

Case No. 76737

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**IN THE SUPREME COURT OF NEVADA**

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Elizabeth A. Brown  
Clerk of Supreme Court

DARRELL E. WHITE,

Petitioner,

v.

STATE OF NEVADA, EX REL DIVISION OF FORESTRY, ET AL.,

Respondents

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On Appeal of the Decision of the Eighth Judicial District Court, Dept. 32,  
Rob Bare presiding

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**PETITIONER'S OPENING BRIEF**

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### I. STATEMENT OF JURISDICTION.

This Court has jurisdiction over this appeal pursuant to NRS 616C.370.

### II. ROUTING STATEMENT.

Petitioner is appealing the District Court decision which affirmed the Appeal Officer's decision in favor of the Respondents. This is a possible matter of first impression for the Court.

### **III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.**

It is unconstitutional, under the Nevada Constitution, Article 15, §16, for the TPA to compensate Mr. White for Temporary Total Disability based upon an Average Monthly Wage that is less than the State's minimum wage for the 144 days while he was on a Work Restriction, after his release from custody.

### **IV. STANDARD OF REVIEW.**

Agency decisions based upon questions of statutory construction "are purely legal issues, and [the Supreme Court] reviews pure questions of law de novo." *Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 149, 11P.3d 1107 (2005), citing *Beavers v. State, Dep't of Mtr. Vehicles*, 109 Nev. 435, 438, 851 P.2d 432, 434 (1993).

## **I. STATEMENT OF THE CASE.**

This matter comes before the Court on an appeal from the District Court which affirmed the Order of the Appeals Officer, denying Mr. White Temporary Total Disability at an Average Monthly Wage that was at least equal to the State's minimum wage for the 144 days while he was on a Work Restriction, after his release from custody.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.**

On 12/22/15, Mr. White injured his Right Long Finger, while in the employ of the Nevada Department of Forestry ("NDF") as a Nevada state prisoner. He was examined by Dr. John R. Rogers (Grover C. Dils Medical Center) who reviewed the x-ray report and diagnosed the injury as an "oval articular bone fragment ... positioned dorsal to extensor tendon."<sup>1</sup> That same day, the NDF filed a C-1, Notice of Injury,<sup>2</sup> a C-3, Employer's Report of Industrial Injury,<sup>3</sup> and a C-4, Employee's Claim.<sup>4</sup>

On 12/23/15, Mr. White was transported to UMC, where he was diagnosed with an "avulsion fracture of 3<sup>rd</sup> metacarpal."<sup>5</sup>

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<sup>1</sup> Dr. Rogers ER Notes and x-ray report, ROA at 181-182.

<sup>2</sup> Notice of Injury (C-1), ROA at 062.

<sup>3</sup> Employer's Report of Industrial Injury, ROA at 064.

<sup>4</sup> Employee's Claim (C-4), ROA at 063.

<sup>5</sup> UMC Evaluation, ROA at 068.

On 1/8/16, he was examined by Dr. Fadell (Hand Surgery Specialists of Nevada), who confirmed the fracture and prescribed a brace for the finger, which Dr. Fadell ordered to be worn for the next 4 weeks.<sup>6</sup> There was no Work Restriction placed upon Mr. White.

On 1/25/16, the third-party administrator (“TPA”), Cannon Cochran Management Services, Inc. (“CCMSI”), issued its written Notice of Claim Acceptance.<sup>7</sup>

On 2/24/16, Mr. White was again examined by Dr. Fadell, who noted “fracture fragments” beneath the skin. He was to continue “working on range of motion” and was allowed to discontinue the brace.<sup>8</sup> There was no Work Restriction placed upon Mr. White. In fact, Dr. Faddell stated in a subsequent written statement that he “intended to release Mr. White to full duty on 2/24/16.”<sup>9</sup>

On 4/25/16, CCMSI replied to Mr. White’s 4/3/16 letter, informing him that he was “required to continue treating through your incarceration. If you feel that you are not recovered upon your release, CCMSI will continue to facilitate treatment once you have been

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<sup>6</sup> Dr. Fadell exam notes, ROA at 184-192.

