

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT and CCMSI,

Appellant,

vs.

ROBERT HOLLAND

Respondent.

CASE NO.: 82843
Electronically Filed
May 03 2022 12:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENT'S MOTION FOR PUBLICATION

OF ORDER OF AFFIRMANCE

Comes Now, the Respondent, ROBERT HOLLAND (hereinafter "Respondent" or "Holland"), by and through his attorneys of record, LISA M. ANDERSON, ESQ., and JASON D. MILLS, ESQ., of GGRM LAW FIRM, and moves this Honorable Court for an Order directing that this Court's Order of Affirmance filed on April 20, 2022, be published in the Nevada Reports based upon the significant procedural value in the area of the Nevada Industrial Insurance Act ("NIIA" codified at NRS 616A-616D).

This Motion conforms with the provisions of Nevada Rule of Appellate Procedure ("NRAP") 27, and is based on NRAP 36, the following Points and Authorities, and all documents on file herein to date.

Respectfully submitted this 3rd day of May 2022.

By: /s/ Lisa M. Anderson, Esq.
LISA M. ANDERSON, ESQ.
Nevada Bar No. 004907
JASON D. MILLS, ESQ.
Nevada Bar No. 007447
GGRM LAW FIRM
2770 S. Maryland Parkway, Suite 100
Las Vegas, Nevada 89109
Attorneys for Respondent
Robert Holland

I
POINTS AND AUTHORITIES

Respondent respectfully moves this Honorable Court to grant this Motion and publish the Court’s April 20, 2022, Order of Affirmance (“Order”), as this Order constitutes a much-needed opinion which significantly clarifies a rule of law previously announced by the Supreme Court of Nevada and involves an issue of public importance that has application beyond the parties. Specifically, this Order clarifies the interpretation of NRS 617.457(11), as well as the Supreme Court's prior interpretation of this statute in Emps. Ins. Co. of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d 1024 (2006). Further, this Order involves an issue that will impact qualified individuals throughout the state of Nevada, as it directly relates to the interpretation of statutory law that governs the payment of certain workers’ compensation benefits.

A. The Respondent's Motion is Timely.

NRAP 36(f) states in pertinent part:

A motion to reissue an unpublished disposition or order as an opinion to be published in the *Nevada Reports* may be made under the provisions of this subsection by any interested person. With respect to the form of such motions, the provisions of Rule 27(d) apply; in all other respects, such motions must comply with the following:

(1) Time to File. Such a motion shall be filed within 14 days after the filing of the order. Parties may not stipulate to extend this time period, and any motion to extend this time period must be filed before the expiration of the 14-day deadline.

The Order of Affirmance in this case was issued by the Court of Appeals of Nevada on April 20, 2022. The Respondent presently seeks publication of the Order in the *Nevada Reports*, on grounds that the Order satisfies at least one of the criteria set forth in NRAP 36(c)(1)(A)-(C). Accordingly, this Motion is timely.

B. The Order Significantly Clarifies a Rule of Law Previously Announced by the Supreme Court of Nevada.

NRAP 36(f) requires that Motions to Reissue an Order as an Opinion must be based on one or more of the criteria set forth in NRAP 36(c)(1)(A)-(C), which states that the Supreme Court or Court of Appeals will decide a case by published opinion if it:

- (A) Presents an issue of first impression;
- (B) Alters, modifies, or significantly clarifies a rule of law previously announced by either the Supreme Court or the Court of Appeals; or

(C) Involves an issue of public importance that has application beyond the parties.

Respondent maintains that the Order of Affirmance issued in this matter significantly clarifies a rule of law that was previously announced by the Supreme Court of Nevada in Emps. Ins. Co. of Nevada v. Daniels, 122 Nev. 1009 (2006). In Daniels, the Court examined the requirements a claimant must meet in order to receive benefits for workers' compensation under NRS 617.457, specifically addressing the "conclusive firefighters' presumption" which "excludes firefighters with heart disease from having to prove that the disease arose out of the course of employment." Emps. Ins. Co. of Nevada v. Daniels, 122 Nev. 1009, 1015 (2006).

The Court went on to state:

[A]n employer is charged with responsibility for a firefighter's disability benefits arising from heart disease if, at the time of disablement, the firefighter had already worked, full-time, for five consecutive years as a firefighter. ***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.***

Id. at 1016. (emphasis added).

