

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY,

Appellant,

vs.

BRENT BEAN,

Respondent.

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Supreme Court Case No.: 78443
District Court Case No.: A773957

PROOF OF SERVICE

I certify that on the date indicated below, I served a copy of this completed Appellant Clark County's Petition for Rehearing upon all parties as follows:

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DATED this 27th day of October, 2020.



An employee of Hooks, Meng & Clement

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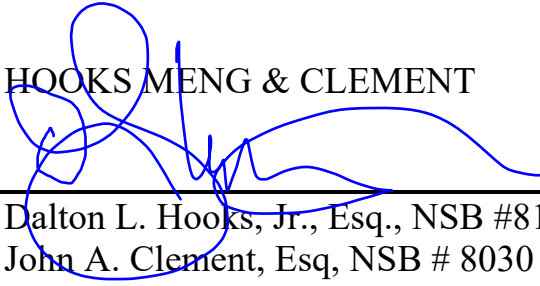
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APPELLANT CLARK COUNTY'S PETITION FOR REHEARING

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I.
NRAP 26.1 DISCLOSURE

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY,

Appellant,

vs.

BRENT BEAN,

Respondent.

Supreme Court Case No.: 78443
District Court Case No.: A773957

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1, and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Appellant Clark County is a governmental entity.

Clark County, was represented by HOOKS MENG & CLEMENT in the underlying litigation and on appeal.

HOOKS MENG & CLEMENT

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II.
TABLE OF CONTENTS

I.	NRAP 26.1 DISCLOSURE.....	i
II.	TABLE OF CONTENTS.....	ii
III.	TABLE OF AUTHORITIES.....	iii
IV.	ARGUMENT.....	1
	A. Legal Standard.....	1
	B. The Court Erroneously Assumed a Legislative Function by Granting Permanent Partial Disability Benefits to Retired Firefighters.....	1
	C. The Court Overlooked NRS 617.453’s Legislative History to Conclude that a Retired Firefighter is Entitled to Permanent Partial Disability.....	3
	D. The Court Overlooked the Question as to Whether a Retiree is Entitled to Permanent Partial Disability.....	8
	1. Workers’ Compensation is Not an “Entitlement Program”; Rather, Claimants Must Establish Eligibility for Specific Benefits Depending on their Personal Circumstances.....	9
	2. Under Nevada Law and the Majority Approach Articulated in Larson's Workers' Compensation Law, a Claimant Must Demonstrate Both Medical Impairment and Economic Loss to Receive Any “Disability” Award.....	10
V.	CONCLUSION.....	13
VI.	CERTIFICATE OF COMPLIANCE.....	13
VII.	CERTIFICATE OF SERVICE.....	15

III. **TABLE OF AUTHORITIES**

Constitutional Provisions

Nev. Const. art. III § 1.....	1
Nev. Const. art. IV § 1.....	1

Rules of Appellate Procedure

Nev. R. App. P. 40.....	1
-------------------------	---

Statutes

NRS 616C.150.....	8, 9
NRS 616C.390.....	12
NRS 616C.435.....	11
NRS 616C.475.....	11
NRS 616C.590.....	9
NRS 616C.500.....	11
NRS 617.358.....	8, 9
NRS 617.440.....	4
NRS 617.453.....	passim

Cases

<i>Amazon.com v. Magee</i> , 121 Nev. 632, 637, 119 P.3d 732, 735 (2005)....	11
<i>Am. Home Assurance Co. v. Eighth Judicial Dist. Court</i> , 122 Nev. 1229,	

1240 n.39, 147 P.3d 1120, 1128 (2006).....	10
<i>Banegas v. State Indus. Ins. Sys.</i> , 117 Nev. 222, 227, 19 P.3d 245, 248 (2001).....	1
<i>Buma v. Providence Corp. Dev.</i> , 453 P.3d 904, 907 (Nev. 2019).....	10
<i>Nev. Indus. Comm'n v. Hildebrand</i> , 100 Nev. 47, 51, 675 P.2d 401, 404 (1984).....	12
<i>State Indus. Ins. Sys. v. Bokelman</i> , 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997).....	8
<i>Vredenburg v. Sedgwick CMS</i> , 124 Nev. 553, 558 n.10, 188 P.3d 1084, 1088 (2008).....	10
<i>Washoe Med. Ctr. v. Second Judicial Dist. Court</i> , 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).....	3
<i>Weaver v. State Indus. Ins. Sys.</i> , 104 Nev. 305, 306, 756 P.2d 1195, 1195 (1988).....	1, 13

