

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**

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**STATUTES**

NRS 233B.135 ..... 1

NRS 617.457 ..... 1, 2, 4, 5, 6, 8

**REPLY**

The District Court committed reversible error by reweighing the evidence and by adding new requirements to claims filed under NRS 417.457. Claimant's attempt to shift the burden to Appellants to prove his predisposing conditions were within his ability to correct is legally erroneous. The Appeals Officer properly weighed the evidence, properly applied the law, and therefore was entitled to deference. The District Court's decision to essentially retry the case was not within its purview under NRS 233B.135.

During his tenure with LVMPD, Claimant was consistently informed in writing of predisposing conditions he needed to correct, and steps to do so to ensure he would be eligible for coverage under the heart and lung bill. The evidence does not support Claimant's contention that he took steps in good faith to correct his predisposing conditions. Therefore, the Appeals Officer properly concluded Claimant was excluded by virtue of NRS 617.457(11) from the conclusive presumption.

Employer properly denied the claim under the exclusion to the conclusive presumption based on Nevada law. "An employer can defend a claim by showing that the employee failed to correct a predisposing condition, such as smoking or being overweight, after being warned to do so in writing." Emplrs. Ins. Co. of Nev.

1 v. Daniels, 122 Nev. 1009, 145 P.3d 1024 (2006)<sup>1</sup> 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

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23 <sup>1</sup> 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  
28 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  
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.***

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

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

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:

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

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

13 2. Notwithstanding any other provision of this chapter,  
diseases of the heart, resulting in either temporary or  
14 permanent disability or death, are occupational diseases  
and compensable as such under the provisions of this  
15 chapter if caused by extreme overexertion in times of  
stress or danger and a causal relationship can be shown  
16 by competent evidence that the disability or death arose  
out of and was caused by the performance of duties as a  
17 volunteer fireman by a person entitled to the benefits of  
chapter 616 of NRS pursuant to the provisions of NRS  
18 616.070 and who, for 5 years or more, has served  
continuously as a volunteer fireman in this state and who  
19 has not reached the age of 55 years before the onset of  
the disease.

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

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

25 5. All physical examinations required pursuant to  
subsection 3 must be paid for by the employer.  
26  
27

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  
remuneration, work as a fireman or police officer,  
may elect to receive the benefits provided under NRS  
616.580 for a permanent total disability.

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

11 (emphasis added)

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

14 During the March 29, 2017 meeting of the Assembly Committee on Commerce  
15 and Labor, testimony was had regarding the history of workers' compensation in  
16 this state as substantive amendments to the Nevada Industrial Insurance Act  
17 ("NIIA") were being proposed. In that context, the Executive Secretary-Treasurer  
18 of the Nevada State AFL-CIO, Rusty McAlister, explained as follows:  
19

20  
21 There are benefits covered in NRS Chapter 617, which  
22 are about occupational diseases. The provisions within  
23 that section of the statute apply only to police,  
24 firefighters, and emergency medical technicians. There  
25 are heart and lung benefits for firefighters and police  
26 officers. This is not a new concept. The benefits for  
27 firefighters for lung disease were put in the statutes in  
1965 and heart disease in 1969. In 1975, police officers  
were added to both of those benefits. If the employees  
comply with the requirements of the statute, they will be  
eligible for the benefits. **The requirements include  
being employed for five years, having an annual  
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  
28

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 predisposing conditions if he does not try to?  
4

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

20 The Appeals Officer relied on the evidence which showed undisputedly that  
21 in the years before his retirement, Claimant was ordered to correct predisposing  
22 conditions and was explicitly informed in writing following his annual physical  
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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 substantial evidence.  
4

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 18<sup>th</sup> of January, 2022.

18 Respectfully submitted,  
19

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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.  
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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 . . .

26 . . .  
27

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 18<sup>th</sup> 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 18<sup>th</sup> 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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