Baiguen v. Harrah's Las Vegas, LLC

Supreme Court of Nevada

September 13, 2018, Filed

No. 70204

Reporter
426 P.3d 586 *; 2018 Nev. LEXIS 70 **; 134 Nev. Adv. Rep. 71

ISRAEL BAIGUEN, AN INDIVIDUAL, Appellant, vs. HARRAH'S LAS VEGAS, LLC, A NEVADA DOMESTIC LIMITED LIABILITY CORPORATION, D/B/A HARRAH'S CASINO HOTEL, LAS VEGAS; AND CAESARS ENTERTAINMENT CORPORATION, A NEVADA FOREIGN CORPORATION, D/B/A HARRAH'S CASINO HOTEL, LAS VEGAS, Respondents.

Prior History: **[**1]** Appeal from summary judgment in a tort action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Baiguen v. Harrah's Las Vegas, LLC, 2017 Nev. App. Unpub. LEXIS 124 (Nev. Ct. App., Feb. 28, 2017)

Disposition: Affirmed.

Core Terms

stroke, injuries, *workers' compensation*, coworkers, workplace, course of employment, personal risk, employees, arises, training, clocked, mixed, t-PA, exclusive remedy, argues, risks

Counsel: The Galliher Law Firm and Jeffrey L. Galliher, Las Vegas; Law Offices of Steven M. Burris, LLC, and Steven M. Burris and Adrian A. Karimi, Las Vegas, for Appellant.

Fisher & Phillips LLP and Scott M. Mahoney, Las Vegas, for Respondents.

Judges: By the Court, PICKERING, J. Pickering, J., We concur: Douglas, C.J., Cherry, J., Gibbons, J., Hardesty, J., Parraguirre, J., Stiglich, J.

Opinion by: PICKERING

Opinion

[*588] BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

The Nevada *workers' compensation* system provides the exclusive remedy an employee has against his or her employer for a work-related injury. This case requires us to decide whether an injury arising from an employer's failure to provide medical assistance to an employee suffering a stroke arose out of and in the course of the employment. We hold that it did. Because an employee's sole remedy for such an injury is *workers' compensation*, we affirm summary judgment for the employer.

I.

Israel Baiguen was suffering a stroke when he arrived for work as a Harrah's houseperson. Baiguen parked his car in the employee-only parking garage **[**2]** and met with coworkers on the second floor of the garage about 15 minutes before his shift. His coworkers noted that he was drooling and unresponsive to questions. He then went with a coworker to the employee-only clock-

in area at the housekeeping office in the basement of **[*589]** Harrah's, where he walked around disoriented, then waited in line to receive his keys and radio for his shift. While Baiguen waited for his keys and radio, his immediate supervisor asked him a question; when Baiguen did not respond, the coworker said that Baiguen was "not good." Observing that Baiguen was drooling, and that his face was drooping, the supervisor notified a manager that Baiguen was "not fine." The manager told Baiguen that he could not work, and when the coworker volunteered to help Baiguen, the manager allowed the coworker to find Baiguen a ride home.

Baiguen never left the employee-only areas of Harrah's to begin his shift. Two coworkers on the outgoing shift drove Baiguen home, unlocked his front door for him, helped him change clothes, and then left after about 30 minutes. Baiguen remained in the apartment for two days until his girlfriend stopped by, discovered that he was unable to talk and drooling, **[**3]** and drove him to the hospital.

The only FDA-approved treatment for Baiguen's type of stroke at the time was a blood-clot-busting medication called tissue plasminogen activator (t-PA). As a diabetic, Baiguen had an approximately three-hour window after exhibiting stroke symptoms for the t-PA to be administered. When timely administered, t-PA increases by 30 percent the chance that a patient will fully recover from the stroke with minimal or no disability. Even so, t-PA carries a risk of internal bleeding and death; the drug is not a guaranteed fix, but rather a way to help improve a stroke victim's chances of recovery. Baiguen did not receive t-PA following his stroke, because he was not treated within the three-hour window.

Baiguen sued Harrah's in district court for failure to aid him during the "golden window" of diagnostic and treatment opportunity. The district court granted summary judgment to Harrah's, finding that Baiguen's exclusive remedy was *workers' compensation*, because the injury occurred in the workplace and arose out of his employment with Harrah's. Baiguen appealed and the case was transferred to the court of appeals. The court of appeals reversed. We granted Harrah's **[**4]** petition for review, vacated the decision of the court of appeals, and affirm the district court's summary judgment order.

II.

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)*. Summary judgment is appropriate if the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *NRCP 56*. "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood, 121 Nev. at 729, 121 P.3d at 1029*.

The Nevada Industrial Insurance Act (NIIA) provides the exclusive remedy for an employee against his employer when the employee sustains an injury "arising out of and in the course of the employment." *NRS 616A.020(1)*; *see Wood, 121 Nev. at 732, 121 P.3d at 1031* ("The NIIA provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries 'arising out of and in the course of employment."). In exchange for the NIIA provisions and protections, covered employees and employers give up their common law remedies and defenses for workplace injuries. *NRS 616A.010(3)* (*workers' compensation* is "based on a renunciation of the rights and defenses of employers and employees recognized at common law"); *see* ***[**5]*** *also Millersburg Military Inst. v. Puckett, 260 S.W.3d 339, 341 (Ky. 2008)* ("*Workers' compensation* is a statutory creation under which workers and employers agree to forego common law remedies/liability for workplace injuries . . ."). Thus, when an employee's injury occurs within the course of the employment and arises out of the employment, the employer is liable under the NIIA, and the employee may not sue the employer in court for negligence.

A.

Baiguen argues that Harrah's failure to respond to his stroke did not occur within the course of his employment, and therefore is not covered by *workers' compensation*, **[*590]** because he had not clocked in yet and his symptoms prevented him from performing any work duties. "[W]hether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood, 121 Nev. at 733, 121 P.3d at 1032*. But there is no requirement that the employee actually be capable of performing job duties or be actively engaged in those job duties at the time of the injury for it to occur in the course of employment. *See, e.g., Dugan v. Am. Express Travel Related Servs. Co., 185 Ariz. 93, 912 P.2d 1322, 1330 (Ariz. Ct. App. 1995)* (rejecting employee's argument that she could not be in the course of employment when she **[**6]** was incapacitated due to a brain injury). And even accepting Baiguen's allegation that he did not clock in for work,[1] it remains undisputed that Baiguen was on Harrah's premises at his regularly scheduled time to work and that he was in line to receive his radio and keys when Harrah's approved the plan to have two coworkers drive him home.

In *Mirage v. Cotton*, we held that "injuries sustained on the employer's premises while the employee is proceeding to or from work, within a reasonable time, are sufficiently connected with the employment to have occurred 'in the course of employment.'" *121 Nev. 396, 400, 116 P.3d 56, 58 (2005)*, *quoting Norpac Foods, Inc. v. Gilmore, 318 Ore. 363, 867 P.2d 1373, 1376 (Or. 1994)*. There, a woman tripped over a curb and injured her ankle walking from her employer's parking lot to the entrance of the employer's building ten minutes before her shift. *Id.* Here, Baiguen parked in the Harrah's employee lot, walked to an area where employees typically gather before their shift, entered the back area of the building where employees clock in, and got in line to receive his radio and keys as his shift was about to begin. Under *Cotton*, Harrah's alleged failure to aid Baiguen occurred in the course of Baiguen's employment.

B.

