Rush v. Nevada Indus. Comm'n

Supreme Court of Nevada

July 3, 1978

No. 9058

Reporter
94 Nev. 403 *; 580 P.2d 952 **; 1978 Nev. LEXIS 576 ***

RALPH O. RUSH and MARY RUSH, Appellants, v. NEVADA INDUSTRIAL COMMISSION; JOHN REISER; DONALD BREIGHNER; RICHARD PETTY; JOHN DOES I-X, INDIVIDUALS, Respondents

Prior History: [*1]** Appeal from judgment of dismissal. First Judicial District Court, Carson City; Frank B. Gregory, Judge.

Disposition: Affirmed in part; reversed in part; and remanded for further proceedings.

Core Terms

immunity, Industrial, damages

Case Summary

Procedural Posture
Appellants, injured employee and spouse (collectively employee), sought review of an order of the First Judicial District Court, Carson City (Nevada), which entered a judgment of dismissal in the employee's common law negligence suit against appellees, Nevada Industrial Commission and others (collectively commission).

Overview

The employee injured his eye at work and filed a claim with the commission. After the employee's doctor diagnosed the employee with a retinal detachment and recommended referral to a larger medical center for treatment, the commission took the position that it would not pay for such further treatment unless it was demonstrated that the medical condition was caused by the industrial accident. Four months later, a further examination revealed that the employee's vision in one eye could not be saved. The employee filed suit against the commission for negligence, alleging that the tardiness of the commission in authorizing the specialized treatment proximately caused the eventual loss of employee's eye. The trial court granted the commission's motion to dismiss. On appeal, the court reversed the trial court's dismissal, holding that the commission was a permissive defendant under Nev. Rev. Stat. § 616.560. The court remanded for further proceedings on the issue of sovereign immunity after finding that the trial court applied the wrong rule in its analysis. The court affirmed the trial court's dismissal of the employee's claims for punitive damages, citing *Nev. Rev. Stat. § 41.035*.

Outcome
The court affirmed the trial court's order insomuch as it struck the employee's causes of action for punitive damages against the commission. The court then reversed the trial court's order dismissing the employee's suit against the commission and remanded for further proceedings with instructions for the trial court to consider the issue of sovereign immunity in the context of the proper procedural rule.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Third Party Actions > Third Party Liability

HN1 **Third Party Actions, Third Party Liability**

In determining whether the Nevada Industrial Commission (NIC) is a proper defendant in a common law negligence suit brought by an injured employee, the better rule is not an equation of the NIC with the employer, but rather that the third party referred to in Nev. Rev. Stat. § 616.560 is one other than the employer and a co-employee, thus making the NIC a permissive defendant. In Nevada, the carrier is the NIC

itself, but this is an unimportant distinction where the complaint is not based upon the employer-employee relationship. Since Nevada's statutory scheme does not expressly equate the NIC with the employer and afford the concomitant protection from suit, the NIC is not insulated through Ch. 616 of the Nevada Industrial Insurance Act.

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

A statute will not be construed as taking away a common law right existing at the time of its enactment unless that result is imperatively required.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > Remedies > Damages > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN3[] **Heightened Pleading Requirements, Fraud Claims**

Nev. Rev. Stat. § 41.035(1) precludes the recovery of exemplary or punitive damages against the Nevada Industrial Commission. *Section 41.035(1)* provides that an award for damages in an action sounding in tort brought under *Nev. Rev. Stat. § 41.031* or against a present or former officer or employee of the state or any political subdivision or any state legislator or former state legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of $ 35,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

Counsel: *John T. Coffin,* Reno, for Appellants.

Riley Beckett, Carson City, for Respondents.

Judges: Manoukian, J. Batjer, C. J., and Mowbray and Gunderson, JJ., and Hoyt, D. J., [3] concur.

Opinion by: MANOUKIAN

Opinion

[*405] **[**953]** On August 3, 1973, appellant, Ralph O. Rush, while employed as a mechanic, got metal shavings in his eye. Through his employer a claim was filed with the Nevada Industrial Commission, and appellant was sent to a Reno ophthalmologist. After several months of examination and treatment, the doctor informed the NIC on October 23 that he was able to detect a retinal detachment and that because no facilities for treatment existed in Reno, appellant would have to be referred to a larger medical center.

It was then the position of the NIC that it would not pay for such further treatment **[***2]** unless it was demonstrated that the medical condition was caused by the metal shavings involved in the industrial accident. In response to a request four months later, after further examination revealed that vision in the left eye could not be saved, an operation was performed to remove the eye and fit appellant with a prosthetic device.

On September 5, 1975, appellants filed suit for negligence, alleging that the tardiness of respondents in authorizing the specialized treatment proximately caused the eventual loss of appellant's eye. Respondents successfully moved to dismiss the complaint and this appeal ensued.

There are three issues before us: (1) Is a claimant under The Nevada Industrial Insurance Act precluded from pursuing a negligence action against the Nevada Industrial Commission; (2) are the actions of the NIC and its employees within the protection of governmental immunity; and (3) did the trial court err in striking causes

[3] The Governor designated Hon. Merlyn H. Hoyt, Judge of the 7th Judicial District, to sit in place of Hon. Gordon Thompson, Justice, who was disabled. Nev. Const. art. 6 § 4.

of action alleging fraudulent behavior?

1. *Suit against the NIC.*

Below, appellants attempted to recover damages in a common law negligence action against the NIC in addition to receiving a NIC compensation award for disability. They cite NRS **[***3]** 616.560 as authority that actions may be maintained **[*406]** against "some person, other than the employer or a person in the same employ." Appellants then contend that the NIC satisfies neither description and is thus a permissible defendant in a suit which alleges that negligent delay in authorization for specialized treatment resulted in the loss of his eyesight. We agree.

Appellant cites *Nelson v. Union Wire Rope Corporation, 199 N.W.2d 769 (Ill. 1964)*; *Fabricius v. Montgomery Elevator Company, 121 N.W.2d 361 (Iowa 1963)*; and *Mays v. Liberty Mutual Insurance Company, 323 F.2d 174 (3rd Cir. 1963)*, for the proposition that a workman's compensation insurance carrier is distinguished from the workman's employer and thus a permissible defendant in a subsequent trial.

In *Nelson, supra*, although the Illinois Supreme Court interpreted Florida law to find a carrier was subject to suit, a Florida court subsequently rejected that analysis and interpreted the statute to confer immunity. *Carroll v. Zurich Insurance Company, 286 S.2d 21 (Fla.App. 1973)*. After the *Fabricius* and *Mays* decisions, the respective legislatures amended the statutes to expressly grant immunity to carriers. **[***4]** *See,* Iowa Acts 1965 (61 G.A.) Ch. 107, § 14 (repealed); *Pa. Stat. Ann., Title 77, § 501* (supp. 1967). *See also, Modjeski v. Atwell, Vogel & Sterling, Inc., 309 F.Supp. 199 (D. Minn. 1969)*, and *Brown v. Travelers Insurance Company, 254 A.2d 27 (Pa. 1969)*.

Thus, in those cases, when immunity has not been expressly given by statute, such immunity was subsequently provided either through judicial interpretation or statutory amendment. We believe ***HN1***[⬆] the better rule to be not an equation of the NIC with the employer but rather that the third party referred to in NRS 616.560 is one other than the employer and a co-employee, thus making the NIC a permissive defendant. *Mager v. United Hospitals of Newark, 212 A.2d 664 (N.J. 1965)*. In Nevada, unlike New Jersey, the carrier is the Commission itself, but we are unpersuaded by this distinction, as the complaint here is not based upon the employer-employee relationship. **[**954]** *See, Szydlowski v. General Motors Corp., 229 N.W. 2d 365 (Mich. 1975)*. Here, since Nevada's statutory scheme does not expressly equate the NIC with the employer and afford the concomitant protection from suit, we hold that respondents are not insulated **[***5]** through Chapter 616, the Nevada Industrial Insurance Act.

Had the Nevada Legislature contemplated that the Nevada Industrial Commission stand in the place and stead of the employer in administering workman's compensation benefits in this factual context and further contemplated employers rely solely on the NIC as a means of fulfilling their liabilities or responsibilities to employees, its intention would have been **[*407]** plain and unambiguous. *Compare, Public Service Commission of Nevada v. District Court, 94 Nev. 42, 574 P.2d 272 (1978)*; *Schoonover v. Caudill, 337 P.2d 402 (N.M. 1959)*. Although the contention is persuasive, this should be made to the legislature and not this Court.

HN2[⬆] A "statute will not be construed as taking away a common law right existing at the time of its enactment unless that result is imperatively required," *Fabricius, supra,* 121 N.W.2d at 352, and we conclude our Legislature has not made such "imperatively required" in this instance.

2. *Sovereign Immunity.*

Are the NIC members and its employees insulated from suit by virtue of the doctrine of sovereign immunity? We find no necessity to discuss *NRS 41.032* [1] since it is apparent to this **[***6]** Court that the trial court summarily adjudicated the sovereign immunity issue and in doing so confused procedurally a motion to dismiss, *NRCP 41(b)*, with a motion for summary judgment, *NRCP 56*. We find it appropriate to remand this issue and matter to the district court for further proceedings.

3. *Striking Causes of Action.*

Appellants alleged causes of action for punitive damages against respondents. The counts alleged that respondents were "guilty of fraud and oppression" and that their behavior was "characterized by fraud, malice, and oppression." Upon these allegations, appellants pray for exemplary damages.

---

[1] *NRS 41.032* provides in part that no action may be brought against any state agency or its employees based on the performance or failure to perform a discretionary duty.

The trial court dismissed both causes of action because the allegations of fraud had not been stated with particularity, a requirement of NRCP 9(b). While we concur with the trial court's conclusion, more fundamentally, we are **[***7]** constrained to cite HN3[↑] NRS 41.035(1) [2] which here precludes the recovery of exemplary or punitive damages against any of the respondents.

[*408] Affirmed in part; reversed in part; and, remanded for further proceedings consistent herewith.

End of Document

[2] NRS 41.035 provides that

> (1) An award for damages in an action sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the state or any political subdivision or any state legislator or former state legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of $ 35,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. *An award may not include any amount as exemplary or punitive damages.* (Emphasis supplied.)

Northern Nev. Ass'n of Injured Workers v. Nevada State Indus. Ins. Sys.

Supreme Court of Nevada

March 7, 1991 ; March 7, 1991, Filed

No. 20704

Reporter
107 Nev. 108 *; 807 P.2d 728 **; 1991 Nev. LEXIS 9 ***

NORTHERN NEVADA ASSOCIATION OF **INJURED WORKERS**, RONALD MOORE, TONYA MOORE, ELMER SCOTT, DAVID COX, JUAN HERNANDEZ, MARK PELTIER, MARGARET A. VIERRA and LAWRENCE ADAMSON, Appellants, v. **NEVADA** STATE INDUSTRIAL INSURANCE SYSTEM, LAURY M. LEWIS, MATHEW DORANGRICCHIA, MARYANN ELORREAGA and DEBORAH WEAVER, Respondents

Prior History: [*1]** Appeal from district court order granting NRCP 12(b)(1) and (5) motion to dismiss. Second Judicial District Court, Washoe County; William **N.** Forman, Judge.

Disposition: Reversed and remanded.

Core Terms

amended complaint, allegations, appellants', employees, immunity, official capacity, district court, discretionary, rights, state official, claimant, damages, cause of action, state agency, Industrial, statutes, fail to state a claim, injunctive relief, respondents', reopen

Case Summary

Procedural Posture

Appellant **workers** filed an action against respondent administrative agency and related employees for negligence and bad faith in the processing of the **worker**'s injury claims, and for deprivation of their civil rights. The Second Judicial District Court (**Nevada**) granted respondents' **Nev.** R. Civ. P. 12(b)(1), (5) motion to dismiss. The **workers** appealed.

Overview

The **workers** were **injured** on the job. The administrative agency and related employees failed to process the **workers** resulting injury claims in a timely manner. The **workers** filed a negligence, bad faith, and civil rights action under *42 U.S.C.S. § 1983*, *1985* for money damages, injunctive relief, attorney fees, and costs against the administrative agency and the related employees in their official and individual capacities. The trial court dismissed the complaint. On appeal the court held that: (1) neither states nor state officials acting in their official capacities could be sued under *§§ 1983*, *1985* in state court, (2) the administrative agency and the related employees were not insulated by the **Nevada** Industrial Insurance Act, **Nev.** Rev. Stat. § 41.032 from liability arising from a common law negligence claim where the cause of action was based on a mandatory duty, (3) there was no aspect of discretion in failing to meet statutorily imposed deadlines, (4) claims against officials in their individual capacities were not prohibited, (5) injunctive relief was available, and (6) the federal civil rights claims were properly dismissed.

Outcome

The court held that the dismissal of the federal civil rights claims against the administrative agency and related employees was proper but that the dismissal of the common law negligence and bad faith actions were not. The court reversed the trial court and remanded for further proceedings.

LexisNexis® Headnotes

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN1[] Local Officials, Customs & Policies

Neither states nor state officials acting in their official capacities may be sued under *42 U.S.C.S. §§ 1983, 1985* in state courts.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Public Entity Liability > Liability > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Filing Requirements

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

Civil Procedure > Remedies > Damages > General Overview

Governments > State & Territorial Governments > Claims By & Against

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN2[] Damages, Punitive Damages

A claimant can file an action against the **Nevada** Industrial Commission (NIC) because the third party referred to in **Nev.** Rev. Stat. § 616.560 is one other than the employer and a co-employee, thus making NIC a permissive defendant.

Torts > Public Entity Liability > Immunities > General Overview

Workers' Compensation & SSDI > Compensability > Inferences & Presumptions

Governments > Legislation > Interpretation

Torts > Public Entity Liability > Liability > General Overview

HN3[] Public Entity Liability, Immunities

The legislature presumably knew the law when it most recently amended the **workers'** compensation statute. The statutory language considered by this court in Rush has remained unchanged and thus it is presumed that the legislature approves of our interpretation of the provision. Respondents are therefore not insulated by the **Nevada** Industrial Insurance Act from liability arising from a common law negligence claim.

Administrative Law > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

Governments > Local Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > General Overview

HN4[] Administrative Law, Sovereign Immunity

See *Nev. Rev. Stat. § 41.032*.

Administrative Law > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

Business & Corporate Compliance > ... > **Workers'** Compensation & SSDI > Compensability > Occupational Diseases

Administrative Law > Separation of Powers > Jurisdiction

HN5[] Administrative Law, Sovereign Immunity

The State Industrial Insurance System (SIIS) is clearly a state agency for the following reasons: (1) it is subject to the approval and control of the Governor, the legislature, and other agencies of the government, (2) it is treated as the State or a state agency throughout the **Nevada** Revised Statutes, and (3) it possesses certain powers of a sovereign authority. Therefore, the discretionary acts of SIIS and its employees are not actionable.

Administrative Law > Sovereign Immunity

Workers' Compensation &

SSDI > Exclusivity > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

Workers' Compensation & SSDI > Benefit Determinations > General Overview

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview

HN6 Administrative Law, Sovereign Immunity

The State Industrial Insurance System (SIIS) and its employees do exercise discretion when processing worker's compensation claims. When SIIS receives a claim it must determine whether: (1) the worker is covered by the act, (2) there was an accident arising out of and in the course of employment, and (3) claimants' disability is permanent and total, permanent and partial, temporary and total, or temporary and partial. These determinations all involve discretion, and thus SIIS, its officials and employees are immune from liability for making such determinations.

Workers' Compensation & SSDI > ... > Claims > Statute of Limitations > General Overview

HN7 Claims, Statute of Limitations

The time provisions within which the State Industrial Insurance System must either accept or deny responsibility is not discretionary.

