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## Summary of Desert Valley Construction and Employers Insurance Company of Nevada v. Keith Hurley, 120 Nev. Adv. Op. No. 55

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**Desert Valley Construction and Employers Insurance Company of Nevada v. Keith Hurley, 96 P.3d 739, 120 Nev. Adv. Op. No. 55 (2004)<sup>1</sup>**

**EMPLOYMENT LAW – WORKER’S COMPENSATION**

**Summary:**

Employers Desert Valley Construction and Employers Insurance Company of Nevada (EICN) appealed from an order denying their petition for judicial review of a workers’ compensation award in favor of respondent Keith Hurley.

**Disposition/Outcome:**

The appeals officer’s decision in favor of Hurley was upheld.

**Factual and Procedural History:**

Employee Keith Hurley was injured in a construction accident after falling from a scaffold. His employer, Desert Valley, provided workers’ compensation insurance through EICN. However, a post-accident urine sample revealed that Hurley had 747 ng/mL of marijuana metabolite, THC carboxylic acid, in his system. NRS 616C.230(1)(d)<sup>2</sup> prohibits workers compensation awards for injuries proximately caused by the use of a controlled substance. This statute creates a rebuttable presumption that intoxication was the proximate cause of the injury. As such, Desert Valley and EICN refused to pay any compensation to Hurley.

Hurley did not appeal the application of NRS 616C.230(1)(d) to his case, though the Nevada Supreme Court pointed out in dicta that marijuana metabolite is not a specifically listed controlled substance. Instead, Hurley argued that the use of a controlled substance was not a proximate cause of his accident.

None of Hurley’s coworkers witnessed the accident and the only witness at the hearing was Dr. Raymond Kelly who testified that the levels of marijuana metabolite in Hurley’s system suggested that he was likely impaired at the time of the accident.

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<sup>1</sup> By: Kirk Reynolds

<sup>2</sup> NRS 616C.230(1) states in pertinent part:

1. Compensation is not payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS for an injury:

....

(d) Proximately caused by the employee’s use of a controlled substance. If the employee had any amount of a controlled substance in his system at the time of his injury for which the employee did not have a current and lawful prescription issued in his name or that he was not using in accordance with the provisions of chapter 453A of NRS, the controlled substance must be presumed to be a proximate cause unless rebutted by evidence to the contrary.

The appeals officer initially denied Hurley's evidence of a different proximate cause. However, Hurley petitioned the district court for review of the decision and presented the affidavit of Timothy Griswold. Griswold testified that he observed the scaffold roll into the hole and tip over while Hurley was pulling himself along the ceiling of the construction site, and that the wheel locks would not have prevented the scaffold from rolling. Griswold also testified that Hurley did not appear to be intoxicated, impaired, or under the influence of a controlled substance prior to the accident.

In response to this evidence, the appeals officer reversed the prior decision and found that the movement of the scaffold into the hole was the proximate cause of the injury rather than Hurley's use of a controlled substance. Desert Valley and EICN appealed the ruling of the appeals officer.

### **Discussion:**

The Nevada Supreme Court reviews an administrative agency's decision only to determine whether substantial evidence supports the agency's decision<sup>3</sup> and will not reweigh the evidence or pass on the credibility of witnesses.<sup>4</sup> The Nevada Supreme Court recently dealt with the application of NRS 616C(230(1)(d) in *Construction Industry v. Chalue*<sup>5</sup> in which the court noted that to rebut the presumption a workers' compensation claimant need only establish by a preponderance of the evidence that the presence of a controlled substance did not cause the injuries.

Desert Valley and EICN's only claim before the Nevada supreme court was that the agency's ruling was not supported by substantial evidence and that Hurley should not have been permitted to rebut the presumption against compensation with evidence of his own negligence. The Nevada supreme court found that substantial evidence was presented to the administrative agency to rebut the presumption. The court specifically noted that the scaffold had been placed within one foot of the hole and that one of the wheels from the scaffold was later found inside the hole. Though Dr. Raymond Kelly testified that Hurley was likely intoxicated at the time, the court notes that this does not by itself indicate that the impairment caused the injury. Rather, the court points to the testimony of Griswold as the only evidence of the effects of Hurley's impairment. Griswold testified that there were no effects on Hurley's abilities. Desert Valley and EICN pointed to the fact that Griswold is a convicted felon and therefore is not credible. However, the court notes that it is not the role of the supreme court to weigh the credibility of witnesses. As such, the court found that there was substantial evidence presented to rebut the presumption and affirmed the appeals officer's finding.

Desert Valley and EICN also suggested to the court that it could not have been the Nevada legislature's intent to allow compensation for individuals as severely intoxicated as Hurely's tests indicated he was at the time of the accident. The Nevada Supreme Court, however, points out that the current statutory construction creates a rebuttable presumption regardless of the levels of intoxication. As such, no matter how intoxicated

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<sup>3</sup> Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994).

<sup>4</sup> Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

<sup>5</sup> Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003) (stating that "if an employee has marijuana in his system when injured, then marijuana caused the accident unless proven otherwise.").

a worker is, he may still rebut the presumption with evidence of a different proximate cause.

**Conclusion:**

Under NRS 616C.230(1)(d) any worker who was using a controlled substance at the time of an accident may not be awarded workers' compensation unless he can rebut the presumption that the intoxication was a the proximate cause of the accident. This presumption can be rebutted by a showing of evidence sufficient to meet the preponderance of the evidence standard.