Baiguen also argues that his injury did not arise **[**7]** out of his employment. An injury arises out of the employment "when there is a causal connection between the employee's injury and the nature of the work or workplace." *Wood, 121 Nev. at 733, 121 P.3d at 1032*. It is not enough that an employee was at work and suffered an injury. *See Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997)* ("merely being at work and suffering an injury" is insufficient to show that the injury arose out of the employment). Rather, "the employee must show that the origin of the injury is related to some risk involved within the scope of employment." *Rio All Suite Hotel & Casino v. Phillips, 126 Nev. 346, 350, 240 P.3d 2, 5 (2010)* (quoting *Mitchell v. Clark Cty. Sch. Dist., 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)*). If the injury "is not fairly traceable to the nature of the employment or workplace environment, then the injury cannot be said to arise out of the claimant's employment." *Gorsky, 113 Nev. at 604, 939 P.2d at 1046*.

1.

An employee might encounter three types of risks at work: (1) employment; (2) personal; and (3) neutral. *See Phillips, 126 Nev. at 351, 240 P.3d at*

[1] The parties dispute whether Baiguen clocked in to work. In Harrah's reply to Baiguen's opposition to the motion for summary judgment, Harrah's attached an affidavit from an employee that Baiguen clocked in on the day in dispute. Baiguen refutes this by pointing to evidence not in the record and statements by witnesses who claimed not to know whether Baiguen clocked in. While this may not create a genuine dispute of material fact, *see Wood, 121 Nev. at 732, 121 P.3d at 1031* (recognizing that the nonmoving party must show more than "that there is some metaphysical doubt" and cannot rely on "gossamer threads of whimsy, speculation, and conjecture"), we need not decide whether it does because the remaining undisputed facts are sufficient to establish that Baiguen's injury occurred in the course of his employment.

5. Employment risks arise out of the employment. *Id.* They are solely related to the employment and include obvious industrial injuries. *Id.; see also* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law § 4.01*, at 4-2 (rev. ed. 2017) (classic employment risks include "machinery breaking, objects falling, explosives exploding, tractors **[*591]** tipping, fingers getting caught in gears, excavations caving in, and so on" as well as "occupational **[**8]** diseases").

On the other hand, personal risks do not arise out of the employment. *Phillips, 126 Nev. at 351, 240 P.3d at 6*. Personal risks include injuries caused by personal conditions and illnesses, such as falling at work due to "a bad knee, epilepsy, or multiple sclerosis." *Phillips, 126 Nev. at 351, 240 P.3d at 5*; *see also Larson, supra § 4.02*, 4-2 (examples of personal risks include dying a natural death, the effects of disease or internal weakness, and death by "mortal personal enemy").

Finally, a neutral risk is a risk that is neither an employment risk nor a personal one, such as a fall that is not attributable to premise defects or a personal condition. *Phillips, 126 Nev. at 351, 240 P.3d at 5*; *see also Larson, supra § 4.03*, at 4-2 (examples of neutral risks include "hit by a stray bullet out of nowhere, bit by a mad dog, stabbed by a lunatic running amuck," acts of God, and unknown causes). A neutral risk arises out of the employment if the employee was subjected to a greater risk than the general public due to the employment. *See Phillips, 126 Nev. at 353, 240 P.3d at 7* (adopting the increased-risk test).

Under some circumstances, the risk may be mixed. A mixed risk is "a personal cause and an employment cause combin[ing] to produce the harm." *Larson, supra § 4.04*, at 4-3. A classic example of an injury from a mixed risk is "a person with a weak heart who dies because of strain occasioned **[**9]** by the employment." *Id.* A mixed risk arises out of the employment if the employment risk was a contributing factor in the injury. *Id.*

Both parties agree that Baiguen's employment at Harrah's did not cause his stroke. They disagree, however, about whether Baiguen's alleged injuries in this suit—the lost chance of recovery and the exacerbated effects of his stroke due to delayed medical assistance—constituted a personal risk, a neutral risk, or an employment risk. Baiguen argues that his injuries were a personal risk, and therefore did not arise out of his employment, which would allow him to sue Harrah's in tort and avoid the *workers' compensation* bar. He alternatively argues that even if it was a neutral risk, the injuries did not arise out of the employment because he faced the same risk that Harrah's would not come to his aid as any other Harrah's guest or visitor. Conversely, Harrah's argues that Baiguen's alleged injury is the lost chance of recovery due to Harrah's alleged failure to properly train employees or obtain medical assistance for Baiguen—an employment risk.

Baiguen urges a neutral risk analysis, but the personal origin of his stroke defies a neutral risk analysis. *See **[**10]** Larson, supra § 7.04(1)(b)*, at 7-28 ("Whenever personal disease or weakness contributes to the [injury], an entirely new set of rules comes into play, since the risk is no longer neutral but either personal or, perhaps, 'mixed.'). A neutral risk is a risk that is not related to either a personal risk or an employment risk; it is not a risk that is a combination of a personal risk and an employment risk. *See id. § 4.03*, at 4-2 (defining neutral risks as "of *neither* distinctly employment nor distinctly personal character") (emphasis added). We conclude that Baiguen's alleged injuries are the result of a mixed risk—the personal risk that he could have a stroke, and the employment risk that if he had a stroke at work his employer might fail to render appropriate aid. *See id. § 4.04*, at

Baiguen's stroke itself constituted a personal risk, But his claim is not that Harrah's caused his stroke; rather, that its inadequate response to his stroke symptoms cost him his window of treatment opportunity, turning a treatable medical incident into a catastrophic injury. That Harrah's might

respond inadequately to Baiguen's stroke in the workplace, due to inadequate workplace policies, procedures, or training, or fail to follow existing **[**11]** policies, procedures, and training, is a risk related to Baiguen's employment. Such inadequate policies, procedures, and training are conditions of the workplace akin to well-recognized physical hazards, like the risk that the injury from a painter's stroke will be worsened by falling off a ladder, or an epileptic cook who suffers a seizure and burns himself on a stove, *See, **[*592]** e.g., Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479, 161 A.2d 479, 486 (N.J. 1960)*. Thus, where an injury at work was exacerbated by the absence of (or failure to adhere to) a policy, procedure, or the necessary training to allow other employees to properly respond to such an injury, the workplace contributed to the injury and it arose out of the employment, *Id. at 487* ("In these situations, the parallel operative facts are (1) a non-work-connected injury, (2) a common-law duty arising in another to take care to procure medical aid, (3) non-procurement of that aid for a reason related to the employment, and (4) resulting [injury] .").

For example, in *Dugan*, an employee with a history of heart problems suffered a "heart event" at work, *912 P.2d at 1325*. But when her coworkers tried to call 9-1-1 they could not reach the emergency dispatcher, because, unknown to them, the employer had blocked 9-1-1 "in favor of an **[**12]** in-house emergency number," *Id.*, Because the coworkers could not summon emergency help, medical assistance was delayed and the employee suffered irreversible brain damage from prolonged oxygen deprivation, *Id.* The court held that "[w]hen an industrial injury aggravates a pre-existing physical condition or combines with the pre-existing condition to produce an additional injurious effect, the employee is entitled to [*workers'] compensation* for losses attributable to the further harm." *Id. at 1329*. By blocking any calls to 9-1-1, the employer delayed the employee's necessary medical treatment, which aggravated or contributed to the brain injury from the employee's personal heart condition. *Id.*

Similarly, Baiguen alleges that decisions by Harrah's employees exacerbated the effects of his stroke and cost him a 30-percent chance of recovery by preventing timely administration of the t-PA medicine. Just as the employer's decision in *Dugan* to block 9-1-1 access, Harrah's negligence, if any, was inextricably linked to Harrah's workplace conditions, including its policies, procedures, and training related to recognizing and providing medical assistance for medical events occurring in the workplace.

2.

