

***NAIW v. Nevada Self-Insurers Ass’n*, 126 Nev. Adv. Op. 7  
(Feb. 25, 2010)<sup>1</sup>**

**ADMINISTRATIVE LAW – WORKERS’ COMPENSATION**

**Summary**

Appeal considering whether a workers’ compensation regulation [NAC 616C.476], which implicitly permits physicians and chiropractors to consider a person’s ability to perform activities of daily living when making a disability impairment rating for spinal injuries, contradicts the statutory provisions [NRS 616C.110(1); 616C.490(5)] for determining the percentage of an employee’s disability resulting from work-related spinal injury.

**Disposition/Outcome**

Nevada’s statutory scheme indicates the Legislature’s intent that activities of daily living should be taken into consideration when evaluating work-related spinal injuries; thus, NAC 616C.476 does not violate NRS 616C.110(2)(c) or NRS 616C.490(5).

**Factual and Procedural History**

Nevada Self-Insurers Association (Association) filed a complaint for declaratory relief in district court against the State of Nevada Department of Business and Industry, Division of Industrial Relations (DIR). The Association maintained that Nevada law prohibits physicians from considering a person’s ability to perform daily activities when making a disability impairment rating for spinal injuries, and that DIR regulation, NAC 616C476, which permits such considerations, violates Nevada law. The district court granted the relief; DIR and the Nevada Attorney for Injured Workers (NAIW) appealed.

**American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides)<sup>2</sup>**

NRS 616C.110(1) requires that DIR adopt the *AMA Guides* for use in all permanent partial disability examinations. The *AMA Guides* were originally published to establish a standardized, objective way to evaluate medical impairments.<sup>3</sup> The *AMA Guides* set criteria that physicians and chiropractors can use to give an “impairment percentage” or “rating.”<sup>4</sup>

Impairment ratings reflect functional limitation, demonstrate severity of medical condition, and the “degree to which the impairment decreases an individual’s ability to perform common activities of daily living.”<sup>5</sup> As opposed to work activities, activities of

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (Linda Cocchiarella & Gunnar B.J. Anderson eds., 5th ed. 2000) [hereinafter Cocchiarella & Anderson, *AMA Guides*].

<sup>3</sup> *Id.* § 1.1, at 2.

<sup>4</sup> *Id.* § 1.2, at 4.

<sup>5</sup> *Id.*

daily living consist of everyday activities such as: self-care, personal hygiene, standing, walking, taste, smell, tactile feeling, sexual function, sleep, etc.<sup>6</sup>

To evaluate the severity that a person's injury has on activities of daily living, physicians apply their medical knowledge about the patient's medical condition.<sup>7</sup> The impairment rating is then considered by the insurance provider in conjunction with other factors such as: age, experience and education.<sup>8</sup>

Distinguishable from earlier editions of the *AMA Guides*, the fifth edition allows an adjustment of up to three percent for treatment results and their impact on a person's ability to complete activities of daily living.<sup>9</sup> To award the additional range of up to three percent, objective evidence must first establish a permanent physical impairment.<sup>10</sup>

#### Nevada statutes and regulations concerning the fifth edition of the AMA Guides

In 2003, the Legislature mandated that DIR adopt regulations that incorporate the fifth edition of the *AMA Guides*.<sup>11</sup> The Legislature granted DIR authority to amend its regulations so long as the amendments were consistent with the *AMA Guides* and that the amendments did not consider any factors other than the degree of physical impairment of the whole man in calculating the entitlement to compensation.<sup>12</sup>

Similarly, NRS 616C.490(5), governing permanent partial disability compensation, echoes NRS 616C.110(2)(c) and provides that unless adopted regulations provide otherwise, rating evaluations must include evaluations for loss of motion, sensation and strength, and that no factors other than the degree of physical impairment of the whole man may be considered in calculating the entitlement to compensation for a permanent partial disability.<sup>13</sup> DIR then enacted NAC 616C.002(1), adopting the fifth edition of the *AMA Guides*, which reiterated NRS 616C.110(2)(c)'s and NRS 616C.490(5)'s prohibition on considering anything other than physical impairment.

#### DIR proceedings

After DIR enacted NAC 616C.476, the Association filed a petition with DIR requesting an amendment to include a section providing that a rating physician must not consider activities of daily living in determining the percentage of disability for the spine. The Association argued that considering activities of daily living in determining percentage of disability would allow recovery for subjective complaints of pain, contradicting NRS 616C.110(2)(c) and 616C.490(5).

DIR conducted a public workshop, hearing testimony from certified rating physicians. The physicians gave varied opinions, including the opinion that an injury's impact on activities of daily living is subjective and often due to pain, that physical impairment influences activities of daily living, and that consideration of activities of daily living is only one of several tools utilized to make a determination of person's

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<sup>6</sup> *Id.*

<sup>7</sup> Cocchiarella & Anderson, *AMA Guides*, *supra* note 2, § 1.2 at 5.

