

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY LEE FOGGY,
Appellant,
vs.
EMPLOYERS INSURANCE COMPANY
OF NEVADA,
Respondent.

No. 39200

FILED

SEP 22 2003

ORDER REVERSING AND REMANDING
WITH INSTRUCTIONS

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

This is a proper person appeal from a district court order dismissing appellant's petition for judicial review as untimely.¹ Although we agree that the district court should not have dismissed the petition without considering whether it could be considered timely under an equitable tolling doctrine, the petition lacked merit and appellant is not entitled to the relief he requested. We therefore reverse and remand with instructions to deny, rather than dismiss, the judicial review petition.

In November 1988, Henry Foggy sustained a compensable industrial injury. He was granted a forty-six percent permanent partial disability award and his claim was closed. The claim was later reopened, and, in 1994, respondent changed Foggy's status to permanently totally disabled (PTD) and began paying him PTD benefits in October.

In July 1995, the Legislature substantially revised Nevada's Industrial Insurance Act. Among many other things, it added a provision

¹Although appellant was not granted leave to file papers in proper person, see NRAP 46(b), we have considered the proper person documents received from him.

in direct response to this court's 1993 opinion in SIIS v. Campbell,² which held that the state industrial insurer lacked authority to suspend workers' compensation disability benefits during a claimant's incarceration. A new section, NRS 616C.440(2), provides that, effective July 5, 1995, and subject to an exception not here at issue, an injured employee or his dependents are not entitled to PTD benefits while the injured employee is incarcerated, although benefits may resume when the injured employee is released if he is certified PTD.³

In September 1995, Foggy was convicted of murder and incarcerated. Respondent thereafter suspended Foggy's PTD benefits due to his incarceration. In doing so, respondent did not violate Foggy's rights.

The United States Constitution, Article 1, section 10, provides, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts," and the Nevada Constitution, Article 1, section 15 provides, "No bill of attainder, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed." NRS 616C.440(2) is not a bill of attainder, which is legislation that punishes named persons or easily ascertainable members of a group without judicial process,⁴ and it is not an ex post facto law, which criminalizes an act that was innocent when it was committed.⁵ NRS 616C.440(2) also does not

²109 Nev. 997, 862 P.2d 1184 (1993).

³Formerly NRS 616.580(2); see 1995 Nev. Stat., ch. 587, § 99, at 2154-55 and § 155(2), at 2170-71. NRS 616C.475(2) similarly suspends temporary total disability benefits during incarceration.

⁴Oueilhe v. Lovell, 93 Nev. 111, 560 P.2d 1348 (1977).

⁵Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d 332 (1976).

impair any obligation of contracts, because Nevada's workers' compensation act is compulsory, not contractual or consensual.⁶

In addition, respondent's suspension of Foggy's PTD benefits under NRS 616C.440(2) does not violate Foggy's due process rights. Foggy's injury and, presumably, the conduct that led to his incarceration predated the act's effective date, but his incarceration occurred afterwards.⁷ Thus, the statute had retroactive and prospective effect, but only its retroactive application is challenged.

Retroactive application of legislation cannot take away or impair a vested right acquired under existing laws without violating due process,⁸ but Foggy did not have an absolute vested right to collect PTD benefits; Foggy had a conditional vested right to collect monthly PTD benefits as long as he remained eligible. Foggy's incarceration changed his eligibility. NRS 616C.440(2) does not operate retroactively to deny workers' compensation benefits accrued before its effective date, but instead denies benefits to claimants based upon their temporary status as unavailable for work and therefore ineligible to collect workers' compensation benefits.⁹

⁶K-Mart Corporation v. SIIS, 101 Nev. 12, 20, 693 P.2d 562, 567 (1985).

⁷The district court record does not disclose when Foggy committed the murder that led to his incarceration.

⁸Id. at 21, 693 P.2d at 567-68.

⁹See Juliano v. W.C.A.B. (Custodis-Cottrell), 683 A.2d 1319, 1321 (Pa. Commw. Ct. 1996) (affirming an administrative determination that a statute suspending workers' compensation benefits during the claimant's incarceration was not an illegal retroactive application of law, although his injury and incarceration preceded the legislation, because he was

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The Legislature may change workers' compensation benefits or eligibility, even retroactively, through a rational exercise of the state's police power.¹⁰ The change here is rational: while injured employees are incarcerated they are not available to accept work and their wage loss is caused by their incarceration, which may be deemed voluntary and intentional, and not their disabilities.¹¹

The district court dismissed the judicial review petition after the appeals officer effectively deprived Foggy of his right to seek judicial review by failing to comply with NRS 233B.130(4). Although the district court should have considered whether equity required tolling NRS 233B.130(2)'s jurisdictional time limit,¹² any error was harmless because

... continued

deemed as a result of his incarceration to have withdrawn voluntarily and intentionally from the labor market).

¹⁰K-Mart Corporation v. SIIS, 101 Nev. at 22-23, 693 P.2d at 568-69 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17-19 (1976)).

¹¹Juliano, 683 A.2d at 1320-21; Cummings Lumber v. Workmen's Comp. Appeal Bd. (Young), 669 A.2d 1027, 1028 (Pa. Commw. Ct. 1995).

¹²See, e.g., Thompson v. I.N.S., 375 U.S. 384, 387 (1964) (holding that equity may require tolling jurisdictional time limits when an aggrieved party has been prevented from asserting his appeal rights in some extraordinary way); Harris Lines, v. Cherry Meat Packers, 371 U.S. 215, 217 (1962); Carlile v. South Routt Sch. Dist. RE 3-J, 652 F.2d 981 (10th Cir. 1981); Hernandez-Rivera v. Immigration & Naturalization, 630 F.2d 1352, 1355 (9th Cir. 1980); but see Osterneck v. Ernst & Whinney, 489 U.S. 169, 178-79 (1989) (limiting the unique circumstances doctrine to those instances when a party has performed an act that, if properly done, would postpone the deadline for appealing and has received specific assurance from a judicial officer that the act was properly done even if it was not).

the petition must be denied on its merits.¹³ Accordingly, we reverse the district court's order and remand to the district court with instructions to deny the judicial review petition and affirm the appeals' officer's decision.

It is so ORDERED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Michael L. Douglas, District Judge
Henry Lee Foggy
Beckett & Yott, Ltd./Las Vegas
Clark County Clerk

¹³Because this appeal presents only issues of law, we reviewed the administrative appeals officer's decision de novo. Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993).