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LVMPD v. Holland, 139 Nev. Adv. Op. 10 (Apr. 20, 2023)

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LVMPD v. Holland, 139 Nev. Adv. Op. 10 (Apr. 20, 2023)¹

AN EMPLOYER MUST PROVE THEIR AFFIRMATIVE DEFENSE UNDER NRS 617.457(11) BY A PREPONDERANCE OF THE EVIDENCE.

Summary

The Nevada Supreme Court addressed the burden of proof for an NRS 617.457 occupational heart disease claim, when an NRS 617.457(11) defense is raised alleging that the employee failed to correct predisposing conditions. In order to raise an affirmative defense under NRS 617.457(11), the employer bears the burden of proving (1) the employee had a predisposing condition that leads to the disease, (2) the employee was “ordered in writing by the examining physician” to correct the predisposing condition, (3) the employee failed to correct the predisposing condition, and (4) the correction was “within the ability of the employee.”² It is not enough to show that the employee failed to correct the predisposing condition leading to heart disease; employers also have the burden to show that the employee had the ability to correct the condition.

Background

Respondent Robert Holland retired after 25 years as a police officer with the Las Vegas Metropolitan Police Department (LVMPD). Holland experienced two heart attacks and was totally disabled from May 27, 2019, to June 17, 2019. Holland’s cardiologist filled out a workers' compensation claim form to request occupational disease benefits pursuant to NRS 617.457. During annual physical exams throughout his years of employment, Holland was notified that he had predisposing conditions and informed about associated corrective actions to address those conditions. Holland’s workers’ compensation request was denied by appellant Cannon Cochran Management Services, Inc. (CCMSI), LVMPD's workers' compensation administrator, for failure to meet the statutory requirements.

Holland administratively appealed. The hearing officer affirmed the denial, noting Holland “has a history of being told of the need to deal with predisposing factors/conditions on a continuous basis.” Holland appealed again, and the appeals officer affirmed, finding Holland “offered no [contradictory] evidence” and that he “failed to correct his predisposing condition.” Holland petitioned for judicial review, and the district court reversed, finding the appeals officer’s decision was not supported by substantial evidence. LVMPD and CCMSI appealed.

Discussion

The court reviews “an appeals officer's decision for clear error or arbitrary abuse of discretion.”³

In a claim pursuant to NRS 617.457, the employee bears the initial burden of proof that they are entitled to the conclusive presumption NRS 617.457(1)

¹ By Jefferson Cummings.

² *Gault v. Grose*, 39 Nev. 274, 282, 155 P. 1098, 1100 (1916) (“To maintain an affirmative defense it must be established by a preponderance of the evidence.”).

³ *Manwill v. Clark County*, 123 Nev. 238, 241, 162 P.3d 876, 879 (2007).

The court noted when a police officer who has served for two years or more contracts heart disease that renders them disabled, NRS 617.457(1) provides a conclusive presumption that the disease arose out of and in the course of the officer's employment—relieving the officer of the initial burden of proving that an occupational disease arose out of and in the course of employment.⁴ Here, the parties did not dispute Holland made the preliminary showing that he was entitled to the conclusive presumption under the statutory requirements.

NRS 617.457(1) is an affirmative defense, and the employer bears the burden of proof by a preponderance of evidence

Appellants argued the district court improperly reweighed the evidence from the appeals officer's decision and that Holland failed to provide evidence showing he took steps to correct predisposing conditions. Holland argues that the appeal officer's decision was not supported by the record and appellants did not present any evidence that he had the ability to correct the predisposing efforts.

Under NRS 617.475(11), an employer can defend against the conclusive presumption by showing that the employee failed to correct a predisposing condition after being warned to do so in writing.⁵ In asserting this affirmative defense, appellants bore the burden to prove, by a preponderance of the evidence, that (1) Holland had a predisposing condition that leads to heart disease, (2) Holland was “ordered in writing by the examining physician” to correct the predisposing condition, (3) Holland failed to correct the predisposing condition, and (4) the correction was “within the ability of the employee.”⁶

The court concluded appellants met their burden to establish the first, second, and third elements. However, the court held “it is not enough to show that Holland failed to correct the predisposing condition leading to heart disease; appellants also had the burden to show the fourth element, that Holland had the ability to correct the condition.”⁷ The court emphasized that appellants relied solely on the *lack* of evidence to show that Holland failed to take corrective action, but the burden of proof was theirs. Therefore, appellants did not make the showing required to raise the affirmative defense under NRS 617.457(11).

If the employer makes the necessary showing under NRS 617.457(11), the burden shifts back to the employee to rebut the application

The court then opined that if an employer meets its burden of demonstrating the elements of NRS 617.457(11), the burden shifts to the employee to rebut the employer's evidence.

⁴ See also *Manwill*, 123 Nev. at 242-44, 162 P.3d at 879-80.

⁵ NRS 617.457(11); *Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1016, 145 P.3d 1024, 1029 (2006).

⁶ *Gault v. Grose*, 39 Nev. 274, 282, 155 P. 1098, 1100 (1916) (“To maintain an affirmative defense it must be established by a preponderance of the evidence.”).

⁷ *LVMPD v. Holland*, 139 Nev. Adv. Op. 10, 10 (Apr. 20, 2023).

Conclusion

In order to raise an affirmative defense under NRS 617.457(11), LVMPD bore the burden of proving (1) Holland had a predisposing condition that leads to the disease, (2) Holland was “ordered in writing by the examining physician” to correct the predisposing condition, (3) Holland failed to correct the predisposing condition, and (4) the correction was “within the ability of the employee.”⁸ LVMPD showed Holland failed to correct the predisposing condition leading to heart disease but was unable to affirmatively show that Holland had the ability to correct the condition. Therefore, LVMPD was unable to meet the burden required to raise a defense under NRS 617.457(11) and the Supreme Court affirmed the district court.

⁸ *Gault v. Grose*, 39 Nev. 274, 282, 155 P. 1098, 1100 (1916) (“To maintain an affirmative defense it must be established by a preponderance of the evidence.”).