2017 NEVADA WORKERS COMPENSATION EDUCATIONAL CONFERENCE

New Developments in Nevada Workers Compensation Subrogation

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Workers Compensation and Subrogation/Who gets the money?

I. NRS 616C.215 Providing for offsets and subrogation in certain third-party liability situations.

NRS 616C.215 Actions and proceedings to recover damages in tort or from proceeds of vehicle insurance: Reduction of compensation by amount of recovery; rights of injured employee or dependents and of insurer or Administrator; notification and payment of insurer or Administrator; instructions to jury; calculation of employer's premium.

1. If an injured employee or, in the event of his or her death, the dependents of the employee, bring an action in tort against his or her employer to recover payment for an injury which is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and, notwithstanding the provisions of NRS 616A.020, receive payment from the employer for that injury:

(a) The amount of compensation the injured employee or the dependents of the employee are entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount paid by the employer.

(b) The insurer, or in the case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, has a lien upon the total amount paid by the employer if the injured employee or the dependents of the employee receive compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS.

This subsection is applicable whether the money paid to the employee or the dependents of the employee by the employer is classified as a gift, a settlement or otherwise. The provisions of this subsection do not grant to an injured employee any right of action in tort to recover damages from the employer for the injury.

2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:

(a) The injured employee, or in case of death the dependents of the employee, may take proceedings against that person to recover damages, but the amount of the compensation the injured employee or the dependents of the employee are entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of the damages recovered, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.

(b) If the injured employee, or in case of death the dependents of the employee, receive compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer, or in case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of the employee's dependents to recover therefor.

3. When an injured employee incurs an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances entitling the employee, or in the case of death the dependents of the employee, to receive proceeds under his or her employer's policy of uninsured or underinsured vehicle coverage:

(a) The injured employee, or in the case of death the dependents of the employee, may take proceedings to recover those proceeds, but the amount of compensation the injured employee or the dependents of the employee are entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of proceeds received.

(b) If an injured employee, or in the case of death the dependents of the employee, receive compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer, or in the case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, is subrogated to the rights of the injured employee or the dependents of the employee to recover proceeds under the employer's policy of uninsured or underinsured vehicle coverage. The insurer and the Administrator are not subrogated to the rights of an injured employee or the dependents of the employee under a policy of uninsured or underinsured vehicle coverage purchased by the employee.

(c) Any provision in the employer's policy of uninsured or underinsured vehicle coverage which has the effect of:

(1) Limiting the rights of the injured employee or the dependents of the employee to recover proceeds under the policy because of the receipt of any compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS;

(2) Limiting the rights of subrogation of the insurer or Administrator provided by paragraph (b); or

(3) Excluding coverage which inures to the direct or indirect benefit of the insurer or Administrator,
is void.

4. In any action or proceedings taken by the insurer or the Administrator pursuant to this section, evidence of the amount of compensation, accident benefits and other expenditures which the insurer, the Uninsured Employers' Claim Account or a subsequent injury account have paid or become obligated to pay by reason of the injury or death of the employee is admissible. If in such action or proceedings the insurer or the Administrator recovers more than those amounts, the excess must be paid to the injured employee or the dependents of the employee.

5. In any case where the insurer or the Administrator is subrogated to the rights of the injured employee or of the employee's dependents as provided in subsection 2 or 3, the insurer or the Administrator has a lien upon the total proceeds of any recovery from some person other than the employer, whether the proceeds of such recovery are by way of judgment, settlement or otherwise. The injured employee, or in the case of his or her death the dependents of the employee, are not entitled to double recovery for the same injury, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.

6. The lien provided for pursuant to subsection 1 or 5 includes the total compensation expenditure incurred by the insurer, the Uninsured Employers' Claim Account or a subsequent injury account for the injured employee and the dependents of the employee.

7. An injured employee, or in the case of death the dependents of the employee, or the attorney or representative of the injured employee or the dependents of the employee, shall notify the insurer, or in the case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, in writing before initiating a proceeding or action pursuant to this section.

8. Within 15 days after the date of recovery by way of actual receipt of the proceeds of the judgment, settlement or otherwise:

(a) The injured employee or the dependents of the employee, or the attorney or representative of the injured employee or the dependents of the employee; and

(b) The third-party insurer,

shall notify the insurer, or in the case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, of the recovery and pay to the insurer or the Administrator, respectively, the amount due pursuant to this section together with an itemized statement showing the distribution of the total recovery. The attorney or representative of the injured employee or the dependents of the employee and the third-party insurer are jointly and severally liable for any amount to which an insurer is entitled pursuant to this section if the

attorney, representative or third-party insurer has knowledge of the lien provided for in this section.

9. An insurer shall not sell its lien to a third-party insurer unless the injured employee or the dependents of the employee, or the attorney or representative of the injured employee or the dependents of the employee, refuses to provide to the insurer information concerning the action against the third party.

10. In any trial of an action by the injured employee, or in the case of his or her death by the dependents of the employee, against a person other than the employer or a person in the same employ, the jury must receive proof of the amount of all payments made or to be made by the insurer or the Administrator. The court shall instruct the jury substantially as follows:

Payment of workmen's compensation benefits by the insurer, or in the case of claims involving the Uninsured Employers' Claim Account or a subsequent injury account the Administrator, is based upon the fact that a compensable industrial accident occurred, and does not depend upon blame or fault. If the plaintiff does not obtain a judgment in his or her favor in this case, the plaintiff is not required to repay his or her employer, the insurer or the Administrator any amount paid to the plaintiff or paid on the behalf of the plaintiff by the plaintiff's employer, the insurer or the Administrator.

If you decide that the plaintiff is entitled to judgment against the defendant, you shall find damages for the plaintiff in accordance with the court's instructions on damages and return your verdict in the plaintiff's favor in the amount so found without deducting the amount of any compensation benefits paid to or for the plaintiff. The law provides a means by which any compensation benefits will be repaid from your award.

11. To calculate an employer's premium, the employer's account with the private carrier must be credited with an amount equal to that recovered by the private carrier from a third party pursuant to this section, less the private carrier's share of the expenses of litigation incurred in obtaining the recovery, except that the total credit must not exceed the amount of compensation actually paid or reserved by the private carrier on the injured employee's claim.

12. As used in this section, "third-party insurer" means an insurer that issued to a third party who is liable for damages pursuant to subsection 2, a policy of liability insurance the proceeds of which are recoverable pursuant to this section. The term includes an insurer that issued to an employer a policy of uninsured or underinsured vehicle coverage.

II. Breen v. Caesars Palace, 102 Nev. 79 (1986)

In Breen, a Department of Administration Appeals Officer ruled that a self-insured employer (Caesars) could assert a subrogation lien against the proceeds of a third-party medical malpractice settlement, and the District Court affirmed on Caesars Petition for Judicial Review. On appeal to the Nevada Supreme Court, the Court held a) that a Nevada self-insured employer may assert a subrogation lien in such a case; b) that the lien did not extend to medical expenses accrued before the medical malpractice occurred; c) that in such a circumstance, the self-insured employer had to pay a percentage of the malpractice litigation costs; and d) the self-insured employers' lien included recovery of non-economic damages—and non-economic damages include claims for "loss of society" and "loss of association" which are NOT benefits under Chapter 616 of the NRS.

III. State Indus. Ins. System v. Eighth Judicial District Court, 111 Nev. 28 (1995)

After the Nevada District Court issued an Order denying SIIS' petition to intervene in an injured workers suit against a third-party tortfeasor, SIIS petitioned the Nevada Supreme Court for a writ of mandamus that would allow them to intervene; that Court ultimately ruled that SIIS had such a right based on the clear dictates of NRS 616C.215.

IV. Silvera v. Employers Insurance Company Of Nevada, 118 Nev. 105 (2002)

In Silvera, a workers' compensation Claimant brought a personal injury action against the motorist involved in his third-party injury, and against that motorist's automobile uninsured/underinsured ("UM") policy. After receiving workers compensation benefits and settling with both defendants, Claimant filed a Motion with the District Court requesting an Order from the Court holding that Claimant's workers compensation insurer had no subrogation rights against the UM policies proceeds and the District Court denied the Motion—and the Nevada Supreme Court on appeal held that Claimant's workers compensation insurer did not have such subrogation rights with respect to the UM policy under these circumstances. As the Court explained, neither party to the action disputed that NRS 616C.215(3)(b) expressly permits subrogation against a UM policy maintained by the employer and prohibits subrogation against a UM policy maintained by the employee/claimant; the issue in Silvera was whether the workers compensation insurer could assert subrogation rights against a UM policy that is maintained by a party other than the employer or employee. The Court stated that in prior holdings they had held that a UM insurance company was not an entity with a legal liability to pay damages within the meaning of NRS 616C.215, and therefore in this case, they concluded that the statute does not grant the workers compensation insurer in Nevada a right of subrogation against a UM policy maintained by a party other than the employer or employee.

V. American Home Assur. Co. v. Eighth Judicial Dist. Court ex..., 122 Nev. 1229 (2006)

In American Home, a Claimant brought a personal injury action against a third-party tortfeasor in the Eighth Judicial District Court and the Court denied the workers compensation insurer's application/motion to intervene. The workers compensation insurer filed a writ of mandamus with the Nevada Supreme Court on the denial and after argument, the Court held

1) workers compensation insurers do not have an unconditional right to intervene in a Claimant's action against a third-party tortfeasor; 2) that generally an injured workers representation in an action against a third-party tortfeasor would be adequate to protect a workers compensation insurer's subrogation interest; and 3) therefore the trial court did not abuse its discretion in denying the Motion to intervene—and in fact workers compensation insurers already have a statutory lien against any proceeds obtained by Claimants in separate actions against such third-party tortfeasors.

VI. Employers Ins. Co. of Nevada v. Chandler, 117 Nev. 421 (2001)

A Claimant who was injured in a work-related motor vehicle accident and received workers compensation benefits and also received a third-party settlement for his injuries, later sought to reopen his workers compensation claim for further psychological treatment. At an administrative hearing, an Appeals Officer ruled that Claimant was entitled to receive medical benefits without first exhausting the entire amount of the third-party settlement proceeds and the District Court denied the employer's appeal of that ruling. On appeal to the Nevada Supreme Court, the Court reversed the District Court and held that denial of further medical benefits for Claimant's work related injury was warranted under NRS 616C.215 until Claimant exhausted his third-party proceeds.

VII. Poremba v. Southern Nevada Paving, 133 Nev. Adv. Op. 2, 388 P.3d 232 (2017)

A Claimant who was injured in a work-related MVA and who received a third-party settlement for his injuries, sought to reopen his workers compensation claim. After an Appeals Officer hearing, the Appeals Officer granted the workers compensation insurer summary judgment because Claimant admitted that he spent the third-party settlement funds on expenses other than medical expenses. Claimant appealed to the District Court and that Court essentially affirmed the Appeals Officer below. Claimant appealed to the Nevada Supreme Court and ultimately the Court ruled 1) An Appeals Officer must first reopen a workers compensation claim based solely on the statutory requirements set out in Chapter 616 of the NRS, and then determine what, if any, reimbursements owed to the workers compensation insurer; 2) The workers compensation insurer is not entitled to reimbursement from the portion of the settlement funds designated to compensate Claimant for pain and suffering; 3) Claimant was not required to prove that he spent excess tort recovery on medical expenses as a condition precedent to the reopening of his claim; 4) The Appeals Officer was required to determine whether Claimant qualified for reopening of his claim before considering whether the workers compensation insurer was entitled to reimbursement; and 5) An evidentiary hearing was necessary to determine the correct allocation of settlement funds and potential reimbursement of the workers compensation insurer.

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Esquivel v. Labor Com'n, Utah App., January 22, 1999

102 Nev. 79
Supreme Court of Nevada.

Raina Lee BREEN, widow of John J. Breen, deceased, and Mark Anthony Breen and Crystal Fay Breen, infants, by Raina Lee Breen, as their guardian, and John Joseph Breen, infant, by Debra Ann Meyers, as his guardian, Appellants,
v.
CAESARS PALACE, A Nevada corporation, Respondent.

No. 16164.
|
March 13, 1986.

Department of Administration permitted self-insured employer to assert a subrogation lien against proceeds of a third-party medical malpractice settlement. The Eighth Judicial District Court, Clark County, Thomas A. Foley, J., affirmed, and appeal was taken. The Supreme Court held: (1) self-insured employer may assert a subrogation interest in a medical malpractice recovery; (2) lien did not extend to medical expenses accrued before the medical malpractice occurred; (3) employer was to bear portion of malpractice litigation costs; and (4) lien extended to recovery of noneconomic damages.

Affirmed in part; reversed and granted in part.

West Headnotes (6)

[1] **Workers' Compensation**
⇦ Rights of Employer or Insurer as Subrogee or Transferee

Self-insured employer could assert subrogation lien against proceeds of third-party medical malpractice settlement. N.R.S. 616.560.

1 Cases that cite this headnote

[2] **Workers' Compensation**
⇦ Lien of Employer or Insurer

In determining whether legislature intended to give compensation carriers or self-insured employers an unrestricted lien on third-party recovery when it used the phrase "total proceeds" the court could look to the purpose of the statute as a whole, as evidence by the statutory scheme. N.R.S. 616.560.

7 Cases that cite this headnote

[3] **Workers' Compensation**
⇦ Rights of Employer or Insurer as Subrogee or Transferee

Employer's lien on medical malpractice recovery obtained by deceased employee's survivors did not encompass medical expenses which accrued before the medical malpractice occurred, notwithstanding that statute gives a lien on the "total proceeds." N.R.S. 616.560, subd. 2.

7 Cases that cite this headnote

[4] **Workers' Compensation**
⇦ Rights of Employer or Insurer as Subrogee or Transferee

Employer would be unjustly enriched if it could assess its compensation lien against total proceeds of medical malpractice settlement without bearing its share of litigation expenses; employer's share of litigation expenses was the total amount of lien divided by the settlement minus fees and costs, and workman's survivors' share was the amount of excess recovery over the amount due under the compensation act divided by the settlement minus fees and costs. N.R.S. 616.560.

10 Cases that cite this headnote

[5] **Workers' Compensation**
Rights of Employer or Insurer as Subrogee or Transferee

Self-insured employer's subrogation interest in "total proceeds" of medical malpractice settlement included that portion of settlement proceeds attributable to noneconomic losses, i.e., loss of deceased workman's society, association, protection, etc., notwithstanding that the Industrial Injury Act does not compensate workers for noneconomic damages. N.R.S. 616.560.

3 Cases that cite this headnote

[6] **Workers' Compensation**
Meaning of Language in General

Where a liberal construction of Industrial Injury Act would not further legislative purpose to compensate injured employees the court is bound by the literal language. N.R.S. 616.560.

5 Cases that cite this headnote

Attorneys and Law Firms

**1070 *79 Vannah, Roark & Madson and Stephen G. Snyder, Las Vegas, for appellants.

King, Clark, Gross & Sutcliffe, Las Vegas, for respondent.

*80 OPINION

PER CURIAM:

In this appeal appellants challenge a district court order upholding an appeals officer's **1071 decision to permit a self-insured employer to assert a subrogation lien against the proceeds of a third-party malpractice settlement. We affirm the order insofar as it permits the employer to assert the lien but reverse and remand with instructions for a determination of the proper scope of the lien.

THE FACTS

On June 13, 1981, John J. Breen (hereafter "Decedent") was refueling a portable stove in the course of his duties as a banquet chef for respondent Caesars Palace (hereafter "Caesars") when the stove exploded causing Decedent to suffer serious but apparently non-fatal burns over 35% of his body. Decedent was admitted to Southern Nevada Memorial Hospital where he died two days later from an accumulation of fluid in his lungs.

Caesars, a self-insured employer, paid Decedent's medical bills, burial expenses and pension benefits to appellants, Decedent's wife and three minor children.