"In **[**13]** Nevada, as under the common law, strangers are generally under no duty to aid those in peril." *Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001)*. But "where a special relationship exists between the parties," the law may impose an affirmative duty. *Id.* The relationship between an employer and its employee is one of those special relationships. *Id.* While its exact contours are disputed, the duty, by its very nature, arises out of the employer-employee relationship. *See Handzel v. Kane-Miller Corp., 244 Ill. App. 3d 244, 614 N.E.2d 206, 208, 185 Ill. Dec. 72 (Ill. App. Ct. 1993)* (because "there is no duty at common law to provide aid to an injured person . . . [w]hatever duty [the defendants] owed the decedent must necessarily arise out of the employer-employee relationship"). And where the duty is breached, the injury resulting from the breach arises out of the employment. *See Vand. Univ. v. Russell, 556 S.W.2d 230, 231 (Tenn. 1977)* (explaining that an employer's negligent failure to render aid "[w]hen an employee becomes helpless in the course of employment due to illness or other cause not related to his employment" arises out of the employment); *Dudley, 161 A.2d at 488* ("The breach of the assumed duty was the realization of a risk of the employment in exactly the same way as is a breach of the duty to render or procure emergency medical aid. And, in just the same way, [an injury] resulting from such breach of duty **[**14]** arises out of the employment.").

Baiguen claims that his injury does not arise out of

his employment because Harrah's owed him the same duty under our law as any other person on Harrah's premises. *See Lee, 117 Nev. at 296-97, 22 P.3d at 212* (discussing special relationships that create a duty to render aid to those in peril, such as innkeeper-guest, employer-employee, and restaurateur-patron). Even accepting this assertion as true, it is inapposite given that Baiguen's stroke occurred in an employee-only area and while in the course of his employment. *See Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 902 A.2d 620, 625 (Conn. 2006)* ("Compensability also may not be denied simply because the plaintiff could have been **[*593]** exposed to a similar risk of injury from the administration of aid had he suffered the seizure outside of work."). Baiguen was not a hotel guest or a restaurant patron; he was at Harrah's to work. And when he showed up for work, he remained in areas restricted to employees, where his only opportunity for aid was from his employer, Harrah's, or his coworkers. Under the facts before us, any duty on Harrah's part to render aid to Baiguen would have arisen out of the employer-employee relationship, not another special relationship such as innkeeper-guest or restaurateur-patron. *See Lee, 117 Nev. at 296-97, 22 P.3d at 212*. Thus, **[**15]** while the NIIA's exclusive remedy provision cannot bar a guest or a patron from suing in court for negligence on facts analogous to these, the NITA limits an employee's remedy to *workers' compensation*. *See NRS 616A.020(1)*.

Baiguen's injuries occurred in the course of his employment and arose out of his employment such that *workers' compensation* is his exclusive remedy against Harrah's. We therefore affirm.

/s/ Pickering, J.

Pickering

We concur:

/s/ Douglas, C.J.

Douglas

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Hardesty, J.

Hardesty.

/s/ Parraguirre, J.

Parraguirre

/s/ Stiglich, J.

Stiglich

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N. Lake Tahoe Fire Prot. Dist. v. Bd. of Admin.

Supreme Court of Nevada

December 6, 2018, Filed

No. 70592

Reporter
431 P.3d 39 *; 2018 Nev. LEXIS 107 **; 134 Nev. Adv. Rep. 93; 2018 WL 6388348

NORTH LAKE TAHOE FIRE PROTECTION DISTRICT; AND PUBLIC AGENCY COMPENSATION TRUST, Appellants, vs. THE BOARD OF ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR THE ASSOCIATIONS OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS; AND ADMINISTRATOR OF THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS, Respondents.

Prior History: [**1] Appeal from a district court order denying a petition for judicial review in an administrative law matter. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Disposition: Reversed and remanded.

Core Terms

permanent, physical impairment, spondylolisthesis, subsequent injury, written record, reimbursement, preexisting, rating, pre existing condition, conditions, impairment, permanent impairment, associations, self-insured, inferred, qualify

Case Summary

Overview

HOLDINGS: [1]-An employer seeking reimbursement of *workers' compensation* based on the employee's preexisting disabling condition did not have to prove that it knew of the exact medical terminology for the employee's permanent physical impairment before the subsequent injury occurred because *Nev. Rev. Stat. § 616B.578(3), (4)* required only that an employer produce a written record from which its prior knowledge of the employee's qualifying disability could fairly and reasonably be inferred; [2]-In light of medical testimony establishing that the employee had multiple preexisting conditions, only one of which met the requirement of *§ 616B.578(3)* that the impairment amount to six percent or more of the whole person, the record was unclear as to whether the employer actually knew of a permanent physical impairment, and a remand for further administrative proceedings was necessary.

Outcome

Reversed and remanded.

LexisNexis® Headnotes

Administrative Law > Judicial Review

***HN1*[⬇] Judicial Review**

The Nevada Supreme Court's role in reviewing an administrative agency's decision is identical to that of the district court, and it does not give any deference to the district court's order denying a petition for judicial review.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN2[] De Novo Standard of Review

Although statutory construction is generally a question of law reviewed de novo, a reviewing court defers to an agency's interpretation of its governing statutes and regulations if the interpretation is within the language of the statute.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN3[] Abuse of Discretion

A court reviews an administrative agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence. Nev. Rev. Stat. § 233B.135(3)(e), (f). Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion. Substantial evidence may be shown inferentially if certain evidence is absent. If the administrative agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious.

Workers' Compensation & SSDI > Compensability > Injuries > Successive Injuries

HN4[] Successive Injuries

Nevada's Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers is a workers' compensation program that was created to encourage self-insured employer members of associations to hire and retain workers with preexisting disabling conditions. In furtherance of this purpose, Nev. Rev. Stat. § 616B.578(1) allows for reimbursement of workers' compensation paid by an employer where an employee sustains an injury in the course of his or her employment that is substantially greater due to the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone. However, certain conditions must be met. To qualify for reimbursement, the associations of self-insured public or private employers must establish by written record either that the employer (1) had knowledge of the permanent physical impairment at the time the employee was hired or (2) retained its employee after it acquired knowledge of the permanent physical impairment. In the second scenario, an employer must acquire knowledge of an employee's permanent physical impairment before the subsequent injury occurs to qualify for reimbursement.

Workers' Compensation & SSDI > Compensability > Injuries > Successive Injuries

HN5[] Successive Injuries

In interpreting Nev. Rev. Stat. § 616B.578(4), a court must look to § 616B.578(3), which defines "permanent physical impairment" as any permanent condition, whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For purposes of this section, a

condition is not a permanent physical impairment unless it would support a rating of permanent impairment of 6 percent or more of the whole person. Interpreting *§ 616B.578* as requiring an applicant to prove by its contemporaneous written record that it had knowledge of a preexisting permanent physical impairment that would support a rating of 6 percent or more is reasonable.

Governments > Legislation > Interpretation

***HN6*[⬇] Interpretation**

When interpreting a statute, a court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.

Workers' Compensation &
SSDI > Compensability > Injuries > Successive Injuries

***HN7*[⬇] Successive Injuries**

An interpretation of *Nev. Rev. Stat. § 616B.578* as requiring the employer to show that it knew of the employee's specific medical condition prior to the subsequent injury is not reasonable because *§ 616B.578(3)* plainly requires a showing of any permanent condition that hinders employment.

