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### Summary of Garcia v. Scolari's Food & Drug, 125 Nev. Adv. Op. No. 6

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*Nevada Law Journal*

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## ADMINISTRATIVE LAW

### Summary

As a matter of first impression, the Court offered guidance on what constitutes—or rather what does not constitute—good reason for failing to present evidence during an administrative hearing under NRS 233B.131(2). The statute is part of Nevada's Administrative Procedure Act.<sup>2</sup> In a related matter, the Court affirmed the administrative tribunal's denial of occupational disease benefits for reasons of insufficient evidence.

### Disposition/Outcome

(1) An attorney's losing strategy to withhold evidence from an administrative hearing is not a justifiably good reason under NRS 233B.131(2) to warrant inclusion of such evidence on appeal.

(2) Failure to connect an employee's condition to her employment constitutes failure to establish industrial causation of that employee's medical condition and is proper grounds for administrative denial of occupational disease benefits.

### Factual and Procedural History

In April 2005, Kathy Garcia filed a claim for occupational disease benefits with her employer Scolari's Food & Drug. However, subsequent medical evaluations failed to link her injury to the workplace. Though the job at Scolari's aggravated her symptoms, it was not the primary cause of Garcia's condition. Thus, her claim was denied.

Garcia hired counsel for her administrative appeal. Her attorney argued that she was entitled to compensation for work-related aggravation of her condition. Nevada law, however, provides for compensation only where an occupational disease is established. Prior to the administrative appeal, Garcia had obtained additional medical evaluations that both established her occupational disease and linked it to her work-related aggravations. Conscious of these new records, the appeals officer granted additional time so that Garcia's attorney could submit the existing documents and bring her claim into compliance with Nevada law. Nevertheless, her attorney chose to withhold the additional evidence from the appeals officer. Consequently, Garcia failed to meet her statutory burden of proving industrial causation. Her administrative appeal was thus denied.

Dissatisfied with counsel, Garcia petitioned the district court in proper person for judicial review. She alleged that the administrative decision was issued without all relevant evidence. Still, her motion to present additional evidence to the district court was denied because it failed to adequately justify why the evidence was not submitted during the administrative proceeding. Ultimately, the district court also denied Garcia's petition for judicial review. Again in proper person, she took her case to the Nevada Supreme Court.

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<sup>1</sup> By Richard Manhattan.

<sup>2</sup> NRS 233B.010 et. seq.

## Discussion

### (1) Denial of Garcia’s motion to present additional evidence affirmed

NRS 233B.131(2) provides for judicial discretion over whether to allow a party to present additional evidence in district court that was not presented during a prior administrative hearing. Under the statute, evidence that is both (a) material<sup>3</sup> and (b) omitted for good reasons may—at the judge’s discretion—be deemed admissible under the statute. Because the district court held there was no good reason for Garcia’s failure to present the additional evidence at the administrative hearing, the Nevada Supreme Court reviewed for abuse of discretion.

Nevada’s high court had never before determined what valid reasons exist for failure to present evidence at an administrative hearing under NRS 233B.131(2). For guidance, the Court turned to sister states with similar statutes.<sup>4</sup> Most compelling were Illinois<sup>5</sup> and South Dakota<sup>6</sup> case law. Those cases do not allow a party to wait until it knows the results of an administrative hearing before deciding to submit additional evidence on appeal.

Based on this guidance, the Court adopted a rule applicable to future NRS 233B.131(2) determinations, namely that an attorney who deliberately or negligently decides to exclude evidence during administrative proceedings and—after an adverse ruling—motions to include that same evidence, fails to satisfy the “good reasons” element of the statute. In other words, an attorney’s losing strategy to withhold evidence from an administrative hearing is not a justifiably good reason under NRS 233B.131(2) to warrant inclusion of such evidence on appeal.

In the instant case, Garcia’s attorney did not present certain available evidence to the appeals officer at the administrative level. The Court felt the evidence was withheld as a losing but deliberate trial strategy. Thus, the majority held that the attorney’s decision to withhold evidence at the administrative level did not—after an adverse decision—justify remand for consideration of the same evidence. Furthermore, the attorney’s alleged negligence did not alter the outcome.

Accordingly, the district court did not abuse its discretion by refusing to consider the withheld evidence under NRS 233B.131(2).

### (2) Administrative denial of Garcia’s claim affirmed

Garcia also alleged that the appeal officer’s factual decisions at the administrative level were improper. In Nevada, reviewing courts do not substitute their opinion for an agency’s findings of fact. Instead, their job is to determine if substantial evidence exists in the record to support the agency’s decision.

On review, the Court held that substantial evidence of record supported the agency’s ruling that Garcia did not produce sufficient evidence to prove industrial causation of her condition. Specifically, the medical reports of record failed to connect her condition to her employment. Thus, failure to connect an employee’s condition to her employment constitutes failure to

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<sup>3</sup> The materiality requirement of NRS 233B.121(2) was not reached in this decision.

<sup>4</sup> Cases were cited from courts in Connecticut, Illinois, Maryland, Montana, and South Dakota.

<sup>5</sup> Northern Illinois Gas v. Industrial Com’n, 498 N.E.2d 327, 332 (Ill. App. Ct. 1986) (“A party cannot choose one trial strategy and then, faced with an adverse decision, supply additional evidence on review.”).

<sup>6</sup> McDowell v. Citibank, 734 N.W.2d 1, 11 (S.D. 2007) (“[A] party may not wait to submit evidence at an administrative hearing until after the party learns how the hearing examiner will rule.”).

establish industrial causation of that employee's medical condition and is proper grounds for administrative denial of occupational disease benefits.

### **Dissent**

CHERRY, J. and SAITTA, J.

The dissent felt the majority's decision inconsistent with the more flexible, informal nature of administrative hearings. Logically, Nevada's flexible administrative proceedings call for an equally flexible approach to NRS 233B.131(2)'s "good reasons" requirement. Relying on a Connecticut case,<sup>7</sup> the dissent equated the outcome here to a denial of due process for Garcia. A more acceptable outcome, it reasons, would follow had the majority provided that an attorney's negligence constituted a good reason for failing to present evidence at an administrative hearing under NRS 233B.131(2). Consequently, the dissent would have held that the district court did abuse its discretion in refusing to remand the matter to the appeals officer for consideration of the negligently withheld evidence.

### **Conclusion**

The Court issued its first ever ruling on what constitutes "good reasons" for an attorney's failure to present evidence at an administrative hearing under NRS 233B.131(2). The ruling is stated in the negative—establishing what does *not* constitute a good reason for such failure. Specifically, an attorney's decision to withhold evidence from an administrative hearing is not a justifiably good reason under NRS 233B.131(2) to warrant inclusion of such evidence on appeal in light of an adverse administrative ruling.

The Court also refused to disturb the associated agency decision based on allegations of incomplete evidence. Where the record shows substantial evidence of an employee's failure to connect her condition to her employment, it is proper grounds for administrative denial of her occupational disease claim.

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<sup>7</sup> *Salmon v. Department of Public Health*, 788 A.2d 1199, 1220-21 (Conn. 2002) (concluding that attorney incompetence is good reason for failing to present evidence at an administrative hearing).