Legislative History

A.B. 797, Hearing Before the Assembly Committee on Labor and Management, 64th Session of the Nevada Legislature (1987) (Statement of Bill Bunker).....	3, 4
A.B. 797, Hearing Before the Assembly Committee on Labor and Management, 64th Session of the Nevada Legislature (1987) (Statement of Kim Mueller).....	4
A.B. 451, Hearing Before the Assembly Committee on Commerce and Labor, 72nd Session of the Nevada Legislature (2003) (Statement of Rusty McAllister).....	4, 5
A.B. 507, 73rd Session of the Nevada Legislature (2005).....	5
A.B. 521, 75th Session of the Nevada Legislature (2009).....	5

A.B. 521, Hearing Before the Assembly Committee on Commerce and Labor, 75th Session of the Nevada Legislature (2009) (Statement of Rusty McAllister).....	5
A.B. 521, Hearing Before the Assembly Committee on Commerce and Labor, 75th Session of the Nevada Legislature (2009) (Statement of Dr. Matthew Schwartz).....	5
Local Government Fiscal Notes, A.B. 521, 75th Session of the Nevada Legislature (2009).....	6
S.B. 215, 80th Session of the Nevada Legislature (2019).....	6
S.B. 215, Hearing Before the Assembly Committee on Commerce and Labor, 80th Session of the Nevada Legislature (2019) (Statement of Rusty McAllister).....	6, 7

Secondary Sources

6 Larson's Workers' Compensation Law § 80.02 (2020).....	10, 11 12, 13
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IV. ARGUMENT

A. Legal Standard

This Court may consider a Petition for Rehearing “[w]hen the court has overlooked or misapprehended...a material question of law in the case” or “has overlooked, misapplied or failed to consider a statute, procedural rule, regulation, or decision directly controlling a dispositive issue in the case.” Nev. R. App. P. 40(c)(2)(A)–(B).

B. The Court Erroneously Assumed a Legislative Function by Granting Permanent Partial Disability Benefits to Retired Firefighters.

The Nevada Constitution states that “[t]he Legislative authority of this state shall be vested in a Senate and Assembly...” Nev. Const. art. IV § 1. The Legislature may not grant its lawmaking power to the executive or judicial departments. Nev. Const. art. III § 1; *see also Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) (stating that “[o]ne of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated to any other body or authority”). This is all the more true in workers’ compensation, “[b]ecause the system is uniquely legislative in nature...” and this Court has “previously refused to disturb the delicate balance created by the legislature by implying provisions not expressly included in the legislative scheme.” *Weaver v. State Indus. Ins. Sys.*, 104 Nev. 305, 306, 756 P.2d 1195, 1195 (1988).

Here, this Court assumed a Legislative function by ruling that retired firefighters are entitled to permanent partial disability (PPD). This result is in direct conflict with NRS 617.453 (10), which specifies that a retired firefighter is only entitled to medical benefits. As explained by Mr. Rusty McAllister, lobbyist for Professional Fire Fighters of Nevada, medical benefits include only medical care and does not include disability benefits of any kind. *See infra* part C.

The instant case has implications beyond the parties before the Court. In its ruling, the Court cited the district court's rationale that "[p]ermanent partial disability is a medical benefit intended to compensate the injured worker for permanent physical damages caused by the industrial injury or occupational disease and not a form of disability compensation associated with lost wages." As a result, it is anticipated that future workers' compensation claimants will cite to the instant case as authority for the proposition that a PPD award is a medical benefit instead of a lost wage indemnity. Under the instant case, retired firefighters will seek PPD payments in retirement despite NRS 617.453 (10)'s mandate that such compensation include only medical benefits and not disability benefits. Accordingly, this Court should rehear this matter to clarify and reconsider the precedential impact of the instant case.

C. The Court Overlooked NRS 617.453's Legislative History to Conclude that a Retired Firefighter is Entitled to Permanent Partial Disability.

