2-15-2018

Felton v. Douglas County, 134 Nev. Adv. Op. 6 (Feb. 15, 2018)

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ADMINISTRATIVE LAW: CONCURRENT WAGES IN WORKERS' COMPENSATION CALCUATION

Summary

The Court determined that when an uncompensated volunteer, who has concurrent private employment and is injured during the course of volunteer work, shall have their average monthly wage for the purposes of workers' compensation benefits to be the aggregate of the "deemed wage" provided by statute along with their earnings from the concurrent private employment.

Background

Gregory Felton suffered an injury while volunteering on the Douglas County Search and Rescue team. At the time of the injury Felton had concurrent private employment. Following the injury, Felton filed a claim for workers' compensation benefits. The claims adjustor calculated Felton's benefits based on his average monthly wage, using only the statutorily deemed wage of a search and rescue volunteer.[2] Felton sought review by an appeals officer, and argued that his deemed wage should be aggregated with his earned wage of his private employment. The appeals officer upheld the claim adjustor's decision, and Felton sought review by the District Court. The District Court denied review, which was then appealed the Nevada Supreme Court.

Discussion

The standard is that The Court applies a de novo standard of review to the administrative interpretation of statutes.[3] The Court decides pure legal questions without deference to the agency's determination, or the district court's decision regarding the petition for review.[4]

NRS 616A.065 provides a starting point for calculating Felton's AMW

The calculation of average monthly wage (AMW) is either the monthly wage earned or deemed earned by statute, or a maximum amount based on the average weekly wage earned in the state, whichever is lower. NRS 616A.065(1) states the average monthly wage shall be the "lesser of: (a) The monthly wage actually received or deemed to have been received …; or (b) One hundred fifty percent of the state average weekly wage . . ."[5] The reviewing appeals officer, in upholding the decision that Felton's average monthly wage was only his deemed wage, found that wage to be the "lesser of: (a) the monthly wage actually received **or** deemed to have been received."[6] The Court found that the appeals officer misread NRS 616A.065 when they claimed that "lesser of" applied to the "or" contained within NRS 616A.065(1)(a). Instead, the "lesser of"

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[2] NEV. REV. STAT. § 616A.157 (2015).
[3] Elizondo v. Hood Mach., Inc., 129 Nev. 780, 784–85, 312 P.3d 479, 482 (2013).
[4] *Id.*
[5] NEV. REV. STAT. § 616A.065(1) (2015).
[6] *Id.* (emphasis added).

applies to the "or" between subsection (1)(a) and (1)(b), meaning the "lessor of: (a) The monthly wage …; **or** (b) One hundred fifty percent. . ." [7] Thus, the Court found the calculation of average monthly wage to be the wages earned or deemed earned, provided that this does not exceed the maximum based on the average weekly wage in 1(b).

The Court then looked at the "or" in subsection (1)(a), stating the statute clearly indicates either deemed wages or actual wages are properly included in an average monthly wage determination, but the statute is not clear whether concurrent employment was included. When the statute does not address an issue, the Court may look outside the statutory language to determine the Legislature's intent regarding the issue.[8] The Court found NRS 616C.420 and NAC 616C.447, its corresponding regulation, to be helpful, as it requires regulations be made to provide "a method of determining average monthly wage," and the regulation addresses concurrent employment.[9]

NAC 616C.447 requires that Felton's AMW be calculated by aggregating his private wage with his deemed wage for volunteer work

The Court found that the plain language of NAC 616C.447 requires the aggregation of wages for concurrent employment and does not bar the aggregation of different categories of wages.[10] The regulation provides that the "average monthly wage of an employee who is employed by two or more employers … on the date of a disabling accident or disease is equal to the sum of the wages earned or deemed to have been earned at each place of employment."[11] The appeals officer attempted to distinguish NAC 616C.447 by citing *Meridian Gold Co. v. State ex rel. Department of Taxation*, stating that when an administrative regulation conflicts, expands, or modifies a governing statute, then the regulations will be deemed invalid.[12] However, the Court rejected this argument, and instead construed the related provision in harmony to keep the provisions in effect.[13] The two provisions provide context to each other; NRS 616A.065 provides the definition of an average monthly wage, and NAC 616C.447 provides how concurrent employment applies to that definition.[14] Therefore, NAC 616C.447 applies to Felton's workers' compensation claim and his average monthly wage is calculated as the aggregation of his deemed wage for being a volunteer and his concurrent private earned wage, subject to the maximum set forth in NRS 616A.065(1)(b).

Conclusion

The Court remanded the matter to recalculate Felton's benefits accordingly.

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[7] *Id.* (emphasis added).
[8] Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008).
[9] NEV. REV. STAT. § 616C.420 (2015); NEV. ADMIN CODE § 616C.447 (2016).
[10] NEV. ADMIN CODE § 616C.447 (2016)
[11] *Id.*
[12] 119 Nev. 630, 81 P.3d 516 (2003).
[13] State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).
[14] NEV. REV. STAT. § 616A.065 (2015); NEV. ADMIN CODE § 616C.447 (2016).