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### Clark County v. Bean, 136 Nev. Adv. Op. 65 (October 8, 2020)

Tanner Castro

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## DISABILITY BENEFITS: RETIREE PERMANENT PARTIAL DISABILITY BENEFITS

### **Summary**

The court concludes that retirees are entitled to permanent partial disability benefits based on their wages earned immediately before retirement.

### **Background**

Brent Bean worked as a Clark County firefighter and retired in 2011. In 2014, Bean was assessed with having a 40-percent permanent partial disability rating after having part of his prostate removed as a result of prostate cancer. Bean then filed for occupational disease benefits. Clark County accepted Bean's claims for medical expenses but rejected the claim insofar as Bean sought ongoing permanent partial disability benefits. Clark County based its reasoning on Bean's retirement status at the time of his disability. Therefore, there was no earning to base a permanent partial disability benefits award. Accordingly, Clark County did not dispute Bean's disability rating but declined to award him any benefits for the rating.

Bean then challenged the decision arguing that his benefits award should be based on his wages earned at the time he retired. The appeals officer agreed and reversed the denial. The appeals officer refused to apply *Howard* in his decision which concluded that a workers' compensation claimant "is not entitled to total temporary disability benefits for an occupational disease manifesting after retirement."<sup>2</sup> The appeals officer noted the difference between the benefits in *Howard* and the benefits sought by Bean: "Unlike temporary total disability benefits, which are intended to compensate the injured worker during the temporary period in which he is not working, permanent disability benefits are intended to compensate the injured worker for permanent physical impairment."<sup>3</sup>

The district court rejected Clark County's petition for review for similar reasons to that of the appeal officer. The district court concluded that permanent partial disability benefits are intended to compensate the injured worker for permanent damages and are not associated with lost wages. Clark County then appealed the district court's rejection.

### **Discussion**

The Nevada Supreme Court reviews an administrative agency's decision by assessing factual findings for clear error or an arbitrary abuse discretion, only overturning if they are not supported by substantial evidence.<sup>4</sup> Under NRS 617.453(4) firefighters or their dependents are entitled to compensation for disabling work-related cancers, such as Bean's prostate cancer.<sup>5</sup>

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<sup>1</sup> By Tanner Castro.

<sup>2</sup> *Howard v. City of Las Vegas*, 121 Nev. 691, 695, 120 P.3d 410, 412 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).

<sup>5</sup> NEV. REV. STAT. § 617.453(4) (2005).

Claimants are also entitled to “[t]he compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death.”<sup>6</sup> Further, NRS 616C.490 addresses the amount of benefit for a permanent partial disability rating which bases the amount of compensation for such a rating on the employee’s average monthly wage.<sup>7</sup> An employee’s average monthly wage is calculated by using a twelve week period ending on the date which the accident or disease occurred, or the last day of the payroll period preceding the accident or disease if this period is representative of the average monthly wage.<sup>8</sup> In addition, when a statute is unambiguous, the court applies its ordinary meaning, but if it is open to more than one interpretation, then the statute is interpreted consistent with the Legislature’s intent.<sup>9</sup>

The Court previously held in *DeMaranville* that the statute for calculating average wages is ambiguous when attempting to calculate the average monthly wage of an employee who died from an occupational disease after retirement.<sup>10</sup> The ambiguity arising from the date of the occurrence of an occupational disease.<sup>11</sup> The court then turned to the statute’s legislative intent concluding that the statutory scheme envisions compensating claims arising after separation from service and that NAC 616C.435 could not contradict this scheme.<sup>12</sup> Thus, the Court rejected any interpretation of the statute that would reduce an employee’s death benefit to zero.

Here, the court found Bean’s case to be analogous to *DeMaranville* and concluded that any interpretation of NAC 616C.435 to deny benefits to Bean because he was not earning wages at the time he was diagnosed would go against the statute’s intent. Further, the Court determined that assessing Bean’s ambiguity in his monthly wage should be resolved by applying the Court’s same reasoning in *DeMaranville*. Therefore, Bean’s disability benefits would be based on the wages he was earning at the time he retired, as that was the last day of the disease-risk exposure... causally connected to the disease. Moreover, the Court clarified that nothing in *Howard* impacted their decision since that case dealt with temporary disability benefits and not partial permanent disability benefits. Accordingly, the Court affirmed the district court’s denial of Clark County’s petition for judicial review.

## **Conclusion**

The Court holds that retiree benefits under NAC 616C.435 regarding permanent partial disability benefits should be based on the retiree’s wages earned immediately before retirement. As such it affirms the district court’s order denying Clark County’s petition for judicial review, as the appeals officer correctly found that compensating Bean’s permanent partial disability rating should be based on his wages before retirement.

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<sup>6</sup> NEV. REV. STAT. § 617.453(4)(a)-(b) (2005).

<sup>7</sup> NEV. REV. STAT. § 616C.490(8) (2019).

<sup>8</sup> Nev. Admin. Code § 6160.435(1), (8).

<sup>9</sup> *DeMaranville v. Employers Insurance Co. of Nevada*, 135 Nev. 259, 448 P.3d 526 (2019).

<sup>10</sup> *Id.* at 526.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 265-66, 448 P.3d at 532 (listing statutes showing an intent to compensate employees post-retirement); *See* NEV. REV. STAT. § 617.453(6) (2005) (providing that a firefighter’s claim of disability resulting from cancer can be made after separating from employment).