Workers' Compensation &
SSDI > Compensability > Injuries > Successive Injuries

***HN8*[⬇] Successive Injuries**

It is not necessary to show that an employer knew of the exact medical terminology for an employee's permanent physical impairment prior to a subsequent injury. This interpretation of *Nev. Rev. Stat. § 616B.578* supports the public policy behind Nevada's Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers, which encourages employers to knowingly hire or retain employees who suffer from a permanent physical impairment. However, the employee's preexisting permanent physical impairment, which is recognized by statute, must be fairly and reasonably inferred from the written record. In Nevada, the impairment must amount to a minimum of 6 percent or more of the whole person. *§ 616B.578(3)*.

Counsel: Thorndal Armstrong Delk Balkenbush & Eisinger and Robert F. Balkenbush and Kevin A. Pick, Reno, for Appellants.

The Law Offices of Charles R. Zeh, Esq., and Charles R. Zeh, Reno, for Respondent Board of Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers.

Donald C. Smith and Jennifer J. Leonescu, Henderson, for Respondent Department of Business and Industry, Division of Industrial Relations.

Judges: Douglas, C.J. We concur: Cherry, J., Pickering, J., Parraguirre, J., Gibbons, J., Hardesty, J., Stiglich, J.

Opinion by: DOUGLAS

Opinion

[*40] BEFORE THE COURT EN BANC

By the Court, DOUGLAS, C.J.:

Under *NRS 616B.578*, an employer may qualify for reimbursement on a *workers' compensation* claim if the employer proves by written record that it retained its employee after acquiring knowledge of the employee's permanent physical impairment and before a subsequent injury occurs. In this appeal, we examine the statutory definition of a "permanent physical impairment," which **[*41]** generally defines a permanent **[**2]** physical impairment as

"any permanent condition . . . of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment," but also states that "a condition is not a 'permanent physical impairment' unless it would support a rating of permanent impairment of 6 percent or more of the whole person." NRS 616B.578(3). We conclude that requiring an employer to prove that it had knowledge of a preexisting permanent physical impairment that would support a rating of at least 6% whole person impairment is a reasonable interpretation of NRS 616B.578. However, we further conclude that this statute cannot be reasonably interpreted to require knowledge of a specific medical diagnosis in order for an employer to successfully seek reimbursement. In the present case, it is unclear whether the employer knew of any permanent condition that hinders the employee's employment, and whether it could be fairly and reasonably inferred from the written record that the employer knew of the employee's preexisting permanent physical impairment, which supported a rating of at least 6% whole person impairment. Therefore, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

In 1981, appellant North **[**3]** Lake Tahoe Fire Protection District (the District) hired a man as a paramedic and firefighter (the employee). For approximately 20 years, the employee worked without a documented injury. Between 2002 to 2007, however, the employee injured his back on numerous occasions while on duty and sought treatment following his injuries. Doctors diagnosed the employee with various back conditions, such as herniated nucleus pulposus (HNP), radiculopathy, back sprain, and lumbar disc abnormalities.

In November 2007, the employee then suffered a subsequent back injury while on duty, and following this subsequent injury, doctors specifically diagnosed the employee with spondylolisthesis.[1] A few years later, the employee underwent back surgery for the spondylolisthesis, and a year after his surgery, the employee retired.

Shortly after the employee retired, Dr. David Berg conducted a permanent partial disability (PPD) evaluation on the employee in response to the employee's November 2007 back injury and rated the employee with a 21% whole person impairment (WPI) with no apportionment for any preexisting condition. Next, at the request of the third-party administrator of the **[**4]** underlying *workers' compensation* claim, Dr. Jay Betz reviewed the employee's medical records and Dr. Berg's PFD evaluation. Dr. Betz disagreed with Dr. Berg's conclusion regarding no apportionment and instead found that the employee's spondylolisthesis was a preexisting impairment with a 7-9% WPI. Dr. Betz further found that at least half of the 21% WPI should be apportioned to the employee's preexisting conditions, and thus, 11% WPI should be apportioned to the November 2007 injury (10.5% rounded up). After receiving Dr. Betz's report, Dr. Berg agreed with Dr. Betz by apportioning one-half of the WPI to preexisting conditions. Thereafter, the employee saw Dr. G. Kim Bigley for a second PFD evaluation. Dr. Bigley found that the employee did not have spondylolisthesis prior to his November 2007 back injury, and thus, found that apportionment was inappropriate.

The insurer, appellant Public Agency Compensation Trust (PACT), paid the employee an 11% PFD award after apportionment. PACT then sought reimbursement under NRS 616B.578 from the Nevada Department of Business and Industry, Division of Industrial Relations (DIR). Respondent Administrator of DIR recommended denying PACT's claim for failure to **[**5]** show compliance with NRS 616B.578. PACT timely requested a

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[1] Spondylolisthesis "is the If forward movement of the body of one of the lower lumber vertebrae on the vertebra below it, or upon the sacrum.'" *Lederer v. Viking Freight, Inc., 193 Ore. App. 226, 89 P.3d 1199, 1200 n.2 (Or. Ct. App. 2004)* (alteration in original) (quoting *Stedman's Medical Dictionary* 1678 (27th ed. 2000)).

hearing before respondent Board of Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers (the Board) to challenge the Administrator's recommendation of denial.

[*42] Following a hearing, the Board issued its decision. The Board concluded, in pertinent part, that *NRS 616B.578* required appellants to prove, by written record, that the District had knowledge of a preexisting permanent physical impairment amounting to a rating of at least 6% WMI. The Board also concluded that appellants were required to show that the District knew *specifically* of the employee's spondylolisthesis condition prior to the subsequent injury. Moreover, the Board found that the employee's preexisting conditions documented prior to his subsequent injury—including his HNP, radiculopathy, back sprain, and lumbar disc abnormalities—were not the same as spondylolisthesis and did not rise to the level of a permanent physical impairment as required by *NRS 616B.578(3)*, and thus, appellants failed to satisfy *NRS 616B.578*. Based on the foregoing, the Board denied appellants' application for reimbursement. Appellants petitioned the district court for judicial review **[**6]** of the Board's decision. The district court affirmed the Board's decision and denied appellants' petition.

DISCUSSION

Standard of review

HN1[↑] This court's role in reviewing an administrative agency's decision is identical to that of the district court, and we do not give any deference to the district court's order denying a petition for judicial review. *Elizondo v. Hood Mach., Inc., 129 Nev. 780, 784, 312 P.3d 479, 482 (2013)*. ***HN2***[↑] "Although statutory construction is generally a question of law reviewed de novo, this court defers to an agency's interpretation of its governing statutes and regulations if the interpretation is within the language of the statute." *Taylor v. State, Dep't of Health & Human Servs., 129 Nev. 928, 930, 314 P.3d 949, 951 (2013)* (internal quotation marks omitted); *see also Collins Disc. Liquors & Vending v. State, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990)* ("[C]ourts should not substitute their own construction of a statutory provision for a reasonable interpretation made by an agency.").

Moreover, ***HN3***[↑] this court reviews an administrative agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence. *NRS 233B.135(3)(e), (f)*; *Elizondo, 129 Nev. at 784, 312 P.3d at 482*. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion." *Nev. Pub. Emps. Ret. Bd. v. Smith, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013)* (internal quotation marks omitted). Substantial evidence may be shown inferentially if certain evidence is absent. **[**7]** *Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005)*. "If the [administrative] agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious." *City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002)*.

