of risk factors that could lead to atherosclerotic heart

disease, and noted the myocardial infarction was most likely not due to postoperative complications. 2 JA 339-343. Dr. Pemmaraju's report was not accompanied by the records he reviewed in reaching his opinion.

EICON also proffered the opinion of Dr. Ali who claimed to have seen in the records evidence of cardiovascular disease but could not find in the records proof of atherosclerotic heart disease as stated by Dr. Gomez in the death certificate. 2 JA 344-347. The particular records Dr. Ali reviewed also did not accompany her opinion as to the cause of death. An important point for the appeals officer was Dr. Ali's expressed disappointment in not having cardiac enzymes testing to review. 2 JA 347; 4 JA 639. Dr. Gomez ordered the cardiac enzyme testing after his patient entered the recovery room. 4 JA 606.

EICON also proffered the opinion of Dr. Lagstein. Dr. Lagstein concluded the medical records he reviewed did not contain enough evidence to support a diagnosis of arteriosclerotic heart disease as declared in the death certificate. 4 JA 564-568. The records Dr. Lagstein reviewed also were not provided with his opinion. The appeals officer noted in her decision Dr. Lagstein's expressed disappointment

that there was no postoperative EKG and that cardiac enzymes were not drawn. 4 JA 568. Dr. Lagtein's confusion on this point was raised in the closing arguments to Appeals Officer Ward at the conclusion of the evidentiary hearing. 5 JA 766-769. Dr. Carrea, the cardiologist who responded to the recovery room when Mr. DeMaranville's heart began to fail, compared the absence of EKG abnormalities during the gall bladder surgery with the echocardiogram findings at the time of the heart attack. 4 JA 610.

Unlike the confusion as to what records the City's and EICON's cardiology experts did or did not rely on, the records presented to Dr. Ruggeroli were admitted into evidence just as they were reviewed by Dr. Ruggeroli. See Claimant's First Exhibit, 3 JA 358-492, and Claimant's Fourth Exhibit, 4 JA 595-612. The City sought to impeach Dr. Ruggeroli's conclusions by pointing out to the appeals officer the cardiologists whose opinions the City relied on could not determine the exact cause of death. 5 JA 772-777. The appeals officer made a point of explaining in her decision that Dr. Ruggeroli was the only physician who saw and evaluated the cardiac enzymes (troponin). 4 JA 641.

Upon review of the medical records found in Claimant's First Exhibit, Dr. Ruggeroli issued his first opinion in which he concluded Daniel DeMaranville suffered from occult occlusive atherosclerosis which resulted in a catastrophic heart attack shortly after his gall bladder surgery. 3 JA 525-531. He was later provided a copy of Dr. Lagstein's opinion and additional records admitted at the hearing as Claimant's Fourth Exhibit. In response Dr. Ruggeroli issued his second opinion directly refuting the suggestion that troponin levels were not contained in the records. 4 JA 581-587.

In the opinion of Dr. Ruggeroli, the cardiac enzymes identified as troponins drawn four hours prior to Mr. DeMaranville's death were elevated and consistent with a cardiovascular cause of death. 4 JA 585. Compare this with the findings of Dr. Ali and Dr. Lagstein who both opined that elevated troponin levels would have been conclusive (2 JA 347, 4 JA 564) but neither doctor saw the cardiac enzyme testing in the record. Also, note that none of the other physicians refute Dr. Ruggeroli's finding that Mr. DeMaranville's medical history was remarkable for multiple cardiac risk factors. As early as 2004 Mr. DeMaranville was noted to have abnormal electrocardiogram

(EKG or ECG) results on examination or unusual heartbeats and was diagnosed with right branch bundle block, although his condition was such that he continued to be cleared for work. 3 JA 0364, 0385-0386, 0391, 0408-0411, 0416-0417, 0481.

The appeals officer's factual determinations should only be overturned if they are not supported by substantive evidence. Nassiri v. Chiropractic Physicians' Bd. of Nev., 130 Nev. Adv. Rep. 27, 327 P.3d 487 (2014) (citations omitted). Substantial evidence means evidence which a reasonable mind might accept as adequate to support a conclusion. NRS 233B.135(4). Here, the appeals officer and the district court reviewing the appeals officer's decision found substantial evidence to favor Dr. Ruggeroli's opinion as to the cause of Daniel DeMaranville's death over the opinions of the cross-appellant's witnesses.

IX.

CONCLUSION

The appeals officer was correct in her determination that Laura DeMaranville was entitled to death benefits as a result of the death of Daniel DeMaranville. Under NRS 617.457 Mr. DeMaranville was entitled to disability benefits for heart disease. Substantial evidence was relied upon by the appeals


officer to conclude Mr. DeMaranville died of heart disease. The district court correctly affirmed the appeals officer on the cause of death.

The correct analysis to determine Mrs. DeMaranville's monthly death benefit was applied by the appeals officer. She is entitled to monthly benefits Mr. DeMaranville was earning at the date of disability, which was the date of his death. The district court misapplied case law and administrative regulations to reach an incorrect conclusion reversing the appeals officer on this issue.

The district court should be affirmed on the issue of the cause of death and reversed on the issue of calculating monthly death benefits owed to the appellant/cross-respondent, Laura DeMaranville.

DATED this 17th day of November, 2018.

NEVADA ATTORNEY FOR INJURED WORKERS

By: 

Evan Beavers, Esq.
Nevada State Bar No. 3399
1000 E. William, Suite 208
Carson City, Nevada 89701
(775) 684-7555
Attorneys for Appellant,
Laura DeMaranville

CERTIFICATE OF COMPLIANCE
(NRAP 28.2)

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:

_____ 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.

Respectfully submitted this 19th day of November, 2018.

NEVADA ATTORNEY FOR INJURED WORKERS

By: 

Evan Beavers, Esq.
Nevada State Bar No. 3399
1000 E. William, Suite 208
Carson City, Nevada 89701
(775) 684-7555
Attorneys for Appellant,
Laura DeMaranville

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on November 19, 2018, the foregoing APPELLANT/CROSS RESPONDENT'S REPLY TO CITY OF RENO'S ANSWER TO APPEAL AND RESPONSE TO CITY OF RENO'S CROSS-APPEAL was electronically filed with the Clerk of 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 Eflex as users will be served by the Eflex system as follows:

trowe@mcdonaldcarano.com

TIMOTHY E ROWE ESQ

MCDONALD CARANO WILSON

100 W LIBERTY ST 10TH FL

PO BOX 2670

RENO NV 89505-2670

Attorney for Respondent/Cross Appellant City of Reno

Attorney for Respondent Cannon Cochran Management Services, Inc.

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on this date I deposited for mailing at Carson City, Nevada, a true and correct copy of the within and foregoing APPELLANT/CROSS RESPONDENT'S REPLY TO CITY OF RENO'S ANSWER TO APPEAL AND RESPONSE TO CITY OF RENO'S CROSS-APPEAL addressed to:

MARK S SERTIC ESQ

SERTIC LAW LTD

5975 HOME GARDENS DR

RENO NV 89502

Attorney for Respondent Employers Insurance Company of Nevada

DATED:

November 19, 2018

SIGNED:

Taney L. Sherwood