<sup>8</sup> *See id.* § 1.2, at 8; NEV. REV. STAT. 616C.490(2) (2003).

<sup>9</sup> *See* Cocchiarella & Anderson, *AMA Guides*, *supra* note 2, §§ 4.02(E), 15.4, at 384.

<sup>10</sup> Steven Babitsky & James J. Mangraviti, Jr., *Understanding the AMA Guides in Workers' Compensation* § 4.05(C) (4th ed. 2008) [hereinafter Babitsky & Mangraviti, *Understanding the AMA Guides*].

<sup>11</sup> *See* NEV. STAT., ch. 305, §7, at 1671 (2003).

<sup>12</sup> *Id.*; NEV. REV. STAT. 616C.110(2) (2003).

<sup>13</sup> NEV. REV. STAT. 616C.490(5) (2001); NEV. REV. STAT. 616C.110(2)(c) (2003).

physical impairment. Also, among the experts was one of the editors of the fifth edition of the *AMA Guides*, Dr. Cocchiarella, who testified that consideration of activities of daily living is required for appropriate use of the *AMA Guides*. Dr. Cocchiarella also explained that activities of daily living are not purely subjective because there are other, objective criteria such as physical therapy, history and observation.

Before DIR issued a decision, the Legislative Counsel Bureau (LCB) addressed whether DIR “may exclude the portion of the *AMA Guides* that relates to the ability to engage in activities of daily living.”<sup>14</sup> LCB was of the opinion that the portion of the *AMA Guides* at issue must be excluded from use if that material provides for compensation for impairments beyond physical impairments and must not be excluded otherwise. Therefore, LCB determined that the issue was whether consideration of activities of daily living is something other than “physical impairment,” as prohibited by NRS 616C.110(2)(c) and NRS 616C.490(5).

DIR was persuaded by the variation from the previous editions of the *AMA Guides* from the fifth edition in that the fifth edition provided that only impairments that interfere with activities of daily living qualify for an impairment rating, and that such impairments are ratable in terms of a percentage of the whole person.<sup>15</sup> DIR assumed that the Legislature was aware of the new changes to the *AMA Guides*, thus intending that physicians use activities of daily living as a consideration in measuring physical impairment of spinal injuries.

DIR also concluded that because the Legislature stated in NRS 616C.490 that evaluations should include evaluation of loss of motion, sensation and strength, the Legislature intended to include consideration of functional abilities regarding physical impairment of the whole man. Therefore, DIR concluded that Nevada law did not require DIR to amend NAC 616C.476 to exclude consideration of activities of daily living.

The Association filed a complaint for declaratory and permanent injunctive relief in district court. Relying on Eighth Judicial District Court precedent,<sup>16</sup> the Association argued that, as required by NRS 616C.110 or NRS 616C.490, subjective complaints of pain or limitations do not become objective findings that allow a physician to determine that an injured employee is suffering from a physical impairment. In that case, the district court determined that DIR’s chronic-pain regulation violated Nevada law, and permanently enjoined DIR from considering subjective pain complaints that lack physical findings. Thus, based on the district court’s determination in 1998, because NAC 616C.476 allowed physicians to consider limitations on activities of daily living, including subjective pain, such a rating considers something other than physical impairment in violation of NRS 616C.110(2)(c) and NRS 616C.490(5).

Here, the district court acknowledged a statement made in 2003 legislative hearing that “we do not do pain in Nevada”.<sup>17</sup> The district also found the testimony of the Association’s witnesses in the public workshop was credible in saying that activities

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<sup>14</sup> See letter from LCB to Assemblywoman Buckley in response to her question on this issue (Mar. 30, 2004).

<sup>15</sup> See Cocchiarella & Anderson, *AMA Guides*, *supra* note 2, Ch. 15.

<sup>16</sup> Nevada Self-Insurers Ass’n v. State of Nevada, Dep’t of Bus. & Indus., Div. of Indus. Relations, No. A377851 (Nev. Dist. Ct. June 1, 1998).

<sup>17</sup> *Hearing on A.B. 168 Before the Assembly Commerce and Labor Comm.*, 72nd Leg. (Nev. Mar. 21, 2003).

of daily living and subsequent ratings based thereon would constitute a rating for pain and would be something other than physical impairment.

The district court then concluded that: (1) the declaratory relief action was proper pursuant to NRS 233B.110 and (2) the legislative intent of NRS 616C.110(2)(c) and NRS 616C.490(5) evidenced that DIR erred by permitting physicians to consider something other than the degree of physical impairment with respect to spine injury ratings. The district court granted the complaint for relief, mandating DIR to amend NAC 616C.476 to prohibit physicians from adjusting ratings for limitations on activities of daily living.

DIR and NAIW then appealed.