Whether the Board erred in denying appellants reimbursement

Appellants argue that the Board committed clear legal error when considering whether appellants were entitled to reimbursement. In particular, appellants contend that the Board erred in interpreting the definition of "permanent physical impairment" by requiring proof that appellants had specific knowledge of spondylolisthesis prior to the employee's subsequent injury. Instead of requiring proof that an employer had knowledge of a specific medical diagnosis, appellants contend that an employer's general knowledge of a permanent,

preexisting impairment that could pose a hindrance to employment or reemployment satisfies the plain meaning of, and public policy behind, NRS 616B.578. Conversely, respondents argue that appellants erroneously disregard the 6% rule under the plain meaning of NRS 616B.578(3). While we agree with appellants that they were not required to show that they knew the employee suffered specifically from spondylolisthesis prior to his subsequent injury in order to satisfy NRS 616B.578, we also agree **[**8]** with respondents that NRS 616B.578(3) requires a condition to amount to at least 6% WPI to be considered a permanent physical impairment.

[*43] *The Board's interpretation of NRS 616B.578 was reasonable in part*

HN4[↑] Nevada's Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers (the Account) is a *workers' compensation* program that was created to encourage self-insured employer members of associations to hire and retain workers with preexisting disabling conditions. Crystal M. McGee, Legislative Counsel Bureau Research Division, *Background Paper 01-1: A Study of Subsequent Injury Funds* 1 (2000). In furtherance of this purpose, NRS 616B.578(1) allows for reimbursement of *workers' compensation* paid by an employer where an employee sustains an injury in the course of his or her employment that is "substantially greater [due to] the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone." NRS 616B.578(1). However, certain conditions must be met. *Cf. Holiday Ret. Corp. v. State Div. of Indus. Rels., 128 Nev. 150, 152, 274 P.3d 759, 760 (2012)* (analyzing NRS 616B.587, which has provisions identical to NRS 616B.578, but applies to private carriers instead of associations of self-insured public or private employers). To qualify for **[**9]** reimbursement, the associations of self-insured public or private employers must establish by written record "either that the employer (1) had knowledge of the permanent physical impairment at the time the employee was hired or (2) retained its employee after it acquired knowledge of the permanent physical impairment." *Id. at 154, 274 P.3d at 761*. In the second scenario, "an employer must acquire knowledge of an employee's permanent physical impairment before the subsequent injury occurs to qualify for reimbursement." *Id. at 154-55, 274 P.3d at 762*. HN5[↑] In interpreting NRS 616B.578(4), this court must look to NRS 616B.578(3), which defines "permanent physical impairment" as:

> [A]ny permanent condition, whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For purposes of this section, a condition is not a "permanent physical impairment" unless it would support a rating of permanent impairment of 6 percent or more of the whole person . . . .

Here, the Board interpreted NRS 616B.578 as "requir[ing] an applicant to prove by its contemporaneous written record that it had knowledge of a preexisting permanent physical impairment . . . [that] would support **[**10]** a rating of 6% [WPI] or more." In giving effect to the plain meaning of the statute's relevant subsections, we conclude that the Board's statutory interpretation of NRS 616B.578 was reasonable. Appellants' reliance solely on the first sentence of NRS 616B.578(3) inappropriately renders the second sentence of the statute requiring at least 6% WPI nugatory. *See S. Nev. Homebuilders Ass'n v. Clark Cty., 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)* (HN6[↑] "When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." (internal quotation marks omitted)).

However, the Board also concluded that appellants

failed to satisfy NRS 616B.578(4) because "there is no proof by written record that applicant knew of spondylolisthesis, until after the subsequent industrial injury occurred." Thus, the Board concluded that appellants were required to show that the District knew of the employee's specific medical condition prior to his subsequent injury. HN7[↑] That interpretation of the statute is not reasonable because NRS 616B.578(3) plainly requires a showing of "any permanent condition" that hinders employment. (Emphasis added.)

Moreover, in Alaska, a "permanent physical impairment" is similarly **[**11]** defined in comparison to the first sentence in NRS 616B.578(3). See Alaska Stat. § 23.30.205(f) (2016). However, instead of defining a permanent physical impairment based on "a rating of permanent impairment of 6 percent or more of the whole person," NRS 616B.578(3), Alaska's statute prescribes that a condition may not be considered a "permanent physical impairment" unless the condition is one of 27 conditions statutorily listed or the condition **[*44]** "would support a rating of disability of 200 weeks or more if evaluated according to standards applied in compensation claims." Alaska Stat. § 23.30.205(f). Considering the similarity between the language of Alaska's relevant statute and NRS 616B.578(3), we are persuaded by the Supreme Court of Alaska's interpretation of the written record requirement.

The Supreme Court of Alaska has stated that "the written record does not need to contain the exact medical terminology describing the condition" in order to qualify for reimbursement. VECO Alaska, Inc. v. State, Dep't of Labor, Div. of Workers' Comp., Second Injury Fund (VECO), 189 P.3d 983, 989 (Alaska 2008). Rather, the employer satisfies the written record requirement by showing that the employee's preexisting condition "could reasonably be due to one of the conditions [recognized by statute], even if the employer cannot precisely identify the specific medical condition." *Id.* "[T]he statutory standard is the employer's **[**12]** knowledge [of the employee's condition], not the knowledge of either the employee or his physicians." Id. at 991. In other words, "[a]n employer is entitled to reimbursement from the Second Injury Fund if it produces a written record from which its prior knowledge of the employee's qualifying disability can fairly and reasonably be inferred." Id. at 988 (internal quotation marks omitted).

We are persuaded by the reasoning in VECO, and thus, we conclude that HN8[↑] appellants were not required to show that the employer knew of the exact medical terminology for the employee's permanent physical impairment, specifically, spondylolisthesis, prior to the subsequent injury. This interpretation of NRS 616B.578 supports the public policy behind the Account, which encourages employers to knowingly hire or retain employees who suffer from a permanent physical impairment. However, the employee's preexisting permanent physical impairment, which is recognized by statute, must be fairly and reasonably inferred from the written record. In Nevada, the impairment must amount to a minimum of 6% WPI. NRS 616B.578(3). Here, Dr. Betz and Dr. Berg apportioned 10.5% WPI to preexisting conditions, and Dr. Betz further specified that spondylolisthesis was the **[**13]** preexisting condition with 7-9% WPI. This mathematically leaves the employee's other conditions, such as HNP, radiculopathy, back sprain, and lumbar disc abnormalities, with a maximum of 4% WPI. Consequently, because none of his other conditions could meet the 6% WPI requirement of the employer's written record, spondylolisthesis was the employee's only permanent physical impairment recognizable under the statute.[2] Although appellants were not required to show that the employer knew of the employee's spondylolisthesis specifically, knowledge of a

[2] For this reason, we conclude that the Board's finding that the employee's other preexisting conditions documented prior to the subsequent injury did not rise to the level of a permanent physical impairment as required by NRS 616B.578(3) is supported by substantial evidence.

qualifying permanent impairment had to be fairly and reasonably inferred from the written record. After review of the record, we find that it is unclear whether the employer actually knew of any permanent condition that hinders employment, and it is further unclear whether it could be fairly and reasonably inferred from the written record that the employer knew of the employee's spondylolisthesis. Therefore, due to lack of clarity concerning the employer's specific knowledge, and in light of *VECO*, we reverse the district court's decision and remand this matter for the district court to further remand to the Board for proceedings consistent **[**14]** with this opinion as to knowledge of the employee's hindering condition constituting a preexisting permanent impairment.

/s/ Douglas, C.J.

Douglas

We concur:

/s/ Cherry, J.

Cherry

Pickering, J.

Pickering

/s/ Parraguirre, J.

Parraguirre

/s/ Gibbons, J.

Gibbons

/s/ Hardesty, J.

Hardesty

/s/ Stiglich, J.