Workers' Compensation & SSDI > ... > Claims > Statute of Limitations > General Overview

HN8 Claims, Statute of Limitations

See Nev. Rev. Stat. § 616.500(7).

Administrative Law > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

Workers' Compensation & SSDI > ... > Claims > Statute of Limitations > General Overview

HN9 Administrative Law, Sovereign Immunity

Meeting the thirty, sixty and ninety-day deadlines is a mandatory duty imposed upon the State Industrial Insurance System by the legislature. Mandatory duties fall within the operational sphere of duties and involve little or no discretion; Nev. Rev. Stat. § 41.032 immunity does not extend to such acts.

Governments > State & Territorial Governments > Claims By & Against

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN10 State & Territorial Governments, Claims By & Against

If workers compensation claimants are harmed by a state agency's failure to meet the deadlines set forth in Nev. Rev. Stat. § 616.500(7), they are entitled to pursue their causes of action against the agency under that theory.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN11 Administrative Proceedings, Claims

There is no aspect of discretion involved in refusing or failing to reopen a claimant's file. When a state agency fails to appeal a hearing officer's determination, it is left with an operational duty to promptly reopen that file.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN12 Local Officials, Customs & Policies

Only purely discretionary acts are cloaked with

immunity.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Governments > State & Territorial Governments > Claims By & Against

HN13[] **Local Officials, Customs & Policies**

The United States Supreme Court has held that neither states nor their officials acting in their official capacities are persons under *42 U.S.C.S. § 1983* and therefore neither may be sued in state courts under the federal civil rights statutes. The same is true for claims under *42 U.S.C.S. § 1985*.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN14[] **Local Officials, Customs & Policies**

The court agrees that Will does not prohibit claims against officials acting in an individual capacity.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN15[] **Pleadings, Rule Application & Interpretation**

The style of the caption of a complaint is not determinative as to whether a state official has been sued in his or her official or individual capacity.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN16[] **Injunctions, Grounds for Injunctions**

Injunctive relief against state officials acting within their official capacities is available under *42 U.S.C.S. § 1983*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

HN17[] **Defenses, Demurrers & Objections, Defects of Form**

If defendants are truly perplexed by any aspect of a plaintiff's amended complaint, they may obtain further specificity by filing a motion for a more definite statement under ***Nev.*** *R. Civ. P. 12(e)* or simply deny allegations of uncertain meaning under ***Nev.*** *R. Civ. P. 8(b)*.

Counsel: *Victor R. Cook*, Reno, for Appellants.

R. Scott Young, General Counsel, State Industrial Insurance System, Carson City, for Respondents.

Judges: Mowbray, C.J., Springer, J., Rose, J., Steffen, J., Young, J.

Opinion by: PER CURIAM

Opinion

[*110] **[**729]** Appellants sued respondents State Industrial Insurance System (SIIS) and certain individual SIIS employees (employees) for negligence and bad faith in the processing of appellants' claims, and for deprivation of their civil rights. The district court granted respondents' *NRCP 12(b)(1)* and *(5)* motion to dismiss for lack of subject matter jurisdiction and a failure to state a claim upon which relief can be granted.

The district court's order of dismissal was premised on four conclusions: (1) SIIS's immunity as a state agency; (2) the discretionary nature of SIIS's conduct; (3) the inapplicability of *42 U.S.C. §§ 1983* and *1985* to

respondents; and (4) the insufficiency of factual allegations in appellants' amended complaint to support [***2] its contentions.

For the reasons discussed below, we hold that it was error to dismiss appellants' amended complaint.

Facts and Procedural Background

Accepting, as we must, the truth of appellants' factual allegations, Haertel v. Sonshine Carpet Co., 102 **Nev.** 614, 730 P.2d 428 (1986), appellant Ronald Moore (Moore) was ***injured*** by a dynamite explosion while working for Marshall Earth Resources, Inc. He suffered a fractured skull, injuries to his neck and back, and severe mental disorientation. [1]

Moore received benefits under the ***Nevada*** Industrial Insurance Act and in due course SIIS advised Moore by letter dated July 6, 1988 that it would close his file. On September 1, 1988, Moore's attorney wrote a letter to SIIS advising the System that Moore's condition had worsened. The attorney asked SIIS to reopen Moore's file; SIIS refused.

On December 27, 1988, [***3] a hearing officer reversed SIIS and remanded the file for reopening. SIIS neither appealed the hearing officer's determination nor reopened the file.

On March 13, 1989, M.H. Duxbury, M.D., wrote a letter to SIIS alerting the system that Moore required immediate care resulting from a work-related accident. Dr. Duxbury stated that the possibility of Moore having a stroke or heart attack was great. On the same day, appellants filed a complaint in district court alleging that respondents negligently and maliciously processed ***workers***' compensation claims, and violated their civil rights [*111] secured by *42 U.S.C. §§ 1983* and 1985. [2] Shortly thereafter, appellants filed, and the district court granted, an application for a writ of mandamus. The writ ordered SIIS to comply [**730] with the hearing officer's determination of December 27, 1988.

[***4] Appellants filed their amended complaint on April 4, 1989, which named additional plaintiffs and defendants, and alleged further instances of breach of duty by the defendants. In response, respondents filed a 12(b) motion to dismiss the amended complaint. The grounds for the motion were that the district court lacked subject matter jurisdiction, appellants' complaint failed to state a claim upon which relief could be granted, and the prerequisites for a class action had not been met. [3] Appellants opposed the motion and in the alternative sought leave to amend.

The district court granted respondents' motion to dismiss on December 5, 1989, finding that (1) SIIS was a state agency; (2) the conduct complained of was discretionary within the scope of NRS 41.032; (3) the amended complaint failed to state a claim upon which relief could be granted under the federal civil rights [***5] statutes; [4] and (4) the amended complaint failed to disclose factual allegations sufficient to support its conclusions. This appeal followed.

Discussion

We initially consider whether there is a cause of action in ***Nevada*** against SIIS and its employees for negligent or malicious claims processing.

In Rush v. ***Nevada*** Indus. Comm'***n***, 94 **Nev.** 403, 580 P.2d 952 (1978), a claimant attempted to sue the ***Nevada*** Industrial [***6] Commission (NIC) for money and punitive damages. [5] The claimant [*112] argued NIC's delay in approving specialized treatment proximately caused the eventual loss of his eye. Id. at

---

[1] In disposing of this appeal we have found it unnecessary to address facts pertaining to the remaining appellants.

[2] Appellants prayed for money damages, injunctive relief, attorney's fees and costs. Moreover, the complaint alleges violations of 42 U.S.C. § 1985(2). Appellants concede they inadvertently cited to subsection (2) when they intended and made out a cause of action under subsection (3).

[3] We do not address this issue and express no opinion concerning it because the district court did not rule on the issue in its order of dismissal.

[4] Prior to the district court's ruling on the motion to dismiss, appellants responsibly directed the court's attention to the United States Supreme Court decision in Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989). The *Will* decision conclusively holds that ***HN1***[⬆] neither states nor state officials acting in their official capacities may be sued under ***42 U.S.C. §§ 1983*** and 1985 in state courts. Id. 109 S.Ct. at 2312.

[5] Appellants in the present case also prayed for punitive damages. As we held in *Rush*, punitive damages are unavailable in actions of this nature. Rush, 94 **Nev.** at 407, 580 P.2d at 954, construing NRS 41.035(1) ("[a]***n*** award may not include any amount as exemplary or punitive damages").

405, 580 P.2d at 953. We held that HN2[↑] claimant could sue NIC because "the third party referred to in NRS 616.560 is one other than the employer and a co-employee, thus making NIC a permissive defendant." Id. at 406, 580 P.2d at 953.

Despite respondents' contentions to the contrary, *Rush* is still good law. HN3[↑] The legislature presumably knew the law when it most recently amended the **workers'** compensation statute. **[***7]** *See* City of Boulder v. General Sales Drivers, 101 **Nev.** 117, 694 P.2d 498 (1985). The statutory language considered by this court in *Rush* has remained unchanged and thus it is presumed that the legislature approves of our interpretation of the provision. **Nevada** Indus. Comm'n v. Strange, 84 **Nev.** 153, 158, 437 P.2d 873, 876 (1968). Respondents are therefore not insulated by the **Nevada** Industrial Insurance Act from liability arising from a common law negligence claim. *Rush*, 94 **Nev.** at 406, 580 P.2d at 953.

We must next decide whether respondents are immune from liability for the misconduct alleged in appellants' complaint. In addressing this issue, it is necessary to consider the language of the relevant statute, NRS 41.032. [6] Under the **[**731]** terms of the statute, respondents may successfully invoke immunity if SIIS is a state agency and the acts described in the complaint are of a discretionary nature.

[*8]** HN5[↑]

SIIS is clearly a state agency for the following reasons: (1) it is subject to the approval and control of the Governor, the legislature, and other agencies of the government; [7] (2) it is treated as the **[*113]** State or a state agency throughout the **Nevada** Revised Statutes; [8] and (3) it possesses certain powers of a sovereign authority. [9] Therefore, the discretionary acts of SIIS and its employees are not actionable.

[*9]** In analyzing respondents' entitlement to immunity under the statute, it is necessary to determine whether the acts alleged in appellants' amended complaint are properly categorized as discretionary. HN6[↑] SIIS and its employees do exercise discretion when processing **worker's** compensation claims. When SIIS receives a claim it must determine whether: (1) the **worker** is covered by the act; [10] **[***10]** (2) there was an accident arising out of and in the course of employment; [11] and (3) claimants' disability is permanent and total, permanent and partial, temporary and total, or temporary and partial. [12] These

---

[6] HN4[↑] NRS 41.032 provides:

> Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 [waiver of immunity] or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is:
>
> 1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
>
> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

[7] NRS 353.210 (SIIS operates on money designated in the **Nevada** Constitution for the purpose of providing compensation for industrial accidents, occupational diseases, and administrative expenses related thereto); NRS 616.1701(2); NRS 616.180; NRS 616.380(3)(a), (b)(2), (c) and (d) (3); NRS 616.440; NRS 616.460; NRS 616.497-616.499 (authorizations for and limitations on SIIS investment activities).

[8] NRS 218.610; NRS 233B.031; NRS 286.070(2); NRS 616.1725(2); NRS 616.1805(1).

[9] *See* NRS 616.1725(9), NRS 616.192(3), NRS 616.252(3), NRS 616.380(1)(b), NRS 616.383(3). The foregoing statutes authorize SIIS to adopt regulations that have the force of law. NRS 233B.040(1).

[10] *See* NRS 616.045 (compensation defined); NRS 616.505 (application for death benefits); NRS 616.055-616.088 (definitions of employees and those persons excluded from the act); NRS 616.105 (independent contractor defined); NRS 616.110 (injury and personal injury defined); NRS 616.114 (sole proprietor defined); NRS 616.115 (subcontractor defined); NRS 616.260 (provisions dealing with out-of-state **workers**); NRS 616.510 (persons conclusively presumed totally dependent on **injured** employee).

[11] *See* NRS 616.270 (**Nevada** Industrial Insurance Act provides compensation for accidental personal injuries arising out of and in the course of employment).

[12] *See* NRS 616.570-616.6285 (level of disability and compensation benefits resulting from injury or death).

determinations all involve discretion, and thus SIIS, its officials and employees are immune from liability for making such determinations.

HN7[↑] The time provisions within which SIIS must either accept or deny responsibility, however, are not discretionary. HN8[↑] NRS 616.500(7) provides:

> The insurer must either accept or deny responsibility for compensation under this chapter or chapter 617 of NRS within 30 days after the notice provided for in this section is received. If additional information is necessary to determine **[*114]** liability, the insurer may extend the period to 60 days upon notice to the claimant if the administrator approves. If additional information is still necessary, the insurer may grant a further extension if the administrator approves and the claimant gives his written consent, but the total period may not be extended to more than 90 days.

HN9[↑] Meeting the thirty, sixty and ninety-day deadlines is a mandatory duty imposed upon SIIS by the legislature. **[***11]** Mandatory duties fall within the operational sphere of duties and involve little or no discretion; NRS 41.032 immunity does not extend to such acts. Crucil v. Carson City, 95 **Nev.** 583, 600 P.2d 216 (1979).

Appellants allege that SIIS and its employees failed to timely process appellants' claims. HN10[↑] If appellants were harmed by respondents' failure to meet the deadlines set **[**732]** forth in NRS 616.500(7), they are entitled to pursue their causes of action against respondents under that theory.

Moreover, HN11[↑] there was no aspect of discretion involved in refusing or failing to reopen Moore's file. When SIIS failed to appeal the hearing officer's determination, it was left with an operational duty to promptly reopen Moore's file. *See* SIIS v. Partlow-Hursh, 101 **Nev.** 122, 696 P.2d 462 (1985) (time periods set to appeal a hearing officer's determination are jurisdictional and mandatory; failure to comply with the time limits cannot be excused).

Upon remand, the district court must differentiate between allegations of misconduct based upon their discretionary or operational nature. HN12[↑] Only purely discretionary **[***12]** acts are cloaked with immunity. *Crucil*, 95 **Nev.** at 585, 600 P.2d 218.

To the extent appellants seek to recover money damages under *42 U.S.C. §§ 1983* and *1985* from SIIS, the complaint fails to state an actionable claim. HN13[↑] The United States Supreme Court has held that neither states nor their officials acting in their official capacities are persons under *42 U.S.C. § 1983* and therefore neither may be sued in state courts under the federal civil rights statutes. Will v. Michigan Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311-12 (1989). The same is true for claims under § 1985. Santiago v. NYS Dept. of Correctional Services, 725 F.Supp. 780 (S.D.**N.**Y. 1989), Rode v. Dellarciprete, 617 F.Supp. 721 (D.C.Pa. 1985). Because SIIS is a state agency, appellants' cause of action has failed to state a claim under the federal civil rights statutes against SIIS. The same must be said for SIIS's officers and employees to the extent the cause of action seeks to impose **[***13]** liability for actions properly attributable to **[*115]** their official capacities. The amended complaint also sued SIIS officials and employees for actions engaged in outside their official capacities. Indeed, allegations of conspiracy, civil rights violations, interference with claimants' rights to seek medical and legal help are hardly descriptive of acts that may be rationally included within the prerogatives of an employee's official capacity. HN14[↑] We agree with those courts that have concluded that *Will* does not prohibit claims against officials acting in an individual capacity. *See* Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060, 1065 **n.**2 (2nd Cir. 1989) (damages available under *Will* against state official sued in individual capacity); Gutierrez-Rodriquez v. Cartagena, 882 F.2d 553, 567 **n.**10 (1st Cir. 1989) (same ruling); Jones v. State of Rhode Island, 724 F.Supp. 25, 29 (D.R.I. 1989) (same ruling); Cross v. Meisel, 720 F.Supp. 486, 488 **n.**3 (E.D.Pa. 1989) (same ruling); Braggs v. Lane, 717 F.Supp. 609, 611 (**N.**D.Ill. 1989) (*§ 1983* **[***14]** action sustainable under *Will* against official in individual capacity); Harrington v. Schossow, 457 **N.**W.2d 583, 586-87 (Iowa 1990) (same ruling). *See also* Nahmod, Civil Rights and Civil Liberties Litigation § 6.20 (1986 and Supp. 1990). [13]

---

[13] The *Will* decision supplies a basis for some confusion or uncertainty in that it concludes at one point that a suit against a state official *"in his or her official capacity is not a suit against the official but rather is a suit against the official's office."* Will, 109 S.Ct. at 2311. Later, the Court holds that "neither a State nor its officials *acting in their official capacities* are 'persons' under ***§ 1983***." Id. at 2312. It would appear, inasmuch as the *Will* Court did not countenance an interpretation of ***§ 1983*** that would permit circumventing "congressional intent by a mere pleading device," id. at 2311, that the Court would look to the substance of the allegations of

[*15]** For reasons previously discussed, we are not able to conclude on this record that **[**733]** appellants failed to state a claim against the individual employees. Upon remand, the district court will have to differentiate between allegations within and without the respondent employees' official capacities in order to determine whether an action may be sustainable against them.