In a malpractice suit filed against Decedent's treating physicians and the hospital, appellants alleged that Decedent's death was not caused by the burns but by negligent medical treatment. Specifically, appellants alleged that the doctors had pumped fluids into Decedent faster than his body could expel them, causing his lungs to fill with fluid and drown him.

Caesars filed a subrogation lien against the prospective settlement proceeds on July 27, 1983. Appellants settled the malpractice suit against the doctors and hospital for $1,000,000.00 on August 18, 1983. At the time of settlement, Caesars had disbursed *81 $39,728.16 in benefits to appellants. Caesars had also reserved $650,000.00 as future pension benefits.

Appellants reimbursed Caesars the $39,728.16 in benefits out of the $1,000,000.00 settlement. In its letter acknowledging the receipt of the $39,728.16, Caesars broke down the settlement per appellant and declared the offset it was claiming as to each appellant's pension benefits. Caesars stopped paying pension benefits at the time of the settlement.

Appellants challenged the propriety of Caesar's subrogation interest in the malpractice settlement proceeds before a Department of Administration hearing officer. The hearing officer, the appeals officer and the district court all found for Caesars, concluding that, pursuant to NRS 616.560, Caesars was entitled to assert a subrogation lien against the malpractice settlement proceeds for the entire amount due appellants under worker's compensation. From the district court's order affirming the decision of the appeals officer, appellants bring this appeal.

DISCUSSION

[1] Pursuant to NRS 616.560[1] an employer may assert a subrogation interest in **1072 compensation paid to an employee by a third-party *82 tortfeasor where a work-related "injury was caused under circumstances creating a legal liability" in a third party. Injury is defined in the Nevada Industrial Insurance Act (NIIA) as "a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result." NRS 616.110(1). Appellants contend that Caesars may not assert a subrogation lien on the malpractice settlement because the malpractice injury was severable from the work-related injury; appellants argue that the definition of injury does not encompass the aggravation of an original injury by medical malpractice.

We conclude, however, that the aggravation of an injury by medical malpractice is within the scope of risks created at the time the original injury occurs. Since an employer must compensate the employee for the aggravation of the injury[2] it stands to reason that the employer should be able to seek reimbursement from the third party via a subrogation lien. We will not construe a statute to produce an unreasonable result when another interpretation will produce a reasonable result. *See Alper v. State ex rel. Dep't of Hwys.*, 96 Nev. 925, 930, 621 P.2d 492 (1980). Appellants construction of the statute would indeed produce an unreasonable result by permitting an employee to recover twice for the same injury. The statutory scheme itself contemplates that an employee should not be allowed to receive a double recovery. NRS 616.560(2) provides that an "employee, or in the case of his death his dependents, are not entitled to double recovery for the same injury." In holding that an employer is entitled to reimbursement from malpractice proceeds we join the overwhelming majority of jurisdictions which have construed their statutes to permit subrogation under similar circumstances. *See* 2A Larson, *Law of Workmen's Compensation* §§ 72.61(a), 72.65(e) (1983).

Having decided that Caesars' assertion of a subrogation lien was proper, we now determine the scope of that lien. The district *83 court concluded that Caesars could discontinue paying benefits to appellants until the entire $1,000,000.00 settlement had been offset. Appellants contend that pre-malpractice medical expenses, non-economic damages and attorney's fees and costs must first be deducted from the settlement before calculating Caesars' lien. Caesars argues that the statutory language makes no provision for adjusting the amount of the lien but instead provides that the "insurer has a lien upon the *total proceeds* of any recovery from" a third party. NRS 616.560(2) (emphasis added).

[2] To determine whether the legislature intended to give insurers an unrestricted lien on third-party recoveries when it used the phrase "total proceeds," we may look to the purpose of the statute as a whole as evidenced by the statutory scheme. *See Colello v. Administrator, Real Est. Div.*, 100 Nev. 344, 683 P.2d 15 (1984). It is unquestionably the purpose of worker's compensation laws "to provide economic **1073 assistance to persons who suffer disability or death as a result of their employment." *SIIS v. Jesch*, 101 Nev. 690, 709 P.2d 172 (1985). "This court has a long-standing policy of liberally construing these laws to protect workers and their families." *Id.* Mindful of these guidelines, we proceed to analyze each of the deductions claimed by appellants.

Pre-Malpractice Medical Expenses

[3] Appellants contend that Caesars should reimburse them for $4,860.34 in medical expenses which accrued before the medical malpractice

occurred. Presumably the malpractice settlement compensated appellants only for expenses related to the malpractice; appellants will not be compensated for expenses that accrued before the malpractice if Caesars is allowed to obtain reimbursement out of the settlement proceeds for expenses unrelated to the malpractice.

A literal reading of NRS 616.560(3) would, however, permit insurers to recoup expenses out of third-party proceeds even though the proceeds had not compensated the employee for those expenses:

> The lien provided for under subsection 2 includes the *total compensation expenditure* incurred by the insurer for the injured employee and his dependents.

NRS 616.560(3) (emphasis added).

" 'The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained will prevail over the literal sense.' [citations omitted]." *84 *Welfare Div. v. Washoe Co. Welfare Dep't,* 88 Nev. 635, 637, 503 P.2d 457 (1972). We decline to read NRS 616.560(3) literally as it is evident that the statutory scheme was designed to accommodate situations where the work-related injury and third-party tortious conduct occur simultaneously. In the usual situation, medical expenses for the work-related injury and the third-party injury will not be severable. Other jurisdictions which have had to deal with similar statutory gaps have held that the insurer's lien extends only to the expenses attributable to the medical aggravation of the injury. "In other words the amount of the employer's lien is limited to the amount that he is required to pay because of the malpractice." *Heaton v. Kerlan,* 27 Cal.2d 716, 166 P.2d 857, 861 (1946); *see also Drypolcher v. New York Tel. Co.,* 85 App.Div.2d 895, 446 N.Y.S.2d 728, 729 (1981) (employer may not recoup through subrogation lien "any sums expended prior to the occurrence of the malpractice"); 2A Larson, *Law of Workmen's Compensation* § 72.65(b) (1983) (citing *Heaton* as achieving fair and sensible results in face of statute that fails to segregate payments for original and aggravated portions of a compensable injury).

We conclude that the legislative intent to compensate injured employees should prevail over the literal reading of the statute. Caesars must reimburse appellants for the $4,860.34 in medical expenses that accrued prior to the malpractice.

Attorney's Fees and Costs

We next determine whether Caesars' lien should extend to only two-thirds of the settlement proceeds because appellants paid one-third of the proceeds in attorney's fees and costs. NRS 616.560 makes no provision for the allocation of these expenses between the insurer and the injured employee.

"Under third-party statutes containing no reference to fees and costs, the majority of courts currently hold that the carrier or employer may be charged with a proportionate share of the costs and attorneys' fees incurred by the employee in the third-party suit." 2A Larson, *Law of Workmen's Compensation* § 74.32(a)(3) (1983). Jurisdictions which have held an employer liable for a proportionate share of litigation expenses in the absence of an authorizing statute have done so on principles of equity and unjust enrichment:

> Where no guidance is given ... fundamental fairness must be the guidelines. In the instant case it was the claimant who bore the burden of the expense and risk of litigation of the third party action. It would be unduly burdensome on the **1074 claimant to pay all of the expenses and by the same token it would unjustly enhance the economic position of the carrier not to assess a portion of the costs against it.

*85 *Transport Indemnity Company v. Garcia,* 552 P.2d 473, 476 (N.M.Ct.App.1976). *See also Security Insurance Company of Hartford v. Norris,* 439 S.W.2d 68, 70 (Ky.1969) (employer/insurer's

liability for litigation costs based on principles of equity, fairness and justice, such as are invoked in cases of unjust enrichment).

[4] We conclude that Caesars would be unjustly enriched if it were permitted to assess its lien against the total proceeds of the settlement without bearing its share of litigation expenses. Caesars will have obtained a substantial benefit, the almost complete extinguishment of its obligation to appellants, at appellants' expense if Caesars is not held accountable for a proportionate share of the cost of obtaining the settlement. We are unable to determine the parties' proportionate shares of the attorney's fees and costs on the record before us. We instruct the district court to determine upon remand the parties' respective shares according to the following formulas:

$$\text{Caesars' share} = \frac{\text{Total amount of lien}}{\text{Settlement—(fees and costs)}}$$

$$\text{Appellants' share} = \frac{\text{Excess recovery over amount due under NIIA}}{\text{Settlement—(fees and costs)}}$$

To illustrate how these formulas work, we provide the following hypothetical. Suppose the district court determines Caesars' lien to be $650,000.00. Appellants' excess recovery is then computed by deducting attorney's fees, costs and Caesars' lien from the total settlement: $1,000,000.00 − 333,333.33 − 650,000.00 = $16,666.66. By inserting these figures into the formulas, we arrive at the parties' proportionate shares:

$$\text{Caesars' share} = \frac{650{,}000.00}{1{,}000{,}000.00 - 333{,}333.33} = .975$$

$$\text{Appellants' share} = \frac{16{,}666.66}{1{,}000{,}000.00 - 333{,}333.33} = .025$$

Caesars thus bears 97.5% of the litigation expenses; appellants bear the remaining 2.5%.[3]

*86 *Non-economic Damages*

[5] In their malpractice suit, appellants sought compensation for non-economic losses, i.e., the loss of Decedent's society, association, protection, etc. Non-economic losses are not compensable under the NIIA. Therefore appellants contend that Caesars' subrogation lien should extend only to that portion of the malpractice proceeds attributable to economic losses.

The prevailing rule in the United States has been to allow an employer to reach an entire award or

settlement even where the non-economic damages have been segregated and identified. 2A Larson, *Law of Workmen's Compensation* § 74.35 (1983). In *United States v. Lorenzetti,* 467 U.S. 167, 104 S.Ct. 2284, 81 L.Ed.2d 134 (1984), a federal employee was injured in a car accident in the course of his employment. He **1075 received payment for his medical expenses and lost wages under the Federal Employees' Compensation Act (FECA) which, like the NIIA, does not compensate victims for non-economic damages. The employee recovered only damages for pain and suffering from the driver of the other car because the no-fault insurance system in effect limited the other driver's liability to non-economic damages. The Supreme Court held that the Government was entitled to reimbursement from the third-party award even though the award was for damages not compensable under FECA. The Court reasoned that Congress knew that third-party recoveries might encompass compensation for pain and suffering when it enacted FECA with the provision giving the Government an unrestricted right of reimbursement. Had the Legislature wanted to restrict the right of reimbursement, the Court concluded, it could have done so. "It is for Congress, not the courts, to revise longstanding legislation in order to accommodate the effects of changing social conditions. Congress simply has not done so here." *Id.* at ——, 104 S.Ct. at 2292.

In interpreting their state worker's compensation statutes, other courts have been influenced by language in the statute permitting the employer a subrogation right in the "total" proceeds. The Arizona Supreme Court held that an insurer's lien extended to the employee's entire third-party recovery, including items not covered by worker's compensation, because the statute speaks of "total recovery." *See Hendry v. Industrial Commission,* 112 Ariz. 108, 538 P.2d 382 (1975), *cert. denied,* 424 U.S. 923, 96 S.Ct. 1133, 47 L.Ed.2d 332 (1976). The court concluded that the statutory language was controlling even if it did produce an inequitable result.

We similarly conclude that we are bound by the statutory language which gives an insurer a subrogation interest in the "total proceeds." It is the legislature's prerogative, not this *87 court's, to correct any injustice occasioned by a literal reading of the statute. The rules of statutory construction which enabled us to liberally construe NRS 616.560 with respect to the payment of pre-malpractice medical expenses and attorney's fees and costs are not applicable here. With respect to this issue, there is no room for statutory interpretation; the language of the statute is plain and no legislative purpose would be served by deviating from the literal language. *See Spencer v. Harrah's, Inc.,* 98 Nev. 99, 641 P.2d 481 (1982).

[6] The literal reading of the statute controls with respect to this issue because, unlike the issue of pre-malpractice medical expenses, the purpose of the statute is not thwarted by a literal reading. The NIIA was enacted to compensate injured employees for *economic* losses. Since a liberal construction would not further this purpose, we are bound by the literal language.

In concluding that Caesars should bear a proportionate share of attorney's fees and costs, we did not usurp the legislative function. We were able to reach an equitable result on that issue because of the absence of legislative guidance. Here, however, the legislature has provided that an insurer's lien extends to the "total proceeds" of a third-party recovery. We conclude that the legislature must have known that this language might permit an insurer to reach an employee's non-economic loss recovery from a third party. The legislature may well have decided that the objective of reimbursing the insurer would prevail over the employee's interest in a recovery for non-economic losses.

CONCLUSION

This matter is remanded to the district court with instructions to determine the scope of Caesars' lien in conformance with this opinion.

MOWBRAY, C.J., SPRINGER, GUNDERSON and YOUNG, JJ., and WHITE, District Judge,[4] concur.

All Citations

102 Nev. 79, 715 P.2d 1070

Footnotes

1 NRS 616.560 provides in pertinent part:

> 1. When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which injury was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee, or in case of death, his dependents, may take proceedings against that person to recover damages, but the amount of the compensation to which the injured employee or his dependents are entitled under this chapter, including any future compensation under this chapter, must be reduced by the amount of the damages recovered, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.
>
> (b) If the injured employee, or in case of death his dependents, receive compensation under this chapter, the insurer has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of his dependents to recover therefor. In any action or proceedings taken by the insurer under this section evidence of the amount of compensation, accident benefits and other expenditures which the insurer has paid or become obligated to pay by reason of the injury or death of the employee is admissible. If in such action or proceedings the insurer recovers more than the amounts it has paid or become obligated to pay as compensation, the excess must be paid to the injured employee or his dependents.
>
> (c) The injured employee, or in the case of death his dependents, shall first notify the insurer in writing of any action or proceedings, pursuant to this section, to be taken by the employee or his dependents.
>
> 2. In any case where the insurer is subrogated to the rights of the injured employee or of his dependents as provided in subsection 1, the insurer has a lien upon the total proceeds of any recovery from some person other than the employer, whether the proceeds of such recovery are by way of judgment, settlement or otherwise. The injured employee, or in the case of his death his dependents, are not entitled to double recovery for the same injury, notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.
>
> 3. The lien provided for under subsection 2 includes the total compensation expenditure incurred by the insurer for the injured employee and his dependents.

2 Jurisdictions which have addressed the issue universally hold that an "employer is liable in compensation for aggravation of a compensable injury by a physician's negligence." 2A Larson, *Law of Workmen's Compensation* § 72.61(c) (1983). This is the apparent policy of the Department of Administration and is uncontested by Caesars in this appeal.

3 If Caesars' lien equals or exceeds $666,666.66, Caesars will, obviously, bear the total litigation expense.

4 The Honorable Earle White, Jr., Judge of the Eighth Judicial District Court, was designated by the Governor to sit in place of Justice Thomas L. Steffen, who voluntarily disqualified himself. Nev. Const., art. 6, § 4.

End of Document

State Indus. Ins. System v. Eighth Judicial District Court,
111 Nev. 28 (1995)

KeyCite Red Flag - Severe Negative Treatment
Overruled by American Home Assur. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark, Nev., December 21, 2006

111 Nev. 28
Supreme Court of Nevada.

STATE INDUSTRIAL INSURANCE SYSTEM, a Public Agency of the State of Nevada, Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, In and For the COUNTY OF CLARK, and the Honorable Donald M. Mosley, District Judge, Respondents,
Monarch Beverage Company, d/b/a Coors of Las Vegas, and Craig Mytton, Real Parties in Interest.

No. 24300.
|
Jan. 24, 1995.

After the Eighth Judicial District Court, Clark County, Donald M. Mosley, J., denied request of State Industrial Insurance System (SIIS) to intervene in claimant's suit against third-party tort-feasor, SIIS petitioned for writ of mandamus allowing its intervention. The Supreme Court, Young, J., held that SIIS had right to intervene.

Petition granted.

Rose, J., filed opinion concurring in result, in which Shearing, J., joined.