Stiglich

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City of Reno v. Yturbide

Supreme Court of Nevada

May 2, 2019, Filed

No. 73971

Reporter
440 P.3d 32 *; 2019 Nev. LEXIS 22 **; 135 Nev. Adv. Rep. 14; 2019 WL 1966960

CITY OF RENO, Appellant, vs. JODY YTURBIDE, Respondent.

Prior History: [**1] Appeal from a district court order denying a petition for judicial review in a *workers' compensation* matter. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Disposition: Affirmed.

Core Terms

lump-sum, disability, percent, rating, lump sum, insurer, elect, *workers' compensation*, appeals, awards, installments, industrial, regulation, deduct, officer's decision, claimant

Case Summary

Overview

HOLDINGS: [1]-The trial court properly denied a city's petition for judicial review in a *workers' compensation* matter by an injured city employee, as it was properly determined that she was entitled to a 25 lump-sum payment for a permanent partial disability (PPD) award pursuant to *Nev. Rev. Stat. §§ 616C.495*, *616C.490(9)*, and *Nev. Admin. Code § 616C.498*; [2]-Although the employee already obtained two prior lump-sum PPD payments totaling seven percent whole person impairment, the city was not permitted to subtract those payments from the 25-percent limit, as there was no statutory, regulatory, or common-law authority to support its position that previous PPD awards that were paid in a lump sum could be used to reduce the 25-percent lump-sum limit of *§ 616C.498* for a subsequent PPD award related to a different disability.

Outcome

Order affirmed.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Types of Awards

***HN1*[↓] Interpretation**

Under *Nev. Rev. Stat. § 616C.495* and *Nev. Admin. Code § 616C.498*, an injured employee may elect to receive a lump-sum payment for a permanent partial disability (PPD) award. However, if the employee's PPD rating exceeds a 25-percent whole person impairment, the employee may only elect to receive a lump-sum payment for up to 25 percent of the rating, and for anything exceeding that 25 percent, the employee must receive payments in installments. There is no legal basis to justify a reduction by a *workers' compensation* insurer of the

25-percent lump-sum-payment limit for an employee's PPD award when that employee has already received a lump-sum payment for a previous PPD award. The Nevada Supreme Court is unwilling to read any such justification into Nevada's statutory *workers' compensation* scheme when the statutory scheme is otherwise silent on the issue.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review

HN2 **Standards of Review**

On appeal from a district court order denying a petition for judicial review, the Nevada Supreme Court reviews an appeals officer's decision, such as from a *workers' compensation* matter, in the same manner that the district court reviews the decision.

Governments > Legislation > Interpretation

Administrative Law > Agency Rulemaking > Rule Application & Interpretation

HN3 **Interpretation**

The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate. Statutory construction rules also apply to administrative regulations. Where the language of the statute is plain and unambiguous, a court should not add to or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Types of Awards

HN4 **Permanent Partial Disabilities**

Nev. Admin. Code § 616C.498 does not permit a *workers' compensation* insurer to use a previous permanent partial disability (PPD) award that was paid in a lump sum to reduce the 25-percent lump-sum-payment limit when the employee suffers a subsequent industrial injury and obtains a subsequent PPD award. *Section 616C.498*'s silence on the issue means that the regulation is not pertinent to the issue whatsoever. If anything, *§ 616C.498*'s references to "a permanent partial disability that exceeds 25 percent" and that portion of the injured employee's disability in excess of 25 percent suggest that the 25-percent limit applies on a disability-by-disability basis and not as an aggregate cap for all disabilities an employee may have throughout his or her working career.

Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Types of Awards

HN5 **Permanent Partial Disabilities**

Nev. Rev. Stat. § 616C.495(1)(e) simply prohibits an employee with multiple injuries from having a combined whole person impairment (WPI) rating of above 100 percent, which is a common-sense proposition. And *Nev. Rev. Stat. § 616C.490(9)* merely provides that if there is a previous disability, the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury. By its terms, *§ 616C.490(9)* requires previous WPI ratings to be subtracted from

an employee's entire WPI when arriving at the WPI rating for a subsequent injury. The statute says nothing about using lump-sum payments related to previous permanent partial disability (PPD) awards as a justification for reducing the lump-sum payment an employee is otherwise entitled to for a subsequent PPD award.

Counsel: McDonald Carano LLP and Timothy E. Rowe and Lisa M. Wiltshire Alstead, Reno, for Appellant.

Hutchison & Steffen, LLC, and Jason D. Guinasso, Reno, for Respondent.

Kemp & Kemp and James P. Kemp, Las Vegas; The Law Firm of Herb Santos, Jr., and Herb J. Santos, Jr., Reno, for Amicus Curiae Nevada Justice Association.

Judges: Parraguirre, J. We concur: Pickering, J., Cadish, J.

Opinion

[*33] BEFORE PICKERING, PARRAGUIRRE and CADISH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

This *workers' compensation* matter raises an issue pertaining to an injured employee's entitlement to a lump-sum payment for a permanent partial disability (PPD) award. ***HN1***[↑] Under *NRS 616C.495* and *NAC 616C.498*, an injured employee may elect to receive a lump-sum payment for a PPD award. However, if the employee's PPD rating exceeds a 25-percent whole person impairment (WPI), the employee may only elect to receive a lump-sum payment for up to 25 percent of the rating, and for anything exceeding that 25 percent, the employee must receive payments in installments. This appeal requires us to **[**2]** decide whether a *workers' compensation* insurer can reduce the 25-percent lump-sum-payment limit for an employee's PPD award when that employee has already received a lump-sum payment for a previous PPD award. We conclude that there is no legal basis to justify such a reduction, and we are unwilling to read any such justification into Nevada's statutory *workers' compensation* scheme when the statutory scheme is otherwise silent on the issue. Accordingly, the appeals officer correctly rejected appellant's position, and we affirm the district court's denial of appellant's petition for judicial review.

FACTS AND PROCEDURAL HISTORY

Respondent Jody Yturbide worked as a public safety dispatcher for appellant City of Reno (the City), during which time she received three separate PPD awards.[1] As a result of a 2008 industrial injury to her wrist, Yturbide received a 5-percent WPI rating and elected to obtain a lump-sum PPD payment. In 2011, Yturbide suffered another industrial injury, this time to her elbow, and **[*34]** received a 2-percent WPI rating, for which she elected to obtain another lump-sum PPD payment. Finally, in 2014, Yturbide suffered an industrial injury to her back, for which she received **[**3]** a 33-percent WPI rating.

With respect to Yturbide's third PPD payment, the City disputed the extent to which Yturbide was entitled to a third lump-sum payment. Relying on *NRS 616C.495(1)(d)* (2007) and *NAC 616C.498* (1996), the City offered Yturbide an 18-percent lump-sum payment, based on the City's belief that the statute and regulation permitted the City to deduct Yturbide's previous two PPD lump-sum payments.[2] Specifically, under the versions of the

[1] The City is self-insured, meaning it provides its own *workers' compensation* coverage, as is permitted by *NRS 616B.615*.

[2] This opinion addresses the versions of *NRS 616C.495(1)(d)* and *NAC 616C.498* that were in effect at the time of Yturbide's third injury. *See NRS 616C.425(1)* ("The amount of compensation and benefits . . . must be determined as of the date of the accident or

statute and regulation in effect at the time of Yturbide's injury to her back, NRS 616C.495(1)(d) provided that "[a]ny claimant injured on or after July 1, 1995, may elect to receive his or her compensation in a lump sum in accordance with regulations adopted by the Administrator [of the Division of Industrial Relations of the Department of Business and Industry]." NRS 616C.495(1)(d) (2007). In turn, the Administrator promulgated NAC 616C.498, which provided that

> [a]n employee injured on or after July 1, 1995, who incurs *a permanent partial disability that. . . [e]xceeds 25 percent* may elect to receive his compensation in a lump sum equal to the present value of an award for a disability of 25 percent. *If the injured employee elects to receive compensation in a lump sum pursuant to this subsection, the insurer shall* **[**4]** *pay in installments to the injured employee that portion of the injured employee's disability in excess of 25 percent.*

NAC 616C.498(2) (1996) (emphases added).