The Court began its analysis by determining that NRS 617.453 (4) is ambiguous and noted that an “ambiguous [statute] should be interpreted consistent with the Legislature’s intent, according with reason and public policy.” Without hearing argument from the parties regarding the Legislature’s intent in passing NRS 617.453 (4), the Court mistakenly presumed that the Legislature intended to extend PPD benefits to retired firefighters. Rather than investigating that threshold question, the Court focused on the methodology of how to calculate a PPD award where a retired firefighter earns no wages.¹ And without answering the threshold question of whether the Legislature intended to grant permanent partial disability to retired firefighters, the Court then evaluated how to calculate a permanent partial disability award where a retired firefighter earns no wages. However, when construing an ambiguous statute such as NRS 617.453 (4), the Court should first “look to legislative history for guidance” because “legislative intent is controlling.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).

¹ Appellant has raised the issue of whether NRS 616C.453 grants permanent partial disability benefits to retired firefighters throughout its opening and reply briefs.

NRS 617.453 became law in 1987 via the enactment of Assembly Bill 797. Importantly, Assembly Bill 797's legislative history specifically rejects the notion, set forth by Respondent, that the Legislature intended to grant firefighters disability benefits in retirement. A.B. 797, Hearing Before the Assembly Committee on Labor and Management, 64th Session of the Nevada Legislature (1987) (Statement of Bill Bunker). Instead, Assembly Bill 797's legislative history clearly establishes that the Legislature intended NRS 617.453 to serve as a mechanism for firefighters to more easily establish causation between cancer and their employment as firefighters in order to secure *medical treatment only*. *Id.*

Mr. Bill Bunker testified in support of Assembly Bill 797 on behalf of the Federated Firefighters. *Id.* According to Mr. Bunker, "one of the prime concerns of the subcommittee was if a firefighter left on disability it might be possible for him to draw more money than he would have if he had been working." *Id.* Mr. Bunker "stressed that was not the intent of the bill." *Id.* Instead, Mr. Bunker explained that Assembly Bill 797's purpose was to change the burden of proof that a firefighter must fulfill to establish a compensable occupational disease claim for cancer. *Id.* Under the general occupational disease causation statute, NRS 617.440, firefighters were unable to secure medical treatment because "[t]here was no scientific evidence but a gut feeling from the firefighters [that] led to the pursuit of compensation for them." A.B. 797, Hearing Before the Assembly Committee on Labor and

Management, 64th Session of the Nevada Legislature (1987) (Statement of Kim Mueller).

NRS 617.453 was next amended in 2003 through Assembly Bill 451. Assembly Bill 451 facilitated access to medical treatment for firefighters by establishing a list of carcinogens and associated cancers. A.B. 451, Hearing Before the Assembly Committee on Commerce and Labor, 72nd Session of the Nevada Legislature (2003) (Statement of Rusty McAllister).

Mr. Rusty McAllister testified on behalf of the Professional Fire Fighters of Nevada and explained that “[t]he reason that we bring this bill before you today is because there are several insurers that will not accept these claims even though we meet the requirements set forth in [NRS 617.453].” *Id.*

Mr. McAllister spoke of a firefighter who was unable to establish a causal connection between his cancer and employment as a fighter, and as a result, “[h]is claim has been denied and is still pending in the system.” Mr. McAllister further explained that “[f]ortunately, this firefighter has gotten the appropriate treatment through his health insurance trust and is back on the job protecting the public.” *Id.* at 8. Mr. McAllister contrasted said firefighter with prison firefighters, who upon contracting cancer are provided with health care at government expense.

The Legislature amended NRS 617.453 in 2005, substituting “firefighter” for “fireman.” A.B. 507, 73rd Session of the Nevada Legislature (2005). Subsequent

amendments to NRS 617.453 in 2009 via Assembly Bill 521 added additional known carcinogens to facilitate access to medical treatment. A.B. 521, 75th Session of the Nevada Legislature (2009). Mr. Rusty McAllister, testifying on behalf of the Professional Fire Fighters of Nevada, stated that “[w]e would like you to reconsider the amount of time you have to be a firefighter in order to have medical coverage for these types of cancers.” A.B. 521, Hearing Before the Assembly Committee on Commerce and Labor, 75th Session of the Nevada Legislature (2009) (Statement of Rusty McAllister). Dr. Matthew Schwartz, M.D., also testified in support of the bill and indicated that “[i]t is a disservice to these men to not allow them medical coverage.” A.B. 521, Hearing Before the Assembly Committee on Commerce and Labor, 75th Session of the Nevada Legislature (2009) (Statement of Dr. Matthew Schwartz). Fiscal notes submitted regarding Assembly Bill 521 indicate that the majority of Nevada local governments understood the impact of Assembly Bill 521 as expanding access to medical treatments.²