West Headnotes (5)

[1] **Mandamus**
⇦ Nature of Acts to Be Commanded

Writ of mandamus is available to compel performance of act which law requires as duty resulting from office, trust or station, or to control arbitrary or capricious exercise of discretion.

Cases that cite this headnote

[2] **Mandamus**
⇦ Remedy at Law

Writ of mandamus will not issue if petitioner has plain, speedy and adequate remedy in ordinary course of law. N.R.S. 34.170.

Cases that cite this headnote

[3] **Mandamus**
⇦ Modification or Vacation of Judgment or Order

Petition for writ of mandamus was appropriate method to seek relief from trial court's denial of application to intervene as party in action since petitioner could not appeal district court's order. N.R.S. 34.170.

1 Cases that cite this headnote

[4] **Workers' Compensation**
⇦ New Parties, Intervention, and Substitution

State Industrial Insurance System (SIIS) could intervene as of right in claimant's suit against alleged third-party tort-feasor; SIIS had independent statutory right of action against tort-feasor, and it did not make judicial or economic sense to deny intervention and force SIIS to file independent action. Rules Civ.Proc., Rule 24(a)(1); N.R.S. 616.560, 616.560, subd. 1(b).

1 Cases that cite this headnote

[5] **Workers' Compensation**
⇦ New Parties, Intervention, and Substitution

State Industrial Insurance System (SIIS) had right to intervene in claimant's suit against third-party tort-feasor where request to intervene was timely, it had interest in underlying

suit, and right to participate in lawsuit would help preserve size of its lien recovery; SIIS could avoid reduction of lien by intervening and expending its own monies and efforts to obtain adequate settlement or judgment, and thereby avoid proportional reduction of its lien recovery for claimant's litigation expenses. Rules Civ.Proc., Rule 24(a)(2); N.R.S. 616.560, 616.560, subd. 1(b).

2 Cases that cite this headnote

Attorneys and Law Firms

**911 *28 Riley M. Beckett and Laurie A. Yott, Carson City, for petitioner.

Samuel A. Harding, Peter L. Flangas, Thorndal, Backus, Armstrong & Balkenbush, and Brian K. Terry, Las Vegas, for real parties in interest.

*29 *OPINION*

YOUNG, Justice:

FACTS

The facts relevant to this petition are not in dispute. Art Axas ("Axas"), an employee of Von's Grocery Store, was injured at work when a stack of water bottles crashed on top of him. The accident was caused by a forklift driver employed by Monarch Beverage Company. Axas was injured in the course of his employment and therefore petitioner the State Industrial Insurance System ("SIIS") began paying him insurance benefits. As of January 8, 1993, SIIS had paid Axas approximately $73,000.00.

Axas filed a lawsuit against respondents Monarch Beverage Company and the driver, **912 Craig Mytton, (collectively "Monarch") in the Eighth Judicial District Court on June 13, 1990. On February 2, 1993, SIIS sought to intervene in the action. Plaintiff's counsel welcomed SIIS's assistance. Monarch, however, opposed the intervention. On March 18, 1993, the district court denied SIIS's request to intervene, reasoning that its lien and subrogation rights were adequately represented by Axas' counsel. *30 The court also reasoned that SIIS's participation in the lawsuit would only serve to confuse the jury and complicate the litigation process.

SIIS petitions this court for a writ of mandamus, claiming that it has a right to intervene in accordance with NRS 616.560 and NRCP 24. We agree and accordingly grant the petition for a writ of mandamus.

DISCUSSION

[1] [2] A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *see also Round Hill Gen. Imp. Dist. v. Newman,* 97 Nev. 601, 637 P.2d 534 (1981). A writ of mandamus will not issue, however, if petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. *See* NRS 34.170.

[3] As a preliminary matter, we note that this petition is appropriate for writ of mandamus consideration because SIIS has no adequate remedy at law. The application to intervene was denied by the district court and therefore SIIS is not a party to this action. Thus, it cannot appeal the district court's order. *Aetna Life & Casualty v. Rowan,* 107 Nev. 362, 812 P.2d 350 (1991).

[4] NRCP 24 governs intervention of right with the following pertinent language:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or

impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As indicated by the rule, intervention of right may exist through two different avenues. First, the right may be specifically conferred by statute. Second, the party may have an interest in the action that is not being adequately represented by the existing litigants.

In the instant case, SIIS claims that it has a right to intervene in Axas' lawsuit under both subsections of NRCP 24(a). Specifically, SIIS claims that this right is statutorily established by the following pertinent language of NRS 616.560:

*31 1. When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:

(a) The injured employee, or in case of death, his dependents, may take proceedings against that person to recover damages, but *the amount of the compensation* to which the injured employee or his dependents are entitled under this chapter, including any future compensation under this chapter, *must be reduced by the amount of the damages recovered,* notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.

(b) If the injured employee, or in case of death his dependents, receive compensation under this chapter, *the insurer,* or in case of claims involving the uninsured employers' claim fund or the subsequent injury fund, the administrator, *has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee* or of his dependents to recover therefor....

2. *In any case where the insurer or the administrator is subrogated* to the rights of the injured employee or of his dependents as provided in subsection 1, *the insurer* **913 *or the administrator has a lien upon the total proceeds of any recovery from some person other than the employer,* whether the proceeds of such recovery are by way of judgment, settlement or otherwise. The injured employee, or in the case of his death his dependents, are not entitled to double recovery....

(Emphasis added). [1]

SIIS points out that NRS 616.560 contemplates two different methods of obtaining reimbursement of industrial insurance benefits paid to the injured employee. The injured employee can file an independent action against a negligent third party and SIIS can sit back, wait for a recovery, and assert statutorily created lien rights. Conversely, NRS 616.560(1)(b) provides that SIIS has a right to file an independent action against the negligent third party. SIIS urges that this latter form of reimbursement, when literally applied, is a statutory right of intervention.

*32 We agree. Although the right to intervene is not specifically provided in the language of the statute, the right exists by practical application. NRS 616.560(1)(b) provides SIIS with an independent right of action against Monarch. If this court were to deny intervention, there is nothing that would prohibit SIIS from filing its own lawsuit against Monarch. At that point, Axas would assuredly be joined as an indispensable party under NRCP 19, because his absence would leave Monarch susceptible to multiple or inconsistent obligations. SIIS, Axas, and Monarch would all be involved in the same lawsuit. This is the same result that follows if SIIS were simply allowed to intervene. Moreover, with two identical actions pending, the district court would be well-advised to consolidate. *See Fernandez v. Infusaid,* 110 Nev. 187, 193, 871 P.2d 292, 295 (1994).

This analysis illustrates that it is wholly inconsistent to recognize that SIIS has an independent right of action against Monarch on one hand and then to determine that it does not have a right to intervene in Axas' lawsuit on the other. As a result, we

conclude that the district court erred by rejecting SIIS's petition for intervention.

Our conclusion is not only supported by the workings of NRS 616.560(1)(b), but also by salient policy considerations. It does not make judicial or economic sense to deny intervention and force SIIS to file an independent action against Monarch. It goes without saying that the taxpayers of this state should not be subject to such superfluous costs associated with public litigation. Intervention of right should be broadly construed because it protects precious judicial resources. *Scotts Valley Band of Pomo Indians v. U.S.*, 921 F.2d 924 (9th Cir.1990).

We also note that issues regarding undue confusion of the jury seem overstated by the district court. Oftentimes, juries hear cases where different litigants have a stake in one proceeding and are represented by different trial court counsel. In fact, SIIS has submitted an affidavit, informing this court that it routinely intervenes in the third party actions of its insureds. Certainly, the district court is free to marshall the trial proceedings in a way that dampens any confusion of having both SIIS and Axas sitting at the plaintiff's table.

[5] As alternative support for issuing the writ of mandamus, we additionally conclude that SIIS had a right to intervene under NRCP 24(a)(2). Under this provision of our procedural rules, a petitioner has a right to intervene where the application was timely, its rights are impacted by the subject litigation, and its interests are not being adequately represented by the named *33 parties. *Lundberg v. Koontz*, 82 Nev. 360, 418 P.2d 808 (1966). It is undisputed that SIIS's request to intervene was timely and that it has interests in the underlying lawsuit. The only outstanding determination is whether its rights are being adequately represented by the participating litigants.

SIIS presents a compelling argument that it must be afforded the right to participate in Axas' lawsuit so that it can contribute to the litigation effort and ultimately preserve the **914 size of its lien recovery. Our decision in *Breen v. Caesars Palace*, 102 Nev. 79, 85, 715 P.2d 1070, 1074 (1986), illustrates the merit of this argument. In *Breen*, we held that where an employer asserted a lien interest in its injured employee's negligence action against a third party, the employer had to reduce the amount of its lien recovery by a proportionate share of the litigation expenses. In other words, the employer could not obtain a windfall by sitting on the sidelines and relying upon the independent collection efforts of the injured worker. Where the injured worker pursues an independent cause of action against a negligent third party, the employer/lienholder must share in the litigation expenses. *Id.*

In the instant case, SIIS would avoid the proportionate reduction of its lien recovery by intervening in Axas' lawsuit and expending its own monies and efforts to obtain an adequate settlement or judgment. The formula established by *Breen* would not apply. By denying intervention, the district court prohibited SIIS from preserving the integrity of its statutory lien. In this sense, SIIS's interests were not being adequately represented by the named parties. Therefore, it had a right to intervene under NRCP 24(a)(2).

In light of the foregoing, we conclude that the district court had an absolute duty to allow SIIS's intervention in Axas' lawsuit. Accordingly, we grant this petition. The clerk of this court shall, forthwith, issue a writ of mandamus ordering the district court to immediately allow SIIS to intervene in this matter pursuant to NRCP 24.

Having concluded that SIIS has a right to intervene under the practical applications of NRS 616.560(1)(b), we need not consider the other contentions presented in SIIS's petitioning papers.

STEFFEN, C.J., and SPRINGER, J., concur.

ROSE, Justice, with whom SHEARING, Justice, joins, concurring:

I concur in granting this petition, but would do so on the basis that the district court abused its discretion in denying SIIS's motion to intervene, rather than declaring that SIIS has an absolute right to intervene in any suit brought by an injured

worker who has received SIIS benefits against a third party.

*34 The Legislature could have clearly and unequivocally given SIIS the right to intervene in every case brought by an injured worker against a third party. This was not done. Rather, the Legislature protected SIIS by giving it a statutory lien against the proceeds derived from any suit brought by an injured worker against a third party, and SIIS was given the right to file an independent action directly against the third party. NRS 616.560(1)(b). Intervention into an injured worker's suit was not given as a matter of right, but can be granted pursuant to NRCP 24(a)(2) on a discretionary basis when SIIS presents reasonable grounds for such participation.

The intervention of SIIS has been considered a discretionary right by our district courts and should continue to be handled in this manner absent clear legislative authority giving SIIS the right to intervene in all actions brought by injured workers. There are many cases where plaintiff's counsel is adequately protecting SIIS's interests. If a plaintiff shows that SIIS's involvement in its case is unwarranted and would unduly complicate the issues and mislead the jury, the district court should be able to determine that such intervention is not warranted.

SIIS argues that it can do indirectly what the right of intervention gives it directly, and therefore it should be given the absolute right of intervention. It is generally true that SIIS can file an independent action against the third party and then move that the case be consolidated with the pending lawsuit brought by the injured worker against that same party. Such a motion to consolidate will usually be granted and SIIS would indeed accomplish indirectly what I feel it does not have the right to do directly. However, there would still be reasonable discretion in the district court to determine that the consolidation of the cases is appropriate and no undue prejudice will be suffered by the injured worker.

**915 NRS 616.560 provides adequate safeguards to permit SIIS to recoup money it paid to injured workers from third parties who are liable to the injured worker, and the right to intervene in every injured worker's lawsuit is unnecessary and not provided for by Nevada law.

In the instant case, SIIS felt that its intervention was necessary to protect its lien and the injured worker plaintiff welcomed such intervention and assistance. Monarch's claim that intervention would unduly complicate the case or confuse the issues is not compelling. Therefore, I conclude that the district court abused its discretion in not granting SIIS the right to intervene and concur in the result reached by the majority.

All Citations

111 Nev. 28, 888 P.2d 911

Footnotes

1 NRS 616.560 was amended by the Nevada legislature in 1993. 1993 Nev.Stat., ch. 265, § 188 at 742–45. The new provisions do not differ from the referenced language pertinent to this appeal and presumably do not undermine the integrity of this decision.

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Silvera v. Employers Insurance Company Of Nevada,
118 Nev. 105 (2002)

C

Supreme Court of Nevada.
Joseph SILVERA, Appellant,
v.
EMPLOYERS INSURANCE COMPANY OF NEVADA, Respondent.

No. 33975.
Feb. 15, 2002.

Workers' compensation claimant brought personal injury action against motorist involved in accident, and against insurer of claimant's car. After receiving workers' compensation benefits and settling with both defendants, claimant moved for declaration that workers' compensation insurer had no subrogation rights against automobile insurer. The Eighth Judicial District Court, Clark County, James A. Brennan, Senior Judge, denied motion. Claimant appealed. The Supreme Court, Agosti, J., held that workers' compensation insurer did not have subrogation right against automobile insurer.

Reversed and remanded.

West Headnotes

[1] Workers' Compensation 413 ⇐2190

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(C) Action Against Third Persons in General for Employee's Injury or Death
413XX(C)3 Right of Employer or Insurer to Remedy of Employee or Employee's Representative
413k2190 k. Right of Insurer to Remedy Against Third Person or to Reimbursement in General. Most Cited Cases

Under subrogation law, insurer of automobile in which workers' compensation claimant was injured was not a party with a "legal liability to pay damages" to injured workers' compensation claimant under underinsured motorist (UM) policy, and thus, workers' compensation insurer had no subrogation rights against automobile insurer for payment made to claimant. N.R.S. 616C.215.

[2] Statutes 361 ⇐220

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative Construction. Most Cited Cases

It is presumed that the legislature approves the Supreme Court's interpretation of a statutory provision when the legislature has amended the statute but did not change the provision's language subsequent to the court's interpretation.

**429 *105 Law Offices of Michael F. Bohn, Ltd., Las Vegas, for Appellant.

Beckett & Yott, Carson City, for Respondent.

Before SHEARING, AGOSTI and LEAVITT, JJ.

OPINION

AGOSTI, J.

Employers Insurance Company of Nevada ("EICON") is the primary provider of workers' compensation insurance to Nevada employers. Under NRS 616C.215(5), when an employee is injured on the job, EICON is subrogated to the employee's right to recover damages in certain circumstances and may place a lien "upon the total proceeds of any recovery."

*106 In this appeal, we are asked to decide if EICON may assert a lien against an injured employee's recovery from an uninsured or underinsured motorist ("UM") insurance policy maintained by a party other than the **430 employer or employee. We conclude that EICON is not permit-

ted to place a lien against such a recovery.

On November 16, 1994, appellant Joseph Silvera, an employee of the Greater Nevada Auto Auction, was involved in an automobile accident with another motorist, Janet Springmeyer. The accident occurred within the course and scope of Silvera's employment with Auto Auction. Silvera sustained serious injuries. Toyota West owned the vehicle that was driven by Silvera.

Both Springmeyer and Toyota West carried automobile insurance. Springmeyer's policy limits were $15,000.00. Toyota West carried a fleet UM policy with MIC Property and Casualty Insurance Corporation ("MIC").

Silvera applied for and received workers' compensation benefits through EICON. The payments totaled $47,218.97. In addition, Silvera filed a lawsuit against and ultimately settled with both Springmeyer and MIC for the damages he sustained in the collision. Silvera settled the claim against Springmeyer for the policy maximum of $15,000.00 and settled with MIC for $135,000.00. EICON subsequently asserted that it had a right under NRS 616C.215 to place a lien against the MIC settlement proceeds.