According to the City, because NRS 616C.495(1)(d) and NAC 616C.498 provided a 25-percent lump-sum-payment limit, and because Yturbide had already obtained two previous lump-sum PPD payments totaling 7-percent WPI, the City was permitted to subtract Yturbide's previous lump-sum PPD payments from the 25-percent limit. Thus, according to the City, Yturbide was entitled only to an 18-percent lump-sum payment for her back injury, with the remaining 15 percent to be paid in installments.

Yturbide appealed this determination concerning her third PPD award by requesting a hearing before the Department of Administration Hearings Division. Following a hearing, the hearing officer found that, pursuant to NAC 616C.498, the City had erred in its 18-percent lump-sum calculation, and further found that Yturbide was entitled to a 25-percent lump-sum payment, with the remaining 8 percent to be paid in installments. The City then appealed the hearing officer's decision and requested a hearing before the Department of Administration Appeals Office. An appeals officer affirmed the hearing **[**5]** officer's decision, concluding, among other things, that NAC 616C.498 did not support the City's position that it was entitled to reduce Yturbide's lump-sum payment for her third PPD award based on Yturbide having already received lump-sum payments for previous PPD awards. The City then petitioned the district court for judicial review of the appeals officer's decision. The district court affirmed the appeals officer's decision, thereby denying the City's petition. This appeal followed.

DISCUSSION

HN2[↑] On appeal from a district court order denying a petition for judicial review, this court reviews an appeals officer's decision in the same manner that the district court reviews the decision. Vredenburg v. Sedgwick CMS, 124 Nev. 553, 557, 188 P.3d 1084, 1087 [*35] (2008). Here, the sole issue pertains to the construction of NAC 616C.498, which is an issue of law that this court reviews de novo. *See* Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 329, 849 P.2d 267, 269 (1993) (HN3[↑] "The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate."); *see also* Silver State Elec. Supply Co. v. State, Dep't of Taxation, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007) ("Statutory construction rules also apply to administrative regulations."). "Where the language of the statute is plain and unambiguous . . ., a court

injury . .. ."). Although NRS 616C.495(1)(d) was amended in 2017 to expressly include NAC 616C.498's language that is at issue in this case, *see* 2017 Nev. Stat., ch. 216, § 9, at 1167, there is no indication that the amendment was intended to accomplish anything other than to codify the provisions of the regulation. *See* Hearing on A.B. 458 Before the Assembly Commerce & Labor Comm., 79th Leg. (Nev., March 29, 2017); *see also* Hearing on A.B. 458 Before the Senate Commerce, Labor & Energy Comm., 79th Leg. (Nev., May 17, 2017). After it was codified in NRS 616C.495, NAC 616C.498 was repealed. *See* Legislative Counsel Bureau File No. R127-17 (effective Jan. 30, 2019).

should not add to or alter the language to accomplish **[**6]** a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports." *See Maxwell, 109 Nev. at 330, 849 P.2d at 269* (internal quotation marks omitted).

Having considered the City's arguments, we conclude that the appeals officer correctly determined that ***HN4***[↑] *NAC 616C.498* does not permit a *workers' compensation* insurer to use a previous PPD award that was paid in a lump sum to reduce the 25-percent lump-sum-payment limit when the employee suffers a subsequent industrial injury and obtains a subsequent PPD award. The City contends that *NAC 616C.498* permits an insurer to deduct previous PPD awards when those awards were paid in a lump sum because *NAC 616C.498* does not prohibit an insurer from doing so, but in our view, *NAC 616C.498*'s silence on the issue means that the regulation is not pertinent to the issue whatsoever. *See Maxwell, 109 Nev. at 330, 849 P.2d at 269*. If anything, *NAC 616C.498*'s references to "a permanent partial disability that... [e]xceeds 25 percent" and "that portion of *the injured employee's disability* in excess of 25 percent" (emphases added) suggest that the 25-percent limit applies on a disability-by-disability basis and not as an aggregate cap for all disabilities an employee may have throughout his or her working career. *See Maxwell, 109 Nev. at 330, 849 P.2d at 269*.

The City alternatively **[**7]** contends that *NRS 616C.495(1)(e)*[3] or *NRS 616C.490(9)* require *NAC 616C.498* to be construed in a manner that would permit a *workers' compensation* insurer to deduct previous PPD awards when computing the amount of a lump-sum payment for a subsequent PPD award. We disagree. ***HN5***[↑] *NRS 616C.495(1)(e)* simply prohibits an employee with multiple injuries from having a combined WPI rating of above 100 percent, which is a common-sense proposition and is not the case here. *Cf.* Hearing on S.B. 232 Before the Senate Commerce, Labor & Energy Comm., 78th Leg. (Nev., March 13, 2015) (explaining the purpose of what would become *NRS 616C.495(1)(e)*); Hearing on S.B. 232 Before the Assembly Commerce & Labor Comm., 78th Leg. (Nev., May 6, 2015) (same). And *NRS 616C.490(9)* merely provides that

> if there is a previous disability, . . . the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.

By its terms, *NRS 616C.490(9)* requires previous WPI ratings to be subtracted from an employee's entire WPI when arriving at the WPI rating for a subsequent injury. Had *NRS 616C.490(9)* been properly applied in this case, the physician that conducted Yturbide's WPI rating **[**8]** for her third injury should have determined her entire WPI rating and then deducted the two previous WPI ratings (i.e., 5 and 2 percent) from the total WPI rating.[4] The statute says nothing about using lump-sum payments related to previous PPD awards as a justification for reducing the lump-sum payment an employee is otherwise entitled to for a subsequent PPD award. Nor has the City identified any legislative history to suggest that, in enacting *NRS 616C.495(1)(e)* **[*36]** or *NRS 616C.490(9)*, it was the Legislature's roundabout intent to permit *workers' compensation* insurers to deduct previous PPD awards paid in a lump sum to reduce the 25-percent lump-sum-payment limit under *NAC 616C.498*. *See Maxwell, 109 Nev. at 330, 849 P.2d at 269*.

The City next contends that *Eads v. State Industrial*

[3] *Subsection (1)(e)* did not exist at the time of Yturbide's third injury. *See* 2015 Nev. Stat., ch. 240, § 3, at 1142 (enacting *subsection (1)(e)*). It has since been moved to *subsection (1)(g)*. *See* 2017 Nev. Stat., ch. 216, § 9, at 1168.

[4] Although the rating physician did not actually follow *NRS 616C.490(9)* in this case, failure to follow the statute does not change the meaning of the statute.

Insurance System, 109 Nev. 733, 857 P.2d 13 (1993), supports its position, but again, we disagree. In *Eads*, an employee sustained a work-related injury and was given a 19-percent PPD award, which the employee accepted in a lump-sum payment. *109 Nev. at 734, 857 P.2d at 14*. The employee subsequently reopened his claim because the same injury required additional treatment, and he received a 16-percent PPD award over and above the original award. *Id. at 734-35, 857 P.2d at 14*. At the time, a since-repealed statute (NRS 616.607(1)(c)) provided that

> [a]ny claimant. . . who incurs a disability that exceeds 25 percent may elect to receive his compensation **[**9]** in a lump sum equal to the present value of an award for a disability of 25 percent. If the claimant elects to receive compensation pursuant to this paragraph, the insurer shall pay in installments to the claimant that portion of the claimant's disability in excess of 25 percent.[5]

Eads, 109 Nev. at 735 n.1, 857 P.2d at 15 n.1.