The final portion of this finding by the Court establishes a defense that can be raised against the conclusive presumption that is granted police officers, firefighters, etc., by NRS 617.457. This defense stems from the statutory language found in NRS 617.457(11), which states "Failure to correct predisposing conditions which lead to

heart disease when so ordered in writing by the examining physician subsequent to a physical examination required pursuant to subsection 4 or 5 excludes the employee from the benefits of this section if the correction is within the ability of the employee.” The Order issued by the Court of Appeals specifically addressed this portion of the opinion in Daniels, and found that, in the underlying administrative order “the appeals officer failed to point to any facts in the record to support its finding that Holland had the ability to correct the levels...” *See* Order p. 7. Further, the Order found that “it is unclear which written actions were meant to be corrective measures for Holland’s elevated triglyceride levels...Thus it cannot be determined that even if Holland had followed the corrective measures as recommended, such measures would have reduced his triglyceride levels and prevented his heart disease” *See* Order p. 8-9. Based on these findings, the Order concluded that the appeal’s officer’s finding that Respondent had the ability to correct his predisposing condition was not supported by substantial evidence.

This provides an important clarification and elaboration on the Supreme Court’s holding in Daniels regarding an employer’s ability to defend against a claim which satisfies conclusive presumption. Specifically, this Order clarifies that in order to bar a claimant who otherwise qualifies for benefits under NRS 617.457, the employer must show (1) that the claimant has predisposing conditions, (2) that the claimant was ordered, in writing, to correct these conditions, and (3) that it is the

employer, not the claimant, that owns the burden of proof that these corrections are actually within the claimant's ability. Publication of this Order will provide the much-needed clarification on the elements an employer must satisfy in order to successfully defend against an otherwise compensable claim.

C. Publication of the Order Will Impact an Issue of Public Importance that has Application Beyond the Parties.

As previously stated, the defense acknowledged in Daniels derives from NRS 617.457(11). Insurers, Third-Party Administrators, and Self-Insured Employers have misrepresented the holdings in Daniels in order to inappropriately shift the burden of proof regarding correctability back onto first responders across Nevada. The Respondent's case is not unique, as there have been hundreds of police officers, firefighters, and corrections officers who have filed claims under the Heart/Lung statutes in this past year alone. And, as a result, there have been numerous opportunities for insurers across the board to deny liability for these claims based solely on the mere existence of predisposing conditions. Further, the administrative hearings and appeals offices have been interpreting the law in line with this misrepresentation by the defense bar.

Based on the language contained in the Order, it was clearly not this Honorable Court's intention to deny compensation benefits to first responders based solely on the mere existence of predisposing conditions. Further, this Court has

unequivocally determined where the burden of proof lies when the issue of correctability of these predisposing conditions is to be addressed. Respondent submits that, by publishing this Order, such widely used and detrimental application of NRS 617.457(11), as well as Daniels, would likely be abated and ultimately impact all qualified individuals seeking workers' compensation benefits under NRS 617.457 and NRS 617.455. Accordingly, publication of this Order will impact an issue of public importance that has application far beyond Holland, the Las Vegas Metropolitan Police Department, and CCMSI.

II

CONCLUSION

Based upon the foregoing, the Respondent respectfully submits that the April 20, 2022 Order of Affirmance in this appeal is an important legal issue and warrants publication. This Court's Order addresses common issues which are frequently litigated and provides clear guidance to lower courts on how to properly apply NRS 617.457 and NRS 617.455. Also, this Court's Order, if published, would aid in preserving Nevada's overburdened judicial resources. Thus, Respondent respectfully requests that this Honorable Court grant this Motion.

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Respectfully submitted this 3rd day of May 2022.

By: /s/ Lisa M. Anderson, Esq.

LISA M. ANDERSON, ESQ.

Nevada Bar No. 004907

JASON D. MILLS, ESQ.

Nevada Bar No. 007447

GGRM LAW FIRM

2770 S. Maryland Parkway, Suite 100

Las Vegas, Nevada 89109

Attorneys for Respondent

Robert Holland

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of May, 2022, I served the foregoing RESPONDENT'S MOTION FOR PUBLICATION OF ORDER OF AFFIRMANCE, upon the following person(s), by depositing a copy of same in a sealed envelope in the United States Mail, postage pre-paid, to the following and that I also caused the foregoing document entitled RESPONDENT'S MOTION FOR PUBLICATION OF ORDER OF AFFIRMANCE to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

Daniel L. Schwartz, Esq.
L. Michael Friend, Esq.
LEWIS BRISBOIS BISGAARD & SMITH
2300 West Sahara Avenue
Suite 900, Box 28
Las Vegas, Nevada 89102

/s/ Ethan Wallace
An Employee of GGRM LAW FIRM