

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73971

Electronically Filed
May 20 2019 04:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CITY OF RENO,

Appellant,

v.

JODY YTURBIDE,

Respondent.

Appeal From Order Denying Petition for Judicial Review
District Court Case No. CV17-00065
Second Judicial District Court of Nevada

PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE STATEMENT

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 disqualification or recusal.

The City of Reno is a governmental party; therefore, no disclosure is necessary.

The law firm of McDonald Carano LLP appeared on behalf of the City of Reno in the underlying administrative proceedings and in the district court.

Dated this 20th day of May, 2019.

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Appellant, the City of Reno (“City”), petitions this Court for rehearing of the Court’s Decision entered in the above-entitled matter on May 2, 2019. The request is made pursuant to NRAP 40.

INTRODUCTION

The City respectfully submits that the Court’s Decision in this appeal overlooks the purpose of the statutory 25% cap on lump sum permanent partial disability awards at issue in the appeal. The Court loses sight of the purpose behind the statutory cap because the Court overlooks a fundamental principle behind calculation of whole person impairment under NRS 616C.490 and the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition (“*AMA Guides*” or “*Guides*”). The Court’s application of the statutory cap on a “disability-by-disability” basis reveals the Court overlooked the whole person impairment concept fundamental to the calculation of impairment under the *AMA Guides*. Under the *Guides* “disability” and “whole person impairment” mean the same thing. The *Guides* require that all impairments be combined, and that impairment always be considered in terms of the combined effect of all impairments on the whole person.

By overlooking this fundamental principle, the Court arrives at the errant conclusion that the 25% cap applies on a “disability by disability” basis rather than

whole person impairment. Doing so undermines the purpose of the statute as clearly and unambiguously expressed by the Nevada's legislature.

ARGUMENT

I. The Applicable Standard for Rehearing

NRAP 40(c)(2) sets forth when rehearing may be considered by the Court:

(c) Scope of Application; When Rehearing Considered.

(2) The court may consider rehearings in the following circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

The City respectfully submits rehearing should be granted in this case because the Court has overlooked a fundamental principal of calculating PPD awards under NRS 616C.490 and the *AMA Guides* resulting in a conclusion that fundamentally contradicts the purpose of the statutory cap.

II. The Whole Body Approach to Impairment¹

Nevada's statutory scheme requires impairment caused by an industrial injury to be evaluated using the *AMA Guides to the Evaluation of Permanent Impairment*.

¹ This issue was raised in Appellant's Opening Brief at page 22 and further discussed in Appellant's Reply Brief at page 9.

See NRS 616C.490(2). The *Guides* require a whole body approach to permanent impairment. As used in NRS 616C.490, the term “disability” and “impairment of the whole person” mean the same thing. They are “equivalent terms.” See NRS 616C.490(1).

When determining disability/whole person impairment caused by an industrial injury, the *Guides* expressly require a whole-body approach to impairment:

“The *Guide’s* impairment ratings reflect the severity and limitations of the organ/body system impairment and resulting **functional limitations**. Most organ/body systems chapters in the *Guides* provide impairment ratings that represent the extent of whole person impairment.” *AMA Guides*, p. 9, §1.3, The Organ System and Whole Body Approach to Impairment. (111 JA 324-326)

The whole body approach to impairment requires that impairments ratings be combined using the Combined Values Chart:

“To determine **whole person impairment**, the physician should begin with an estimate of the individual’s most significant (primary) impairment and evaluate other impairments in relation to it. It may be necessary for the physician to refer to the criteria and estimates in several chapters if the impairing condition involves several organ systems. Related but separate conditions are rated separately and impairment ratings are combined unless criteria for the second impairment are included in the primary impairment. . .”

“In the case of two significant yet unrelated conditions, each impairment rating is calculated separately, converted or expressed as a whole person impairment, then combined using

the Combined Values Chart (p. 604). The general philosophy of the Combined Values Chart is discussed in Chapter 1.” *AMA Guides*, p. 19, § 2.5b, Combining Impairment Ratings. (111 JA 324-326)

The philosophy behind the Combined Values Chart is explained in section 1.4 of the *Guides*:

“The **Combined Values Chart** (p. 604) was designed to enable the physician to account for the effects of multiple impairments with a summary value. A standard formula was used to ensure that regardless of the number of impairments, the summary value would not exceed 100% of the whole person. According to the formula listed in the combined values chart, multiple impairments are combined so that the whole person impairment value is equal to or less than the sum of all the individual impairment values.” *AMA Guides*, p. 9, § 1.4, Philosophy and Use of Combined Values Chart. (111 JA 324-326)

The clear import of these sections of the *Guides* is that multiple disabilities/ impairments must be combined under the Combined Values Chart and expressed in terms of whole person impairment. Anytime a PPD evaluation occurs, the *Guides* require that the PPD physician to identify all impairments effecting the Claimant and to combine those impairments under the combined values chart to determine the Claimant’s whole person impairment. Otherwise, multiple impairments could exceed 100%, which is prohibited by the *Guides* and Nevada’s statutory scheme. *See* NRS 616C.495(1)(e); *AMA Guides*, p. 9, § 1.4, Philosophy and Use of the Combined Values Chart (111 JA 324-326). When this fundamental principle is understood, it quickly becomes apparent that the statutory cap applies to aggregate whole person

impairment, not on a disability-by-disability basis. It is only when the statutory cap is applied to aggregate whole person impairment that the purpose of the cap is accomplished.