Upon settling his claims against Springmeyer and MIC, Silvera moved in that action for adjudication of the lien rights being asserted by EICON. Specifically, Silvera asked the court to declare that EICON had no lien rights with respect to his recovery from MIC, and requested a refund of the amount paid to EICON. EICON was served with the motion and filed its opposition thereto.[FN1] The district court denied the motion, determining that EICON was entitled to assert the lien and that Silvera was not entitled to a refund. This timely appeal followed.

FN1. While Silvera disputes whether Nevada law grants EICON subrogation rights to his recovery, Silvera does not dispute that EICON has properly filed a lien. Additionally, it was proper for the district court to adjudicate EICON's rights under that lien. *See SIIS v. District Court,* 111 Nev. 28, 32, 888 P.2d 911, 913 (1995) (recognizing the right of SIIS, EICON's predecessor, to intervene in order to assert its statutorily created lien rights); *see also Gordon v. Stewart,* 74 Nev. 115, 118, 324 P.2d 234, 236 (1958) (holding that the district court has incidental jurisdiction over issues concerning the establishment and enforcement of an attorney's lien).

We review the district court's construction of NRS 616C.215 de novo.[FN2] Under NRS 616C.215, when an employee receives an injury for which compensation is payable, EICON may become *107 subrogated to the employee's right to recover in two ways. First, EICON may become subrogated to an employee's right of recovery under NRS 616C.215(2) when the circumstances causing an employee's injury give rise to a legal liability in a person other than the employer or employee to pay damages.[FN3] Second, pursuant to NRS 616C.215(3)(b), EICON may become subrogated to an employee's right to recover proceeds under the employer's UM policy; however, NRS 616C.215(3)(b) expressly precludes EICON from becoming subrogated to the employee's right to recover proceeds under the employee's own UM policy.[FN4] Once EICON is subrogated to an employee's**431 right to recovery, NRS 616C.215(5) grants EICON authority to place a lien upon the recovery of such proceeds, unless the proceeds were recovered from the employee's employer.[FN5]

FN2. *See County of Clark v. Upchurch,* 114 Nev. 749, 753, 961 P.2d 754, 757 (1998).

FN3. NRS 616C.215(2)(b) provides in pertinent part:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A

> to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> ....
>
> (b) If the injured employee ... receive[s] compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer ... has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of his dependents to recover therefor.

FN4. NRS 616C.215(3)(b) provides in pertinent part:

> 3. When an injured employee incurs an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances entitling him, or in the case of death his dependents, to receive proceeds under his employer's policy of uninsured or underinsured vehicle coverage:
>
> ....
>
> (b) If an injured employee ... receive[s] compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer ... is subrogated to the rights of the injured employee ... to recover proceeds under the employer's policy of uninsured or underinsured vehicle coverage. The insurer and the administrator are not subrogated to the rights of an injured employee ... under a policy of uninsured or underinsured vehicle coverage purchased by the employee.

FN5. NRS 616C.215(5) provides in pertinent part:

> In any case where the insurer [EICON] ... is subrogated to the rights of the injured employee or of his dependents as provided in subsection 2 or 3, the insurer ... has a lien upon the total proceeds of any recovery from some person other than the employer, whether the proceeds of such recovery are by way of judgment, settlement or otherwise.

Neither party disputes that NRS 616C.215 (3)(b) expressly permits subrogation against a UM policy maintained by the employer and prohibits subrogation against a UM policy maintained by the *108 employee. The issue here, however, is whether EICON may assert subrogation rights against a UM policy that is maintained by a party other than the employer or employee. This involves an analysis of NRS 616C.215(2)(b), which grants subrogation rights to EICON whenever the circumstances causing an employee's injury give rise to a legal liability in a person other than the employer or employee to pay damages. We conclude that NRS 616C.215(2)(b) does not grant EICON a right of subrogation against a UM policy that is maintained by a party other than the employer or employee.

NRS 616C.215(2)(b) defines the subrogation rights of the workers' compensation insurer. This provision provides in relevant part:

> 2. When an employee receives an injury for which [workers'] compensation is payable ... which was caused under circumstances creating *a legal liability in some person,* other than the employer or a person in the same employ, *to pay damages* in respect thereof:
>
> ....
>
> (b) ... the insurer ... has a right of action against the person so liable to pay damages and is sub-

rogated to the rights of the injured employee ....

(Emphases added.) The statute allows subrogation only against someone with a "legal liability ... to pay damages."

[1] In the 1991 decision of *Truck Insurance Exchange v. SIIS,*[FN6] this court determined that a UM insurance company is not someone with a "legal liability ... to pay damages" within the meaning of the subrogation statute. This court decided that only tortfeasors have a "legal liability ... to pay damages," and NRS 616.560(1)(b) (now NRS 616C.215 (2)(b)) grants the workers' compensation insurer subrogation rights only against those liable in tort, not those liable in contract.[FN7] Therefore, this court determined that the workers' compensation insurer did not have subrogation rights against the UM coverage purchased by the employer.[FN8] In response, the legislature enacted NRS 616C.215 (3)(b) in 1993, which specifically grants the workers' compensation insurer subrogation rights against the UM coverage purchased by the employer. NRS 616C.215(3)(b) would have changed the result in *Truck Insurance Exchange.*

FN6. 107 Nev. 995, 823 P.2d 279 (1991).

FN7. *Id.* at 996-97, 823 P.2d at 280-81.

FN8. *Id.*

*109 [2] The legislature did not, however, change the language in the general subrogation statute. NRS 616C.215(2) (formerly NRS 616.560(2)) still allows subrogation only against those who have "a legal liability ... to pay damages." In both *Continental Casualty v. Riveras*[FN9] and *Truck Insurance Exchange,* this court interpreted that language to grant subrogation rights to the workers' compensation insurer only against those liable in tort, not those liable in contract, like the UM carrier. When the legislature, in 1993, added a new provision allowing subrogation on employer-purchased UM policies, it retained the identical language in the general subrogation provision that this court interpreted**432 to refer only to a third-party tortfeasor, not to a UM carrier.[FN10] It is presumed that the legislature approves the supreme court's interpretation of a statutory provision when the legislature has amended the statute but did not change the provision's language subsequent to the court's interpretation.[FN11] Moreover, we have repeatedly refused to imply provisions into the workers' compensation scheme that have not been expressly included by the legislature.[FN12] THUS, NRS 616c.215(2) CANNOT BE READ TO allow subrogation of the workers' compensation insurer to the rights of the injured worker in a third party's UM insurance.

FN9. 107 Nev. 530, 814 P.2d 1015 (1991).

FN10. 1993 Nev. Stat., ch. 265, § 188, at 742-43.

FN11. *Northern Nev. Ass'n Injured Workers v. SIIS,* 107 Nev. 108, 112, 807 P.2d 728, 730 (1991).

FN12. *See SIIS v. Wrenn,* 104 Nev. 536, 539, 762 P.2d 884, 886 (1988); *Weaver v. SIIS,* 104 Nev. 305, 756 P.2d 1195 (1988).

We conclude that there is no statutory provision that allows EICON to place a lien on the third-party MIC proceeds. Accordingly, we reverse the order of the district court and remand for further proceedings consistent with this opinion.

SHEARING and LEAVITT, JJ., concur.

Nev.,2002.
Silvera v. Employers Ins. Co. of Nevada
118 Nev. 105, 40 P.3d 429

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American Home Assur. Co. v. Eighth Judicial Dist. Court ex…,
122 Nev. 1229 (2006)

122 Nev. 1229
Supreme Court of Nevada.

AMERICAN HOME ASSURANCE COMPANY, Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT of The State of Nevada, in and for the COUNTY OF CLARK, and the Honorable Michelle Leavitt, District Judge, Respondents,
and
David Carlton Madison, Jr.; Titanium Metals Corporation; and Guardsmark, Inc., Real Parties in Interest.

No. 47381.
|
Dec. 21, 2006.

Synopsis
Background: Claimant brought personal injury action against third-party tortfeasor. The Eighth Judicial Circuit Court, County of Clark, Michelle Leavitt, J., denied workers' compensation insurer's application to intervene. Insurer brought original petition for a writ of mandamus.

Holdings: The Supreme Court, Hardesty, J., held that:

[1] workers' compensation insurers did not have the unconditional right to intervene in claimants' actions against third-party tortfeasors, overruling *State Industrial Insurance System v. District Court (SIIS)*, 111 Nev. 28, 888 P.2d 911;

[2] generally an injured worker's representation in an action against a third-party tortfeasor would be adequate to protect a workers' compensation insurer's subrogation interest; and

[3] trial court did not abuse its discretion by denying insurer's application to intervene.

Writ petition denied.

West Headnotes (17)

[1] **Mandamus**
Nature of acts to be commanded

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to remedy a manifest abuse of discretion. West's NRSA 34.160.

1 Cases that cite this headnote

[2] **Mandamus**
Remedy at Law

Mandamus
Discretion as to grant of writ

Mandamus is available only when petitioner has no plain, speedy, and adequate legal remedy, and whether the Supreme Court will consider a petition for the extraordinary remedy of mandamus is entirely within the Court's discretion. West's NRSA 34.170.

3 Cases that cite this headnote

[3] **Mandamus**
Presumptions and burden of proof

A petitioner bears the burden of demonstrating that mandamus relief is warranted.

2 Cases that cite this headnote

[4] **Mandamus**
Acts and proceedings of courts, judges, and judicial officers

Mandamus
Parties

Supreme Court's discretionary consideration of workers' compensation insurer's petition for writ of mandamus, seeking review of trial court order denying its motion

to intervene in action that claimant brought against third-party tortfeasor, was appropriate, as insurer had no other adequate means by which to challenge the trial's court's refusal to allow it to intervene in the underlying suit. West's NRSA 34.170.

3 Cases that cite this headnote

[5] **Workers' Compensation**
⇐ New parties, intervention, and substitution

Workers' compensation insurers do not have the unconditional right to intervene in claimants' actions against third-party tortfeasors, and instead intervention in third-party tortfeasor actions is only available when the district court in its discretion finds that intervention is necessary to protect an insurer's interests, as workers' compensation insurers have no statutory right to intervene in third-party tortfeasor actions, and insurers not only have a statutory lien on any proceeds a injured claimant could obtain but also have a statutory right to bring an independent action based on subrogation rights, overruling *State Industrial Insurance System v. District Court (SIIS)*, 111 Nev. 28, 888 P.2d 911. West's NRSA 12.130, 616C.215; Rules Civ.Proc., Rule 24(a).

Cases that cite this headnote

[6] **Parties**
⇐ Intervention

Determining whether an applicant for intervention has met the four requirements allowing intervention when it has an interest that could be impaired which is not adequately represented by existing parties is within the district court's discretion. Rules Civ.Proc., Rule 24(a)(2).

3 Cases that cite this headnote

[7] **Parties**
⇐ Interest in subject of action in general

No "bright-line" test to determine an alleged interest's sufficiency exists, for purposes of rule allowing a party to intervene when it has an interest that could be impaired which is not adequately represented by existing parties; a general, indirect, contingent, or insubstantial interest is insufficient, however, and instead an applicant must show a significantly protectable interest. Rules Civ.Proc., Rule 24(a)(2).

1 Cases that cite this headnote

[8] **Workers' Compensation**
⇐ New parties, intervention, and substitution

Due to its subrogation rights, but not as a result of its lien rights, a workers' compensation insurer generally has a legally protectable interest sufficient to intervene in a claimant's action against a third-party tortfeasor, under rule allowing a party to intervene when it has an interest that could be impaired which is not adequately represented by the existing parties; through its statutory subrogation rights a workers' compensation insurer becomes a partial owner of a cause of action against a third-party tortfeasor and can bring its own action if the injured worker does not, but an insurer's lien recovery is contingent on a claimant successfully resolving his or her claim, and the lien's existence does not give an insurer a right to maintain its own negligence claim against a tortfeasor. West's NRSA 616C.215; Rules Civ.Proc., Rule 24(a)(2).

Cases that cite this headnote

[9] **Workers' Compensation**
New parties, intervention, and substitution

Generally, a workers' compensation insurer's ability to protect its subrogation interest in a claimant's action against a third-party tortfeasor could be impaired by the disposition of the claimant's action, for purposes of rule allowing a party to intervene in an action when it has an interest that could be impaired which is not adequately represented by the existing parties; because an injured worker and the insurer share but one cause of action against the tortfeasor, once the claimant's action against the tortfeasor is resolved the insurer no longer has a right to proceed against the alleged tortfeasor. West's NRSA 616C.215; Rules Civ.Proc., Rule 24(a)(2).

1 Cases that cite this headnote

[10] **Workers' Compensation**
New parties, intervention, and substitution

Generally, unless an insurer demonstrates otherwise, an injured worker's representation in an action against a third-party tortfeasor should be adequate to protect a workers' compensation insurer's subrogation interest, for the purposes of rule allowing a party to intervene in an action when it has an interest that could be impaired which is not adequately represented by the existing parties; though an insurer's burden to prove that a worker is not adequately representing its interest is minimal, the insurer's interest or ultimate objective in the action is the same as the injured worker's interest, or subsumed within the injured worker's objective, given that most injured workers will strive to obtain the greatest amount in damages warranted under the circumstances. West's NRSA 616C.215; Rules Civ.Proc., Rule 24(a)(2).

2 Cases that cite this headnote

[11] **Workers' Compensation**
New parties, intervention, and substitution

The longer a workers' compensation insurer waits after an injured worker commences litigation against a third-party tortfeasor before applying to intervene, the more the insurer's acceptance of the worker's representation as adequate can be implied, under rule allowing a party to intervene when it has an interest that could be impaired which is not adequately represented by existing parties. West's NRSA 616C.215; Rules Civ.Proc., Rule 24(a)(2).

Cases that cite this headnote

[12] **Workers' Compensation**
New parties, intervention, and substitution

Trial court did not abuse its discretion by denying workers' compensation insurer's application to intervene to protect its subrogation interest, in claimant's personal injury action against third-party tortfeasor, as insurer did not attempt to intervene until approximately two-and-one-half years after litigation was instituted, trial was scheduled to commence in only a few months, insurer did not suggest that claimant was not fully and competently prosecuting the case, insurer did not point to recently discovered information indicating that claimant's interest was somehow adverse to its interest, claimant had expressly recognized insurer's right to be reimbursed from any proceeds, and insurer's contrasting interest in avoiding its lien reduction by

a proportionate share of the litigation expenses was irrelevant, as insurer's interest in intervening was not based on its lien but instead was based solely on its subrogation interest. West's NRSA 616C.215; Rules Civ.Proc., Rule 24(a)(2).

Cases that cite this headnote

[13] **Mandamus**
Form, requisites, and sufficiency in general

Mandamus
Scope of inquiry and powers of court

Supreme Court would not address issue raised by workers' compensation insurer that its intervention in claimant's action against third-party tortfeasor was necessary to defend claims of employer negligence, in proceeding on insurer's petition for writ of mandamus after trial court denied insurer's application to intervene, where insurer neither attempted to intervene to help employer defend against third-party complaint filed by tortfeasor nor fully addressed issue in its writ petition. West's NRSA 616C.215, 12.130(2); Rules Civ.Proc., Rule 24(a)(2); Rules App.Proc., Rule 21(a).

2 Cases that cite this headnote

[14] **Parties**
Time for intervention

Even when made before trial, an application to intervene must be timely. Rules Civ.Proc., Rule 24.

Cases that cite this headnote

[15] **Parties**
Time for intervention

Determining whether an application to intervene is timely involves examining the extent of prejudice to the rights of existing parties resulting from the delay and then weighing that prejudice against any prejudice resulting to the applicant if intervention is denied. Rules Civ.Proc., Rule 24.

1 Cases that cite this headnote

[16] **Parties**
Time for intervention

The timeliness of an application to intervene may depend on when the applicant learned of its need to intervene to protect its interests. Rules Civ.Proc., Rule 24.