### **Discussion**

The district court's statutory construction was reviewed de novo according to *Sonia F. v. Dist. Ct.*<sup>18</sup>

The Nevada Supreme Court generally defers to the "agency's interpretation of a statute that the agency is charged with enforcing"<sup>19</sup> when examining validity of administrative regulations. However, the court does not defer to the agency's interpretation if the regulation conflicts existing statutory provisions or exceeds the agency's statutory authority.<sup>20</sup>

### **NAC 616C.476 does not violate NRS 616C.110(2)(c) and NRS 616C.490(5)'s mandate that only a person's physical impairment can be considered when making an impairment rating**

When statutory language is plain and subject to only one interpretation, effect is given to that meaning, and outside sources are not considered.<sup>21</sup> However, if a statute is ambiguous, legislative intent and similar statutory provisions are considered in interpretation.<sup>22</sup> Legislative intent is determined by construing the statute in a manner that conforms to reason and public policy.<sup>23</sup>

The court presumed that the Legislature enacted the statute "with full knowledge of existing statutes relating to the same subject."<sup>24</sup> The Association argued that NAC 616C.476 violated Nevada law because only a person's "physical impairment" can be considered when making a spinal impairment rating. DIR and NAIW contended that, because the *AMA Guides* require that the impact on activities of daily living be assessed in rendering rating impairment evaluations, activities of daily living must be considered in the impairment evaluation. Because both interpretations of the statute were reasonable, the court determined that an ambiguity in the language of the statutes existed.

The court noted that although both NRS 616C.110(2)(c) and NRS 616C.490(5) state that physicians must not consider any factors other than the degree of physical impairment of the whole man, neither statute defines "physical impairment" or "permanent partial disability". The absence of those definitions further illustrated the

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<sup>18</sup> 125 Nev. \_\_\_, \_\_\_, 215 P.3d 705, 707 (2009).

<sup>19</sup> *State Div. of Ins. v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).

<sup>20</sup> *Id.*

<sup>21</sup> *State Farm*, 116 Nev. at 293, 995 P.2d at 485.

<sup>22</sup> *Id.*

<sup>23</sup> *Bacher v. State Eng'r*, 122 Nev. 1110, 1117, 146 P.3d 793, 798 (2006).

<sup>24</sup> *State Farm*, 116 Nev. at 295, 995 P.2d at 486 (quoting *City of Boulder v. Gen. Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985)).

ambiguity in NRS 616C.110(2)(c) and NRS 616C.490(5). Therefore, to resolve the ambiguity, the court turned to legislative intent and public policy considerations.

### Legislative intent and public policy

The Association relied on the statement in the Legislature that “we do not do pain in Nevada”<sup>25</sup> in support of their argument that the Legislature intended to prohibit rating physicians and chiropractors from considering pain in making impairment ratings.

The court reviewed the legislative history surrounding the amendment of NRS 616C.110 and determined that the discussions regarding pain centered on compensation on the basis of chronic pain alone. Therefore, the court decided that the legislative history surrounding NRS 616C.110 was not instructive regarding consideration of activities of daily living. Consequently, the court next evaluated what reason and public policy suggest the Legislature intended.

The court determined that because NRS 616C.490(5) specified that a rating evaluation must include an evaluation of the loss of motion, sensation and strength, the loss of motion, sensation and strength are factors that describe the physical impairment of the whole man. Because the loss of motion, sensation and strength are all influencing factors on the impact of a spinal injury on a person’s ability to perform activities of daily living, the court determined that the statutory language suggested that the Legislature intended to permit physicians to consider activities of daily living in making impairment ratings.

Additionally, construing the statutes as consistent with what reason and public policy suggest the Legislature intended, the court concluded that it is appropriate that a person’s ability to perform activities of daily living be considered as a tool in evaluating impairment for spinal injuries. The court pointed to Dr. Cocchiarella’s testimony that the *AMA Guides* require consideration of impairment of such activities to produce an accurate result. Additionally, the court pointed to the differentiation between people with similar injuries that produced different impairments on activities of daily living justified the up to three percent adjustment, and that was as the Legislature intended.

The court emphasized that permitting compensation for subjective complaints of pain without an objectively identifiable spinal injury clearly violates Nevada law. However, the court was persuaded that evaluating a person’s ability to perform activities of daily living is not an improper consideration of subjective pain because, in order to provide the additional range of up to three percent, physicians must first objectively establish a permanent impairment.

### Conclusion

Because the court determined that DIR did not err by holding that NAC 616C.476 conformed to NRS 616C.110(2)(c) and NRS 616C.490(5), the court concluded that the district court erred in granting the Association relief, and reversed the order of the district court.

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<sup>25</sup> *Hearing on A.B. 168 Before the Assembly Commerce and Labor Comm.*, 72nd Leg. (Nev. Mar. 21, 2003).