III. The Purpose of the Statutory Cap²

The Court's Decision frames the issue as one of statutory construction of NRS 616C.495(1)(d) and the regulation (NAC 616C.488) promulgated under NRS 616C.495(1)(d):

“Here, the sole issue pertains to the construction of NAC 616C.498 . . .”

The Court then construes NAC 616C.498 to allow the 25% statutory cap on lump sum PPD awards to be applied on a disability-by-disability basis. In doing so the Court misapplies the law and loses sight of the fundamental purpose of the statutory cap on lump sum awards arriving at a decision that has exactly the opposite affect than intended by the legislature.

The purpose of the statutory cap is to ensure that the most seriously injured employees are compensated over time and not left destitute after lump-sum payments are exhausted. See *Larson's Worker's Compensation Law, Agreements and Settlements*, §132.07(1) (2015). The rationale behind and the purpose of the statute has been clearly expressed by Nevada's legislature on at least two separate

² This issue was raised in Appellant's Opening Brief at page 22 and further discussed in Appellant's Reply Brief at page 5.

occasions, once when the statutory cap was introduced in 1987, and again in 1995 when the Legislature considered eliminating the cap and chose not to do so. (See Joint Appendix Addendum, AB 757, comments of Raymond Badger, Chairman of the Nevada Trial Lawyers Workmen's Compensation Committee; see also legislative history of SB 458, comments of Senator Randolph Townsend, Hearing Before the Senate Committee on Commerce and Labor, 68th Session, May 11, 1995). The Court's Decision in this case overlooks this important purpose of the statutory cap and effectively guts the protection the Legislature intended for seriously injured workers.

The Court's Decision allows application of the statutory cap on a disability-by-disability basis. Under the Court's analysis the statutory cap would never come into play in the situation where a worker has multiple injuries with multiple PPD awards unless one of those awards exceeds 25%. Under the Court's analysis, it would literally be possible for a worker to have multiple serious injuries and receive multiple lump-sum PPD awards, the total of which far exceeds 25% whole person impairment with no requirement for installments being paid to the injured worker. For example, a worker could have four separate serious injuries, each resulting in a 20% PPD award. Although the aggregate whole person impairment is 80%, the statutory cap would never be triggered under the Court's decision.

The Court's oversight of the purpose behind the statute becomes apparent when you contrast the multiple injury example above with the situation in which an injured worker sustains a single injury resulting in a 50% impairment. Under the Court's decision in the situation where a single injury results in a 50% impairment, the cap would be triggered and the injured worker would receive a 25% lump-sum award with the remainder of the 50% award being paid in installments.

The impact of the Court's Decision is to protect the injured worker with a whole person impairment of 50% by requiring installment payments on the amount of the award exceeding 25%. Yet, in the situation involving the injured worker with multiple injuries and whole person impairment of 80%, the statutory cap is never triggered because the Court's Decision allows the cap to be applied on a disability-by-disability basis rather than on the basis of whole person impairment. The effect of the Decision is to protect the less seriously impaired worker by requiring installments but not requiring installments for the protection of the more seriously impaired employee. That is exactly the opposite of what the Legislature intended when it enacted the statutory cap.

Statutes should always be construed consistent with the purpose and legislative intent behind the statute. *State, Dep't of Motor Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1249-50 (1994). Further, statutory interpretation should not render any part of a statute meaningless, and a statute's language 'should

not be read to produce absurd or unreasonable results.’’’) (internal citation omitted); *see also Public Employees’ Benefits Program v. Las Vegas Metropolitan Police Dept.*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008); *see also McCrackin v. Elko County School Dist.*, 103 Nev. 655, 658, 747 P.2d 1373 (1987). The Court’s Decision here construes the statute in a manner inconsistent with its purpose and effectively renders it meaningless in any situation where a worker is seriously impaired as a result of the cumulative effect of multiple injuries, none of which result in impairment greater than 25%.

CONCLUSION

The Nevada Legislature enacted the statutory cap to protect seriously injured workers by limiting lump-sum awards and requiring installment payments to protect against dissipation of lump-sum awards that might leave a seriously injured worker destitute. Because the Court’s Decision overlooks the *Guides* requirement that disability always be considered in terms of whole person impairment, it concludes the statutory cap applies on a disability-by-disability basis. That conclusion fails to recognize the purpose of the statutory cap. The result is a decision that has exactly the opposite effect of the Legislature’s explicitly stated intention in enacting and retaining the statutory cap. For these reasons, the City respectfully request rehearing of the Court’s May 2, 2019 decision.

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.

Respectfully submitted this 20th day of May 2019.

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,562 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number 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 this brief is not in conformity with the requirements of the Nevada Rules of Appellate

Procedure.

Dated this 20th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on May 20, 2019, 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 Eflex as users will be served by the Eflex system.

Dated: May 20, 2019.

/s/Carole Davis
Employee of McDonald Carano LLP