Appellants also sought injunctive relief. The *Will* court held **[*116]** that ***HN16***[↑] injunctive relief against state officials acting within their official capacities is available under *42 U.S.C. § 1983*. [14] Therefore, appellants did state a cause of action for injunctive relief under the federal civil rights statutes.

[*16]** The district court also dismissed the action below on the ground that the amended complaint did not provide respondents with adequate notice of the nature of the claims and relief sought against them. The amended complaint contains seventeen allegations of conspiracy, civil rights violations, bias, negligence, and interference with appellants' pursuit of medical and legal help.

We conclude from our review of the record that the amended complaint gives respondents sufficient notice of the nature of the claims and relief sought. Moreover, ***HN17***[↑] if respondents are truly perplexed by any aspect of appellants' amended complaint, they may obtain further specificity by filing a motion for a more definite statement under *NRCP 12(e)* or simply deny allegations of uncertain meaning under *NRCP 8(b)*. *See Mays v. District Court, 105* ***Nev.*** *60, 768 P.2d 877 (1989)*.

For the reasons stated above, the order of dismissal entered below was erroneously granted with the exception of the dismissal favoring SIIS on the federal civil rights claims. We therefore reverse and remand for further proceedings. **[***17]**

End of Document

---

a pleading to determine whether the actions complained of were of a nature properly attributable to conduct within the scope of an official's capacities. Thus, ***HN15***[↑] the style of the caption of a complaint should not be determinative as to whether a state official has been sued in his or her official or individual capacity. This interpretation of the Court's ruling is consistent with the Court's opinion in *Scheuer v. Rhodes, 416 U.S. 232 (1974)*. In reversing the district court's dismissal of complaints alleging ***§ 1983*** violations against state officials for the death of students killed at Kent State University, the Court carefully scrutinized the language of the complaints and concluded that the allegations contained therein described acts by the defendants that were either outside the scope of their authority or engaged in "in an arbitrary manner, grossly abusing the lawful powers of office." *Id. at 235*.

[14] In *Will*, the Court stated "of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under ***§ 1983*** because 'official-capacity actions for prospective relief are not treated as actions against the state.'" *Will, 491 U.S. at 71* ***n. 10****, 109 S.Ct. at 2311* ***n.10*** (citations omitted).

Falline v. GNLV Corp.

Supreme Court of Nevada

December 31, 1991 ; December 31, 1991, Filed

No. 20549

Reporter
823 P.2d 888 *; 1991 Nev. LEXIS 216 **; 107 Nev. 1004

NORMAN FALLINE and SHARON FALLINE, Appellants, v. GNLV CORP., a Nevada corporation dba GOLDEN NUGGET HOTEL & CASINO, GIBBENS COMPANY, INC., a Nevada corporation, Respondents

Prior History: [1]** Appeal from judgment on the pleadings and an order granting motion to dismiss. Eighth Judicial District Court, Clark County; Nancy A. Becker, Judge.

Disposition: Reversed in part, affirmed in part and remanded.

Core Terms

self-insured, benefits, bad faith, cause of action, Industrial, claimant, immunity, fine, employees, workmen's compensation, punitive damages, injured worker, good faith, damages, insurer, intentional failure, emotional distress, intentional torts, discretionary, contractor, processing, charges, exclusive remedy, district court, agencies, amended complaint, claims processing, negligence claim, fair dealing, decision-making

Case Summary

Procedural Posture
Appellants, employee and his wife, brought an action against appellee self-insured employer in the Eighth Judicial District Court, Clark County (Nevada) seeking common law causes of action for the employer's delay in payment of workmen's compensation benefits. The trial court granted the employer's motion to dismiss the common law actions. The employee and his wife appealed.

Overview
The employee was awarded benefits for a work-related injury. The employer denied further liability when the employee sought to reopen his claim and failed to pay benefits during the administrative and appeal process. The court held that an employee who suffered damage as a result of the negligent or bad faith failure of a self-insured employer to timely pay claims could pursue a tort action. A claimant could maintain a cause of action against the State Industrial Insurance System (SIIS) under a common law negligence theory and there was no rational basis for permitting such an action against SIIS and denying the same right of action against self-insured plans funded by employers. Such liability would not constitute an erosion of the employer's immunity from common law liability for work-related injuries because the basis for liability was not the industrial injury but the negligent or bad faith failure to timely pay the compensation due. The sanctions imposed on self-insurers who violated their obligations to injured workers was not an exclusive remedy because it did not address the deprivation to the injured worker which was the result of the tortious denial of benefits.

Outcome
The judgment of the trial court dismissing the employee's common law claims was reversed as to the denial of his claims for negligence and bad faith and affirmed in all other respects.

LexisNexis® Headnotes

Torts > Public Entity Liability > Liability > General Overview

Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law

Workers' Compensation & SSDI > Exclusivity > General Overview

HN1[⬇] **Public Entity Liability, Liability**

Self-insured employers and their administrators/agents are liable for negligent claims processing only to the extent that such processing constitutes what would be properly classified as an operational decision if made within the State Industrial Insurance System. If failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not.

Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law

HN2[⬇] **Remedies Under Other Laws, Common Law**

An employee who has suffered damage as a result of the negligent or bad faith failure or refusal by a self-insured employer or its administrator/agent, to process and timely pay claims properly asserted under the Nevada Industrial Insurance Act , Nev. Rev. Stat. 616, may pursue a tort action in accordance with the limitations set forth in *Nev. Rev. Stat. 41.035(1)*.

Counsel: *Greenman, Goldberg, Raby & Martinez*, Las Vegas, for Appellants.

Beckley, Singleton, DeLanoy, Jemison & List and *Daniel F. Polsenberg*, Las Vegas, for Respondent Gibbens Company, Inc.

Hunterton & Naylor and *Cindy Lee Stock*, Las Vegas, for Respondent GNLV Corp.

Badger & Baker, Carson City, for Amicus Curiae.

Judges: Steffen, J. Rose, J., concurs. Young, J., concurring in part and dissenting in part. Mowbray, C. J., agrees. Springer, J., dissenting.

Opinion by: STEFFEN

Opinion

[*889] OPINION

By the Court, Steffen, J.:

Appellants Norman and Sharon Falline sought to maintain common law or private causes of action against respondents GNLV Corporation (Golden Nugget), a self-insured employer, and Gibbens Company, Inc. (Gibbens), the administrator of Golden Nugget's self-insured plan. The causes of action included claims for negligence and bad faith in the processing and payment of **[*890]** claims, intentional and negligent infliction of emotional distress, unfair insurance practices, and other claims which will not be specifically addressed in this opinion. We conclude that the district court erred in dismissing **[**2]** two of appellants' claims, and therefore reverse and remand as to those claims. [1]

At the age of twenty-five, appellant Norman Falline (Falline) injured his back while working as a maintenance laborer at the Golden Nugget. The

[1] All of appellants' causes of action were dismissed with the exception of their claim for wrongful termination which is still pending below.

injury eventually required surgery. Approximately ten weeks after surgery, Falline experienced severe pain in his lower back as he arose from a sitting position. An examining physician determined that there was no new injury and concluded that Falline's initial surgery left him prone to reinjury. The physician recommended treatment for the acute problem and determined that Falline was temporarily totally disabled. Based upon the physician's findings and recommendations, Falline sought to have his claim reopened. Despite the doctor's report, Gibbens and the Golden Nugget denied further liability, stating that Falline had suffered an intervening injury.

Falline **[**3]** appealed respondents' rejection of his claim to a hearing officer, who ruled in favor of reopening the claim and paying benefits. Respondents thereafter appealed to an appeals officer who also ruled in Falline's favor. Subsequently, respondents sought judicial review, but the district court upheld the decision of the appeals officer and ordered the insurer to pay both accident and compensation benefits. Respondents' appeal to this court was dismissed by order filed on June 26, 1986. Stay orders sought by respondents from the district court and this court were also denied.

After Falline was released to return to work, his employment was terminated about three months later. Rehabilitation benefits were subsequently refused by respondents, despite a hearing officer twice ruling that Falline was entitled to such benefits.

Appellants first contend that the district court erred in dismissing their cause of action for the negligent or bad faith delay in the payment of workmen's compensation benefits. We agree. In our recent opinion in Northern Nev. Ass'n of Injured Workers v. Nevada State Indus. Ins. Sys., 107 Nev. __, __ P.2d __ (Adv. Opn. No. 18, March 7, 1991), we reaffirmed **[**4]** our ruling in *Rush v Nevada Indus. Comm'n, 94 Nev. 403, 580 P.2d 952 (1978)*, holding that a claimant could maintain a cause of action against the State Industrial Insurance System (SIIS) under a common law negligence theory because SIIS was a third party separate and apart from the employer. We now conclude that there is no rational basis for permitting such an action against SIIS, which is funded by contributions from employers, and denying the same right of action against administrators of self-insured plans which are also funded by employers. In both instances, "administrators" are obligated to promptly, fairly, and in good faith, process and pay where warranted, compensation benefits to injured workers. Moreover, it makes no difference whether a self-insured plan is administered by the self-insured employer or an agent employed for that purpose. Although Nevada law (NRS 616.2947) imposes liability on a self-insured employer for penalties resulting from the derelictions of the administrator/agent, there is no sound reason why a self-insured employer should not be liable for damages resulting from the negligent or bad faith administration of the self-insured **[*891]** **[**5]** plan by the administrator/agent. There are cogent reasons for concluding that such liability would not constitute an erosion of the employer's immunity from common law liability for work-related injuries under NRS 616.272(2). First, the basis for liability is not the industrial injury upon which the workmen's compensation claim is based, but rather the negligent or bad faith failure or refusal to timely pay the compensation due. Second, the self-insured employer who relies on a fair, efficient, and lawful administration of the self-insured plan by an administrator/agent, and suffers damage by the latter's breach of duty, may seek indemnification from the administrator/agent for such damages assessed against the self-insured employer. See, e.g., *Salt Lake City School District v. Galbraith & Green, Inc., 740 P.2d 284 (Utah Ct. App. 1987)*. Third, it would unfairly discriminate against employees of a self-insured employer to disallow an action for damages resulting from the negligent or bad faith failure or refusal to timely pay compensation entitlements while allowing a similar action against SIIS by employees of employers who

are not self-insured. [2]

[6]** Although Falline properly exhausted his administrative remedies, the record reflects that while administrative and judicial remedies were pursued, he was denied compensation benefits during two intervals that were each approximately six months in duration. During these periods, Falline claims that he and his wife were forced to borrow money, sell their automobile and request the help of relatives.

Our case law strongly emphasizes that one of the obligations of a self-insurer "is the prompt payment of benefits, and if payment is determined to be unwarranted, the self-insurer must seek reimbursement of benefits it paid." *Imperial Palace v. Dawson, 102 Nev. 88, 92, 715 P.2d 1318, 1320 (1986)* (quoting *Dep't Ind. Relations v. Circus Circus, 101 Nev. 405, 411-12, 705 P.2d 645, 649 (1985)*). Under our rulings, respondents' vexatious and dilatory withholding of Falline's compensation cannot be condoned. Nevertheless, there is another consideration that must be addressed in determining whether Falline has a right of action against respondents.

Our ruling in Northern Nev Ass'n of Injured Workers, supra, recognized that under Nevada **[**7]** law, *NRS 41.032*, the liability of SIIS and its employees for negligent acts is limited to acts that are of an operational, rather than discretionary, nature. Although statutory immunity for discretionary acts is accorded only to governmental agencies and employees, we have determined that a denial of such immunity to self-insured employers and their administrators/agents would constitute an unwarranted, discriminatory source of liability against the latter. We therefore hold that ***HN1***[↑] self-insured employers and their administrators/agents are liable for negligent claims processing only to the extent that such processing constitutes what would be properly classified as an operational decision if made within the State Industrial Insurance System. In that connection, however, we also hold that if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not.

Bad faith, the converse of good faith, has been defined as "the absence of a reasonable basis for denying benefits . . . and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. " *Franks v. United States Fidelity & Guar. Co., 718 P.2d 193, 197 (Ariz. Ct. App. 1985)* **[**8]** (quoting *Noble v. National Am. Life Ins. Co., 624 P.2d 866 (1981)*; *Anderson v. Continental Ins. Co., 271 N.W.2d 368 (Wis. 1978)*; 2A A. Larson, The Law of Workmen's Compensation § 68.34(c) at 13-144 (1987 & Supp. 1990). Neither SIIS nor a self-insured employer or its administrator/agent has discretion to act in bad faith, i.e., without a reasonable basis or with knowledge or reckless disregard of the lack of a reasonable basis in the processing or denial of claims. It follows, therefore, that any act involving the processing of claims committed or performed **[*892]** in bad faith cannot, by definition, be within the actor's discretion. [3]

---

[2] By a parity of reasoning, it would be equally discriminatory against self-insured employers to permit injured workers to seek punitive damages against the self-insured employer or its administrator/agent when we have expressly disallowed such damages in actions against SIIS and its employees. See Northern Nev. Ass'n of Injured Workers, 107 Nev. at __, __ P.2d at __ n.5, (citing *Rush v. Nevada Indus. Comm'n, 94 Nev 403, 580 P.2d 952 n.5 (1978)*), for its holding that punitive damages are unavailable in actions involving negligent or malicious claims processing. Punitive damages are therefore precluded in this type of action against self-insured employers and their administrators/agents.

[3] We realize that *NRS 41.032(2)* provides immunity to contractors, officers, employees, agencies and political sub-divisions of the State for the performance or non-performance of discretionary acts "whether or not the discretion involved is abused." (Emphasis supplied.) However, an abuse of discretion necessarily involves at least two factors: (1) the authority to exercise judgment or discretion in acting or refusing to act on a given matter; and (2) a lack of justification for the act or inaction decided upon. Bad faith, on the other hand, involves an implemented attitude that completely transcends the circumference of authority granted the individual or entity. In other words, an abuse of discretion occurs within the circumference of authority, and an act or omission of bad faith

[9]** Respondents contend that the legislative scheme for sanctioning self-insurers who violate their obligations to injured workers, coupled with the availability of additional sanctions imposed by the judiciary in the form of interest, costs and attorney's fees, constitute an exclusive remedy. It is true that NRS 616.294 [4] **[**10]** and NRS 616.647 [5] provide a basis for modest monetary penalties or even a withdrawal of certification that may be invoked against a self-insurer who fails or refuses to comply with the law. Unfortunately, however, with the exception of the limited benefit an aggrieved claimant may receive as a result of judicial sanctions imposed against a self-insurer, the modest administrative fines that may be assessed provide no financial relief to claimants.

[11]** In *Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984)*, we recognized a public policy exception to the at-will employment doctrine in instances where employees are terminated in retaliation for the filing of workmen's compensation claims. As a result, we concluded that aggrieved workers thus terminated were entitled to pursue a **[*893]** tort cause of action against their self-insured employers. If, in Harrah's, we had been receptive to the argument asserted by respondents in the instant case, we would have declared the statutorily provided administrative fines to be an exclusive remedy. Indeed, NRS 616.647(1)(a) and (2)(c) provide for an administrative fine of "not more than $ 1,000" for inducing a claimant not to report an accidental injury or an occupational disease. Thus, within the context of the Harrah's situation, if an employer were to induce an injured employee not to file an industrial accident claim under threat of

---

occurs outside the circumference of authority. Stated otherwise, an abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives, whereas an act of bad faith has no relationship to a rightful prerogative even if the result is ostensibly within the actor's ambit of authority. For example, if an administrator decides to delay or deny a claimant's benefits because of a personal dislike for the claimant, the delay or denial would be attributable to an unauthorized act of bad faith despite the fact that a denial or delay could be otherwise among the rightful prerogatives of the administrator. See *Crosby v. SAIF, 699 P.2d 198 (Or. App. 1985)* (holding that State Accident Insurance Fund's conspiring with employer to eliminate a worker's entitlement to benefits is not a matter of discretion).