<sup>7</sup> Notice of Claim Acceptance, ROA at 096.

<sup>8</sup> Dr. Fadell exam notes, ROA at 194.

<sup>9</sup> Dr. Fadell verified statement, ROA at 254.

released from the correctional facility.”<sup>10</sup>

On 4/29/16, CCMSI wrote to Mr. White and informed him that he had 30 days to “make an appointment and be evaluated by a physician” because he had “not followed up with medical care as recommended by your physician.”<sup>11</sup>

On 6/3/16, CCMSI wrote to Mr. White and informed him that his case was being closed because they had “not received a response” to their 4/29/16 request. He was informed that he had a right to appeal this determination.<sup>12</sup>

On 7/7/16, Mr. White was released from the custody of the NDOC, as he had expired his sentence and was not on parole.<sup>13</sup>

On 7/19/16, Mr. White met with Mr. Barrick, seeking assistance with his claim. The next day, they prepared an Affidavit, with Exhibits, setting forth Mr. White’s version of the events surrounding his Injury and the lack of treatment by the NDOC.<sup>14</sup>

On 8/4/16, CCMSI responded to Mr. White’s Affidavit and

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<sup>10</sup> CCMSI letter, ROA at 098.

<sup>11</sup> CCMSI letter, ROA at 099.

<sup>12</sup> On 6/12/16, Mr. White filed his Request for Hearing because he was “at the mercy of the prison doctors,” he had “been moved twice” and “did not receive sufficient specialist care.” This document was inadvertently omitted from the ROA.

<sup>13</sup> Decision and Order, ROA at 40; Transcript of Hearing, ROA at 15-16.

<sup>14</sup> Mr. White Affidavit, with Exhibits, ROA at 196-98.

scheduled him for an appointment with Dr. Bronstein.<sup>15</sup>

On 8/17/16, Mr. White was examined by Dr. Bronstein, who observed a “healed fracture with an dorsal avulsion fragment that is dorsally displaced.” Dr. Bronstein made an ambiguous entry of “Patient may work, Full duty. (No work status change).”<sup>16</sup> When later asked if he intended to release Mr. White to full work status on that date, he responded, “I released Mr. White to the same work status he was the day before our appointment. My intention was to not change his work status on that visit until post-op.”<sup>17</sup>

On 9/29/16, CCSMI informed Mr. White that his Average Monthly Wage (“AMW”) for Temporary Total Disability (“TTD”) was “\$22.30 for a daily rate of \$0.50.”<sup>18</sup>

On 10/25/16, Mr. White was again examined by Dr. Bronstein, who recommended surgery on the R-finger and noted that, as of 10/19/16, Mr. White was “unable to work.” Dr. Bronstein also prescribed a splint for Mr. White’s finger.<sup>19</sup>

On or about 11/15/16, Dr. Bronstein performed surgery on Mr.

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<sup>15</sup> CCMSI letter, ROA at 101.

<sup>16</sup> Dr. Bronstein exam notes, ROA at 200-201.

<sup>17</sup> Dr. Bronstein verified statement, ROA at 215.

<sup>18</sup> CCMSI Notice of Average Daily Wage, ROA at 203.

<sup>19</sup> Dr. Bronstein exam notes, ROA at 205-208.



White's finger, and on 11/21/16, Dr. Bronstein authorized continuing physical therapy, which was approved for an additional 4 weeks.<sup>20</sup>

On 12/28/16, the TPA informed Mr. White that he had completed his medical treatment and was referring him out for a PPD.<sup>21</sup>

On 3/17/17, the Appeals Officer conducted an Appeal Hearing, wherein Mr. Barrick reiterated the arguments in his Appeal Memorandum,<sup>22</sup> alleging that it is unconstitutional to pay Mr. White less than the minimum wage for the period after release from custody.<sup>23</sup>

On 8/17/17, the Appeals Officer issued the Decision and Order, wherein it was determined that the TPA's determination of AMW was "appropriate," because Mr. White "is not entitled to any rights and remedies established by Chapter 616A to 617 of the Nevada Revised Statutes."<sup>24</sup> It was also determined that "there is no doubt that the claimant, subsequent to release from custody, was declared unable to work until Dr. Bronstein's release on December 2016."<sup>25</sup>

The Decision and Order also cited NAC 616.435 for the basis for

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<sup>20</sup> Dr. Bronstein authorization for physical therapy, ROA at 210-213.

