

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 LAS VEGAS METROPOLITAN
3 POLICE DEPARTMENT and CANNON
4 COCHRAN MANAGEMENT
5 SERVICES, INC.

6 Appellants,

7 v.

8 ROBERT HOLLAND,

9 Respondent.
10

Supreme Court Case No.: 82843

Electronically Filed
Jan 18 2022 11:43 a.m.

District Court Case No.: A-20-818754-1
Elizabeth A. Brown
Clerk of Supreme Court

11
12 **APPELLANTS' REPLY BRIEF**

13
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STATUTES

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1 v. Daniels, 122 Nev. 1009, 145 P.3d 1024 (2006)¹ If the employer can make that
2 showing, per the last clause of NRS 617.457(11), it is then incumbent upon the
3 claimant to prove that correction of the predisposing condition was not within his
4 ability.
5

6 Indeed, if Claimant had submitted evidence showing that, despite a good
7 faith attempt to correct the condition, the predisposing condition persisted, then he
8 may have rebutted Employer’s defense and proven that correction was not within
9 his ability. Whether or not Claimant’s efforts were earnest, sustained, in good faith,
10 and indeed whether he had proven that correction was not within his ability were
11 all **factual** considerations for the Appeals Officer.
12

13 In Daniels, the Court cited to legislative hearing minutes on A.B. 755 from
14 the May 23, 1989 Assembly Commission on Labor and Management. Id. at 1016,
15 P.3d at 1029. That assembly bill and the testimony surrounding it are of great
16 import to NRS 617.457 as that is when the conclusive presumption provision of the
17 statute was added.
18
19
20
21

22
23 ¹ See Also Manwill v. Clark Cty., 123 Nev. 238, 243 n.12, 162 P.3d 876, 879 (2007)(“*See*
24 Gallagher v. City of Las Vegas, 114 Nev. 595, 601 n.9, 959 P.2d 519, 522 n.9 (noting that “[i]f
25 the legislature believes some limitation is necessary, it may amend the statute to terminate
26 application of the presumption at some definite point”). *But see* NRS 617.457(6) (precluding a
27 firefighter from benefiting from the conclusive presumption if the firefighter fails to correct
predisposing conditions that lead to heart disease when warned in writing to do so).”

1 In favor of strengthening the presumption to make it conclusive, minutes
2 indicate that Ray Badger for the Nevada Trial Lawyers Association testified as
3 follows regarding measures in place whereby employers could still defend these
4 claims:
5

6 Mr. Badger said an employer could still defend a claim
7 with all those factors applied, if one went through his
8 annual examination and was told by his doctor, "Based
9 on my exam I want you to lose weight and stop smoking,
or get on a special diet." *The defense would be the
employee was warned to correct something and did not.*

10 Mr. Badger referred to line 9, page 2 and line 28 of the
11 bill. Line 28 presently states: "before the onset of
12 disease." They felt this was a problem, because heart
13 disease may have started at birth with a weak heart. They
14 propose instead to insert "before the disablement" which
15 is defined in this chapter as unable to work. The other
16 amendment suggested the addition of "subject to the
17 provisions of subsection 6." *This would make it clear
that even if the person had been employed 5 years, had
no prior heart disease and had passed all his physicals,
the employer's defense would be if in the annual
physical the doctor said they were overweight and were
going to have a heart attack, that would be a valid
defense and should remain.*

18 Mr. Badger stressed he felt they had a conclusive
19 presumption as long as the individual involved had
20 complied with the provisions of subsection 6.

21 (Hearing Minutes on A.B. 755 from the Assembly Comm. on Labor and Mgmt.,
22 65th Leg. (Nev., May 23, 1989)
23

24 ///

25 ///

26 ///

1 Per the 1989 legislative session, NRS 617.457 was amended to read as
2 follows:
3

4 617.457 1. Notwithstanding any other provision of this
5 chapter, diseases of the heart of a person who, for 5 years
6 or more, has been employed in a full-time continuous,
uninterrupted and salaried occupation as a fireman or
7 police officer in this state [D] which:

8 (a) Are caused from exposure to noxious gases, fumes or
9 smoke or from extreme overexertion, stress or danger;
10 and