[4] NRS 616.294 states in pertinent part:

1. The commissioner may impose an administrative fine, not to exceed $ 500 for each violation, and may withdraw the certification of a self-insured employer if:

. . . .

(c) The employer intentionally fails to comply with regulations of the commissioner regarding reports or other requirements necessary to carry out the purposes of this chapter. . . .

[5] NRS 616.647 states in relevant part that:

1. If the administrator has reason to believe that an insurer or employer has:

. . . .

(e) Refused to pay or unreasonably delayed payment to a claimant of compensation found to be due him by a hearing officer or appeals officer;

(f) Made it necessary for a claimant to resort to proceedings against the employer or insurer for compensation found to be due him by a hearing officer or appeals officer;

(g) Failed to comply with regulations of the department for the acceptance and rejection of claims, determination and calculation of a claimant's average monthly wage, determination and payment of compensation, delivery of accident benefits and reporting relating to these matters . . . .

. . . .

the administrator shall set a date for a hearing. The date must be no sooner than 30 days after notice is served upon the insurer or employer of the alleged action and the time and place of the hearing.

2. If, after an evidentiary hearing, the administrator determines that the insurer or employer has committed the alleged act, the administrator may impose an administrative fine of:

(a) Not more than $ 100 for each act in violation of paragraph (g) of subsection 1 which was not intentional;

(b) Not more than $ 1,000 for each intentional or repeated act in violation of paragraph (g) of subsection 1; or

. . . .

5. The commissioner may withdraw the certification of a self-insured employer if, after a hearing, it is shown that the self-insured employer:

(a) Intentionally or repeatedly committed any of the acts enumerated in paragraph (g) of subsection 1; or

(b) Committed any acts in violation of any other provisions of subsection 1.

termination, the statutory remedy for the wrongful inducement would be a maximum administrative fine of $ 1,000. The aggrieved employee would have received **[**12]** nothing by way of financial relief for his wrongful discharge. Similarly, if a self-insured employer were to fail to accept or pay a valid claim for workmen's compensation, the statutory remedy under NRS 616.647(1)(g), (2)(a) and (2)(b) would be a maximum fine of $ 100 if unintentional or a maximum of $ 1,000 if intentional. We are unwilling to expose Nevada's injured workmen to such a hollow and illusory form of relief. If the Legislature sees fit to declare the statutory scheme of fines an exclusive remedy to aggrieved workmen whose claims are denied or delayed as a result of negligence or bad faith, the Legislature may enact legislation to that end.

In Harrah's we noted that "Nevada's workmen's compensation laws reflect a clear public policy favoring economic security for employees injured while in the course of their employment. It has been a long-standing policy of this Court to liberally construe such laws to protect injured workers and their families." *Harrah's, 100 Nev. at 63, 675 P.2d at 396*.

Consonant with our prior rulings, we hold that *HN2*[↑] an employee who has suffered damage as a result of the negligent or bad faith failure or refusal by **[**13]** a self-insured employer or its administrator/agent, to process and timely pay claims properly asserted under the Nevada Industrial Insurance Act (NRS 616) may pursue a tort action in accordance with the limitations set forth in this opinion. [6]

[14]** We are aware of the contrary position taken by a number of other courts and commentators who have concluded that a legislative scheme of administrative fines is the exclusive remedy for injured workmen who have been aggrieved by the bad faith or negligence of a self-insured employer in the processing and payment of claims for compensation. See *Phillips v. Crawford & Co., 248 Cal. Rptr. 371, 373 (Cal. Ct. App. 1988)*; [7] 2A A. Larson, The Law of **[*894]** Workmen's Compensation § 68.34(c) at 13-146 (1990) (citations omitted). However, we are not persuaded by the contrary view because although administrative fines may have some deterrent effect on self-insured employers, they do not purport to address the plight of the injured worker who may suffer great deprivation as a result of the tortious denial or delay of his or her benefits. The availability of tort damages under the restrictions provided in this opinion should serve the salutary purposes of worker relief and employer compliance.

[15]** Appellants also contend that the district court erred in dismissing their cause of action for

---

[6] In order to achieve fairness and parity in causes of action asserted against SIIS, its officers and employees on the one hand, and self-insured employers, their administrators/agents on the other, it is necessary to recognize that the former enjoys the benefit of a $ 50,000 recovery limit provided by *NRS 41.035(1)*. Consequently, any action seeking tort damages against a self-insured employer or its administrator/agent shall also be subject to a total recovery limit of $ 50,000 exclusive of interest computed from the date of judgment. Although self-insured employers may derive pecuniary benefits by their self-insured status, they also confer benefits on the heavily congested State Industrial Insurance System by saving the System the administrative burdens associated with the processing of claims presented under self-insured programs.

[7] See also, *Bright v. Nimmo, 320 S.E.2d 365, 368 (Ga. 1984)* (adverse financial consequences from the intentional delay of workers' compensation payments does not give rise to an independent cause of action against the employer or its insurer where penalties for such delay are provided by the act); *Hormann v. New Hampshire Ins. Co., 689 P.2d 837, 844 (Kan. 1984)* (the worker's exclusive remedy where an insurer intentionally refuses to pay compensation prior to an award is contained in the Act and allowing independent common-law actions would circumvent the intent of the legislature and the Act); *Dickson v. Mountain States Mut. Casualty Co., 650 P.2d 1, 2-3 (N.M. 1982)* (express remedies provided by the Act are the sole and exclusive remedies available to an employee for claims against his employer or insurer); *Hall v. C & P Tel. Co., 809 F.2d 924, 926 (D.C. Cir. 1987)* (recognizing a cause of action for intentional bad faith refusal to make timely compensation payments when the act provides for a specific remedy would unravel the legislated compromise between the interests of employees and the concerns of employers); *Garrett v. Washington Air Compressor Co., Inc., 466 A.2d 462, 464 (D.C. 1983)* (Longshoremen's and Harbor Workers' Compensation Act provides a specific remedy for tardiness in making payments and appellant's remedy was to seek an administrative fine under the Act).

intentional infliction of emotional distress. We disagree. The synonym for this particular cause of action is the tort of outrage. We have previously held, in *Star v. Rabello, 97 Nev. 124, 625 P.2d 90 (1981)*, that one of the elements of this tort is extreme and outrageous conduct. *Id. at 125, 625 P.2d at 91-92*. Moreover, we have inferred that "malicious intent" is a descriptive aspect of the tort of outrage. See *Branda v. Sanford, 97 Nev. 643, 648, 637 P.2d 1223, 1227 (1981)*. In short, this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case. Moreover, recognizing a cause of action for emotional distress in the workmen's compensation context raises the specter of "almost every emotion-based case turning up as some kind of tort suit." 2A A. Larson, The Law of Workmen's Compensation § 68.34(a) at 13-116 (1987 & Supp. 1990). Finally, **[**16]** the Legislature has established the degree to which self-insurers should be punished for conduct of the type here present by imposing administrative fines in specific maximum amounts.

Appellants also urge us to recognize a discrete cause of action for the negligent infliction of emotional distress. We have not as yet had occasion to adopt this particular tort in Nevada, and do not consider it wise to do so within the context of claims involving the tortious delay or denial of claims for workmen's compensation. [8] Moreover, because the key element for liability in such an action is negligence, and we have already determined that, under the circumstances alleged here, a common law negligence action is available to workers employed by self-insured employers, emotional distress is more appropriately treated as an element of damage in such causes of action rather than a cause of action itself.

[17]** Finally, appellants argue that *NRS 686A.310*, which enumerates unfair insurance practices, gave rise to a private cause of action even prior to its 1987 amendment. On this record, we are not prepared to agree. It is at least doubtful that chapter 686A applies to self-insurers in the workmen's compensation system. In any event, given our disposition of this appeal we decline to address the issue, including the retrospective application of the statute as urged by appellants.

We have fully examined appellants' remaining issues and conclude that they are without merit. For the reasons stated above, we hold that the trial court erred in dismissing appellants' negligence and bad faith claims, and therefore reverse the lower court's judgment as to those claims; in all other respects the judgment below is affirmed.

Steffen, J.

I concur:

Rose, J.

Concur by: YOUNG (In Part)

Dissent by: YOUNG (In Part); SPRINGER

Dissent

YOUNG, J., with whom MOWBRAY, C.J., agrees, concurring in part and dissenting in part:

I concur with the court's opinion to restore appellant's actions for negligence and bad faith.

I disagree with the conclusion of the majority to permit liability only on operational decisions and its conclusion that **[**18]** punitive damages are

[8] Citing *Keck v. Jackson, 593 P.2d 668 (Ariz. 1979)*, and *Dillon v. Legg, 441 P.2d 912 (Cal. 1968)*, we did observe in a footnote to *Nelson v. City of Las Vegas, 99 Nev. 548, 556 n.4, 665 P.2d 1141, 1146 n.4 (1983)*, that appellant Kathleen Nelson "failed to allege facts sufficient to establish a cause of action for negligent infliction of emotional distress, as the basis of her recovery would be the defendant's liability in negligence." Although it could be inferred from the foregoing language that we have recognized the availability of a cause of action for the negligent infliction of emotional distress in Nevada, it is unnecessary for us to so conclude in the present action.

unavailable to appellant.

Under the banner of what is termed a "parity of reasoning," the majority states "we therefore hold that self-insured employers and their administrators/agents are liable to negligent claims processing only to the extent that such processing constitutes what would be properly classified **[*895]** as an operational decision if made within the State Industrial Insurance System." In response thereto, it is respectfully submitted that the limitation on liability for the State Industrial Insurance System originates in *NRS 41.032*. [1] The attempt in the majority opinion to provide the same protection to the self-insurer purports to give the self-insured employer the same protection accorded the State Industrial Insurance System and other state agencies by statute. The majority opinion is clearly judicial legislation.

[19]** Also, under the aegis of fairness, the majority opinion seeks to limit punitive damages against self-insured employers. As authority, it cites *Rush v. Nevada Industrial Commission, 94 Nev. 403, 580 P.2d 952 (1978)*, for its holding that punitive damages are unavailable in actions involving negligent or malicious claims processing against the State Industrial Insurance System. An examination of Rush indicates that the holding was predicated on *NRS 41.035*. [2] Clearly, the immunity offered by *NRS 41.035* was only for the benefit of public entities and should not be construed by our court to apply to self-insured private employers.

[20]** While the goal of the majority is fairness, it seeks to reach this end by flagrant judicial legislation. The legislature is presumed to have known the law when enacting the measure to allow self-insurers. It is not the function of this court to fill in what may now, in our wisdom, appear to be legislative oversight. If, indeed, this is a problem, the remedy is not for us to change the law by judicial fiat but for the legislature to address this problem in the next session.

For the reasons stated above, I dissent from the majority opinion which, by judicial overreach, would provide to private employers certain immunities which the legislature has specifically made available only to governmental agencies.

Young, J.

I concur:

Mowbray, C.J.

SPRINGER, J., dissenting:

Each of the plurality opinions would reverse the judgment of the trial court and restore Falline's tort actions. I cannot agree with either opinion; I think the judgment of the trial court should be affirmed.

I would affirm because I believe that Falline has not properly stated any tort claims in his pleading. This being so, I see no purpose in taking a position on the differences of opinion expressed in the two

---

[1] *NRS 41.032* states:

Conditions and limitations on actions: Acts and omissions of officers, employees and immune contractors. Except as provided in *NRS 278.0233* no action may be brought under *NRS 41.031* or against an immune contractor or an officer or employee of the state or any of its agencies or political subdivisions which is:

1. Based upon an act or omission of an officer, employee or immune contractor, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, if the statute or regulation has not be declared invalid by a court of competent jurisdiction; or

2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

[2] *NRS 41.035* states in pertinent part:

1. An award for damages in an action sounding in tort brought under *NRS 41.031* or against a present or former officer or employee of the state or any political subdivision, immune contractor or state legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of $ 50,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

plurality [**21] opinions. These issues, in my opinion, will not be ripe for consideration unless and until the pleading is put in proper order.

As indicated, I dissent from the majority's restoration of Falline's negligence and bad faith claims because in my view Falline's amended complaint does not state a claim upon which legal relief can be granted.

The first difficulty that I have with Falline's pleading is that although Gibbes is [*896] described as an agent of GNLV, there is no imputation as to how the principal and agent are involved in the tortious conduct alluded to in the complaint. The charging allegation refers generally to "defendants"; and, although it appears from a reading of the record that Falline is trying to accuse Gibbens of tortious misconduct and to charge GNLV as a principal under the doctrine of respondeat superior, this is anything but clear in the amended complaint.

The thrust of Gibbens' position is more clearly manifested in one of its legal memorandums: "Gibbens Company, Inc. administers the claims and makes the determination of when benefits are paid or not to be paid." Gibbens, then, is "an agent of the employer [GNLV] for the purposes of determining whether or not the [**22] employer is obligated to pay any benefits and if so, in what amount." *Mottola v. R. L. Kantz & Co., 199 Cal. App. 3d 98, 108, 244 Cal. Rptr. 737, 742 (1988)*. The negligence or bad faith charged in this case was necessarily committed by Gibbens in the process of making the "determination of when benefits are paid or not to be paid." Falline charges that in making this "determination" Gibbens [1] not only acted "negligently, grossly negligently, carelessly, willfully and maliciously," the claims administrator also "breach[ed] the obligation of good faith and fair dealing by a negligent and intentional failure to pay benefits when due." I would not permit negligent or intentional tort actions in this case to proceed on the present pleading because the capacities of the parties are so ill-defined as to give the defendants inadequate notice of the nature of the action against them.

[**23] Sufficiency of the Negligence Claim for Relief

It does not appear to me that Falline has stated a negligence claim against Gibbens. Ordinarily the making of administrative decisions such as granting or refusing industrial accident claims does not result in tort liability. These decisions are discretionary in nature and do not involve the type of activity out of which negligence claims ordinarily arise. The exception to this rule is found in the case of *Rush v. Nevada Industrial Commission, 94 Nev. 403, 580 P.2d 952 (1978)*, in which a claim for negligent decision-making was allowed when the Nevada Industrial Commission (predecessor to SIIS) negligently delayed claims processing in such a way as to cause a claimant to lose his eye. [2]

[**24] There is no averment of facts in the amended complaint that would disclose or give any hint as to what negligent conduct Gibbens might be charged with doing. The claim of negligence is simply that Gibbens was somehow guilty of a negligent refusal to pay Falline. The plaintiffs' charging allegations do not put the defendants on

[1] Although Falline's charging allegations refer to "defendants," it is clear from a reading of the record that the allegedly negligent conduct complained of is that of Gibbens as administrator and decision-maker and that any liability on the part of GNLV is vicarious and necessarily arises solely out of its capacity as a principal. My reading of the record does not reveal that GNLV took an active part in turning down Falline's claim but, rather, that it was merely following and adopting the administrative decisions of the Gibbens Company. It does not appear to me from the record in this case that GNLV acted in a manner that could be properly termed negligent or in bad faith.