<sup>21</sup> CCMSI Notice of PPD Exam, ROA at 217-218. Accordingly, Mr. White was under a physician's care for his injury from 8/6/16, the date of his release from NDOC, until 12/28/16, for a total of 144 days.

<sup>22</sup> Claimant's Appeal Memorandum, ROA at 177-178.

<sup>23</sup> Transcript of Hearing, ROA at 029-30.

<sup>24</sup> Decision and Order, ROA at 043.

<sup>25</sup> Decision and Order, ROA at 042.

calculating the AMW, which the TPA used, but also cited NAC 616C.435(7) as a “catch all provision” which provides that the method used for calculating the AMW “should be reasonable and fair.”<sup>26</sup>

### **III. SUMMARY OF ARGUMENT.**

It is unconstitutional, under the Nevada Constitution, Article 15, §16, for the TPA to compensate Mr. White for Temporary Total Disability based upon an Average Monthly Wage that is less than the State’s minimum wage for the 144 days on a Work Restriction between 8/6/16 and 12/28/16.

### **IV. ARGUMENT.**

**A. Mr. White is entitled to TTD at an AMW that is no less than the minimum wage for the 144 days post-release from the NDOC.**

**1. The default rule for establishing the Average Monthly Wage is the “date of injury, but it is not the ONLY method.**

The TPA, their counsel, the Hearing Officer, the Appeals Officer and the District Court are all correct in stating that the default rule, “NRS 616C.425(1), requires that the amount of compensation and benefits and the person or persons entitled thereto must be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date.”

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<sup>26</sup> Decision and Order, ROA at 042.

But that default rule is based upon certain assumptions; most important of which is that the date of injury is the same date as the injured worker was placed upon a Work Restriction due to their injuries. This is undoubtedly the situation in the overwhelming majority of cases. So much so that it isn't even questioned.

However, NAC 616.435(7) contains a "catch all provision" which provides that the method for calculating the AMW "should be reasonable and fair."<sup>27</sup> It is hardly arguable that the TPA's determination of Mr. White's TTD at \$.50 per day is "reasonable and fair," once he was released from prison, under a Work Restriction and unable to work to support himself.

NRS 616B.028 provides that an inmate "confined at the state prison" is entitled to coverage under the modified program ... established by the NDOC. But neither NRS 616B.028 nor the NDOC regulations specify the entitlement to TTD once the inmate is released from custody.

NRS 616C.500(2), which sets forth Temporary Partial Disability ("TPD") compensation, **does** address this issue, where it states that the injured inmate is "entitled to receive such benefits if the injured employee is released from incarceration during the period of disability." The statute

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<sup>27</sup> Appeals Officer Decision and Order, ROA at 042.

provides for the restoration of benefits that were obtained before incarceration.

Thus, in one situation, the statutes and regulations contemplate a situation such as Mr. White's and in another situation, it utterly fails to do so.

Accordingly, the default calculation of Mr. White's AMW presents a "hole" in the regime that fails to comply with the purpose of TTD; that is, to provide a subsistence income while he was under a Work Restriction and unable to provide for his basic needs. He has no remedy other than an Order by the Court, remanding the case for a calculation of an AMW that is "reasonable and fair."

**2. Mr. White was never on a Work Restriction while incarcerated.**

Even though the requisite forms were filed for Mr. White on 12/22/16, there is NO evidence in the Record that Mr. White was ever placed upon a Work Restriction during the period he was incarcerated.

