

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
EMPLOYERS INSURANCE COMPANY OF NEVADA'S
ANSWERING BRIEF

NEVADA ATTORNEY FOR INJURED WORKERS

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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.

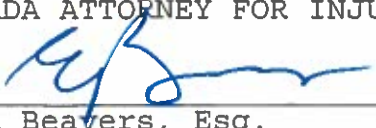
Appellant's parent corporations: None.

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.
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ARGUMENT

In Employers Insurance Company of Nevada's answering brief the respondent replies to the issue raised in Mrs. DeMaranville's appeal regarding the proper calculation of her monthly death benefit. EICON also addresses the issue raised in the City of Reno's cross-appeal whether the City of Reno or EICON has liability for the appellant's/cross-appellant's claim. Lastly, EICON raises the issue of its due process rights arising from the Court's order dismissing EICON's cross-appeal. The appellant/cross-respondent takes no position as to which of the opposing parties, the City or EICON, ultimately bears responsibility for paying the monthly benefits to which she is due nor does the appellant/cross-appellant offer argument on EICON's due process rights. This brief is limited to reply of EICON's arguments regarding the proper calculation of the monthly death benefit owed to Mrs. DeMaranville.

The issues raised by EICON in its answer to the DeMaranville appeal are legal issues, as opposed to factual issues. As such, the Court can decide those pure legal questions raised in EICON's answer without deference to the appeals officer's determinations in her decision of December 10, 2015. See Elizondo v. Hood

Mach., Inc., 129 Nev. 780,785, 312 P.3d 479, 482 (2013) (citations omitted). It is not the case, however, that the appeals officer ignored EICON's arguments on this issue when the case was presented to her.

Laura DeMaranville sought monthly death benefits by motion for summary judgment. 6 JA 0965-0974. The surviving spouse argued that the date of disability was the date of her husband's death and the date on which he was no longer able to work. 6 JA 0968. Authority was presented to the appeals officer that the average monthly wage must be computed from the date of disability, citing to NRS 617.420 and Mirage v. Nevada Dep't. of Admin., 110 Nev. 257, 871 P.2d 317 (1994). 6 JA 0970. The appeals officer was presented with authority that the period immediately preceding the disability is the date on which to calculate disability benefits, citing to Howard v. City of Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005). 6 JA 0970. By use of NAC 616C.441 the appeals officer was urged to calculate monthly death benefits on the wages earned at the date of Mr. DeMaranville's death. 6 JA 0970.

In its response to the motion for summary judgement EICON presented the argument that, presuming benefits must be based on

the employment from which the occupational disease was contracted and presuming in this case Mr. DeMaranville contracted heart disease while employed with the City of Reno, the Howard case and NAC 616C.444 logically lead to the conclusion Mrs. DeMaranville's monthly benefit should be zero. 6 JA 0980. It is true that the appeals officer did not discuss EICON's proposed use of Howard and NAC 616C.444 in her Decision and Order filed December 10, 2015, (6 JA 1007-1013) but that should not lead to the conclusion she did not consider EICON's argument.¹

The district court reversed the appeals officer and in response to Mrs. DeMaranville's appeal of that decision EICON argues that even though the surviving spouse is entitled to monthly death benefits under NRS 616C.457 and NRS 616C.430, the benefit is worth zero. EICON explains that benefits must be determined based upon the average monthly wage earned at the time of disability, but gets to zero by presuming such a wage must come from the employment from which the claim arose. Accepting the finding that Daniel DeMaranville's disability arose at his death, EICON creates a false legal nexus between the date of

¹ In its response to the appeal here EICON relies heavily on NAC 616C.435(9), which EICON did not present to the appeals officer in its opposition to the motion for summary judgment.

disability and the employment from which the claim arose to minimize any compensation owing to the surviving spouse.

As EICON concedes, under NRS 617.457 this Court can presume the disability of heart disease arose from Mr. DeMaranville's employment as a police officer. Further, EICON concedes that NRS 617.430 entitles Mrs. DeMaranville to death benefits given the death of her husband from heart disease. However, EICON abandons the intent of the police officer's heart disease statute when it applies regulations from one act of the Legislature to determine benefits owing under another act.

The statute cited by EICON recognizing the police officer's compensable claim for heart disease, and the statute cited recognizing his widow's entitlement to death benefits, are found in the Occupational Diseases Act (ODA). The statutes used to calculate the value of the death benefit are found in the Nevada Industrial Insurance Act (NIIA). NRS 617.015 states that dependents are entitled to the benefits allowed under the NIIA, and this Court has recognized the need to borrow the statutes and regulations of the NIIA to quantify benefits owing under the ODA. See Mirage at 260. Neither NRS 617.015 nor the decisions of this Court, however, allow wiping out the substantive benefit

arising from the ODA by use of regulations promulgated for the NIIA.