Cases that cite this headnote

[17] **Workers' Compensation**
New parties, intervention, and substitution

In deciding whether an application by a workers' compensation insurer to intervene in a claimant's action against a third-party tortfeasor is timely, a district court must consider the length of delay and the reasons therefore, in light of the insurer's obligation to share in the litigation expenses. West's NRSA 12.130(1); Rules Civ.Proc., Rule 24.

Cases that cite this headnote

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Before the Court En Banc. [1]

*1232 *OPINION*

HARDESTY, J.

In Nevada, when a third party is at fault for an industrial accident, the workers' compensation insurer that paid benefits to the injured worker has a lien upon any proceeds that the worker recovers from the tortfeasor, so that the insurer's payments are reimbursed, ultimately, by the tortfeasor. During the proceedings underlying this writ petition, to protect its lien on any proceeds recovered by the injured worker to whom it provided benefits, a workers' compensation insurer asked the district court to allow it to intervene in the injured worker's tort litigation. Although the insurer contended that it had an absolute right to intervene in the litigation under our 1995 decision in *State Industrial Insurance System v. District* **1123 *Court*, [2] the district court denied the insurer's application. Accordingly, the insurer has brought this original petition for a writ of mandamus, requesting us to direct the district court to allow it to intervene in the injured worker's case.

Because our 1995 decision is unsupportable under the law, however, we overrule it. We conclude that a workers' compensation insurer may intervene in an injured worker's litigation to protect its right to reimbursement only if it meets certain requirements, which include showing that the injured worker cannot adequately represent the insurer's interest in the subject matter of the litigation. *1233 Because the insurer here failed to show that its interest was inadequately represented by the injured worker, we deny the insurer's request for extraordinary relief.

FACTS

Real party in interest Titanium Metal Corporation (Timet) hired real party in interest Guardsmark, Inc., to provide onsite security services. Guardsmark employed real party in interest David Carlton Madison, Jr., as a security guard. While on duty, Madison fell into an abandoned furnace pit on Timet's property. As a result of the fall, Madison suffered severe, debilitating injuries, for which he received workers' compensation benefits from Guardsmark's insurer.

Madison then filed a personal injury action against Timet in December 2003, alleging several negligence theories as bases to recover damages. Timet filed a third-party complaint against Guardsmark for express and implied indemnity, and contribution.

In April 2006, over three years after the accident and approximately two-and-one-half years after Madison filed suit, Guardsmark's workers' compensation insurer, petitioner American Home Assurance Company (AHAC), moved to intervene in Madison's personal injury action for purposes of recovering the workers' compensation benefits that it had paid (and will pay) to Madison. Attached to its motion was a "complaint-in-intervention for reimbursement of workers' compensation benefits," alleging the same negligence claims against Timet as were alleged in Madison's complaint and requesting both damages and a lien against any judgment in favor of Madison, in the amount of the benefits that it paid to Madison. At the time AHAC sought to intervene, a June 2, 2006 discovery cut-off date was in place, and trial was scheduled to begin on September 5, 2006.

Both Madison and Timet opposed the motion to intervene, arguing that AHAC's complaint in intervention constituted an attempt to assert an independent cause of action against Timet and was thus subject to dismissal under the statute of limitations. [3] Further, they argued, given that the intervention complaint did not even contain the word "subrogation," it could not be construed as an effort to enforce a subrogation lien. All parties acknowledged that AHAC retained subrogation

lien rights over any recovery Madison obtained and that AHAC could enforce those rights after any settlement was reached or any judgment was entered. Madison pointed out, however, that if AHAC did not intervene in the action, it would be responsible for contributing its share of the litigation expenses when collecting on its lien, as set forth in *Breen v. Caesars Palace.*[4] Madison asserted that AHAC should not be permitted to *1234 intervene at such a late date, as it attempted to do so merely to avoid paying its proportionate share of the litigation costs.

The district court denied AHAC's motion to intervene, determining that AHAC was attempting to assert an independent cause of action against Timet, which was time-barred. The court further found that AHAC's lien rights were adequately protected, as the parties were on notice that the lien would apply, subject to an offset for AHAC's portion of the litigation expenses, as required under *Breen.*

AHAC consequently filed the instant writ petition, challenging the district court's order **1124 denying it leave to intervene. As directed, Madison timely filed an answer, arguing that AHAC's intervention was not appropriate under these circumstances and, therefore, writ relief was not warranted. We stayed the underlying action pending our resolution of AHAC's petition for extraordinary writ relief.

DISCUSSION

[1] [2] [3] A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station,[5] or to remedy a manifest abuse of discretion.[6] Mandamus is available only when petitioner has no plain, speedy, and adequate legal remedy,[7] and whether we will consider a petition for the extraordinary remedy of mandamus is entirely within our discretion.[8] The petitioner bears the burden of demonstrating that mandamus relief is warranted.[9]

[4] We have determined that our discretionary consideration of this petition is appropriate because AHAC has no other adequate means by which to challenge the district court's refusal to allow it to intervene in the underlying suit.[10] After considering the petition and answer thereto, however, we conclude that extraordinary writ relief is not warranted. Specifically, even though AHAC has an interest in Madison's litigation of his personal injury claims, the district court has discretion in deciding whether AHAC has shown that intervention is appropriate so that it may promote or protect that interest. We conclude that the district court did not manifestly abuse its discretion when it denied AHAC leave to intervene, given Madison's ability to adequately represent AHAC's interest.

*1235 *Intervention is within the district court's discretion*

AHAC argues that, in accordance with this court's decision in *State Industrial Insurance System v. District Court (SIIS),*[11] it may automatically intervene in Madison's suit against Timet as a matter of right. Accordingly, AHAC argues, the district court was obligated to allow it to intervene. Because we determine that our conclusion in *SIIS,* that an insurer has an absolute right to intervene in an injured worker's lawsuit, is not supportable under Nevada law, and because the district court did not abuse its discretion in disallowing AHAC's intervention, we disagree.

Nevada law

NRS 12.130 allows, before the trial commences, "any person ... who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both" to intervene in an action under the Nevada Rules of Civil Procedure (NRCP).[12] NRCP 24 governs intervention, providing for both intervention of right and permissive intervention. At issue here, NRCP 24(a) directs the district court to approve a timely application to intervene of right when either (1) a statute grants an unconditional right to intervene, or (2) "the applicant claims an interest relating to the [subject] property ... and

the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately protected by existing parties." [13] An application to intervene **1125 must be "accompanied by a pleading setting forth the claim ... for which intervention is sought." [14]

In *SIIS*, we ultimately concluded that the industrial insurer had a right to intervene under both subsections (1) and (2) of *1236 NRCP 24(a). [15] first, a majority of the *SIIS* court concluDED THAT, UNDER NRAP 24(a)(1), statutory intervention rights existed. The majority noted that NRS 616C.215 (formerly NRS 616.560) provides that when a workers' compensation insurer pays benefits to an injured worker, it becomes subrogated to the injured workers' right to recover damages from a third-party tortfeasor. Then the majority pointed out that, by asserting its subrogation rights, an insurer could obtain reimbursement in one of two different ways: the insurer could either enforce a lien statutorily imposed on any proceeds recovered by the injured worker or assert an independent action against the negligent third party. [16] The majority determined that "this latter form of reimbursement, when literally applied, is a statutory right of intervention." [17] Thus, even though neither NRS 616C.215 nor any other statute expressly grants an industrial insurer the unconditional right to intervene in an injured worker's lawsuit, the majority concluded that such a right nonetheless exists.

The majority went on to explain that, since the industrial insurer had a right to sue the third-party tortfeasor independently, in which case all the same parties would necessarily be joined, the same amalgamation would occur if the insurer were simply allowed to intervene in the worker's suit, especially as the two separate actions would be providently consolidated. [18] Therefore, the majority concluded, although not an express statutory right, the unconditional right to intervene under NRCP 24(a)(1) "exists by practical application." [19]

The majority also concluded that intervention was also appropriate under NRCP 24(a)(2) because the injured worker's representation was inadequate to "preserv[e] the integrity of [the insurer's] statutory lien." [20] In so concluding, the majority noted that, under *Breen v. Caesars Palace,* [21] an employer (or an employer's insurer) that is reimbursed by way of its lien is required to "reduce the amount of its lien recovery by a proportionate share of the litigation expenses," so that the employer or its insurer does not receive a windfall. [22] Thus, in *SIIS,* the majority deemed intervention appropriate to allow the insurer to expend its own monies and *1237 efforts to obtain reimbursement, and thereby avoid the reduction of any lien recovery under the *Breen* formula. [23]

But our review of this petition leads us to conclude that the *SIIS* majority's analysis is flawed, in respect to both subsections (1) and (2) of NRCP 24(a). First, NRCP 24(a)(1) does not apply, as no statutory right to intervene exists. Second, intervention under NRCP 24(a)(2) is only appropriate when that subsection's requirements have been met.

**1126 *Intervention under NRCP 24(a)(1) is inapplicable*

[5] As even the *SIIS* majority acknowledged, NRCP 24(a)(1) requires that a statute "confer[ ] an unconditional right to intervene," and no such statute has been enacted. Thus, an unconditional right of intervention, as necessary to intervene under NRCP 24(a)(1), does not exist in Nevada. The majority's "practical" result, which creates an absolute statutory right of intervention when the Legislature has not done so, may operate unfairly to any injured worker who does not desire the insurer's intervention, in any case in which the insurer's intervention is unwarranted or inappropriate.

The two concurring justices in *SIIS* apparently recognized the injustice that could result from such an inflexible rule allowing an insurer to

intervene in every injured worker's case. The *SIIS* concurrence provided that, in the absence of direct legislative direction, the court should not alter the district courts' prior practice to exercise discretion when determining whether intervention was appropriate.[24] Further, the concurrence pointed out, the Legislature has protected an insurer's right to recoup its costs by not only imposing a statutory lien on any proceeds an injured worker may obtain, but also by permitting it to bring an independent action, based on its subrogation rights, if necessary.[25] Accordingly, the concurring justices suggested, the insurer has no need to intervene in every injured worker's lawsuit, and the district court should be able to deny intervention when an insurer's "involvement in the case is unwarranted and would unduly complicate the issues and mislead the jury."[26]

We agree with the concurring justices that intervention of right should be available only after the district court, exercising its *1238 discretion, determines that the applicant has met the NRCP 24(a)(2) requirements and the applicant's intervention is otherwise appropriate.[27] Accordingly, in the action underlying this petition, AHAC had no absolute right to intervene under NRCP 24(a)(1), and we proceed to its assertion that intervention should have been allowed under NRCP 24(a)(2).

Intervention is appropriate under NRCP 24(a)(2) only when all the requirements of that subsection have been met

[6] As noted, to intervene under NRCP 24(a)(2), an applicant must meet four requirements: (1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely. Determining whether an applicant has met these four requirements is within the district court's discretion.[28]

Normally, a workers' compensation insurer will be able to meet the first two requirements. With respect to the third factor, AHAC has not shown that Madison cannot adequately represent its interests. Accordingly, we do not determine the timeliness of AHAC's application.

Generally, a workers' compensation insurer has an interest in the injured worker's litigation against an alleged tortfeasor

[7] With regard to the first NRCP 24(a)(2) requirement, that the applicant show **1127 a sufficient interest in the litigation's subject matter, we note that, as federal courts have recognized in interpreting the equivalent federal rule, no "bright-line" test to determine an alleged interest's sufficiency exists.[29] A general, indirect, contingent, *1239 or insubstantial interest is insufficient, however.[30] INSTEAD, AN APPLICAnt must show a "significantly protectable interest."[31] A "significantly protectable interest" has been described, by the Ninth Circuit Court of Appeals, as one that is protected under the law and bears a relationship to the plaintiff's claims.[32]

[8] With respect to these two components of "significantly protectable interest," a workers' compensation insurer's interest in obtaining reimbursement through its subrogation right is protected under law and arises out of the same events as do an injured worker's claims. Thus, the insurer generally has an interest sufficient to intervene under NRCP 24(a)(2). As noted, under NRS 616C.215, a workers' compensation insurer is subrogated to the injured workers' right to recover against a tortfeasor.[33] Through its subrogation right, the insurer "bec[omes] at least a partial owner of [the] cause of action."[34] Indeed, under Nevada law, the insurer obtains such a significant interest in the injured workers' claims as the result of its subrogation right, that it may itself sue the alleged tortfeasor, even if the injured worker does not.[35] Consequently, as the provider of Madison's workers' compensation benefits, AHAC shares, by subrogation, a legally protectable interest in Madison's claims against Timet.[36]

Although AHAC's subrogation rights create a sufficient interest to intervene under NRCP 24(a)

(2), its lien rights do not. The subject matter of Madison's litigation—whether Timet was negligent — *1240 is significantly different than the question of whether AHAC may recover on its statutory lien. AHAC's lien recovery is contingent upon Madison successfully resolving his claims, and the lien's existence does not give AHAC the right to maintain a claim for negligence against Timet.[37] Accordingly, simply because AHAC has a lien on any proceeds recovered in Madison's litigation does not give it an interest in participating in Madison's attempt to prove that Timet's negligence resulted in a certain amount of damage to Madison. Thus, AHAC's interest in Madison's suit arises solely in connection with its subrogation to Madison's right to recover.[38]

**1128 *Generally, a workers' compensation insurer's ability to protect its interest could be impaired by the disposition of the injured worker's action*

[9] NRCP 24(a)(2)'s second requirement is met if the district court determines that the insurer's ability to protect its interest in the litigation's subject matter might be impaired by the disposition of the injured worker's action. Because the injured worker and the insurer share "but one cause of action,"[39] the disposition of the injured worker's action necessarily impacts the insurer's subrogation interest. And as, generally, only one final outcome of the claims against the alleged tortfeasor on account of the industrial injury may exist, once the injured worker's case is resolved, whether by *1241 judgment, dismissal with prejudice, or settlement, the insurer no longer has any right to proceed with a separate action against the alleged tortfeasor, even if any recovery the injured worker obtains is insufficient to fully reimburse the insurer's expenses.[40] Thus, in the proceedings below, "as a practical matter," AHAC's ability to protect its interest may be impacted by the resolution of Madison's action.[41]

Whether existing parties adequately represent the workers' compensation insurer's interest is determined by the particular facts of each case

[10] But, under NRCP 24(a)(2)'s third requirement, the insurer has no right to intervene if its interest is adequately represented by the injured worker. Although the applicant insurer's burden to prove this requirement has been described as "minimal," when the insurer's interest or ultimate objective in the litigation is the same as the injured worker's interest or subsumed within the worker's objective, the injured worker's representation should generally be adequate, unless the insurer demonstrates otherwise.[42]

**1129 [11] To explain, most injured workers undoubtedly will strive to obtain the greatest amount in damages warranted under the circumstances. Consequently, the insurer's objective in obtaining from the tortfeasor an amount sufficient to fully reimburse its costs is completely *1242 subsumed within the injured worker's objective.[43] Thus, unless the insurer can show that the injured worker has a different objective, adverse to its interest, or that the worker otherwise may not adequately represent their shared interest, the worker's representation is assumed to be adequate.[44] AND THE LONGER AN Insurer waits after the litigation commences before applying to intervene,[45] the more the insurer's acceptance of the injured worker's representation as adequate can be implied, and the stronger the showing to the contrary must be to overcome that inference.

[12] Here, AHAC has not shown that Madison may not adequately protect its interest in recovering damages from Timet. As mentioned, AHAC did not try to intervene in Madison's litigation until approximately two-and-one-half years after it was instituted, shortly before the discovery cut-off date, and only a few months before trial was scheduled to commence. Thus, although AHAC might have more easily met this requirement's "minimal" standard if it had applied to intervene early on, its failure to do so until after Madison had completed much of the pretrial litigation makes AHAC's burden more difficult because it suggests that it is comfortable with how Madison has proceeded with the case.

Even so, AHAC has not even suggested, much less demonstrated, that Madison is not fully and competently prosecuting his case.[46] And AHAC has pointed to no recently discovered information indicating that Madison's interest is somehow adverse to its interest. Further, the district court, which has had ample opportunity to assess Madison's representation, has found that his representation adequately protects AHAC's interest. As the court pointed out, *1243 all parties are aware of AHAC's interest in any recovery, and Madison has expressly recognized AHAC's right to be reimbursed from any proceeds.