[2] Rush holds only that the industrial compensation statute does not preclude a claimant's pursuing a negligence action against the state commission for damage resulting from tardy handling of a claim. The question of negligent exercise of discretionary decision-making powers as against negligent operational performance (tardiness in acting on a claim) was not discussed or decided.

notice in any way as to the manner in which they were supposed to have breached their duty of due care. This case is far different from the suggested averment provided in Form 9, NRCP, which authorizes an injured traffic victim to aver that a defendant "negligently drove a motor vehicle against plaintiff who was then crossing said highway." In the Form 9 type of pleading, the defendant is put on notice that he or she is charged with driving a motor vehicle in a negligent manner into a pedestrian at a specified place. Although the exact nature of the defendant's untoward **[*897]** conduct is not described, certainly the defendant is put on notice as to what he or she did and where and when. Here, the defendants are not given a clue as to the nature of their supposed negligent decision-making. It would appear that a Rush type of action might possibly have been contemplated, **[**25]** but the mere allegation of negligent refusal to honor a claim does not, in my opinion, state a valid tort claim against Gibbens. If Falline has a Rush-like claim against Gibbens, he should be allowed to plead it properly. Upon remand to the district court, the court might then grant leave for Falline to plead a proper negligence claim if he is aware of facts to support such a claim. Thus far, none appears. Any vicarious liability on the part of GNLV must, of course, depend on the sufficiency of the claim against Gibbens. Further, I have a serious question in my mind as to whether vicarious liability can be imposed at all on a self-insured employer for negligent acts of a claims administration contractor.

Sufficiency of the Bad Faith Claim for Relief

Falline charges that the "defendants" are guilty of "a breach of the obligation of good faith and fair dealing by a negligent and intentional failure to pay benefits when due." Again, although Falline charges both defendants, it appears to me that the Gibbens Company, as administrator, is the actor, the "refusor," who has actually done the deed that forms the predicate for this intentional tort action. Because one cannot be guilty **[**26]** of both "a negligent and intentional failure to pay," I must assume for the purposes of this opinion that what we are dealing with here is a charge that Gibbens' conduct in refusing the Falline claim rendered it guilty of "a breach of the obligation of good faith and fair dealing by . . . intentional failure [refusal] to pay benefits when due." (My emphasis.)

As I see it, there are a number of difficulties associated with creating in this jurisdiction a new intentional tort called "breach of the obligation [not covenant] of good faith and fair dealing," a tort that was, according to the averments of the amended complaint, committed by "intentional failure to pay benefits when due." (My emphasis.)

The new, "breach-of-obligation" tort proposed by Falline is, I take it, some relation to tortious breach of the implied covenant of good faith and fair dealing that is a part of every contract. I first wonder if there is a contract in this case from which the implied covenant can be derived. Neither defendant is in the insurance business; neither charges premiums; neither enters into an insurance-like contract with industrial claimants. I realize that other jurisdictions have recognized **[**27]** torts which arise out of an "obligation" of good faith; but, to me, presently at least, this "obligation" is of unknown and, in Nevada, unprecedented origin. I would like to know more about this new tort before I rule in favor of the creation of such a tort in Nevada. These matters should be dealt with at the trial level.

Assuming that a breach of the "obligation" referred to by Falline can be turned into something analogous to the bad faith tort in insurance cases which was recognized in *United States Fidelity v. Peterson, 91 Nev. 617, 540 P.2d 1020 (1975)*, I certainly doubt that a mere intentional failure to pay when due is alone sufficient to state a claim for an intentional tort. In Peterson, as I view it, the basis for these kinds of tort actions are insurance companies' refusing without proper cause to honor insurance claims after having knowledge that the

claims are valid. It is not clear to me what Falline's allegation of "intentional failure to pay benefits when due" comprises, but it occurs to me that there might be a variety of non-tortious reasons why an insurance company might fail to pay a claim when due. If Falline had charged **[**28]** Gibbens with actual knowledge that Falline had a valid claim and that, despite such knowledge, Gibbens consciously decided to deprive Falline of the benefits to which it knew he was entitled, then we might be approaching the presence of ingredients out of which an intentional tort might be made. **[*898]**

Even if an intentional tort had been legally pleaded, GNLV, of course, would not be responsible for the tort as pleaded because, as a principal, apparently GNLV did not participate actively in the wrongful administrative decision-making process engaged in by Gibbens, and which is claimed to constitute an intentional tort.

As said, I think the trial judge acted properly in dismissing the negligence and bad faith tort claims because the amended complaint fails to state tort claims upon which relief can be granted. I would affirm the judgment of the trial court.

Springer, J.

End of Document

Madera v. State Indus. Ins. Sys.

Supreme Court of Nevada

April 2, 1998, Filed

No. 28763, No. 28782, No. 28815

Reporter
114 Nev. 253 *; 956 P.2d 117 **; 1998 Nev. LEXIS 41 ***

LOUIS MADERA AND DORIS MADERA, Appellants, vs. STATE INDUSTRIAL INSURANCE SYSTEM, Respondent. ANGELO DIMARIO, Appellant, vs. STATE INDUSTRIAL INSURANCE SYSTEM; LARRY PRESTON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, JEANNE AYOUB, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, AND KAREN NELSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, Respondents. JIM FORRESTER AND SHIRLEY FORRESTER, Appellants, vs. THE STATE OF NEVADA, STATE INDUSTRIAL INSURANCE SYSTEM OF NEVADA, AN AGENCY OF THE STATE OF NEVADA, JEAN WALKER, ALLIE GILBERT, JR., LAURA SHERWOOD, BEVERLY DECKER, IRENE CARTER, JAMES J. KROPID, CRAIG GROSSMAN, NANCY JENNINGS, JACKIE REDDAWAY, AND CAROLYN KELLOGG, Respondents.

Prior History: [***1] Consolidated appeals from orders granting summary judgment and motions to dismiss suits for bad faith administration of worker's compensation claims. Eighth Judicial District Court, Clark County; Jack Lehman and Stephen L. Huffaker, District Judges.

This Opinion Substituted by the Court for Vacated Opinion of February 26, 1998.

Disposition: Affirmed.

Core Terms

remedies, statutes, allegations, rights, district court, insurer, workers' compensation, cause of action, Industrial, employees, cases

Case Summary

Procedural Posture

Plaintiffs, workers' compensation claimants, filed consolidated appeals from the orders of the Nevada district courts, which granted the motions of defendants, State Industrial Insurance System and certain individuals, for summary judgment or to dismiss the claimants' suits for bad faith administration of their workers' compensation claims.

Overview

All of the suits were initiated prior to the effective date of *Nev. Rev. Stat. § 616D.030*, which prohibited the commencement or maintenance of actions alleging bad-faith administration of workers' compensation claims. The district courts concluded that the statute mandated dismissal of the claims even though they were filed before the statute went into effect. On appeal, the court held that the suits were properly dismissed. The presumption of prospective application for new statutes applied only to vested rights or to penalties. The presumption did not obtain when the new statute affected only remedies. Here, *§ 616D.030* was limited in its effect to remedies available against a third-party administrator or insurer, Because the statute was restricted in its effect to remedies available and did not abridge vested

rights, its proscriptions were not presumptively prospective in their application. The court further concluded that its application to pending matters was consistent with the legislature's clear intent. The legislature's use of "brought and maintained" in *§ 616D.030* was a manifestation of its intent that the statute should have retroactive effect.

Outcome
The court affirmed the district courts' judgments.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

In reviewing motions to dismiss, the appellate court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. In making its determination, the court is bound to accept all the factual allegations in the complaint as true.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Standards of Review, De Novo Review**

Orders granting summary judgment are reviewed de novo. Summary judgment should be granted where there is no issue of material fact and the moving party is entitled to judgment as a matter of law.

Workers' Compensation & SSDI > Exclusivity

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > Coverage > Employment Status > Governmental Employees

Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law

HN3[] **Workers' Compensation & SSDI, Exclusivity**

See *Nev. Rev. Stat. § 616D.030*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN4[] **Standards of Review, De Novo Review**

Review in the Nevada Supreme Court from a district court's interpretation of a statute is de novo.

Governments > Legislation > Interpretation

HN5[] **Legislation, Interpretation**

Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction and the courts are not permitted to search for its meaning beyond the statute itself. However, where language is ambiguous, a court should consult other sources such as legislative history, legislative intent, and analogous statutory provisions.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > General Overview

***HN6*[⬇] Effect & Operation, Prospective Operation**

As a general matter, statutes are presumptively prospective. It is also well settled that the presumption of prospective application applies only to vested rights or to penalties. The presumption does not obtain when the new statute affects only remedies.

Governments > Legislation > Interpretation

***HN7*[⬇] Legislation, Interpretation**

The word "maintain," as used frequently in statutes in reference to actions, comprehends the institution as well as the support of the action, and the statutes of Nevada contain many instances where it is used in this broader sense. It is used in other instances to express a meaning corresponding to its more restricted and more proper definition, where it is construed not to comprehend the institution of an action, but merely the support thereof.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

***HN8*[⬇] Involuntary Dismissals, Failure to State Claims**

A civil rights claim under *42 U.S.C.S. § 1983* must meet federal standards even if brought in state court.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

***HN9*[⬇] Local Officials, Customs & Policies**

Unless a complaint against an agency and its employees alleges actions taken outside their official capacities, it will fail to state a claim under *42 U.S.C.S. § 1983*.

Counsel: Clark & Hunt, Las Vegas, for Appellants Madera.

Leslie Mark Stovall, Las Vegas, for Appellant Dimario.

Needham & Needham, Las Vegas; Broening, Oberg, Woods, Wilson & Cass, Las Vegas, for Appellants Forrester.

Lenard Ormsby, General Counsel, D. Michael Clasen, Associate General Counsel and Mary Lynn Newman, Associate General Counsel, Carson City, for Respondents SIIS, Preston, Ayoub, and Nelson.

Laxalt & Nomura, Reno, for Respondents SIIS, Walker, Gilbert, Sherwood, Decker, Carter, Kropid, Grossman, Jennings, Reddaway and Kellogg.

Judges: Shearing, J., Rose, J., Young, J., Maupin, J. SPRINGER, C.J., dissenting.

Opinion

[*255] **[**118]** *OPINION* [1]

[*2]** PER CURIAM:

These consolidated appeals concern actions alleging "bad-faith" administration of workers'

[1] We hereby vacate our prior opinion issued in this matter on February 26, 1998, and substitute this opinion in its place.

[119]** compensation claims. All of the matters were initiated prior to the effective date of NRS 616D.030, which prohibits the commencement or maintenance of such actions.

The district courts concluded that NRS 616D.030 mandated dismissal of the claims even though they were filed before the statute went into effect. The issue on appeal is whether this statute bars actions commenced, but not yet reduced to judgment, as of its effective date. We conclude that it does and, accordingly, affirm the judgments below.

STATEMENT OF FACTS

Dimario v. SIIS

Angelo Dimario (Dimario) was injured in the course of his employment. The State Industrial Insurance System ("SIIS") delayed approval of recommended surgery because a second doctor advised against the procedure. Dimario claims that the delay in approval aggravated his condition causing additional permanent injuries. He brought suit for general damages against SIIS and three of its administrators. On March 14, 1996, SIIS filed a motion to dismiss pursuant to NRS 616D.030. The motion was granted.

Forrester v. SIIS

Jim **[***3]** Forrester (Forrester) and his wife brought suit against the SIIS and numerous SIIS employees for injuries he allegedly sustained as a result of the bad faith, negligence, and breach of contract in the processing of his SIIS claim. SIIS moved for summary judgment in the district court. The motion was granted. [2]

[2] It should be noted that Forrester was convicted and imprisoned on felony charges in connection with an attack on SIIS offices in Las Vegas. In this assault, ostensibly in reaction to the handling of his claim, a heavily armed Forrester drove his vehicle through the lobby of the facility, caused many thousands of dollars in property losses, and endangered the lives of numerous bystanders.

[*256] *Madera v. SIIS*

Louis Madera (Madera) was injured at work on four occasions between 1988 and 1990. Although the SIIS awarded him compensation, Madera and his wife filed suit against SIIS alleging negligence, loss of consortium, and bad faith administration of his claims. A motion to dismiss pursuant to NRS 616D.030 **[***4]** was granted.

DISCUSSION

Standard of Review

HN1[↑] In reviewing motions to dismiss, this court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. Pemberton v. Farmers Ins. Exchange, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993). In making its determination, this court is "'bound to accept all the factual allegations in the complaint as true.'" Id. at 792, 858 P.2d at 381 (quoting Marcoz v. Summa Corporation, 106 Nev. 737, 739, 801 P.2d 1346, 1347 (1990)).

"HN2[↑] Orders granting summary judgment are reviewed de novo." Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). Summary judgment should be granted where there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Bird v. Casa Royale West, 97 Nev. 67, 69-70, 624 P.2d 17, 18 (1981).

I. *Whether NRS 616D.030 applies retroactively*

In 1995, the Nevada Legislature made significant changes to the state's workers' compensation laws. One of those changes is embodied in NRS 616D.030, a measure which took effect while the cases on appeal were pending at the district court level. HN3[↑] NRS 616D.030 **[***5]** provides:

1. No cause of action may be brought or

> maintained against an insurer or third party administrator who violates any provision of [Nevada's industrial insurance statutes].
>
> 2. The administrative fines provided for in NRS 616B.318 and 616D.120 are the exclusive remedies for any violation of this chapter or chapter 616A, 616B, 616C or **[**120]** 617 of NRS committed by an insurer or a third party administrator.

NRS 616D.030 was enacted in response to our ruling in Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (1991). In *Falline,* **[*257]** we recognized limited tort actions against workers' compensation insurers for bad faith and negligence in the processing of workers' compensation claims. This was based on our conclusion that the then existing statutory fines were insufficient to compensate injured workers and their families. Although noting decisions of other courts to the contrary, we held that, if the Legislature see fits to declare the statutory scheme of fines an exclusive remedy to aggrieved workmen whose claims are denied or delayed as a result of negligence or bad faith, the Legislature may enact legislation to that end. *Id. at 1011, 823 P.2d at 893.* With the enactment **[***6]** of NRS 616D.030, the legislature accepted this court's invitation to limit the potential liability of workers' compensation insurers by narrowing the remedies available to an aggrieved party.

Appellants, having commenced their actions prior to its effective date, argue that NRS 616D.030 does not apply because it is not, by its terms, retroactive. We disagree.

HN4[↑] Review in this court from a district court's interpretation of a statute is de novo." State, Dep't of Mtr. Vehicles v. Frangul, 110 Nev. 46, 48, 867 P.2d 397, 398 (1994). It is well-settled that:

> "HN5[↑] Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995) (quoting Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 503, 797 P.2d 946, 949 (1990)).

However, where language is ambiguous, a court should consult other sources such as legislative history, legislative intent, and analogous statutory provisions. *See* Moody v. Manny's Auto Repair, 110 Nev. 320, 871 P.2d 935 (1994). **[***7]**

HN6[↑] As a general matter, statutes are presumptively prospective. *See* McKellar v. McKellar, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994) (holding that "there is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied") . It is also well settled that the presumption of prospective application applies only to vested rights or to penalties. The presumption does not obtain when the new statute affects only remedies. *See* T. R. G. E. Co. v. Durham, 38 Nev. 311, 316, 149 P. 61, 62 (1915), in which we **[*258]** held that "the general rule against retrospective construction of a statute does not apply to statutes relating merely to remedies and modes of procedure"; and Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985) ("when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases"). Nevada's approach mirrors the general rule.

Here, NRS 616D.030 is limited in its effect to remedies available against a third-party administrator or insurer, i.e., it supplants the common-law **[***8]** tort remedy under *Falline,* leaving in its place the administrative remedy. *See also,* Torre v. J.C. Penney Co., Inc., 916 F. Supp. 1029 (D. Nev. 1996) (federal court concluding in diversity action that the Nevada Supreme Court would apply NRS 616D.030 to pending cases).

Because we conclude that NRS 616D.030 is restricted in its effect to remedies available and does not abridge vested rights, we hold that its proscriptions are not presumptively prospective in their application.

