

***Valdez v. Employers Insurance Company of Nevada*, 123 Nev. Adv. Op. 21  
(June 23, 2007)<sup>1</sup>**

**ADMINISTRATIVE LAW – WORKERS’ COMPENSATION**

Summary

Claimant appeals from an order of the Eighth Judicial District Court, State of Nevada, denying a petition for judicial review in a workers’ compensation matter.

Disposition/Outcome

Opinion issued on November 9, 2006 is withdrawn.<sup>2</sup> The district court’s order denying judicial review is affirmed. NRS 616C.090 is procedural and remedial, and applies retroactively to the claimant’s 1987 claim for permanent disability benefits.<sup>3</sup> Thus, the claimant must submit to a change in treating physicians in accordance with the managed-care organization (“MCO”) contract.

Factual and Procedural History

In 1987, a work-related automobile accident severely injured appellant, Donald Valdez (“Valdez”). As a result, Valdez is quadriplegic and confined to a wheelchair. Valdez experiences chronic medical problems requiring continuous care by a treating physician. Initially, the Nevada State Industrial Insurance System (“SIIS”) provided coverage for Valdez’s workers’ compensation claim. Thus, in 1996, Valdez sought treatment from Dr. Steven Kurtz (“Dr. Kurtz”), a treating physician then contracted under SIIS’s MCO provider network.

The Nevada Legislature privatized SIIS in 1999, and the resulting entity, Employers Insurance Company of Nevada (“EICON”), assumed responsibility for Valdez’s workers’ compensation claim. In 2002, EICON contracted with Care Network, Inc. (“CNI”), an MCO provider network, of which Dr. Kurtz was not a member. Although Valdez selected a new treating physician, presumably a member of the CNI provider network, Valdez also requested a hearing before the Nevada Department of Administration (“NDA”).

A hearing officer determined that EICON must permit Valdez to continue treatment with Dr. Kurtz. EICON appealed the hearing officer’s decision to an appeals officer. Ultimately, the appeals officer filed an amended decision reversing the hearing officer’s determination, and concluded that the issue of physician choice was procedural. The appeals officer held that the provision of NRS Chapter 616C applied retroactively to Valdez’s 1987 claim, and that NRS 616C.090(3) mandated that Valdez choose a physician from within the CNI provider network.

Discussion

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<sup>1</sup> Summarized by Matt Lay

<sup>2</sup> See *Valdez v. Employers Ins. Co. of Nevada*, 146 P.3d 250 (Nev. 2006).

<sup>3</sup> See Nev. Rev. Stat. § 616C.090.

1. Physician choice is not a substantive right.

The key statutory terms are ambiguous as to whether physician choice is a substantive entitlement. However, the Nevada Legislature intended that an injured workers' choice of treating physicians be subject to subsequent contracts between EICON and its MCO. When the Legislature privatized SIIS in 1999, it considered physician choice in the context of managed care and excluded physician choice from the scope of "compensation" and "benefits" as defined in NRS 617.130.<sup>4</sup> Once the legislature made SIIS a "private carrier" in 1999, it became subject to the managed-care provisions of NRS 616B.527.<sup>5</sup> As a result, statutory provisions protecting

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<sup>4</sup> See NEV. REV. STAT. § 617.130. Section 617.130 of the Nevada Revised Statutes reads in pertinent part:

1. "Medical benefits" means medical, surgical, hospital or other treatments, nursing, medicine, medical and surgical supplies, crutches and apparatus, including prosthetic devices. 2. The term does not include: (a) Exercise equipment, a hot tub or a spa for an employee's home; (b) Membership in an athletic or health club; (c) Except as otherwise provided in NRS 617.385, a motor vehicle; or (d) The costs of operating a motor vehicle provided pursuant to NRS 617.385, fees related to the operation or licensing of the motor vehicle or insurance for the motor vehicle.