[13] Nevertheless, AHAC argues that, because Madison's interest lies in maximizing his recovery, Madison cannot adequately represent its contrasting interest in avoiding the lien amount's reduction (by its proportionate share of the litigation expenses) under *Breen.*[47] As noted above, however, AHAC's **1130 right to intervene in Madison's litigation is based on its direct interest, arising from subrogation, in the litigation's subject matter, not in its interest in asserting and protecting the size of its anticipated lien on any recovery. Although the *SIIS* majority indicated that intervention is appropriate because an injured worker cannot adequately represent an insurer's interest in avoiding payment of its proportionate share of the litigation costs under *Breen,* that reasoning is based on the insurer's ability to protect an interest for which no right to intervene *1244 exists. Accordingly, we disprove of the *SIIS* majority's reasoning.[48]

Determining whether an application is timely requires balancing any prejudice to the parties

[14] [15] [16] [17] NRS 12.130(1) provides that an applicant may intervene "[b]efore the trial." As we have previously recognized, however, even when made before trial, an application must be "timely" in the sense afforded the term under NRCP 24. Determining whether an application is timely under NRCP 24 involves examining " 'the extent of prejudice to the rights of existing parties resulting from the delay' "[49] and then weighing that prejudice against any prejudice resulting to the applicant if intervention is denied. Further, the timeliness of an application may depend on when the applicant learned of its need to intervene to protect its interests.[50] Thus, in deciding whether an application is timely, the district court must consider the length of delay and the reasons therefore, in light of the applicant's obligation under *Breen* to share in the litigation expenses.

As AHAC's application to intervene was properly denied based on its failure to meet the NRCP 24(a)(2) requirements, however, we do not further discuss the timeliness of its application, other than as it relates to the third NRCP 24(a)(2) requirement.[51]

CONCLUSION

As our prior opinion in *SIIS* included a flawed analysis, we overrule that decision. Thus, AHAC has no absolute right to intervene *1245 in Madison's third-party tort action under NRCP 24(a)(1) and could have intervened under NRCP 24(a)(2) only if it was able to show that Madison might not adequately represent its interest. Since AHAC **1131 waited until shortly before the trial to seek intervention and failed to show that Madison's representation was inadequate, the district court did not abuse its discretion in denying AHAC's intervention application. Consequently, we conclude that extraordinary writ relief is not warranted. Accordingly, we deny this writ petition and vacate our stay of the underlying proceedings.

ROSE, C.J., BECKER, GIBBONS, DOUGLAS and PARRAGUIRRE, JJ., concur.

All Citations

122 Nev. 1229, 147 P.3d 1120

Footnotes

1 The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in this matter.

2 111 Nev. 28, 888 P.2d 911 (1995).
3 Apparently, Guardsmark did not object to AHAC's intervention.
4 102 Nev. 79, 715 P.2d 1070 (1986).
5 *See* NRS 34.160.
6 *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).
7 NRS 34.170.
8 *See Smith v. District Court*, 107 Nev. 674, 818 P.2d 849 (1991).
9 *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).
10 *See SIIS*, 111 Nev. 28, 888 P.2d 911.
11 111 Nev. 28, 888 P.2d 911.
12 NRS 12.130(1); NRS 12.130(3). By intervening, the applicant becomes a party to the action in order to do one of the three following things: (1) join the plaintiff in the complaint's demand; (2) resist, with the defendant, the plaintiff's claims; or (3) make a demand adverse to both the plaintiff and the defendant. NRS 12.130(2).
13 NRCP 24(a). As the parties have not addressed intervention under NRCP 24(b), this opinion does not address whether AHAC's intervention may have been appropriate under that subsection. Thus, we make no comment on whether a workers' compensation insurer may properly intervene under NRCP 24(b) to protect its subrogation rights.
14 NRCP 24(c). Accordingly, AHAC properly submitted a complaint-in-intervention that reiterated Madison's negligence claims against Timet and requested reimbursement, even though it did not mention subrogation. *See also* NRS 12.130(2) ("An intervention takes place when a third person ... join[s] the plaintiff in claiming what is sought by the complaint."); *Nichols v. Lighthouse Restaurant, Inc.*, 246 Conn. 156, 716 A.2d 71, 76 (1998) (approving of an intervening employer's complaint that "repeats all the allegations of the plaintiff's complaint" and indicates that the employer was required to pay benefits to the injured employee).
15 111 Nev. 28, 888 P.2d 911.
16 NRS 616C.215(2)(b), (5); *SIIS*, 111 Nev. at 31, 888 P.2d at 913 (recognizing the insurer's interpretation of the statutory scheme).
17 *SIIS*, 111 Nev. at 32, 888 P.2d at 913.
18 *Id.*
19 *Id.*
20 *Id.* at 33, 888 P.2d at 914.
21 102 Nev. 79, 715 P.2d 1070.
22 *SIIS*, 111 Nev. at 33, 888 P.2d at 914; *see also Breen*, 102 Nev. at 84–85, 715 P.2d at 1073–74.
23 *SIIS*, 111 Nev. at 33, 888 P.2d at 914.
24 *Id.* at 34, 888 P.2d at 914 (Rose and Shearing, JJ., concurring) (disagreeing with the majority's conclusion that NRS 616C.215 gives, by "practical application," an insurer the absolute right to intervene under NRCP 24(a)(1)).
25 *See* NRS 616C.215.
26 *SIIS*, 111 Nev. at 34, 888 P.2d at 914 (Rose and Shearing, JJ., concurring).
27 *Id.*
28 *See Dangberg Holdings v. Douglas Co.*, 115 Nev. 129, 141, 978 P.2d 311, 318 (1999) (providing that the timeliness of an NRCP 24 motion to intervene is directed to the district court's sound discretion) (citing *Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 668–69 (1978) (recognizing that this court may look to the federal courts' interpretations of similar federal rules for guidance)); *Nish v. Cohen*, 191 F.R.D. 94, 96 (E.D.Va.2000) (noting that "[a] district court is entitled to the full range of reasonable discretion in determining whether [the FRCP 24(a)(2)] requirements are met" (citing *Rios v. Enterprise Ass'n Steamfitters Local Union*, 520 F.2d 352, 355 (2d Cir.1975))).
29 *See, e.g., Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir.2002) (discussing Federal Rules of Civil Procedure 24(a)(2)); *Executive Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (recognizing that federal decisions involving the federal civil procedure rules are persuasive authority when this court examines its equivalent rules).
30 *Lynch*, 307 F.3d at 803; *Dairy Maid Dairy, Inc. v. U.S.*, 147 F.R.D. 109, 111 (E.D.Va.1993).

31 *Donaldson v. United States*, 400 U.S. 517, 542, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971), *superseded in part by statute, as stated in Ip v. U.S.*, 205 F.3d 1168, 1172 (9th Cir.2000), *and cited in Sierra Club v. EPA*, 995 F.2d 1478, 1482 (9th Cir.1993).

32 *Lynch*, 307 F.3d at 803; *see also Sierra Club*, 995 F.2d at 1482–84.

33 NRS 616C.215(2)(b).

34 *Geneva Const. Co. v. Martin Transfer & Storage Co.*, 351 Ill.App. 289, 114 N.E.2d 906, 911 (1953); *see also Laffranchini v. Clark*, 39 Nev. 48, 60, 153 P. 250, 254 (1915) (recognizing that a subrogated party "step[s] into the shoes" of the subrogee, so that the same statute of limitations applies to both).

35 NRS 616C.215(2)(b); *see also Heyman v. Exchange Nat. Bank of Chicago*, 615 F.2d 1190, 1193 (7th Cir.1980) (recognizing that a sufficient interest is one so direct that it gives the applicant "a right to maintain a claim for the relief sought").

36 *See Kelley v. Summers*, 210 F.2d 665, 673 (10th Cir.1954) (recognizing that an insurer's subrogation to the right to sue another in tort is "sufficient interest in the subject matter of the litigation to intervene as a matter of right"). We note that, while AHAC's interest in Madison's claims is closely related to the litigation's subject matter, it is not identical to Madison's interest in the litigation, since it rises only to the level of the compensation AHAC is obligated to pay to Madison on account of his injuries.

37 *See supra* note 35; NRS 616C.215(2)(b); *see also Sierra Club*, 995 F.2d at 1483 (noting that "the issue is participation in a lawsuit, not the outcome").

38 *See, e.g., Hyland v. 79 West Monroe Corp.*, 2 Ill.App.2d 83, 118 N.E.2d 636, 638 (1954) (recognizing that an employer's interest in asserting a workers' compensation lien in its injured worker's lawsuit against a third-party tortfeasor was collateral to the worker's litigation and, as the employer did not purport to be a party plaintiff, its intervention was not warranted); *Hudson v. Jarrett*, 269 Va. 24, 606 S.E.2d 827, 831 (2005) (noting distinguishable cases in which an insurer's intervention was allowed to protect a compensation lien, but disallowing intervention to do so in that case because the applicant insurers had lien rights but no corresponding cause of action in tort, and thus could not assert any "right involved in the [injured worker's tort] suit," such that the issues resolved would affect the lien, noting that the insurers could recover under their lien without proving the alleged tortfeasor's liability to the injured worker).

39 *Marquette Casualty Co. v. Brown*, 235 La. 245, 103 So.2d 269, 272 (1958). Because the insurer and the injured worker share one cause of action, the expiration of the applicable limitations period does not bar intervention. *Id.*; Arthur Larson, *Larson's Workers' Compensation Law* § 120.03[3] (2003) [hereinafter *Workers' Compensation Law*]; *see also Jordan v. Superior Court*, 116 Cal.App.3d 202, 172 Cal.Rptr. 30 (1981); *Nichols v. Lighthouse Restaurant, Inc.*, 246 Conn. 156, 716 A.2d 71, 76, 78 (1998) (concluding that the limitations period was tolled by the injured worker's timely filing of a complaint against the third-party tortfeasor); *Geneva Const. Co. v. Martin Transfer & Storage Co.*, 351 Ill.App. 289, 114 N.E.2d 906, 912 (1953); *Guillot v. Hix*, 838 S.W.2d 230, 232, 235 (Tex.1992) (tolling the limitations period).

40 *See Smith v. Hutchins*, 93 Nev. 431, 566 P.2d 1136 (1977) (recognizing that, normally, separate actions may not be maintained on one cause of action, but nevertheless allowing a personal injury plaintiff to proceed with an action for which his insurer had already obtained a judgment, under the particular circumstances noted) (citing *Reardon v. Allen*, 88 N.J.Super. 560, 213 A.2d 26 (Law Div. 1965) (discussing relevant authorities and recognizing that, because an insurer is subrogated to the rights of its insured, once the insured obtains a judgment, the insurer usually cannot maintain an action arising out of its subrogation rights)); *see generally Sierra Club*, 995 F.2d at 1486 (recognizing that, when the "case at bar would have controlling force on those issues" to which the prospective intervenor holds an interest, such as through operation of stare decisis, the prospective intervenor has met the second requirement of the FRCP equivalent to NRCP 24(a)(2), in that the intervenor's ability to protect that interest "would necessarily result in [its] practical impairment" if intervention is not allowed).

41 *See, e.g., Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir.1970) (recognizing "that where the state workmen's compensation law permits subrogation of a compensation carrier, the carrier is entitled to intervene as a matter of right").

42 *Dairy Maid Dairy*, 147 F.R.D. at 112 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)); 6 James Wm. Moore, et al., *Moore's Federal Practice* § 24.03[4] [a] [ii] (3d ed.2006) (noting that when interests or objectives are identical, a presumption of adequate representation may arise, absent "adversity of interest, collusion or nonfeasance").

43 *See, e.g., Breen*, 102 Nev. at 87, 715 P.2d at 1074–75 (defining the scope of an employer's (or an employer's insurer's) lien on the injured worker's "total proceeds" as including the right to reimbursement from the worker's recovery of damages for noneconomic losses).

44 *See Hughes v. Newton*, 295 Ala. 117, 324 So.2d 270 (1975) (recognizing that an insurer's intervention in an injured worker's suit usually is not necessary to protect its subrogation interest, and noting circumstances in which intervention might be warranted because the worker is unable to adequately protect the insurer's interest).

45 We note that, under NRS 616C.215(7), the injured worker must provide written notification to the workers' compensation insurer before commencing an action against a third-party tortfeasor.

46 Although, in the district court, AHAC suggested that its intervention was warranted to allow it to conduct expert discovery, it did not further explain what expert discovery, the completion of which was not anticipated by Madison, it believed was necessary. *See McGinnis v. United Screw & Bolt Corp.*, 637 F.Supp. 9, 11 (E.D.Pa.1985) (finding no inadequacy of representation when the insurer fails to show collusion, adverse interest, or less-than-diligent prosecution).

47 AHAC also summarily asserts that intervention is warranted so that it can defend claims of employer negligence, citing *Aceves v. Regal Pale Brew. Co.*, 24 Cal.3d 502, 156 Cal.Rptr. 41, 595 P.2d 619 (1979), *overruled in part on other grounds by Privette v. Superior Court (Contreras)*, 5 Cal.4th 689, 21 Cal.Rptr.2d 72, 854 P.2d 721 (1993). In *Aceves*, the California court reduced an insurer's reimbursement claim by the percentage of fault attributable to the employer, ultimately denying reimbursement because the insurer had paid less than the amount constituting the employer's percentage share of responsibility. *Id.* As Madison notes, the case cited by AHAC is based on California law, and this court has never determined whether, in Nevada, an insurer's reimbursement from third-party proceeds may be impacted by the employer's concurrent negligence. *See generally Workers' Compensation Law, supra* note 39, at § 120.02[3] (discussing various jurisdictions' differing responses to third-party tortfeasors' allegations that the employer was concurrently negligent); *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 165, 561 P.2d 450, 454 (1977) (recognizing that employers are generally immune from suit and from third-party equitable indemnity claims); *cf. Santisteven v. Dow Chemical Company*, 362 F.Supp. 646, 651 (D.Nev.1973) (interpreting Nevada law to allow a third-party tortfeasor to offset the judgment against him "by the amount of the compensation paid to the injured employee if he can prove that the concurrent negligence of the employer contributed to the injuries").

We do not reach this issue now, however, as AHAC neither attempted to intervene in the district court to help Guardsmark defend against the third-party complaint, *see* NRS 12.130(2) and *Nye County v. Washoe Medical Center*, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) (noting that this court generally will not consider arguments not raised before the district court), nor fully addressed this argument in its writ petition, *see* NRAP 21(a); *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). In any case, AHAC has not even suggested that Guardsmark is unable to adequately defend such claims. *Cf. Scammon Bay Association, Inc. v. Ulak*, 126 P.3d 138, 143–45 (Alaska 2005) (recognizing that intervention was not warranted until the employer discovered that the injured worker would not adequately represent its interest).

48 As we determine that AHAC's intervention was unwarranted in this instance, we do not decide whether to extend *Breen* 's cost-sharing formula to subrogation claims or the extent to which equity might require a proportionate sharing of litigation expenses in cases where intervention is found to be warranted at a late date.

49 *Dangberg Holdings*, 115 Nev. at 141, 978 P.2d at 318 (quoting *Lawler*, 94 Nev. at 626, 584 P.2d at 669).

50 *See generally Ulak*, 126 P.3d at 143; *see also supra* note 47.

51 Additionally, we note that Madison contended that intervention was inappropriate because the workers' compensation benefits were, in reality, provided by the same entity as is Timet's liability insurer. As the district court did not address this contention and as we determine that intervention was unwarranted on other grounds, we do not reach this issue, except to note that such a contention is properly considered when the district court is exercising its discretion in deciding an application. *See generally Workers' Compensation Law, supra* note 39, at § 116.06 (discussing the conflict of interest that arises when the insurer is present on both sides of the litigation—as the workers' compensation provider and as the alleged tortfeasor's liability insurer).