We further conclude that application to pending matters is consistent with the clear intent of the legislature. *See* Convention Properties v. Washoe Co. Assessor, 106 Nev. 400, 402, 793 P.2d 1332, 1333 (1990) (general presumption in favor of prospective application in absence of legislative intent clearly manifested to the contrary) . Because NRS 616D.030, effective July 1, 1995, provides that an action against an insurer for violation of the industrial insurance statutes may not be "brought" or "maintained," we conclude that **[**121]** the legislature intended application to actions filed but not resolved, prior to the effective date of the statute.

"Maintain" is defined as follows:

> To "maintain" an action **[***9]** is to uphold, continue on foot, and keep from collapse a suit already begun, or to prosecute a suit with effect. George Moore Ice Cream Co. v. Rose, Ga., 289 U.S. 373, 53 S. Ct. 620, 77 L. Ed. 1265. To maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action. Maintain, however, is applied to actions already brought, but not yet reduced to judgment. Smallwood v. Gallardo, 275 U.S. 56, 48 S. Ct. 23, 72 L. Ed. 152.

Black's Law Dictionary 859 (5th ed. 1979).

Nevada law is in accord with the dictionary definition of "maintain." In National Mines Co. v. District Court, 34 Nev. 67, 116 P. 996 (1911), this court interpreted the phrase "institute and maintain" as it was used in a legislative act. "Maintain" was defined as follows:

> **[*259]** HN7[↑] The word "maintain," as used frequently in statutes in reference to actions, comprehends the institution as well as the support of the action, and the statutes of this state contain many instances where it is used in this broader sense. It is used in other instances to express a meaning corresponding to its more restricted and more proper definition, as in the cases of Carson-Rand v. Stern **[***10]** 129 Mo. 381, 31 S.W. 772, and Cal. Savings Co. v. Harris, 111 Cal. 133, 43 P. 525, cited in petitioner's brief, where it was construed not to comprehend the institution of an action, but merely the support thereof. In section 1 [of the statute] the two words are used together, "institute and maintain"; and hence both are used in their restricted sense.

34 Nev. at 77-78, 116 P. at 1000.

We conclude that the use of "brought and maintained" in NRS 616D.030 parallels the use of "institute and maintain" as used in the statute in *National Mines.* Accordingly, we hold that the language of the statute is a manifestation of the legislature's intent that NRS 616D.030 should have retroactive effect. [3]

[*11]** II. *Whether Dimario's 42 U.S.C. § 1983 cause of action was properly dismissed.*

Appellant Dimario separately argues that the allegations in his complaint stated a valid claim under *42 U.S.C. § 1983.*

IN8[↑] A civil rights claim under *42 U.S.C. § 1983* must meet federal standards even if brought in state court. *See* Will v. Michigan Department of State Police, 491 U.S. 58, 66, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). In Buckey v. County of Los

---

[3] This matter is analogous to Nevada Industrial Commission v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977). In *Reese,* we noted that the 1967 amendments regarding judicial review under the Nevada Industrial Insurance Act specifically provided that the amendments were not to apply to pending cases: "The 1967 amendatory act stated, in section 13: 'The provisions of this act do not apply to contested cases pending on July 1, 1967.'" Id. at 123, 560 P.2d at 1356. Therefore, in the absence of any language to the contrary, the use of the word "maintained" in NRS 616D.030 is an unmistakable indication that the legislature intended retroactive application.

Angeles, 968 F.2d 791 (9th Cir. 1992), an action against government entities was dismissed for failure to state a claim. On appeal, the Ninth Circuit affirmed, concluding that a complaint containing only bare allegations describing the plaintiff's misfortunes and the persons she believed caused them was vague and conclusory under *section 1983*. *Id.* Also, in *Northern Nev. Ass'n Injured Workers v. SIIS, 107 Nev. 108, 807 P.2d 728 (1991)*, this court held that, *HN9*[↑] unless a complaint against an agency **[*260]** and its employees alleges actions taken outside their official capacities, it will fail to state a claim under federal law. *Id. at 114, 807 P.2d at 732*.

In his complaint, Dimario alleges that the individual SIIS employees "acted in a manner **[***12]** that completely transcended their authority as claims examiners with SIIS." He contends these employees deprived him "of his Federal Constitutional Rights." Dimario fails to state which federal rights he believes have been violated and the specific manner in which they were violated. He also fails to point to actions engaged in by the SIIS employees outside of their official capacities. **[**122]** We conclude that Dimario's *§ 1983* cause of action was properly dismissed because he failed to make sufficient allegations upon which a *§ 1983* claim can be based.

Accordingly, we affirm the district courts in these matters.

Shearing, J.

Rose, J.

Young, J.

Maupin, J.

Dissent by: SPRINGER

Dissent

SPRINGER, C.J., dissenting:

As stated in the majority opinion, the issue here is whether the enactment of *NRS 616D.030* "bars actions commenced, but not yet reduced to judgment." All three of these actions were in the process of litigation, and all three are now barred by what has been incorrectly interpreted as retrospective legislation. In my view, the statute does not require that all of these actions must be thrown out of court; and if it did, it would be a violation of due process to frustrate these ongoing **[***13]** law suits.

During oral argument I posed the hypothetical case of one of the appellant/plaintiff's having obtained a large jury verdict against one or more of the named respondents. I asked counsel what his position would be if an agreed-upon, written judgment on the verdict had been presented to the judge for signature a few minutes after the time that the governor approved *NRS 616D.030*. For example, if it were discovered by defense counsel that the legislation became effective at 10:00 a.m., by virtue of the governor's approval, and that the judgment was not signed until 10:30 a.m., would the plaintiff's claim, at the majority puts it, be *barred* because it had "not yet [been] reduced to judgment as of its effective date"? The question calls attention to the injustice and unfairness of dismissing an ongoing law suit. The whole idea of throwing a plaintiff's pending case out of court by virtue of the enactment of legislation enacted *after* the suit was in progress is repugnant to me and I think to most readers of this opinion. As I will show, *NRS 616D.030* does not require such unseemly action to be taken by the district court.

NRS 616D.030 directs that "no cause of action **[***14]** may be brought or maintained." Black's Law Dictionary defines "maintained" as "commenced and continued." Black's Law Dictionary 859 (5th ed. 1979). Now, of course, there is a big difference **[*261]** between commencing and continuing; but "commenced" is certainly a usual and legitimate reading of the word "maintained," so that "brought or maintained" can be safely and logically read as meaning "brought or

commenced." It is hard for me to understand why, given the majority's recognition that as "a general matter, statutes are presumptively prospective," the majority would ignore the meaning of "maintained" as meaning "commenced" and interpret the statute in a manner that would require dismissal of litigation in progress. To me, it is more reasonable to read "brought or maintained" to mean the bringing or commencing of litigation rather than to mean that all ongoing litigation is to be frustrated as of the effective date of the statute. "Brought or maintained" is merely a redundancy; and the legislature's use of the word "maintained" (although it can also mean "continued") was not intended by the legislature to mean the cutting off of all litigation pending at the time of enactment. This would **[***15]** be a very strained reading of the language and certainly contrary to the presumption of prospectivity recognized by the majority.

I do not think it is appropriate for me to discuss the constitutional dimensions of this case because the majority opinion fails to do so. To the contention that these claimants are being denied a protectable property right, all the majority has to say is that the statute is "limited in its effect to *remedies*" and not to substantial rights. (My emphasis.) It would be difficult indeed to persuade the hypothetical plaintiff mentioned above that losing a substantial jury verdict by a stroke of the governor's pen was merely a procedural or remedial matter and not a depravation of a constitutionally protected property right. I dissent.

Springer, C.J.

End of Document

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROY DANIELS MORAGA,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY OF NEVADA; AND STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS,
Respondents.

No. 66090

FILED

JUN 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying a petition for judicial review in an industrial insurance matter. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

In accordance with a stipulation and order for settlement and dismissal, Employers Insurance Company of Nevada ("EICN") scheduled appointments for Roy Moraga to receive a standing x-ray of his knee and a permanent partial disability evaluation.[1] Moraga, however, was not transported to his appointments.[2] Approximately one month after the appointments were scheduled to take place, Moraga's attorney sent correspondence to EICN's counsel stating that, although his office "duly forwarded the information well ahead of time to the warden's office and requested that the claimant be transported[, . . .] we have learned that the claimant was not transported on October 17 or the 24 and that the

[1]We do not recount the facts except as necessary to our disposition.

[2]At all times relevant to this action, Moraga was incarcerated in the Nevada Department of Corrections.

Department of Prisons in Carson City must be contacted with such requests." Accordingly, Moraga's attorney requested that EICN reschedule Moraga's appointments and stated that his office would "endeavor to get notice and authorization for transportation through Mr. Crawford in Carson City."

Nearly six years after the missed appointments, Moraga filed a complaint with the Division of Industrial Insurance ("DIR") in which he asserted that EICN breached the stipulation by sending him a letter providing the date, time, and other information regarding one of his appointments, which information Moraga claims was to be sent to his attorney only due to prison security protocols. The DIR considered the complaint as alleging a violation of NRS 616D.120(1)(c)(1) and requested a response from EICN. The DIR subsequently rendered a determination in which it concluded that EICN complied with the stipulation and, therefore, declined to impose an administrative fine or benefit penalty. In its determination, the DIR also noted that pursuant to NRS 11.190(4)(b) it is unable to enforce an order more than two years after the date compliance was due.

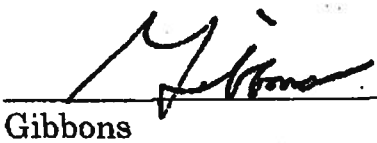
Moraga appealed the DIR's determination and, after conducting a hearing on the matter, an appeals officer entered a decision and order affirming the DIR. In particular, the appeals officer concluded that Moraga failed to demonstrate by a preponderance of the evidence that EICN committed any violation of NRS 616D.120. Moraga then filed a petition for judicial review, which petition the district court denied on the ground that the appeals officer's decision is supported by substantial evidence. This appeal followed.

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. ___, ___, 312 P.3d 479, 482 (2013). Therefore, this court is limited to the record before the agency and cannot substitute its judgment for that of the agency on issues concerning the weight of the evidence on questions of fact. *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008). This court will only overturn an administrative agency's factual findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *Elizondo v. Hood Mach., Inc.*, 129 Nev. at ___, 312 P.3d at 482. However, this court reviews conclusions of law, including the administrative construction of statutes, de novo. *Elizondo*, 129 Nev. at ___, 312 P.3d at 482.

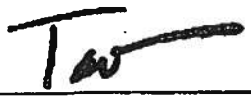
On appeal, Moraga concedes that EICN scheduled the appointments and provided the information to his attorney as agreed and that EICN was not responsible for arranging transportation. Nevertheless, he maintains that the appeals officer erred in affirming the DIR's determination because EICN directly interfered with his transportation when, contrary to prison security protocol as acknowledged by EICN in its prior correspondence, EICN sent a letter to Moraga informing him of the time and place of his permanent partial disability evaluation appointment. EICN and DIR counter that Moraga failed to carry his burden to establish that EICN violated NRS 616D.120(1)(c)(1), as EICN complied with the stipulation, EICN was not responsible for Moraga's transportation, and the stipulation did not prohibit EICN from providing information to Moraga. DIR further argues that Moraga failed to produce evidence to support his claim that the prison did not transport him because of EICN's letter. To the contrary, DIR notes that although

the letter complained of included information regarding only one of the two scheduled appointments, the prison did not transport Moraga to either. Having considered the parties' arguments and reviewed the record on appeal, we conclude that the appeals officer's decision is supported by substantial evidence.[3] We therefore,

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Rob Bare, District Judge
Woodrum Law LLC
Dept of Business and Industry/Div of Industrial Relations/Henderson
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

---

[3]Although we need not reach the issue because we conclude that the appeals officer did not err by affirming the DIR's determination on the merits, we also note that Moraga's DIR complaint was time-barred under NRS 11.190(4)(b).

1995 Statutes of Nevada, Page 1642 (Chapter 497, AB 61, Sec. 13)

Sec. 13. **NRS 616.647** is hereby amended to read as follows:

616.647 1. Except as otherwise provided in ~~[subsection 2,]~~ *this section,* if the administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has:

(a) *Through fraud, coercion, duress or undue influence:*

(1) Induced a claimant ~~[for compensation]~~ to fail to report an accidental injury or occupational disease;

~~[(b)]~~ *(2)* Persuaded a claimant to settle for an amount which is less than reasonable;

~~[(c)]~~ *(3)* Persuaded a claimant to settle for an amount which is less than reasonable while a hearing or an appeal is pending; *or*

~~[(d)]~~ *(4)* Persuaded a claimant to accept less than the compensation found to be due him by a hearing officer , ~~[or]~~ appeals officer ~~[;~~

~~(e)]~~ *, court of competent jurisdiction, written settlement agreement, written stipulation or the division when carrying out its duties pursuant to this chapter and chapter 617 of NRS;*

(b) Refused to pay or unreasonably delayed payment to a claimant of compensation found to be due him by a hearing officer , ~~[or]~~ appeals officer ~~[;~~

~~(f)]~~ *, court of competent jurisdiction, written settlement agreement, written stipulation or the division when carrying out its duties pursuant to this chapter or chapter 617 of NRS, if the refusal or delay occurs:*

(1) Later than 10 days after the date of the settlement agreement or stipulation;

(2) Later than 30 days after the date of the decision of a court, hearing officer, appeals officer or division, unless a stay has been granted; or

(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or division has been lifted;

(c) Refused to process a claim for compensation pursuant to this chapter or chapter 617 of NRS;

(d) Made it necessary for a claimant to ~~[resort to proceedings against the employer or insurer]~~ *initiate proceedings pursuant to this chapter or chapter 617 of NRS* for compensation found to be due him by a hearing officer , ~~[or]~~ appeals officer ~~[;~~

~~(g)]~~ *, court of competent jurisdiction, written settlement agreement, written stipulation or the division when carrying out its duties pursuant to this chapter or chapter 617 of NRS;*

(e) Failed to comply with the division's regulations covering the payment of an assessment relating to the funding of costs of administration of this chapter and chapter 617 of NRS; or

~~[(h) Intentionally or repeatedly]~~

(f) Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 617 of NRS,

the administrator shall impose an administrative fine of ~~[not more than $250]~~ *$1,000* for each initial violation , ~~[which was not intentional,]~~ or a fine of ~~[not more than $1,000 for each intentional or repeated]~~ *$10,000 for a second or subsequent* violation.

2. *Except as otherwise provided in this chapter or chapter 617 of NRS, if the administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has failed to comply with any provision of this chapter or chapter 617 of NRS, or any regulation adopted pursuant thereto, the administrator may take any of the following actions:*

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 617 of NRS, or any regulation adopted pursuant thereto.

The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. Nothing in this section authorizes the administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:

(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

The fine imposed may not be greater than $250 for an initial violation, or more than $1,000 for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the administrator within 30 days after the date of the order.

3. If the administrator determines that a violation of any of the provisions of paragraphs (a) to (d), inclusive, of subsection 1 has occurred, the administrator shall order the insurer, organization for managed care, health care provider, third-party administrator or employer to pay to the claimant a benefit penalty in an amount equal to 50 percent of the compensation due or $10,000, whichever is less. In no event may a benefit penalty be less than $500. The benefit penalty is for the benefit of the claimant and must be paid directly to him within 10 days after the date of the administrator's determination. Proof of the payment of the benefit penalty must be submitted to the administrator within 10 days after the date of his determination unless an appeal is filed pursuant to NRS 616.2207. Any compensation to which the claimant may otherwise be entitled pursuant to this chapter or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection.

4. In addition to any fine *or benefit penalty* imposed pursuant to ~~[subsection 1,]~~ *this section,* the administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures used to calculate an assessment an administrative penalty of up to twice the amount of any underpaid assessment.