On appeal, this court addressed whether the employee could seek the entire subsequent 16-percent PPD award in a lump-sum payment, or whether the 16-percent PPD award needed to be combined with the previous 19-percent PPD award, such that the employee could only receive an additional 6-percent lump-sum payment before reaching the statute's 25-percent limit. This court concluded that the statute's 25-percent limit unambiguously applied to "*a disability*" and that, consequently, "where ... an injured worker's case is reopened for further treatment and evaluation of the original disability, NRS 616.607(1)(c) applies to the combined disability allowance and limits any lump sum payments to a total of twenty-five percent." *Id. at 735-36, 857 P.2d at 15*.

We are not persuaded that *Eads* has any bearing on whether *NAC 616C.498* permits a *workers' compensation* insurer to reduce the 25-percent limit based on a previous PPD award paid in a lump sum that an employee received for a **[**10]** *different* disability. If anything, *Eads* supports the proposition that *NAC 616C.498*'s 25-percent limit should be applied on a disability-by-disability basis. Put simply, the City has not provided this court with any statutory, regulatory, or common-law authority to support its position that previous PPD awards that were paid in a lump sum can be used to reduce *NAC 616C.498*'s 25-percent lump-sum limit for a subsequent PPD award related to a different disability. While we are cognizant of the City's public-policy arguments, those arguments are better directed to the Legislature, which, as of yet, has not enacted legislation pertaining to the issue presented in this case. Accordingly, the appeals officer correctly determined that Yturbide is entitled to a lump-sum payment for the first 25 percent of her most recent WPI rating and PPD award, with the remaining 8 percent to be paid in installments. We therefore affirm the district court's denial of the City's petition for judicial review.

/s/ Parraguirre, J.

Parraguirre

We concur:

/s/ Pickering, J.

Pickering

/s/ Cadish, J.

Cadish

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[5] Notably, the relevant language in this statute is substantively identical to the language in *NAC 616C.498*.

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH WATSON,
Appellant,
vs.
HELMSMAN MANAGEMENT SERVICES; AND THE STATE OF NEVADA DIVISION OF INDUSTRIAL RELATIONS,
Respondents.

No. 75211

FILED

JUN 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.[1]

Appellant Kenneth Watson injured his shoulder while working at Home Depot. He filed a complaint with the Nevada Division of Industrial Relations (NDIR), asserting that respondent, as Home Depot's workers' compensation administrator, failed to comply with the Nevada Industrial Insurance Act (NIIA) in processing his claim and offering a permanent partial disability (PPD) award. Watson asked for the imposition of maximum fines to ensure respondent's compliance with the NIIA. Although

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

the NDIR asked respondent to file a response to the complaint, respondent did not do so. The NDIR reviewed the documentary evidence and determined that respondent failed to (1) timely schedule the PPD rating, (2) timely provide the rating physician with the claims file, and (3) timely offer Watson an award. The NDIR imposed administrative fines based on these failures but declined to impose a benefit penalty because an "intentional violation was not found."

Watson appealed. Although the appeals officer ordered the parties to exchange and file documentary evidence, statements, and points and authorities supporting their positions, respondent did not file any documents or exchange information. Following a hearing, at which respondent did not appear, the appeals officer reversed the benefit penalty determination, finding that respondent intentionally failed to comply with NIIA procedures. Respondent petitioned for judicial review and the district court granted the petition, concluding there was no evidence that respondent intended to violate the NIIA. Watson appeals.

Having considered the parties' arguments and the record, we conclude the appeals officer's finding that respondent's NIIA violations were intentional is supported by substantial evidence and his conclusion that Watson is entitled to a benefit penalty under NRS 616D.120(1)(i) is legally correct. NRS 233B.135(3)(e) and (f); *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (observing that this court reviews "an administrative agency's factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not

supported by substantial evidence" and that no deference is given to the district court's decision on a judicial review petition (internal quotation marks omitted)). With respect to scheduling Watson's PPD rating and offering him a PPD award, the record supports the appeals officer's finding that respondent failed to comply with NRS 616C.490(2) (requiring insurer to schedule a PPD evaluation within 30 days after receiving a physician's report) and NRS 616C.490(6) (requiring insurer to notify the employee of the amount of compensation to which he is entitled within 14 days of receiving the PPD evaluation). The record likewise supports the appeals officer's finding that respondent violated NAC 616C.103 by failing to timely provide the rating physician with the claim file.

With regard to those violations being intentional, the appeals officer found that respondent acted with purpose and design or otherwise to delay processing Watson's claim and that respondent believed that its failure to implement proper claims procedures would lead to violations of the NIIA that were substantially certain to cause hardship to Watson and others. Although respondent argues that there was no evidence showing that its conduct was intentional,[2] substantial evidence in the record supports the appeals officer's findings that respondent repeatedly failed to

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[2]Respondent relies in part on *Conway v Circus Circus Casinos, Inc.*, 116 Nev. 870, 8 P.3d 837 (2000), in arguing that the evidence does not support that its conduct was intentional, but *Conway* is inapposite because it concerned employees suing in district court to recover damages on a common law tort theory to avoid the NIIA's exclusive remedy provision. Here, the NIIA authorizes the benefit penalty Watson seeks in the context of his workers' compensation claim.

follow statutory and regulatory procedures in processing Watson's claim, and did not correct such failures despite correspondence from Watson seeking compliance with these procedures.[3] Additionally, as the appeals officer found, respondent did not address those failures until Watson requested hearings or filed a complaint with the NDIR. *See* NAC 616D.405(1) (providing that an insurer commits an "intentional violation" of the NIIA if it "acts with purpose or design, otherwise acts to cause the consequences, desires to cause the consequences or believes that the consequences are substantially certain to result from the violation"). Based on those findings, the appeals officer properly concluded that Watson is entitled to a benefit penalty. NRS 616D.120(1)(i) and (3) (authorizing

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[3]We perceive no abuse of discretion in the appeals officer's decision denying respondent's reconsideration motion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). We also are not persuaded by respondent's argument that it was an arbitrary and capricious abuse of discretion for the appeals officer to hold the hearing in respondent's absence. Respondent failed to participate in the NDIR or appeal proceedings in any way despite having notice and being asked or ordered to file responses, and despite knowing that Watson was seeking a benefit penalty. *Cf. Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 57, 200 P.3d 514, 520 (2009) (observing that good reasons do not exist for reconsideration of an administrative matter when a party "decides not to present available evidence during the course of the administrative proceeding" and instead waits until it is faced with an adverse decision).

imposition of a benefit penalty when the insurer intentionally fails to comply with any provision of, or regulation adopted pursuant to, the NIIA). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[4]

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

cc: Chief Judge, Eighth Judicial District Court
Carolyn Worrell, Settlement Judge
Law Offices of James J. Ream
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Dept of Business and Industry/Div of Industrial Relations/Henderson
Eighth District Court Clerk

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[4]To the extent the parties' briefs include arguments about the extent or amount of the benefit penalty, including whether evidence showing that the NDIR imposed benefit penalties against respondent's parent company in two earlier matters may factor into the calculation here, we decline to consider those arguments in the first instance. In reversing the NDIR's decision, the appeals officer left that issue for the NDIR to determine on remand. Although respondent asserts that evidence showing that the NDIR had assessed benefit penalties against respondent's parent company is not properly included in the record, respondent did not dispute that the evidence was proper for consideration in the NDIR or appeal proceedings.