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Employers Ins. Co. of Nevada v. Chandler, 117 Nev. 421 (2001)

117 Nev. 421
Supreme Court of Nevada.

EMPLOYERS INSURANCE COMPANY OF NEVADA, a Mutual Company, f/k/a Employers Insurance Company of Nevada, an Agency of the State of Nevada, Appellant,
v.
Harry CHANDLER, Respondent.

No. 35079.
|
May 24, 2001.

Claimant, who was injured in a work-related motor vehicle accident and received a third-party settlement for his injuries, sought to reopen his workers' compensation claim for further psychological therapy. Administrative appeals officer ruled that claimant was entitled to receive medical benefits without first exhausting the entire amount of the third-party settlement proceeds. The Eighth Judicial District Court, Clark County, Nancy M. Saitta, J., denied employer's petition for judicial review. Employer appealed. The Supreme Court held that denial of further medical benefits for claimant's work-related injury was warranted until he exhausted his third-party settlement proceeds.

Reversed and remanded with instructions.

West Headnotes (9)

[1] **Workers' Compensation**
⇦ In general;questions of law or fact

Questions of law in workers' compensation cases are reviewed de novo.

Cases that cite this headnote

[2] **Administrative Law and Procedure**
⇦ Deference to agency in general

A reviewing court may undertake independent review of the administrative construction of a statute.

Cases that cite this headnote

[3] **Workers' Compensation**
⇦ Enforcement or Preservation of Right to Expenses

Denial of further medical benefits for claimant's work-related injury was warranted until he exhausted his third-party settlement proceeds. N.R.S. 616C.215, subd. 2(a).

1 Cases that cite this headnote

[4] **Statutes**
⇦ What constitutes ambiguity;how determined

Statutes
⇦ Plain language;plain, ordinary, common, or literal meaning

When more than one interpretation of a statute can reasonably be drawn from its language, it is ambiguous and the plain meaning rule has no application; however, when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.

4 Cases that cite this headnote

[5] **Statutes**
⇦ Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

When a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given.

Cases that cite this headnote

[6] **Statutes**
⇦ Language and intent, will, purpose, or policy
Statutes
⇦ Superfluousness
Courts must construe statutes to give meaning to all of their parts and language, and the Supreme Court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.

4 Cases that cite this headnote

[7] **Workers' Compensation**
⇦ Subrogation or assignment in general
The term "compensation" in statute granting subrogation rights to a workers' compensation insurer against a claimant's third-party recovery when the claimant receives an injury "for which compensation is payable" clearly and unambiguously includes medical benefits. N.R.S. 616A.035, 616A.090, 616C.215, subd. 2(a).

4 Cases that cite this headnote

[8] **Workers' Compensation**
⇦ Subrogation or assignment in general
The contemplated purpose of statute granting subrogation rights to a workers' compensation insurer against a claimant's recovery from a third-party tortfeasor is to make the insurer whole and to prevent an employee from receiving an impermissible double recovery. N.R.S. 616C.215, subd. 2(a).

2 Cases that cite this headnote

[9] **Workers' Compensation**
⇦ Enforcement or Preservation of Right to Expenses
A workers' compensation insurer is entitled to withhold payment of medical benefits for a work-related injury until an employee has exhausted any third-party settlement proceeds. N.R.S. 616C.215, subd. 2(a).

4 Cases that cite this headnote

Attorneys and Law Firms

**256 *422 Shirley D. Lindsey, Associate General Counsel, Employers Insurance Company of Nevada, Las Vegas, for Appellant.

Nancyann Leeder, Nevada Attorney for Injured Workers, and Gary T. Watson, Deputy Nevada Attorney for Injured Workers, Carson City, for Respondent.

*423 Before YOUNG, LEAVITT and BECKER, JJ.

OPINION

PER CURIAM:

Respondent Harry Chandler sustained injuries in a motor vehicle accident that occurred during the course of his employment. Appellant Employers Insurance Company of Nevada (EICON) paid Chandler workers' compensation benefits and eventually closed his claim. After receiving a third-party settlement and reimbursing EICON for benefits paid, Chandler later requested EICON to reopen his workers' compensation claim. EICON denied Chandler's request on the basis that he was required to exhaust the third-party settlement proceeds before it could reopen his claim. EICON's denial was upheld by a hearing officer, but reversed by an appeals officer. The district court subsequently denied EICON's petition for judicial review. On appeal, EICON contends that Chandler is not entitled to receive further workers' compensation benefits, including medical benefits, without first exhausting the entire amount of his third-party settlement proceeds because the term "compensation" in NRS 616C.215 includes

payment of medical expenses. We agree and reverse the order of the district court denying the petition for judicial review.

FACTS

Chandler, an employee of Greyhound Lines, Inc., was injured in the course of his employment when the bus he was driving was involved in a motor vehicle accident. The accident was caused by a third-party driver whose vehicle collided head-on with the bus in Kingman, Arizona. Chandler sustained injuries to his left knee and right toe. He also suffered post-traumatic stress disorder **257 as a result of the collision, which killed the third-party driver and his passenger. EICON paid Chandler workers' compensation benefits amounting to $3,267.46 before closing his claim.

Chandler also pursued a claim against the third-party driver's insurer. That case was settled for $7,267.46, and Chandler received $4,000.00 in damages after reimbursing EICON the $3,267.46 in benefits out of the settlement proceeds.

*424 Thereafter, Chandler requested EICON to reopen his claim for further psychological therapy because he continued to experience symptoms of post-traumatic stress disorder following the accident. EICON advised Chandler that he would have to exhaust the third-party settlement proceeds before it would reopen his workers' compensation claim. Chandler challenged EICON's decision, and the hearing officer affirmed. Chandler appealed. The appeals officer concluded that Chandler was entitled to receive medical benefits without first exhausting the entire amount of the third-party settlement proceeds because the term "compensation" in NRS 616C.215 includes wage replacement benefits but does not include medical benefits. The district court subsequently denied EICON's petition for judicial review after concluding that substantial evidence supported the appeals officer's decision.

DISCUSSION

[1] [2] The question before this court is one of statutory construction, namely, whether the appeals officer properly interpreted the workers' compensation statutes applicable to this case. Questions of law are reviewed de novo.[1] "[A] reviewing court may undertake independent review of the administrative construction of a statute."[2]

NRS 616C.215 grants subrogation rights to workers' compensation insurers and allows them to place liens upon the proceeds recovered by employees from third-party tortfeasors.[3] In particular, subsection 2 provides in relevant part:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee, or in case of death his dependents, may take proceedings against that person to recover damages, but the amount of the compensation the injured employee or his dependents are entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of the damages recovered, *425 notwithstanding any act or omission of the employer or a person in the same employ which was a direct or proximate cause of the employee's injury.[4]

[3] EICON contends that the plain language of NRS 616C.215(2)(a) entitles it to deny Chandler further medical benefits for his work-related injury until he has exhausted his third-party settlement proceeds because, for purposes of NRS 616C.215(2)(a), NRS 616A.090 defines "compensation" to include accident benefits which, according to the express language of NRS 616A.035, includes medical benefits.[5] Chandler contends, **258 however, that the term "compensation" in NRS 616C.215(2)(a) does not include medical benefits because the phrase "money which is payable to an

employee or to his dependents" in NRS 616A.090 limits the statutory definition of "compensation" to wage replacement benefits.

[4] [5] [6] When more than one interpretation of a statute can reasonably be drawn from its language, it is ambiguous and the plain meaning rule has no application.[6] However, when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.[7] "Under long established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given."[8] Additionally, courts must *426 construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.[9]

[7] [8] We do not read the phrase "payable to an employee or to his dependents" in NRS 616A.090 as Chandler reads it. To the contrary, the word "payable" simply means "due" and does not limit the definition of compensation in NRS 616C.215 to money disbursed directly to an employee or to his dependents.[10] In fact, when read within the context of NRS 616A.035, NRS 616A.090, and NRS 617.130, the term "compensation" in NRS 616C.215 clearly and unambiguously includes medical benefits. Further, the contemplated purpose of NRS 616C.215 is to make the insurer whole and to prevent an employee from receiving an impermissible double recovery.[11] Defining the term "compensation" in NRS 616C.215 to include medical benefits prevents an employee from receiving a double recovery. Thus, the plain meaning of NRS 616C.215(2)(a) is consistent with the purpose of the statute.

CONCLUSION

[9] We conclude that an insurer is entitled to withhold payment of medical benefits for a work-related injury until an employee has exhausted any third-party settlement proceeds because the plain meaning of the term "compensation" in NRS 616C.215 includes medical benefits. Accordingly, we reverse the district court's order denying the petition for judicial review and remand this matter to the district court. On remand, the district court shall grant the petition and reverse the appeals officer's decision that Chandler is not required to exhaust his settlement proceeds before receiving medical benefits.

All Citations

117 Nev. 421, 23 P.3d 255

Footnotes

1 *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

2 *American Int'l Vacations v. MacBride*, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983).

3 *See* NRS 616C.215.

4 NRS 616C.215(2)(a).

5 NRS 616A.090 provides:

> "Compensation" means the money which is payable to an employee or to his dependents as provided for in chapters 616A to 616D, inclusive, of NRS, and includes benefits for funerals, accident benefits and money for rehabilitative services.
>
> NRS 616A.035 provides in relevant part:
>
> 1. "Accident benefits" means medical, surgical, hospital or other treatments, nursing, medicine, medical and surgical supplies, crutches and apparatuses, including prosthetic devices.
>
> 2. The term includes:
>
> (a) Medical benefits as defined by NRS 617.130.
>
> NRS 617.130 provides in relevant part:
>
> 1. "Medical benefits" means medical, surgical, hospital or other treatments, nursing, medicine, medical and surgical supplies, crutches and apparatus, including prosthetic devices.

6 *Hotel Employees v. State, Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987).
7 *See City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).
8 *Randono v. CUNA Mutual Ins. Group*, 106 Nev. 371, 374, 793 P.2d 1324, 1326 (1990) (citations omitted).
9 *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983).
10 *See Random House Webster's College Dictionary* 957 (2d ed.1997).
11 *See* NRS 616C.215; *see also Breen v. Caesars Palace*, 102 Nev. 79, 82, 715 P.2d 1070, 1072 (1986).

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Poremba v. Southern Nevada Paving,
133 Nev. Adv. Op. 2, 388 P.3d 232 (2017)

388 P.3d 232
Supreme Court of Nevada.

William POREMBA, Appellant,
v.
SOUTHERN NEVADA PAVING; and
S&C Claims Services, Inc., Respondents.

No. 66888
|
Filed January 26, 2017

Synopsis

Background: Claimant, who was injured in a work-related motor vehicle accident and received a third-party settlement for his injuries, sought to reopen his workers' compensation claim for further medical benefits. After an evidentiary hearing, administrative appeals officer summarily granted workers' compensation insurer summary judgment after claimant admitted he spent settlement funds on expenses other than medical expenses. The Eighth Judicial District Court, Clark County, Valorie J. Vega, J., denied claimant's petition for judicial review. Claimant appealed.

Holdings: The Supreme Court, Cherry, C.J., en banc, held that:

[1] administrative or appeals officer must first reopen a workers' compensation claim based solely on statutory requirements and then determine what, if any, reimbursement is owed;

[2] insurer is not entitled to reimbursement from portion of settlement funds designated to compensate claimant for pain and suffering;

[3] claimant was not required to prove that he spent excess tort recovery on medical expenses as condition precedent to reopening claim;

[4] appeals officer was required to determine whether claimant qualified to reopen claim before considering whether insurer was entitled to reimbursement; and

[5] evidentiary hearing was required on allocation of settlement funds and reimbursement.

Reversed and remanded.

Opinion, 369 P.3d 357, superseded.

West Headnotes (11)

[1] **Workers' Compensation**
⇦ Necessity and Sufficiency of Grounds

Workers' Compensation
⇦ Rights of Employer or Insurer

An administrative or appeals officer must first reopen a workers' compensation claim based solely on statutory requirements and then determine what, if any, reimbursement from claimant's tort recovery an insurer is entitled to before it must provide additional benefits. Nev. Rev. St. §§ 616C.215(2), 616C.390(1).

Cases that cite this headnote

[2] **Workers' Compensation**
⇦ Rights of Employer or Insurer

Although an insurer may be entitled to reimbursement from portion of settlement funds designated for expenses otherwise covered by workers' compensation, insurer is not entitled to reimbursement from portion of settlement funds designated to compensate injured worker for items outside the definition of "compensation," such as past, present, and future pain and suffering. Nev. Rev. St. §§ 616A.090, 616C.215(2).

Cases that cite this headnote

[3] **Workers' Compensation**
⇦ Change of condition in general

Claimant was not required to prove that he spent excess tort recovery on medical expenses as condition precedent to reopening workers' compensation claim due to change in medical condition. Nev. Rev. St. § 616C.390.

Cases that cite this headnote

[4] **Administrative Law and Procedure**
⇦ Scope

Supreme Court's role in reviewing an administrative agency's decision is identical to that of the district court.

Cases that cite this headnote

[5] **Administrative Law and Procedure**
⇦ Law questions in general

Although the Supreme Court defers to an agency's findings of fact, it reviews legal issues de novo, including matters of statutory interpretation.

Cases that cite this headnote

[6] **Administrative Law and Procedure**
⇦ Administrative construction

Administrative Law and Procedure
⇦ Deference to agency in general

The Supreme Court defers to an agency's interpretations of its governing statutes or regulations only if the interpretation is within the language of the statute.

Cases that cite this headnote

[7] **Workers' Compensation**
⇦ Necessity and Sufficiency of Grounds

Workers' Compensation
⇦ Rights of Employer or Insurer

Appeals officer was required to determine whether claimant qualified to reopen workers' compensation claim before considering whether insurer was entitled to reimbursement from claimant's tort recovery. Nev. Rev. St. §§ 616C.215(2), 616C.390.

Cases that cite this headnote

[8] **Workers' Compensation**
⇦ Rights of Employer or Insurer

Policy behind statute granting subrogation rights to a workers' compensation insurer against a claimant's recovery from a third-party tortfeasor is to prevent a double recovery; double recovery is characterized based not on the event necessitating the compensation, but on the nature of the compensation provided. Nev. Rev. St. § 616C.215(2).

Cases that cite this headnote

[9] **Workers' Compensation**
⇦ Rights of Employer or Insurer

Because workers' compensation insurance never compensates the injured worker for pain and suffering, an insurer is not entitled to reimbursement from any settlement funds that designated for pain and suffering, or any other expense beyond the scope of workers' "compensation." Nev. Rev. St. §§ 616A.090, 616C.215(2).

Cases that cite this headnote

[10] **Workers' Compensation**
⇦ Rights of Employer or Insurer

Silence of claimant's tort settlement as to allocation beyond amount spent directly on then present medical expenses required evidentiary hearing on remand for parties to present evidence and call witnesses privy to the settlement proceedings so that the appeals officer could make factual determination as to how remainder of the settlement was to be allocated

and to order reimbursement to workers' compensation insurer from any portion of the settlement allocated for expenses within the scope of workers' compensation. Nev. Rev. St. §§ 616A.090, 616C.215.

Cases that cite this headnote

[11] **Workers' Compensation**
Rights of Employer or Insurer

Appeals officer's order after hearing on remand to determine how claimant's tort settlement was to be allocated and how workers' compensation insurer was to be reimbursed needed to have detailed findings of fact and conclusions of law. Nev. Rev. St. §§ 233B.125, 616A.090, 616C.215.

Cases that cite this headnote

*234 Petition for en banc reconsideration of a panel opinion in an appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Attorneys and Law Firms

Dunkley Law and Mark G. Losee and Matthew S. Dunkley, Henderson, for Appellant.

