IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Appellant,
vs.
ROBERT SJOGREN,
Respondent.

No. 37226

FILED

AUG 21 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal by the Las Vegas Metropolitan Police Department ("LVMPD") from an order denying LVMPD's petition for judicial review of an appeals officer's decision and order. The appeals officer's decision and order affirmed a hearing officer's decision and order, which required that LVMPD apply the formula set forth in Breen v. Caesars Palace[1] for calculating a subrogation lien.

On appeal, LVMPD argues that the "Breen formula" does not have to be utilized in calculating a subrogation lien on an individual claim when the work-related injury and the third-party injury are not severable. Sjogren claims that a balanced interpretation of the relevant statutes is required, and that Breen is controlling. We conclude that LVMPD's argument is without merit.

NRS 616C.215(2) provides:

> When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under

[1]Breen v. Caesars Palace, 102 Nev. 79, 715 P.2d 1070 (1986).

> circumstances creating a legal liability in some [third party] to pay damages in respect thereof:
>
> > (a) The injured employee . . . may take proceedings against that person to recover damages, but the amount of the compensation the injured employee . . . [is] entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of the damages recovered . . . .

(Emphasis added).

Further, NRS 616C.215(3) provides:

> When an injured employee incurs an injury for which [workers'] compensation is payable . . . and which was caused under circumstances entitling him . . . to receive proceeds under his employer's policy of uninsured or underinsured vehicle coverage:
>
> > (a) The injured employee . . . may take proceedings to recover those proceeds, but the amount of compensation the injured employee or his dependents are entitled to receive . . . including any future compensation, must be reduced by the amount of proceeds received.

(Emphasis added).

In Breen, we held that NRS 616.560(3), now 616C.215, cannot be read literally because to do so would "permit insurers to recoup expenses out of third-party proceeds even though the proceeds had not compensated the employee for those expenses."[2] We also concluded "that the legislative intent to compensate injured employees should prevail over

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[2]Id. at 83, 715 P.2d at 1073.

the literal reading of the statute."[3] In addition, we stated that "it is evident that the statutory scheme was designed to accommodate situations where the work-related injury and third-party tortious conduct occur simultaneously. In the usual situation, medical expenses for the work-related injury and the third-party injury will not be severable."[4]

LVMPD claims that this language suggests that this court was creating an exception to the legislative mandates regarding liens in those situations where the industrial injury and the third-party injury were severable. In Breen, the injured employee was transported to the hospital, where, as a result of negligent medical treatment, he died.[5] Therefore, the injuries were severable. Here, the injuries to Sjogren were suffered while in the course of his employment and no additional, severable injuries were involved. LVMPD argues that this distinction renders Breen inapplicable. We disagree.

The language relied upon by LVMPD from Breen discusses whether or not the employer should reimburse the family of the decedent for medical expenses which accrued before the medical malpractice occurred. However, this discussion does not involve whether the employer should be permitted to calculate the amount of its lien without regard to its share of litigation expenses. In discussing attorney fees and costs, we held that under principles of equity and unjust enrichment, the employer:

> [W]ould be unjustly enriched if it [was] permitted to assess its lien against the total proceeds of the

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[3]Id. at 84, 715 P.2d at 1073.

[4]Id.

[5]Id. at 80, 715 P.2d at 1071.

> settlement without bearing its share of litigation expenses. [The employer] will have obtained a substantial benefit, the almost complete extinguishment of its obligation to appellants, at appellants' expense if [the employer] is not held accountable for a proportionate share of the cost of obtaining the settlement.[6]

Furthermore, in State Industrial Insurance System v. District Court,[7] we clarified that:

> In Breen, we held that where an employer asserted a lien interest in its injured employee's negligence action against a third party, the employer had to reduce the amount of its lien recovery by a proportionate share of the litigation expenses. In other words, the employer could not obtain a windfall by sitting on the sidelines and relying upon the independent collection efforts of the injured worker. Where the injured worker pursues an independent cause of action against a negligent third party, the employer/lienholder must share in the litigation expenses.[8]

Despite case law relying on the "Breen formula" for calculating the reduction of the amount of a lien, LVMPD contends that Breen is inapplicable in circumstances where the industrial injury and the third party injury are not severable. In support of this contention, LVMPD relies on the fact that NRS 616C.215 was amended in 1999 without a provision for the application of the Breen formula.

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[6]Id. at 85, 715 P.2d at 1074.

[7]111 Nev. 28, 888 P.2d 911 (1995).

[8]Id. at 33, 888 P.2d at 914.

It is true that the Nevada Legislature did not include a provision for the application of the Breen formula when it amended NRS 616C.215. However, the Nevada Legislature also failed to adopt an amendment that expressly altered the application of Breen. In fact, the Nevada Legislature discussed Breen in the 1999 Legislative Session, but "could not figure out how in the heck" "to see that the injured worker came out with more money than anybody else."[9] Upon failing to obtain a resolution of the concerns regarding the proposed bill to address Breen, no further action was allowed and the bill was not passed. Accordingly, we conclude that nothing in the legislative history suggests that Breen has been rendered void or inapplicable.

In its reply brief, LVMPD argues that our decision in Employers Insurance Co. of Nevada v. Chandler[10] explained that "the contemplated purpose of NRS 616C.215 is to make the insurer whole and to prevent an employee from receiving an impermissible double recovery."[11] LVMPD acknowledges that we relied on Breen in that case. Nevertheless, LVMPD claims that, pursuant to Chandler, the insurer here must be made whole, consistent with the plain meaning of NRS 616C.215.

In Chandler, we held "that an insurer is entitled to withhold payment of medical benefits for a work-related injury until an employee

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[9]Hearing on S.B. 94 Before the Senate Commerce and Labor Comm., 70th Leg. (Nev., April 9, 1999); see also Hearing on S.B. 94 Before the Senate Commerce and Labor Comm., 70th Leg. (Nev., February 16, 1999); Hearing on S.B. 94 Before the Senate Commerce and Labor Comm., 70th Leg. (Nev., March 18, 1999).

[10]117 Nev. ___, 23 P.3d 255 (2001).

[11]Id. at ___, 23 P.3d at 258.

has exhausted any third-party settlement proceeds."[12] However, the issue in Chandler was whether the appeals officer properly interpreted the workers' compensation statutes with respect to the injured worker's entitlement to medical benefits. That case did not involve a reduction in the amount of the insurer's lien pursuant to Breen in order for the insurer to share in the cost of litigation. Therefore, we conclude that Chandler does not require us to disregard the Breen formula in calculating how much an insurer must reduce a lien in order to share in the cost of litigation. Accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Gene T. Porter, District Judge
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Frank C. Cook
Clark County Clerk

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[12]Id.