EICON misapplies NAC 616C.435(9) and the authority in Howard in the analysis of Mrs. DeMaranville's claim for monthly compensation benefits. In Howard the Court determined that a retired firefighter was not entitled total temporary disability benefits because, as a retiree, he had no income to substitute with such benefits. EICON argues Howard requires average monthly wage be based on the employment from which the heart disease arose. This initiates the distancing EICON seeks from the monthly death benefits due Mrs. DeMaranville. In subsection 1 NRS 617.457 it is conclusively presumed heart disease disabling a police officer arises out of and in the course of his employment as a police officer. Nothing in the statute limits the retired police officer's compensation benefit to wages earned from his ex-employer. Likewise, nothing in NRS 617.015 ties the benefits owed his surviving spouse to non-existent wages. This nexus between the benefit and the average monthly wage earned during the employment "from which the heart disease arose" is a legal fiction created by using the regulation promulgated for the NIIA to avoid the substantive benefits provided by the ODA.

EICON places heavy reliance on NAC 616C.435(9) defining "earnings" as earnings received from the employment which resulted in the injury. EICON adds disease to text of the regulation to support its argument that there must be a relationship between the date of disability for heart disease and the wages paid by the employer bearing the liability for benefits under NRS 617.457. There is no such relationship required in the ODA or in previous decisions of the Court. The Court has declared that the claim of a retiree could be compensable for heart disease under NRS 617.457 many years after leaving service. See Gallagher v. City of Las Vegas, 114 Nev. 595, 959 P.2d 519 (1998) (the municipality's interpretation that no compensation benefits are owing if claimed long after retirement would be unreasonable given the language of NRS 617.457 and the spirit and policy behind it). There is no direct authority for concluding compensation for monthly death benefits due the survivor of a retired police officer is zero.

The application of EICON's analysis under Howard and NAC 616C.435 nullifies the benefit owing Mrs. DeMaranville under the ODA. From the day after a full-time firefighter, arson investigator or police officer retires he or she is no longer

earning an average monthly wage as a firefighter, arson investigator or police officer. Under EICON's analysis the retiree is entitled to compensation benefits worth nothing. Until 2015 there was no Legislative history which might support such a conclusion.

When our State Legislature amended NRS 617.457 in 2015 it limited the claims for retirees to medical benefits only, thereby bringing an end to retired police officers receiving compensation benefits for heart disease. Mrs. DeMaranville's claim predated the effective date of the amendment by seven years. It is also noteworthy, though, that the Legislature took the opportunity in 2015 to reaffirm life-time benefits to career officers. See 2015 Nev. Stat., ch. 420, §2, at 2427-2428. Prior to the effective date of that amendment a career police officer such as Mr. DeMaranville was entitled to both medical benefits and compensation benefits for life. That was the status of the law when he served as a police officer for the City of Reno, and when he retired, and when he died. Stretching case law and regulations to such an extent as to deny Laura DeMaranville the benefits earned by Daniel DeMaranville would be an absurd result. Interpretation of the law contrary to the legislative purpose of

a statute creates absurd results and should be avoided. State Dep't of Bus.& Indus. v. Dollar Loan Ctr., LLC, 134 Nev. Adv. Rep. 15, 412 P.3d 30, 34 (2018).

The appeals officer's application of NRS 617.457 and NRS 617.430 concluding Mrs. DeMaranville is entitled to monthly benefits is harmonious with the Occupational Diseases Act. The appeals officer's application of NRS 616C.505 and NAC 616C.441, borrowed from the Industrial Insurance Act, is harmonious with both the ODA and the NIIA. The district court's decision, concluding the value of the monthly compensation benefit is zero, is not harmonious with the Legislature's commitment to retired police officers and their dependents.

To give effect to the Legislature's intent at the time Daniel DeMaranville was disabled with heart disease the district court's decision must be reversed. To construe the statutory scheme in the ODA and the NIAA in harmony with the intent expressed by the Legislature, the appeals officer's decision should be affirmed. See Dezzani v. Kern Assocs., 134 Nev. Adv.

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Rep. 9, 412 P.3d 56, 59 (2018) (quoting Torrealba v. Kesmetis, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008)).

DATED this 19th day of November, 2018.

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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.

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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 EMPLOYERS INSURANCE COMPANY OF NEVADA'S ANSWERING BRIEF 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:

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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 EMPLOYERS INSURANCE COMPANY OF NEVADA'S ANSWERING BRIEF addressed to:

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DATED:

November 19, 2018

SIGNED:

Tancy L. Sherwood