Lewis Brisbois Bisgaard & Smith, LLP, and Daniel L. Schwartz and Jeanne P. Bawa, Las Vegas, for Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, CHERRY, C.J.:

On April 7, 2016, a panel of this court issued an opinion reversing, remanding, and instructing the district court to remand the case to the appeals officer. After respondents petitioned for en banc reconsideration, we granted the petition. We now withdraw the April 7, 2016, opinion and issue this opinion in its place. On en banc reconsideration, we again reverse, remand, and instruct the district court to remand to the appeals officer, but we instruct the appeals officer to conduct a hearing consistent with this opinion.

NRS 616C.390(1) sets forth the required findings that compel reopening of a workers' compensation claim, none of which include the right of an insurer to reimbursement from an injured workers' third-party recovery. NRS 616C.215(2)(a), however, provides that when an injured employee who receives workers' compensation also recovers damages from the responsible party, the amount of workers' compensation benefits must be reduced by the amount of the damages recovered. We concluded in *Employers Insurance Co. of Nevada v. Chandler*, 117 Nev. 421, 426, 23 P.3d 255, 258 (2001), that an insurer may refuse to pay additional funds via reopening a workers' compensation claim until the claimant demonstrates that he or she has exhausted any third-party settlement funds and that medical expenses are considered to be compensation that an insurer may withhold until the recovery amount has been exhausted.

[1] [2] In the case now before us, it appears that the appeals officer and the district court resolved the petition to reopen based upon whether Poremba exhausted his settlement funds on medical expenses. That is erroneous for two reasons. First, NRS 616G.390 does not require exhaustion or reimbursement as a condition precedent to reopening a workers' compensation claim. Second, insurers, although entitled to reimbursement, are only entitled to reimbursement from the portions of third-party recovery allocated to expenses within the scope of workers' compensation. Accordingly, we hold that (1) an administrative officer, or in this case an appeals officer, must first reopen a worker's compensation claim based solely on the requirements contained within NRS 616C.390(1), then determine what, if any, reimbursement an insurer is entitled to before it must provide additional workers' compensation benefits; and (2) although an insurer may be entitled to

reimbursement from the portion of settlement funds designated for expenses otherwise covered by workers' compensation, an insurer is not entitled to reimbursement from the portion of settlement funds designated to compensate the injured worker for items outside the definition of "compensation" in NRS 616A.090, such as past, present, and future pain and suffering.

FACTS AND PROCEDURAL HISTORY

Appellant William Poremba worked for respondent Southern Nevada Paving as a construction driver. On July 22, 2005, in the course of his duty, Poremba was driving a truck when another driver struck the truck *235 with his backhoe. Poremba suffered injuries to his head, neck, back, and knee. Poremba filed a workers' compensation claim, which Southern Nevada Paving, through respondent S&C Claims (collectively S&C), accepted. S&C eventually closed the claim, sending Poremba a letter with instructions on how to reopen the claim should his condition worsen.

Poremba also sued the backhoe driver and his employer. That lawsuit was settled on July 30, 2009, for $63,500, with a significant amount of that settlement paid directly to cover health-care providers' liens. Poremba personally received $34,631.51. He spent approximately $14,000 of the money he received on additional medical treatment. The settlement agreement, however, did not specify a structure as to how the funds were to be allocated.

Poremba attempted to return to work, but he was unable to do so. Additionally, his doctors instructed him not to go back to work. On January 10, 2013,[1] Poremba sought to reopen his claim, but S&C denied his request. Poremba administratively appealed, and S&C filed a motion for summary judgment, arguing that our decision in *Chandler* precluded Poremba from reopening his claim because he spent settlement funds on expenses other than medical costs. After an evidentiary hearing in which the appeals officer prevented Poremba from introducing evidence about the potential changed circumstances surrounding his injuries, the appeals officer summarily granted S&C summary judgment, again denying Poremba's attempt to reopen his claim. Poremba petitioned the district court for judicial review. The district court denied the petition, and this appeal followed.

DISCUSSION

[3] Poremba asserts that the appeals officer erred in granting summary judgment because, legally, he is not required to prove that he spent his excess recovery on medical expenses and because factual issues exist as to whether his injury had worsened, necessitating additional compensation. S&C argues that *Chandler* "clearly stands for" the proposition that a claimant who receives a third-party settlement may not spend any of that money on home loans or family expenses and reopen his or her workers' compensation claim when his or her medical situation changes. S&C argues that the point is to prevent a double recovery, asserting that double recovery means simply to recover from two sources for the same injury. We disagree with S&C.

[4] [5] [6] 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. 780, 784, 312 P.3d 479, 482 (2013). Although we defer to an agency's findings of fact, we review legal issues de novo, including matters of statutory interpretation. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). We defer to an agency's interpretations of its governing statutes or regulations only if the interpretation "is within the language of the statute." *Id.* (internal quotations omitted).

Workers' compensation provides specific benefits while personal injury recoveries may be designed not only to pay for special damages, such as loss of earnings and medical expenses, but to compensate for general or noneconomic damages such as pain and suffering and emotional distress. The critical inquiry for determining insurer reimbursement is not how an injured worker spends settlement funds, but how those settlement funds are allocated for various damages. We hold that workers' compensation insurers are not entitled

to reimbursement from the portion of third-party settlement funds that do not fall within the definition of compensation found in NRS 616A.090. Moreover, before an administrative officer may even consider reimbursement, the officer must first make a finding pursuant to NRS 616C.390 as to whether the worker's claim must be reopened.

*236 *The administrative officer must make a finding pursuant to NRS 616C.390 before considering whether the insurer is entitled to any reimbursement*

[7] Reimbursement rules notwithstanding, the sole requirements for a claimant to reopen a workers' compensation claim are contained within NRS 616C.390:

> 1. If an application to reopen a claim to increase or rearrange compensation is made in writing more than 1 year after the date on which the claim was closed, the insurer *shall* reopen the claim if:
>
> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
>
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and
>
> (c) The application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.

(Emphasis added.) NRS 616C.390 is silent as to funds that the claimant receives from any other source. *Id.*

Poremba waited the required year after his previous petition to reopen his claim. He submitted documentation from his treating physician stating that the original injury was the primary cause of the changed circumstances and that he needed an increase in compensation because of the changed circumstances. At the hearing, however, the appeals officer did not let Poremba testify or enter the documentation into evidence once she learned that Poremba spent settlement funds on nonmedical expenses. As a result, the appeals officer denied Poremba's petition.

Because the only factors required to compel reopening are found within NRS 616C.390 and the appeals officer failed to make any factual findings as to those factors, we must reverse and remand with instructions to remand to the appeals officer to determine whether Poremba qualifies to reopen his claim based solely on NRS 616C.390 before she considers whether S&C is entitled to reimbursement.

An insurer is not entitled to reimbursement from the portions of a third-party settlement that compensates an injured worker for anything outside the definition of compensation found in NRS 616A.090

Nevada law allows an insurer to claim an offset when the claimant receives money from a lawsuit against the party responsible for the injury. NRS 616C.215(2). In pertinent part, NRS 616C.215(2) provides as follows:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee ... may take proceedings against that person to recover damages, but the amount of the compensation the injured employee ... [is] entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of the damages recovered....
>
> (b) If the injured employee ... receive[s] compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer ... has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured

employee or of the employee's dependents to recover therefor.

For the purposes of workers' compensation insurance, however, " '[c]ompensation' means the money which is payable to an employee or to the dependents of the employee as provided for in chapters 616A to 616D, inclusive, of NRS, and includes benefits for funerals, accident benefits and money for rehabilitative services." NRS 616A.090.

Accident benefits include "medical, surgical, hospital or other treatments, nursing, medicine, medical and surgical supplies, crutches and apparatuses, including prosthetic devices." NRS 616A.035(1). Accident benefits do not include exercise equipment, gym *237 memberships, or in most cases, motor vehicle expenses. NRS 616A.035(3). Medical benefits are defined virtually identically to accident benefits. *See* NRS 617.130.

In 2001, this court concluded that an insurer may withhold payment of medical benefits until the claimant has exhausted any funds received from a third-party settlement. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. Although *Chandler* did not limit how the claimant may exhaust the settlement funds, despite S&C's assertions to the contrary, the issue is not how the funds are exhausted, but which third-party claim for damages must be exhausted before a claimant may seek additional compensation. Accordingly, it is critical to allocate the settlement proceeds in order to determine the category for reimbursement to an insurer.

In *Chandler*, we held that "compensation," as specified in NRS 616C.215, included medical benefits. *Id.* It was not necessary to determine whether wage replacement, or any other type of specific payments, were to be excluded. We concluded that Chandler had to exhaust his settlement proceeds, but we did not decide how he had to exhaust those proceeds. *Id.* [2] We also did not discuss whether an insurer is entitled to reimbursement from all settlement funds or only the portion of those funds designated for expenses within the definition of compensation as found in NRS 616A.090. We take the opportunity to do so today.

When a person is injured, he or she may sue the responsible party for payment to cover a variety of costs. Restatement (Second) of Torts § 924 (Am. Law Inst. 1979). While medical treatment is certainly among those costs, a plaintiff may also recover damages for pain and suffering, lost wages if the defendant's actions prevented the plaintiff from working, and harm to property. *Id.* These damages include and exceed the compensation as defined in NRS 616A.090.

[8] S&C is correct that the policy behind NRS 616C.215 is to prevent a double recovery. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. S&C, however, mischaracterizes double recovery. Double recovery is characterized based not on the event necessitating the compensation, but on the nature of the compensation provided. S&C cites to *Tobin v. Department of Labor & Industries*, 145 Wash.App. 607, 187 P.3d 780 (2008), for the proposition that a claimant should not receive a double recovery as well. *Tobin*, however, explains that double recovery prevents the claimant from receiving compensation from the insurer and "retain[ing] the portion of damages which would include those same elements." 187 P.3d at 783 (internal quotations omitted). The *Tobin* court held that the insurer was only entitled to the portion of proceeds from the third-party suit that correlate to the benefits it provided as a worker's compensation insurer. *Id.* at 784. The *Tobin* court continued:

> [The insurer]'s position would give it an "unjustified windfall" at [the claimant]'s expense. Under [the insurer]'s interpretation, it would be entitled to share in damages for which it has not provided and will never pay compensation. We do not interpret these statutes to require such a fundamentally unjust result. [*The insurer*] *did not, and will never, compensate* [*the claimant*] *for his pain and suffering, therefore it cannot be "reimbursed" from funds*

> *designated to compensate him for his pain and suffering.*

Id. (internal citations omitted) (emphasis added). Only one percent of Tobin's 1.4 million dollar settlement was allocated to future medical expenses, whereas over half of the settlement was allocated to pain and suffering. *Id.* at 781. The breakdown of Poremba's settlement, however, remains unclear and requires further fact-finding.

We agree with S&C insofar as a worker should not receive funds from two sources to pay for the same expenses. The worker, however, may spend settlement funds allocated for expenses beyond NRS 616A.090's definition of workers' compensation on those designated expenses without fear that the insurer will forever be able to deny or refuse to *238 reopen claims for future expenses that are within the scope of workers' compensation.

[9] We agree with the *Tobin* court and hold that because workers' compensation insurance never compensates the injured worker for pain and suffering, an insurer is not entitled to reimbursement from any of the settlement funds that were designated for pain and suffering, or any other expense beyond the scope of workers' compensation defined in NRS 616A.090. To deny a worker the opportunity to reopen his claims for future workers' compensation benefits because he properly used the portion of his settlement money designated for pain and suffering to feed himself and his family is patently unjust and not supported by the statute.

[10] Accordingly, we conclude that while S&C may be entitled to an offset based on the settlement funds allocated for future medical expenses or other expenses within the scope of workers' compensation, it is not entitled to recover any portion of the settlement funds allocated for expenses beyond NRS 616A.090's definition of compensation, such as pain and suffering. Because the record is silent as to how Poremba's settlement was to be allocated beyond the amount spent directly on then present medical expenses, the appeals officer must conduct an evidentiary hearing in which the parties may present evidence and call witnesses privy to the settlement proceedings so that the appeals officer can make a factual determination as to how the remainder of the settlement was to be allocated[3] and may only order reimbursement from the portion of the settlement allocated for expenses within the scope of workers' compensation. Going forward, parties can expressly designate how settlement funds are to be allocated so that future evidentiary hearings are not necessary.

Because Poremba's settlement likely covered expenses beyond the scope of compensation as found in NRS 616A.090, we must reverse the district court's denial of judicial review and instruct the district court to remand to the appeals officer for further proceedings consistent with this opinion.

The administrative officer must issue a decision containing detailed findings of fact and conclusions of law

[11] Poremba argues that the district court erred when it found no improper procedure because Nevada statutes require the appeals officer's order to contain findings of fact and conclusions of law, and they were absent in the appeals officer's order. He further argues that without these findings, it is more difficult for a court to conduct a meaningful review. S&C does not refute Poremba's arguments, but merely suggests that if correct, the remedy would be a remand for a more detailed order. We conclude that after the appeals officer conducts the hearing to determine how Poremba's settlement was to be allocated, an order with detailed findings of fact and conclusions of law is required.

Without detailed factual findings and conclusions of law, this court cannot review the merits of an appeal; thus, administrative agencies are required to issue orders that contain factual findings and conclusions of law. NRS 233B.125. In pertinent part, the statute reads:

> A decision or order adverse to a party in a contested case *must* be in writing or stated in the record.... [A] final decision *must include findings of fact and*

> *conclusions of law, separately stated.* Findings of fact and decisions *must* be based upon substantial evidence. Findings of fact, if set forth in statutory language, *must* be accompanied by a concise and explicit statement of the underlying facts supporting the findings.[4]

Id. (emphases added). Each and every clause in this statute contains mandatory instruction *239 for the appeals officer, leaving no room for discretion.

Here, not only did the appeals officer fail to issue detailed findings of fact or conclusions of law, the appeals officer precluded Poremba from introducing evidence supporting reopening his case after he admitted that he spent settlement money on expenses beyond medical treatment. This illustrates that the appeals officer had the same mistaken impression of the law as do the insurers. Therefore, not only did the appeals officer err when she failed to comply with NRS 233B.125's mandate for detailed findings and conclusions, but because she prevented Poremba from presenting the required evidence, pursuant to NRS 616C.390, to reopen his claim, we are unable to review the facts in this appeal. Accordingly, we must reverse and remand for a full administrative hearing and subsequent order containing detailed findings of fact and conclusions of law as to whether Poremba meets the requirements of NRS 616C.390 and, if so, how much of an offset S&C may claim based on the amount of settlement funds that were designed to compensate for expenses within NRS 616A.090's definition of compensation.

CONCLUSION[5]

Accordingly, the judgment of the district court is reversed, and we remand to the district court with instructions to remand to the appeals officer for a new hearing and determination, consistent with this opinion.[6]

We concur:

Douglas, J.

Pickering, J.

Parraguirre, J.

Gibbons, J.

Hardesty, J.

All Citations

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Footnotes

1 Poremba previously attempted to reopen his claim just over a year prior to January 2013. NRS 616C.390 requires a claimant to wait for a year before a subsequent attempt to reopen, and Poremba complied.

2 In 2007, we again held that compensation, for the purposes of workers' compensation laws, includes medical benefits. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 177, 162 P.3d 148, 152 (2007). We did not limit the term "compensation" to medical benefits.

3 Specifically, the appeals officer must determine how much of the settlement was designated for:
- Medical expenses, both past and future;
- Wage loss, both past and future;
- Pain and suffering, past, present, and future; and
- Any other expense contemplated at the time of the settlement.

4 This statute was amended in 2015 and changed the standard from "substantial evidence" to "a preponderance of the evidence." 2015 Nev. Stat., ch. 160, § 7, at 708. This change does not affect this opinion.

5 Poremba argued that the appeals officer improperly revived S&C's motion for summary judgment. Because we conclude both that the insurer may not seek reimbursement from the portion of the settlement funds

allocated for expenses beyond the limited scope of workers' compensation and that the appeals officer's order must contain detailed factual findings and conclusions of law, we decline to address this issue.

6 The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

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