Mr. White testified that after his initial exam by Dr. Fadell, prison officials "medically cleared [him] to go back to camp," and he performed "yard labor," even though he was not "expected to work." He also testified that he earned his good time credits for working when he stated, "So that's

how I got my days.”<sup>28</sup>

On 2/24/16, Dr. Fadell told Mr. White that he could stop using the brace.<sup>29</sup>

There is no evidence in the Record on Appeal that Mr. White was ever examined again by prison officials or an outside doctor.

Accordingly, there is no “substantial evidence in the record” that Mr. White was on a Work Restriction from the date of the accident until the day he was seen by Dr. Bronstein, on 8/6/17. It also appears from Dr. Bronstein’s verified statement that he assumed (incorrectly) that Mr. White was on a Work Restriction when he was first examined, when he stated, “My intention was to not change his work status on that visit until post-op.”<sup>30</sup>

In Mr. White’s case, the 12/22/15 “date of injury” is irrelevant to his situation and he should be entitled to an “alternate” date of injury for purposes of calculating his AMW.

**3. Either under a “fair and reasonable” alternative method of calculation the AMW, or by establishing an alternate “date of injury,” the calculation of Mr. White’s AMW can be at a rate no less than the Nevada Minimum Wage.**

The Nevada Constitution, Article 15, §16 states, “each employer shall

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<sup>28</sup> Transcript of Appeal Hearing, ROA at 011-12.

<sup>29</sup> Transcript of Appeal Hearing, ROA at 013.

<sup>30</sup> Dr. Bronstein verified statement, ROA at 215.

pay a wage to each employee of not less than the hourly rates set forth in this section.” And, according to the Office of the Labor Commissioner, the minimum wage for workers in Nevada, as of 4/1/16, is “no less than \$7.25 per hour.”<sup>31</sup>

Accordingly, payment of TTD, based upon an AMW calculated on less than the minimum wage for the 144 days he was “unable to work” violates the Nevada Constitution.

It should be obvious that it is patently unfair to pay Mr. White \$0.50 per day for the period after he was released from prison and first placed upon a Work Restriction, as one purposes of the TTD is to provide at least the minimum income to the worker while they are under a doctor’s care and unable to earn a wage. His needs while incarcerated are minimal, compared to his needs upon release, which include housing & utilities, food, and transportation, just to name a few. It is inconceivable that he could meet these needs on \$0.50 per day.

**4. A finding by this Court in Mr. White’s favor is unlikely to “open the flood gates” for similar claims.**

By way of the facts presented here, Mr. White is in a unique position. The insurer should not be entitled to a windfall, simply because

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<sup>31</sup> Mr. White requests Judicial Notice of the 4/1/16 2016 Labor Commissioner Annual Minimum Wage Bulletin, inadvertently omitted from the ROA.

Mr. White was at the mercy of the NDOC for medical care (which he never received) and a compensation regime than never contemplated his situation.

There is no evidence in the record that Mr. White's situation is anything other than an isolated incident.

## V. CONCLUSION.

For the reasons set forth above, Mr. White requests that the Court reverse the Decision of the District Court, remand the matter to the Appeals Office, and order the TPA to recalculate the AMW for the 144 days post-incarceration, based upon an amount no less than the minimum wage, under NAC 616C.435(7).

Dated this <sup>11<sup>th</sup></sup> day of March 2018.

By: 

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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 WORD in 14 font size Georgia type face.

I further certify that this brief complies with the page or type volume limitations in NRAP 32(a)(7) because it is proportionally spaced, has a typeface of 14 points and contains less than 2100 words and does not exceed 12 pages.

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 that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number of the Appendix. 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 <sup>14</sup>// day of March 2019.

By: 

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## STATEMENT OF RELATED CASES

None.

## CERTIFICATE OF SERVICE

I hereby certify that on the 11<sup>th</sup> day of March 2019, I mailed a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** to the counsel listed below:

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