The Legislature most recently changed NRS 617.453 in 2019 through Senate Bill 215. S.B. 215, 80th Session of the Nevada Legislature (2019). Senate Bill 215 removed NRS 617.453’s prior sixty (60) month limitation on retiree claims. *Id.* Henceforth, firefighters who retire after July 1, 2019 who have served twenty (20)

² Local Government Fiscal Notes, A.B. 521, 75th Session of the Nevada Legislature (2009).

years may make an occupational disease claim for cancer at any point in their life. *Id.* However, Senate Bill 215 also limited a claim under NRS 617.453(7) to *medical benefits only*. *Id.* In eliminating retiree claims to medical benefits only, the Legislature intended to match compensation for cancer claims under NRS 617.453 to lung and heart claims under NRS 617.455 and NRS 617.457, respectively.³ Mr. Rusty McAllister, testifying on behalf of the Professional Fire Fighters of Nevada, explained:

The other part we want to make sure we got on the record is, once you leave the job—it is put into the statute just as it was for the heart and lung benefits—the only benefit you are entitled to is medical care. You do not get any type of a permanent or partial disability, there are no disability payments after you leave employment—it is purely for medical care.

S.B. 215, Hearing Before the Assembly Committee on Commerce and Labor, 80th Session of the Nevada Legislature (2019) (Statement of Rusty McAllister).

NRS 617.453’s legislative history as it was amended between 1987 and 2019 indicate that the legislature did not intend to grant PPD to retirees. To the contrary, the Legislature intended retired firefighters to receive medical benefits only. As indicated by firefighter lobbyist Mr. Bill Bunker, the intent of Assembly Bill was not for retired firefighters to receive more money on disability than had they been working. Additionally, firefighter lobbyist Mr. Rusty McAllister specifically denied

³ NRS 617.455 (9) and NRS 617.457 (14) limit retiree lung and heart claims to medical benefits only.

that the intent of NRS 617.453 is to provide any form of partial disability benefit of any kind to retired firefighters. Thusly, rehearing is appropriate because the Court's decision conflicts with legislative history.

D. The Court Overlooked the Threshold Question as to Whether a Retiree is Entitled to Permanent Partial Disability.

Without answering the threshold question of whether a retired firefighter is entitled to PPD benefits, the Court assumed Respondent is automatically entitled to PPD and then evaluated how to calculate said benefit. In doing so, the Court declared that "the Legislature created an entitlement program to compensate employees for disabilities resulting from an occupational disease that arises out of employment..."

Appellant posits that this analysis is a misunderstanding of workers' compensation law because this Court has held that "the purpose of Nevada's workers' compensation statutes is to give the proper amount of compensation, not to provide a panacea for all the ills of society at the expense of Nevada's employers." *State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997) (quotations omitted). Thus, before calculating a PPD award or any other benefit, this Court need first answer the threshold question of whether Respondent is entitled to the benefit. NRS 617.358(1) (2019); *see also* NRS 616C.150(1) (2019).

1. Workers' Compensation is Not an "Entitlement Program"; Rather, Claimants Must Establish Eligibility for Specific Benefits Depending on their Personal Circumstances.

The Court's conclusion that Respondent is automatically entitled to PPD benefits because he suffered an occupational disease represents a fundamental departure from the common understanding of Nevada workers' compensation law. Workers' compensation claimants are not entitled to specific benefits unless the facts of their case indicate they are entitled to the same. NRS 617.358(1) (2019); *see also* NRS 616C.150(1) (2019).

For example, Respondent is not automatically entitled to vocational rehabilitation benefits by virtue of suffering an occupational disease. NRS 616C.590. Instead, eligibility for vocational rehabilitation is a fact-based analysis requiring application of NRS 616C.590. Nor is respondent automatically entitled to unlimited medical treatment unrelated to his underlying condition. Rather, eligibility for each specific treatment must be decided by a preponderance of the evidence in accord with NRS 617.358(1). Thus, this Court must decide whether the facts of the instant case entitle Respondent to permanent partial disability *before* undertaking an analysis of calculation methods. The Court did not perform this analysis. Therefore, rehearing is appropriate.

2. Under Nevada Law and the Majority Approach Articulated in Larson's Workers' Compensation Law, a Claimant Must Demonstrate Both Medical Impairment and Economic Loss to Receive Any “Disability” Award.