~~[3.]~~ *5.* If the administrator determines that a person has violated any of the provisions of NRS 616.630, 616.635, 616.640 or 616.675 to 616.700, inclusive, the administrator shall impose an administrative fine of not more than $10,000.

~~[4.]~~ *6.* Two or more fines of $1,000 *or more* imposed in 1 year for acts enumerated in subsection 1 must be considered by the commissioner as evidence for the withdrawal of ~~[a certificate of self-insurance to act as a self-insured employer or an association of self-insured public or private employers.~~

~~5.]~~ *:*

(a) A certificate to act as a self-insured employer.

(b) A certificate to act as an association of self-insured public or private employers.

(c) A certificate of registration as a third-party administrator.

7. The commissioner may *, without complying with the provisions of NRS 616.296 or 616.3798,* withdraw the certification of a self-insured employer *,* ~~[or an]~~ association of self-insured public or private employers *or third-party administrator* if, after a hearing, it is shown that the self-insured employer *,* ~~[or]~~ association *of self-insured public or private employers or third-party administrator* violated any provision of subsection 1.

1995 Statutes of Nevada, Page 2160 (Chapter 587, SB 458, Sec. 106.5)

Sec. 106.5. **NRS 616.647** is hereby amended to read as follows:

616.647 1. Except as otherwise provided in subsection 2, if the administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has:

(a) Induced a claimant for compensation to fail to report an accidental injury or occupational disease;

(b) Persuaded a claimant to settle for an amount which is less than reasonable;

(c) Persuaded a claimant to settle for an amount which is less than reasonable while a hearing or an appeal is pending;

(d) Persuaded a claimant to accept less than the compensation found to be due him by a hearing officer or appeals officer;

(e) Refused to pay or unreasonably delayed payment to a claimant of compensation found to be due him by a hearing officer or appeals officer;

(f) Made it necessary for a claimant to resort to proceedings against the employer or insurer for compensation found to be due him by a hearing officer or appeals officer;

(g) Failed to comply with the division's regulations covering the payment of an assessment relating to the funding of costs of administration of this chapter and chapter 617 of NRS; ~~[or]~~

(h) *Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to section 4.5 of this act; or*

(i) Intentionally or repeatedly failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 617 of NRS,

the administrator shall impose an administrative fine of not more than $250 for each initial violation which was not intentional, or a fine of not more than $1,000 for each intentional or repeated violation.

2. In addition to any fine imposed pursuant to subsection 1, the administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures used to calculate an assessment an administrative penalty of up to twice the amount of any underpaid assessment.

3. If the administrator determines that a person has violated any of the provisions of NRS 616.630, 616.635, 616.640 or 616.675 to 616.700, inclusive, the administrator shall impose an administrative fine of not more than $10,000.

4. Two or more fines of $1,000 imposed in 1 year for acts enumerated in subsection 1 must be considered by the commissioner as evidence for the withdrawal of a certificate of self-insurance to act as a self-insured employer or an association of self-insured public or private employers.

5. The commissioner may withdraw the certification of a self-insured employer or an association of self-insured public or private employers if, after a hearing, it is shown that the self-insured employer or association violated any provision of subsection 1.

1999 Statutes of Nevada, Page 1798 (Chapter 388, SB 37, Sec. 68.8) and Page 3148 (Chapter 582, SB 133, Sec. 26.5)

Sec. 68.8. NRS 616D.120 is hereby amended to read as follows:

616D.120 1. Except as otherwise provided in this section, if the administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has:

(a) Through fraud, coercion, duress or undue influence:

(1) Induced a claimant to fail to report an accidental injury or occupational disease;

(2) Persuaded a claimant to settle for an amount which is less than reasonable;

(3) Persuaded a claimant to settle for an amount which is less than reasonable while a hearing or an appeal is pending; or

(4) Persuaded a claimant to accept less than the compensation found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the division when carrying out its duties pursuant to chapters 616A to 617, inclusive, of NRS;

(b) Refused to pay or unreasonably delayed payment to a claimant of compensation found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the refusal or delay occurs:

(1) Later than 10 days after the date of the settlement agreement or stipulation;

(2) Later than 30 days after the date of the decision of a court, hearing officer, appeals officer or division, unless a stay has been granted; or

(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or division has been lifted;

(c) Refused to process a claim for compensation pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(d) Made it necessary for a claimant to initiate proceedings pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS for compensation found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(e) Failed to comply with the division's regulations covering the payment of an assessment relating to the funding of costs of administration of chapters 616A to 617, inclusive, of NRS;

(f) Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to NRS 616C.165; or

(g) Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 616A, 616B, 616C or 617 of NRS,

the administrator shall impose an administrative fine of $1,000 for each initial violation, or a fine of $10,000 for a second or subsequent violation.

2. Except as otherwise provided in chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has failed to comply with any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, the administrator may take any of the following actions:

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto.

The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. ~~[Nothing in]~~ ***The provisions of*** this section ~~[authorizes]~~ ***do not authorize*** the administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:

(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

The fine imposed may not be greater than $250 for an initial violation, or more than $1,000 for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the administrator within 30 days after the date of the order.

3. If the administrator determines that a violation of any of the provisions of paragraphs (a) to (d), inclusive, of subsection 1 has occurred, the administrator shall order the insurer, organization for managed care, health care provider, third-party administrator or employer to pay to the claimant a benefit penalty in an amount ~~[equal to 50 percent of the compensation due or $10,000, whichever is less. In no event may a benefit penalty be less than $500. The]~~ ***that is not less than $5,000 and not greater than $25,000. To determine the amount of the benefit penalty, the administrator shall consider the degree of physical harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c) or (d) of subsection 1, the amount of compensation found to be due the claimant and the number of fines and benefit penalties previously imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer pursuant to this section. If this is the third violation within 5 years for which a benefit penalty has been imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer, the administrator shall also consider the degree of economic harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c) or (d) of subsection 1. Except as otherwise provided in this section, the*** benefit penalty is for the benefit of the claimant and must be paid directly to him within 10 days after the date of the administrator's determination. ***If the claimant is the injured employee and he dies before the benefit penalty is paid to him, the benefit penalty must be paid to his estate.*** Proof of the payment of the benefit penalty must be submitted to the administrator within 10 days after the date of his determination unless an appeal is filed pursuant to NRS 616D.140. Any compensation to which the claimant may otherwise be entitled pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection.

4. In addition to any fine or benefit penalty imposed pursuant to this section, the administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures used to calculate an assessment an administrative penalty of up to twice the amount of any underpaid assessment.

5. If:

(a) The administrator determines that a person has violated any of the provisions of NRS 616D.200, 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive; and

(b) The fraud control unit for industrial insurance established pursuant to NRS 228.420 notifies the administrator that the unit will not prosecute the person for that violation,

the administrator shall impose an administrative fine of not more than $10,000.

6. Two or more fines of $1,000 or more imposed in 1 year for acts enumerated in subsection 1 must be considered by the commissioner as evidence for the withdrawal of:

(a) A certificate to act as a self-insured employer.

(b) A certificate to act as an association of self-insured public or private employers.

(c) A certificate of registration as a third-party administrator.

7. The commissioner may, without complying with the provisions of NRS 616B.327 or 616B.431, withdraw the certification of a self-insured employer, association of self-insured public or private employers or third-party

administrator if, after a hearing, it is shown that the self-insured employer, association of self-insured public or private employers or third-party administrator violated any provision of subsection 1.

2005 Statutes of Nevada, Page 1101 (Chapter 322, AB 254, Sec. 2)

Sec. 2. NRS 616D.120 is hereby amended to read as follows:

616D.120 1. Except as otherwise provided in this section, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has:

(a) Induced a claimant to fail to report an accidental injury or occupational disease;

(b) Without justification, persuaded a claimant to:

(1) Settle for an amount which is less than reasonable;

(2) Settle for an amount which is less than reasonable while a hearing or an appeal is pending; or

(3) Accept less than the compensation found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 617, inclusive, of NRS;

(c) Refused to pay or unreasonably delayed payment to a claimant of compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the refusal or delay occurs:

(1) Later than 10 days after the date of the settlement agreement or stipulation;

(2) Later than 30 days after the date of the decision of a court, hearing officer, appeals officer or the Division, unless a stay has been granted; or

(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or the Division has been lifted;

(d) Refused to process a claim for compensation pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(e) Made it necessary for a claimant to initiate proceedings pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS for compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(f) Failed to comply with the Division's regulations covering the payment of an assessment relating to the funding of costs of administration of chapters 616A to 617, inclusive, of NRS;

(g) Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to NRS 616C.165; or

(h) Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 616A, 616B, 616C or 617 of NRS,

➥ the Administrator shall impose an administrative fine of ~~[$1,000]~~ ***$1,500*** for each initial violation, or a fine of ~~[$10,000]~~ ***$15,000*** for a second or subsequent violation.

2. Except as otherwise provided in chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has failed to comply with any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, the Administrator may take any of the following actions:

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the Division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto.

➥ The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. The provisions of this section do not authorize the Administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:

(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

➥ The fine imposed must not be greater than ~~[$250]~~ ***$375*** for an initial violation, or more than ~~[$1,000]~~ ***$1,500*** for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the Administrator within 30 days after the date of the order.

3. If the Administrator determines that a violation of any of the provisions of paragraphs (a) to (e), inclusive, ***or (h)*** of subsection 1 has occurred, the Administrator shall order the insurer, organization for managed care, health care provider, third-party administrator or employer to pay to the claimant a benefit penalty in an amount that is not less than $5,000 and not greater than ~~[$25,000.]~~ ***$37,500.*** To determine the amount of the benefit penalty, the Administrator shall consider the degree of physical harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), ~~[or]~~ (e) ***or (h)*** of subsection 1, the amount of compensation found to be due the claimant and the number of fines and benefit penalties previously imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer pursuant to this section. If this is the third violation within 5 years for which a benefit penalty has been imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer, the Administrator shall also consider the degree of economic harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), ~~[or]~~ (e) ***or (h)*** of subsection 1. Except as otherwise provided in this section, the benefit penalty is for the benefit of the claimant and must be paid directly to him within 10 days after the date of the Administrator's determination. If the claimant is the injured employee and he dies before the benefit penalty is paid to him, the benefit penalty must be paid to his estate. Proof of the payment of the benefit penalty must be submitted to the Administrator within 10 days after the date of his determination unless an appeal is filed pursuant to NRS 616D.140. Any compensation to which the claimant may otherwise be entitled pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection.

4. In addition to any fine or benefit penalty imposed pursuant to this section, the Administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures or premiums received that are used to calculate an assessment, an administrative penalty of up to twice the amount of any underpaid assessment.

5. If:

(a) The Administrator determines that a person has violated any of the provisions of NRS 616D.200, 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive; and

(b) The Fraud Control Unit for Industrial Insurance of the Office of the Attorney General established pursuant to NRS 228.420 notifies the Administrator that the Unit will not prosecute the person for that violation,

➥ the Administrator shall impose an administrative fine of not more than ~~[$10,000.]~~ ***$15,000.***

6. Two or more fines of $1,000 or more imposed in 1 year for acts enumerated in subsection 1 must be considered by the Commissioner as evidence for the withdrawal of:

(a) A certificate to act as a self-insured employer.

(b) A certificate to act as an association of self-insured public or private employers.

(c) A certificate of registration as a third-party administrator.

7. The Commissioner may, without complying with the provisions of NRS 616B.327 or 616B.431, withdraw the certification of a self-insured employer, association of self-insured public or private employers or third-party administrator if, after a hearing, it is shown that the self-insured employer, association of self-insured public or private employers or third-party administrator violated any provision of subsection 1.

2007 Statutes of Nevada, Page 3363 (Chapter 537, AB 496, Sec. 19)

Sec. 19. NRS 616D.120 is hereby amended to read as follows:

616D.120 1. Except as otherwise provided in this section, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has:

(a) Induced a claimant to fail to report an accidental injury or occupational disease;

(b) Without justification, persuaded a claimant to:

(1) Settle for an amount which is less than reasonable;

(2) Settle for an amount which is less than reasonable while a hearing or an appeal is pending; or

(3) Accept less than the compensation found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 617, inclusive, of NRS;

(c) Refused to pay or unreasonably delayed payment to a claimant of compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the refusal or delay occurs:

(1) Later than 10 days after the date of the settlement agreement or stipulation;

(2) Later than 30 days after the date of the decision of a court, hearing officer, appeals officer or the Division, unless a stay has been granted; or

(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or the Division has been lifted;

(d) Refused to process a claim for compensation pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(e) Made it necessary for a claimant to initiate proceedings pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS for compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(f) Failed to comply with the Division's regulations covering the payment of an assessment relating to the funding of costs of administration of chapters 616A to 617, inclusive, of NRS;

(g) Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to NRS 616C.165; or

(h) Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 616A, 616B, 616C or 617 of NRS,

➥ the Administrator shall impose an administrative fine of $1,500 for each initial violation, or a fine of $15,000 for a second or subsequent violation.

2. Except as otherwise provided in chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has failed to comply with any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, the Administrator may take any of the following actions:

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the Division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto.

➥ The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. The provisions of this section do not authorize the Administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:

(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

➥ The fine imposed must not be greater than $375 for an initial violation, or more than $1,500 for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the Administrator within 30 days after the date of the order.

3. If the Administrator determines that a violation of any of the provisions of paragraphs (a) to (e), inclusive, or (h) of subsection 1 has occurred, the Administrator shall order the insurer, organization for managed care, health care provider, third-party administrator or employer to pay to the claimant a benefit penalty ***:***

(a) Except as otherwise provided in paragraph (b), in an amount that is not less than $5,000 and not greater than $37,500 ~~.~~ ***; or***

(b) Of $3,000 if the violation involves a late payment of compensation or other relief to a claimant in an amount which is less than $500 or which is not more than 14 days late.

4. To determine the amount of the benefit penalty, the Administrator shall consider the degree of physical harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), (e) or (h) of subsection 1, the amount of compensation found to be due the claimant and the number of fines and benefit

penalties *, other than a benefit penalty described in paragraph (b) of subsection 3,* previously imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer pursuant to this section. If this is the third violation within 5 years for which a benefit penalty *, other than a benefit penalty described in paragraph (b) of subsection 3,* has been imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer, the Administrator shall also consider the degree of economic harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), (e) or (h) of subsection 1. Except as otherwise provided in this section, the benefit penalty is for the benefit of the claimant and must be paid directly to him within 10 days after the date of the Administrator's determination. If the claimant is the injured employee and he dies before the benefit penalty is paid to him, the benefit penalty must be paid to his estate. Proof of the payment of the benefit penalty must be submitted to the Administrator within 10 days after the date of his determination unless an appeal is filed pursuant to NRS 616D.140. Any compensation to which the claimant may otherwise be entitled pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection.

~~[4.]~~ *5.* In addition to any fine or benefit penalty imposed pursuant to this section, the Administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures or premiums received that are used to calculate an assessment, an administrative penalty of up to twice the amount of any underpaid assessment.

~~[5.]~~ *6.* If:

(a) The Administrator determines that a person has violated any of the provisions of NRS 616D.200, 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive; and

(b) The Fraud Control Unit for Industrial Insurance of the Office of the Attorney General established pursuant to NRS 228.420 notifies the Administrator that the Unit will not prosecute the person for that violation,

➥ the Administrator shall impose an administrative fine of not more than $15,000.

~~[6.]~~ *7.* Two or more fines of $1,000 or more imposed in 1 year for acts enumerated in subsection 1 must be considered by the Commissioner as evidence for the withdrawal of:

(a) A certificate to act as a self-insured employer.

(b) A certificate to act as an association of self-insured public or private employers.

(c) A certificate of registration as a third-party administrator.