11 (b) Result in either permanent or temporary disability or
12 death, are occupational hazards and compensable as such
under the provisions of this chapter unless it can be
13 shown by competent evidence that the person suffered
14 from the same ailment sometime during the 5-year period
15 immediately preceding employment. <D] [A] BEFORE
16 THE DATE OF DISABLEMENT ARE
17 CONCLUSIVELY PRESUMED TO HAVE ARISEN
18 OUT OF AND IN THE COURSE OF THE
19 EMPLOYMENT. <A]

20 2. Notwithstanding any other provision of this chapter,
21 diseases of the heart, resulting in either temporary or
22 permanent disability or death, are occupational diseases
23 and compensable as such under the provisions of this
24 chapter if caused by extreme overexertion in times of
25 stress or danger and a causal relationship can be shown
26 by competent evidence that the disability or death arose
27 out of and was caused by the performance of duties as a
volunteer fireman by a person entitled to the benefits of
chapter 616 of NRS pursuant to the provisions of NRS
616.070 and who, for 5 years or more, has served
continuously as a volunteer fireman in this state and who
has not reached the age of 55 years before the onset of
the disease.

28 3. Except as otherwise provided in subsection 4, each
employee who is to be covered for diseases of the heart
pursuant to the provisions of this section shall submit to a
physical examination, including an examination of the
heart, upon employment, upon commencement of
coverage and thereafter on an annual basis during his
employment.

4. A physical examination is not required for a volunteer
fireman more than once every 3 years after an initial
examination.

5. All physical examinations required pursuant to
subsection 3 must be paid for by the employer.

1 *6. Failure to correct predisposing [D] physical <D>*
2 *conditions which lead to heart disease when so ordered*
3 *in writing by the examining physician subsequent to the*
4 *annual examination excludes the employee from the*
5 *benefits of this section if the correction is within the*
6 *ability of the employee.*

7 7. A person who is determined to be:

8 (a) Partially disabled from an occupational disease
9 pursuant to the provisions of this section; and

10 (b) Incapable of performing, with or without
11 remuneration, work as a fireman or police officer,
12 may elect to receive the benefits provided under NRS
13 616.580 for a permanent total disability.

14 8. Claims filed under this section may be reopened at any
15 time during the life of Claimant for further examination
16 and treatment of Claimant upon certification by a
17 physician of a change of circumstances related to the
18 occupational disease which would warrant an increase or
19 rearrangement of compensation

20 (emphasis added)

21 The legislatures' understanding of these requirements has remained
22 consistent from at least 1989 up through the present iteration of NRS 617.457.

23 During the March 29, 2017 meeting of the Assembly Committee on Commerce
24 and Labor, testimony was had regarding the history of workers' compensation in
25 this state as substantive amendments to the Nevada Industrial Insurance Act
26 ("NIIA") were being proposed. In that context, the Executive Secretary-Treasurer
27 of the Nevada State AFL-CIO, Rusty McAlister, explained as follows:

28 There are benefits covered in NRS Chapter 617, which
29 are about occupational diseases. The provisions within
30 that section of the statute apply only to police,
31 firefighters, and emergency medical technicians. There
32 are heart and lung benefits for firefighters and police
33 officers. This is not a new concept. The benefits for
34 firefighters for lung disease were put in the statutes in
35 1965 and heart disease in 1969. In 1975, police officers
36 were added to both of those benefits. If the employees
37 comply with the requirements of the statute, they will be
38 eligible for the benefits. **The requirements include
39 being employed for five years, having an annual
40 physical, and making good-faith efforts to correct any**

1 predisposing conditions that are within his or her
2 ability to correct. If the employee meets these
3 requirements and has a heart or lung problem, it is
conclusively presumed that he or she is eligible for these
benefits.