In determining whether an injured worker entitled to PPD benefits, the Court must first seek to ascertain what “disability” means in the context of the act. “Disability” is not defined within the NIIA. In workers’ compensation matters, awards “are not made for physical injury... but for ‘disability’ produced by such injury.” 6 Larson's Workers' Compensation Law § 80.02 (2020).⁴ Larson's Workers' Compensation Law defines “disability” as a “blend of two ingredients”: medical impairment and inability to earn wages. *Id.* Larson explains that:

The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

Id.

Accordingly, a compensable “disability” requires a “blend” of medical impairment and wage loss. *Id.* Larson explains that “[t]he proper balancing of the

⁴ The Nevada Supreme Court has cited Larson's Workers' Compensation Law with approval. *See, e.g., Buma v. Providence Corp. Dev.*, 453 P.3d 904, 907 (Nev. 2019); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 558 n.10, 188 P.3d 1084, 1088 (2008); *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1240 n.39, 147 P.3d 1120, 1128 (2006).

medical and the wage-loss factors is, then, the essence of the ‘disability’ problem in worker’s compensation.” *Id.* According to Larson, “disability” does not exist in the absence of either medical impairment or wage loss. Where, as is here, a claimant has not experienced both medical impairment and wage loss, PPD benefits are unwarranted as no “disability” exists.

Similar to the majority approach identified by Larson, all disability benefits set forth within the NIIA require the claimant fulfill both medical and wage loss elements. For example, an award of temporary total disability benefits pursuant to NRS 616C.475 requires a medical finding that the claimant is totally disabled while also requiring a showing of economic loss via the claimant’s average monthly wage. *See Amazon.com v. Magee*, 121 Nev. 632, 637, 119 P.3d 732, 735 (2005) (discussing the link between physical disability and resulting work limitations when concluding that the claimant is not entitled to temporary total disability benefits). Under NRS 616C.500, an award of temporary partial disability requires that the claimant demonstrate medical loss in addition to an economic loss as shown by the claimant earning less than the temporary total disability rate while working light-duty.

Likewise, an award of permanent total disability requires a medical finding that a claimant suffered a scheduled injury or is otherwise an odd-lot upon the labor market as a result of an injury by accident arising out of and in the course of his or her employment in addition to a showing of economic loss via the claimant’s average

monthly wage. NRS 616C.435; *see also Nev. Indus. Comm'n v. Hildebrand*, 100 Nev. 47, 51, 675 P.2d 401, 404 (1984).

Nor can it be said that the Legislature has failed to account for retirees. NRS 616C.390 (11)(b) defines “retired” as a person who “[i]s not employed and earning wages” and instead receives retirement benefits or a pension. A retiree such as Respondent inherently cannot experience wage loss as he is not employed and is instead receiving a pension. The NIIA recognizes this important distinction between retirees and employees by, for example, limiting benefits to retirees upon reopening a claim pursuant to NRS 616C.390. Retirees’ interests are protected under the NIIA to the extent they suffer loss which the NIIA is intended to protect.

This Court has taken a position contrary to the majority opinion identified by Larson in ignoring wage-loss factors when holding that a retiree is entitled to permanent partial disability. The Court has thusly misapprehended the nature of disability benefits in general and PPD in particular, which are intended to compensate for “disability.” As discussed and explained above, disability is the product of injury and not exist in the absence of *both* medical and wage loss elements.

Further, there is no source of authority within the NIIA which directs or authorizes this Court to sever the mandatory economic loss component from the threshold question of whether a claimant such as Respondent is entitled to PPD

benefits or the calculation thereof. To do otherwise “disturb[s] the delicate balance created by the legislature by implying provisions not expressly included in the legislative scheme.” *Weaver v. State Indus. Ins. Sys.*, 104 Nev. 305, 306, 756 P.2d 1195, 1195 (1988). Rehearing of this matter is warranted.

V.
CONCLUSION

The Court assumed an impermissible legislative function by ruling in conflict with NRS 617.453 that retired firefighters may receive PPD payments. In doing so, the Court ignored legislative history which shows that the Legislature specifically intended to exclude all disability benefits from the workers’ compensation benefits available to retired firefighters. This decision is contrary to Nevada law and the majority approach identified by Larson and should be reheard.

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VI.
CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Rehearing 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 in Time New Roman 14 point font. I further certify that this brief complies with the type-volume limitations of NRAP 40 because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 2,933 words.

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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 26th day of October, 2020.

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