~~[7.]~~ *8.* The Commissioner may, without complying with the provisions of NRS 616B.327 or 616B.431, withdraw the certification of a self-insured employer, association of self-insured public or private employers or third-party administrator if, after a hearing, it is shown that the self-insured employer, association of self-insured public or private employers or third-party administrator violated any provision of subsection 1.

9. If the Administrator determines that a vocational rehabilitation counselor has violated the provisions of section 1.3 of this act, the Administrator may impose an administrative fine on the vocational rehabilitation counselor of not more than $250 for a first violation, $500 for a second violation and $1,000 for a third or subsequent violation.

2009 Statutes of Nevada, Page 3040 (Chapter 500, SB 195, Sec. 10)

Sec. 10. NRS 616D.120 is hereby amended to read as follows:

616D.120 1. Except as otherwise provided in this section, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has:

(a) Induced a claimant to fail to report an accidental injury or occupational disease;

(b) Without justification, persuaded a claimant to:

(1) Settle for an amount which is less than reasonable;

(2) Settle for an amount which is less than reasonable while a hearing or an appeal is pending; or

(3) Accept less than the compensation found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 617, inclusive, of NRS;

(c) Refused to pay or unreasonably delayed payment to a claimant of compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the refusal or delay occurs:

(1) Later than 10 days after the date of the settlement agreement or stipulation;

(2) Later than 30 days after the date of the decision of a court, hearing officer, appeals officer or the Division, unless a stay has been granted; or

(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or the Division has been lifted;

(d) Refused to process a claim for compensation pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(e) Made it necessary for a claimant to initiate proceedings pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS for compensation or other relief found to be due him by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(f) Failed to comply with the Division's regulations covering the payment of an assessment relating to the funding of costs of administration of chapters 616A to 617, inclusive, of NRS;

(g) Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to NRS 616C.165; ~~[or]~~

(h) ***Engaged in a pattern of untimely payments to injured employees; or***

(i) Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 616A, 616B, 616C or 617 of NRS,

➥ the Administrator shall impose an administrative fine of $1,500 for each initial violation, or a fine of $15,000 for a second or subsequent violation.

2. Except as otherwise provided in chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator or employer has failed to comply with any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, the Administrator may take any of the following actions:

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the Division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto.

➥ The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. The provisions of this section do not authorize the Administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:

(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

➥ The fine imposed must not be greater than $375 for an initial violation, or more than ~~[$1,500]~~ ***$3,000*** for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the Administrator within 30 days after the date of the order.

3. If the Administrator determines that a violation of any of the provisions of paragraphs (a) to (e), inclusive, ~~[or]~~ (h) ***or (i)*** of subsection 1 has occurred, the Administrator shall order the insurer, organization for managed care, health care provider, third-party administrator or employer to pay to the claimant a benefit penalty:

(a) Except as otherwise provided in paragraph (b), in an amount that is not less than $5,000 and not greater than ~~[$37,500;]~~ ***$50,000;*** or

(b) Of $3,000 if the violation involves a late payment of compensation or other relief to a claimant in an amount which is less than $500 or which is not more than 14 days late.

4. To determine the amount of the benefit penalty, the Administrator shall consider the degree of physical harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), (e) , ~~[or]~~ (h) ***or (i)*** of subsection 1, the amount of compensation found to be due the claimant and the number of fines and benefit penalties, other than a benefit penalty described in paragraph (b) of subsection 3, previously imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer pursuant to this section. ~~[If this is the third violation within 5 years for which a benefit penalty, other than a benefit penalty described in paragraph (b) of subsection 3, has been imposed against the insurer, organization for managed care, health care provider, third-party administrator or employer, the]~~ ***The*** Administrator shall also consider the degree of economic harm suffered by the injured employee or his dependents as a result of the violation of paragraph (a), (b), (c), (d), (e) , ~~[or]~~ (h) ***or (i)*** of subsection 1. Except as otherwise provided in this section, the benefit penalty is for the

benefit of the claimant and must be paid directly to him within 10 days after the date of the Administrator's determination. If the claimant is the injured employee and he dies before the benefit penalty is paid to him, the benefit penalty must be paid to his estate. Proof of the payment of the benefit penalty must be submitted to the Administrator within 10 days after the date of his determination unless an appeal is filed pursuant to NRS 616D.140. Any compensation to which the claimant may otherwise be entitled pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection. ***To determine the amount of the benefit penalty in cases of multiple violations occurring within a certain period of time, the Administrator shall adopt regulations which take into consideration:***

(a) The number of violations within a certain number of years for which a benefit penalty was imposed; and

(b) The number of claims handled by the insurer, organization for managed care, health care provider, third-party administrator or employer in relation to the number of benefit penalties previously imposed within the period of time prescribed pursuant to paragraph (a).

5. In addition to any fine or benefit penalty imposed pursuant to this section, the Administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures or premiums received that are used to calculate an assessment ~~,~~ an administrative penalty of up to twice the amount of any underpaid assessment.

6. If:

(a) The Administrator determines that a person has violated any of the provisions of NRS 616D.200, 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive; and

(b) The Fraud Control Unit for Industrial Insurance of the Office of the Attorney General established pursuant to NRS 228.420 notifies the Administrator that the Unit will not prosecute the person for that violation,

➥ the Administrator shall impose an administrative fine of not more than $15,000.

7. Two or more fines of $1,000 or more imposed in 1 year for acts enumerated in subsection 1 must be considered by the Commissioner as evidence for the withdrawal of:

(a) A certificate to act as a self-insured employer.

(b) A certificate to act as an association of self-insured public or private employers.

(c) A certificate of registration as a third-party administrator.

8. The Commissioner may, without complying with the provisions of NRS 616B.327 or 616B.431, withdraw the certification of a self-insured employer, association of self-insured public or private employers or third-party administrator if, after a hearing, it is shown that the self-insured employer, association of self-insured public or private employers or third-party administrator violated any provision of subsection 1.

9. If the Administrator determines that a vocational rehabilitation counselor has violated the provisions of NRS 616C.543, the Administrator may impose an administrative fine on the vocational rehabilitation counselor of not more than $250 for a first violation, $500 for a second violation and $1,000 for a third or subsequent violation.

10. The Administrator may make a claim against the bond required pursuant to NRS 683A.0857 for the payment of any administrative fine or benefit penalty imposed for a violation of the provisions of this section.

2011 Statutes of Nevada, Page 120 (Chapter 28, AB 464, Sec. 25)

NRS 616D.120 Administrative fines and benefit penalties for certain violations; powers of Administrator; revocation or withdrawal of certificate of self-insurance or registration as third-party administrator; claim against bond for payment of administrative fines or benefit penalties.

1. Except as otherwise provided in this section, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator, employer or employee leasing company has:

(a) Induced a claimant to fail to report an accidental injury or occupational disease;

(b) Without justification, persuaded a claimant to:

(1) Settle for an amount which is less than reasonable;

(2) Settle for an amount which is less than reasonable while a hearing or an appeal is pending; or

(3) Accept less than the compensation found to be due the claimant by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 617, inclusive, of NRS;

(c) Refused to pay or unreasonably delayed payment to a claimant of compensation or other relief found to be due the claimant by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written

stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the refusal or delay occurs:

(1) Later than 10 days after the date of the settlement agreement or stipulation;

(2) Later than 30 days after the date of the decision of a court, hearing officer, appeals officer or the Division, unless a stay has been granted; or

(3) Later than 10 days after a stay of the decision of a court, hearing officer, appeals officer or the Division has been lifted;

(d) Refused to process a claim for compensation pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(e) Made it necessary for a claimant to initiate proceedings pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS for compensation or other relief found to be due the claimant by a hearing officer, appeals officer, court of competent jurisdiction, written settlement agreement, written stipulation or the Division when carrying out its duties pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(f) Failed to comply with the Division's regulations covering the payment of an assessment relating to the funding of costs of administration of chapters 616A to 617, inclusive, of NRS;

(g) Failed to provide or unreasonably delayed payment to an injured employee or reimbursement to an insurer pursuant to NRS 616C.165;

(h) Engaged in a pattern of untimely payments to injured employees; or

(i) Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter or chapter 616A, 616B, 616C or 617 of NRS,

➥ the Administrator shall impose an administrative fine of $1,500 for each initial violation, or a fine of $15,000 for a second or subsequent violation.

2. Except as otherwise provided in chapters 616A to 616D, inclusive, or chapter 617 of NRS, if the Administrator determines that an insurer, organization for managed care, health care provider, third-party administrator, employer or employee leasing company has failed to comply with any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, the Administrator may take any of the following actions:

(a) Issue a notice of correction for:

(1) A minor violation, as defined by regulations adopted by the Division; or

(2) A violation involving the payment of compensation in an amount which is greater than that required by any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto.

➥ The notice of correction must set forth with particularity the violation committed and the manner in which the violation may be corrected. The provisions of this section do not authorize the Administrator to modify or negate in any manner a determination or any portion of a determination made by a hearing officer, appeals officer or court of competent jurisdiction or a provision contained in a written settlement agreement or written stipulation.

(b) Impose an administrative fine for:

(1) A second or subsequent violation for which a notice of correction has been issued pursuant to paragraph (a); or

(2) Any other violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS, or any regulation adopted pursuant thereto, for which a notice of correction may not be issued pursuant to paragraph (a).

➥ The fine imposed must not be greater than $375 for an initial violation, or more than $3,000 for any second or subsequent violation.

(c) Order a plan of corrective action to be submitted to the Administrator within 30 days after the date of the order.

3. If the Administrator determines that a violation of any of the provisions of paragraphs (a) to (e), inclusive, (h) or (i) of subsection 1 has occurred, the Administrator shall order the insurer, organization for managed care, health care provider, third-party administrator, employer or employee leasing company to pay to the claimant a benefit penalty:

(a) Except as otherwise provided in paragraph (b), in an amount that is not less than $5,000 and not greater than $50,000; or

(b) Of $3,000 if the violation involves a late payment of compensation or other relief to a claimant in an amount which is less than $500 or which is not more than 14 days late.

4. To determine the amount of the benefit penalty, the Administrator shall consider the degree of physical harm suffered by the injured employee or the dependents of the injured employee as a result of the violation of paragraph (a), (b), (c), (d), (e), (h) or (i) of subsection 1, the amount of compensation found to be due the claimant and the number of fines and benefit penalties, other than a benefit penalty described in paragraph (b) of subsection 3, previously imposed against the insurer, organization for managed care, health care provider, third-party administrator, employer

or employee leasing company pursuant to this section. The Administrator shall also consider the degree of economic harm suffered by the injured employee or the dependents of the injured employee as a result of the violation of paragraph (a), (b), (c), (d), (e), (h) or (i) of subsection 1. Except as otherwise provided in this section, the benefit penalty is for the benefit of the claimant and must be paid directly to the claimant within 10 days after the date of the Administrator's determination. If the claimant is the injured employee and the claimant dies before the benefit penalty is paid to him or her, the benefit penalty must be paid to the estate of the claimant. Proof of the payment of the benefit penalty must be submitted to the Administrator within 10 days after the date of the Administrator's determination unless an appeal is filed pursuant to NRS 616D.140. Any compensation to which the claimant may otherwise be entitled pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS must not be reduced by the amount of any benefit penalty received pursuant to this subsection. To determine the amount of the benefit penalty in cases of multiple violations occurring within a certain period of time, the Administrator shall adopt regulations which take into consideration:

(a) The number of violations within a certain number of years for which a benefit penalty was imposed; and

(b) The number of claims handled by the insurer, organization for managed care, health care provider, third-party administrator, employer or employee leasing company in relation to the number of benefit penalties previously imposed within the period of time prescribed pursuant to paragraph (a).

5. In addition to any fine or benefit penalty imposed pursuant to this section, the Administrator may assess against an insurer who violates any regulation concerning the reporting of claims expenditures or premiums received that are used to calculate an assessment an administrative penalty of up to twice the amount of any underpaid assessment.

6. If:

(a) The Administrator determines that a person has violated any of the provisions of NRS 616D.200, 616D.220, 616D.240, 616D.300, 616D.310 or 616D.350 to 616D.440, inclusive; and

(b) The Fraud Control Unit for Industrial Insurance of the Office of the Attorney General established pursuant to NRS 228.420 notifies the Administrator that the Unit will not prosecute the person for that violation,

➥ the Administrator shall impose an administrative fine of not more than $15,000.

7. Two or more fines of $1,000 or more imposed in 1 year for acts enumerated in subsection 1 must be considered by the Commissioner as evidence for the withdrawal of:

(a) A certificate to act as a self-insured employer.

(b) A certificate to act as an association of self-insured public or private employers.

(c) A certificate of registration as a third-party administrator.

8. The Commissioner may, without complying with the provisions of NRS 616B.327 or 616B.431, withdraw the certification of a self-insured employer, association of self-insured public or private employers or third-party administrator if, after a hearing, it is shown that the self-insured employer, association of self-insured public or private employers or third-party administrator violated any provision of subsection 1.

9. If the Administrator determines that a vocational rehabilitation counselor has violated the provisions of NRS 616C.543, the Administrator may impose an administrative fine on the vocational rehabilitation counselor of not more than $250 for a first violation, $500 for a second violation and $1,000 for a third or subsequent violation.

10. The Administrator may make a claim against the bond required pursuant to NRS 683A.0857 for the payment of any administrative fine or benefit penalty imposed for a violation of the provisions of this section.

(Added to NRS by 1981, 1453; A 1985, 864; 1989, 1593; 1991, 2427; 1993, 756, 758, 1874; 1995, 531, 542, 1642, 2160; 1997, 533, 535, 3219; 1999, 1796, 3148; 2001, 2455; 2003, 1677; 2005, 1101; 2007, 3363; 2009, 1131, 3040; 2011, 120)

DEPARTMENT OF BUSINESS & INDUSTRY
DIVISION OF INDUSTRIAL RELATIONS/WORKERS' COMPENSATION SECTION
400 West King Street, Suite 400 Carson City, Nevada 89703
Telephone: (775) 684-7270 Fax: (775) 687-6305

COMPLAINT FORM

Last Name	First Name		Social Security No.	
Home Address	City	State	Zip Code	Home Phone No.
Employer	Work Phone No.	Date of Injury	Claim No.	
Insurer/Third Party Administrator	Address		Phone Number	

WHAT DO YOU WISH TO ACCOMPLISH WITH THIS COMPLAINT?

CIRCUMSTANCES LEADING YOU TO FILE THIS COMPLAINT:

Note: If additional space is required, please attach additional sheets, along with any available documentation.

☐ I have contacted the Nevada Attorney for Injured Workers

☐ I have contacted the Office of Consumer Health Assistance

COMPLAINANT'S SIGNATURE

DATE

Complaint form cc (Rev. 4/2016)

DEPARTMENT OF BUSINESS & INDUSTRY
DIVISION OF INDUSTRIAL RELATIONS/WORKERS' COMPENSATION SECTION
3360 West Sahara Ave., Suite 250, Las Vegas, NV 89102
Telephone: (702) 486-9000 or (702) 486-9080
Fax: (702) 486-8712

COMPLAINT FORM

Last Name	**First Name**		**Social Security No.**	
Home Address	**City**	**State**	**Zip Code**	**Home Phone No.**
Employer	**Work Phone No.**	**Date of Injury**	**Claim No.**	
Insurer/Third Party Administrator	**Address**		**Phone Number**	

WHAT DO YOU WISH TO ACCOMPLISH WITH THIS COMPLAINT?

CIRCUMSTANCES LEADING YOU TO FILE THIS COMPLAINT:

Note: If additional space is required, please attach additional sheets, along with any available documentation.

☐ I have contacted the Nevada Attorney for Injured Workers.

☐ I have contacted the Office of Consumer Health Assistance.

COMPLAINANT'S SIGNATURE _____ DATE _____

Complaint form lv (Rev. 6/2018)