<sup>5</sup> See NEV. REV. STAT. § 616B.527. Section 616B.527 of the Nevada Revised Statutes reads in pertinent part:

1. A self-insured employer, an association of self-insured public or private employers or a private carrier may: (a) Except as otherwise provided in NRS 616B.5273, enter into a contract or contracts with one or more organizations for managed care to provide comprehensive medical and health care services to employees for injuries and diseases that are compensable pursuant to chapters 616A to 617, inclusive, of NRS. (b) Enter into a contract or contracts with providers of health care, including, without limitation, physicians who provide primary care, specialists, pharmacies, physical therapists, radiologists, nurses, diagnostic facilities, laboratories, hospitals and facilities that provide treatment to outpatients, to provide medical and health care services to employees for injuries and diseases that are compensable pursuant to chapters 616A to 617, inclusive, of NRS. (c) Require employees to obtain medical and health care services for their industrial injuries from those organizations and persons with whom the self-insured employer, association or private carrier has contracted pursuant to paragraphs (a) and (b), or as the self-insured employer, association or private carrier otherwise prescribes. (d) Except as otherwise provided in subsection 3 of NRS 616C.090, require employees to obtain the approval of the self-insured employer, association or private carrier before obtaining medical and health care services for their industrial injuries from a provider of health care who has not been previously approved by the self-insured employer, association or private carrier. 2. An organization for managed care with whom a self-insured employer, association of self-insured public or private employers or a private carrier has contracted pursuant to this section shall comply with the provisions of NRS 616B.528, 616B.5285 and 616B.529.

physician choice disappeared from the NRS. Moreover, a judicial construction of the terms “compensation” and “benefits” which incorporates physician choice would unreasonably frustrate the carefully considered, comprehensive legislative scheme adopting managed care as the preferred method of administering workers’ entitlement to compensation for and treatment of work-related injuries.

2. Medical benefits, compensation, and substantive rights.

Managed care and physician choice are acceptable procedural and remedial mechanisms for administering a vested entitlement. Valdez has a statutorily created property interest in the continued receipt of workers’ compensation benefits that the State may not abrogate without due process under the Fourteenth Amendment to the United States Constitution. However, Valdez has no substantive right to choose his treating physician that vested on the date of his injury. Rather, the manner in which an injured worker may select a physician and any limits on that selection are procedural mechanisms for managing Nevada’s workers’ compensation system.

Concurring/Dissenting Opinions

MAUPIN, C.J., CONCURRING:

Chief Justice Maupin concurred with the majority’s neutral interpretation of ambiguities in Nevada’s statutory workers’ compensation scheme, as well as its result. However, the Chief Justice noted his “continued concern” that the neutrality rule embodied in NRS 616A.010(2)-(4) “has operated again to the distinct disadvantage of a profoundly injured Nevada worker.”<sup>6</sup>

Conclusion

Physician choice under the managed-care system is a procedural and remedial means of administering an injured worker’s substantive, vested right to workers’ compensation. Physician

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<sup>6</sup> Valdez v. Employers Insurance Company of Nevada, 123 Nev. Adv. Op. 21, 17 (June 23,2007) (citing Grover C. Dils Med. Ctr. V. Menditto, 121 Nev. 278, 112 P.3d 1093 (2004)); See NEV. REV. STAT. § 616A.010(2)-(4). Section 616A.010(2)-(4) of the Nevada Revised Statutes reads in pertinent part:

The legislature hereby determines and declares that: ... 2. A claim for compensation filed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS must be decided on its merit and not according to the principle of common law that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature; 3. The provisions of chapters 616A to 617, inclusive, of NRS are based on a renunciation of the rights and defenses of employers and employees recognized at common law; and 4. For the accomplishment of these purposes, the provisions of chapters 616A to 617, inclusive, of NRS must not be interpreted or construed broadly or liberally in favor of an injured or disabled employee or his dependents, or in such a manner as to favor the rights and interests of an employer over the rights and interests of an injured or disabled employee or his dependents.

choice is not, in and of itself, a vested, substantive right. Therefore, NRS 616C.090(3) applies retroactively, and requires injured workers to choose a treating physician from among those on EICON's MCO provider network.