4 (Hearing Minutes on A.B. 458 from the Assembly Comm. on Commerce and
5 Labor., 78th Leg. (Nev., March 29, 2017)(emphasis added)
6

7 Thus, the legislative history confirms that employers can defend claims for
8 benefits under NRS 617.457 by showing that a claimant was warned about
9 predisposing conditions and did not correct them. According to both the legislative
10 history and the Supreme Court, if “the employee was warned to correct something
11 and did not,” then claimants are excluded from benefits. At that point, if the
12 employer can make that initial showing, per the last clause of NRS 617.457(11), it
13 is then incumbent upon a claimant to prove that correction of the predisposing
14 condition was not within his ability. Note that there was no caveat to the testimony
15 in the legislature or the language of the Supreme Court: if a claimant fails to
16 correct the predisposing condition, the claim is deemed defended.
17
18
19

20 Claimant argues it is that it is somehow Respondent’s burden to prove a
21 negative, i.e. that Claimant did or did not make a concerted good faith attempt to
22 correct his predisposing conditions. The Supreme Court has held that the *lack* of
23 evidence can absolutely be evidence in and of itself. In the case of Wright v. State
24 DMV, 121 Nev. 122, 110 P.3d 1066, (2005), the Supreme Court held that
25 “substantial evidence need not be voluminous and may even be inferentially shown
26
27

1 by a lack of certain evidence.” (citations omitted) Indeed, such is the situation here.
2 How can Respondent prove that Claimant is or is not able to correct his
3
4 predisposing conditions if he does not try to?

5 Here, between 2008 and 2012, Claimant was consistently warned in writing
6 about predisposing conditions for heart disease, specifically high triglycerides.
7
8 (APP pp. 51-52, 58-59, 66-67, 74-75.) He was specifically directed to maintain a
9 low-fat diet. (APP pp. 52, 75.) By 2012, when his weight had increased 10 lbs. and
10 his triglycerides had increased 30 points, he was told not only to maintain a low-fat
11 diet, but also to increase cardio and take omega twice daily. (APP pp. 84-85.)
12 These are factual determinations made by the Appeals Officer directly from the
13 record that following Claimant’s annual physical examinations, he was advised in
14 writing of predisposing conditions and corrective actions to take regarding them.
15
16 Claimant specifically acknowledged that failure to take corrective actions and to
17 advise Employer of what steps he was taking could exclude him from the exact
18 coverage he now seeks. (APP pp. 205, 228, 264, 279.) Claimant presented no
19 evidence that he took any corrective measures or that he notified his employer
20 about the same.
21
22
23

24 The Appeals Officer relied on the evidence which showed undisputedly that
25 in the years before his retirement, Claimant was ordered to correct predisposing
26 conditions and was explicitly informed in writing following his annual physical
27

1 examinations that failure to correct the same could exclude him from benefits
2 under NRS 617.457. The Appeals Officer's decision was proper and supported by
3
4 substantial evidence.

5 **II.**

6 **CONCLUSION**

7
8 Based upon the foregoing, not only did the District Court improperly weigh
9 the evidence, but it also acted arbitrarily and capriciously by unilaterally adding
10 new requirements to NRS 617.457(11). Appellants respectfully request that this
11 Court reverse the District Court and affirm the Appeals Officer Decision and Order
12 finding that Claimant did not meet his burden of establishing that he was entitled to
13 benefits under NRS 617.457 because he was excluded from coverage per NRS
14 617.457(11).
15
16

17 Dated this 18th of January, 2022.

18 Respectfully submitted,

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1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared
5 in a proportionally spaced typeface using Microsoft Word in Times New Roman
6 font size 14.
7

8
9 2. I further certify that this brief complies with the type-volume
10 limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief
11 exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14
12 points or more, and contains 2, 050 words and 211 lines of text.
13

14 3. Finally, I hereby certify that I have read this appellate brief, and to the
15 best of my knowledge, information, and belief, it is not frivolous or interposed for
16 any improper purpose. I further certify that this brief complies with all applicable
17 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
18 every assertion in the brief regarding matters in the record to be supported by a
19 reference to the page and volume number, if any, of the transcript or Appendix
20 where the matter relied on is to be found.
21
22

23 ...

24 ...

25 ...

1 4. I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5 Dated this 18th day of January, 2022.

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1 **CERTIFICATE OF MAILING**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on
3 the 18th day of January, 2022, service of the attached **APPELLANTS’ REPLY**
4 **BRIEF** was made this date by depositing a true copy of the same for mailing, first
5 class mail, and/or electronic service as follows:

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