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November 7, 2017

OPINION NO. 2017-11

**PUBLIC EMPLOYEES' BENEFITS PROGRAM (PEBP); INSURANCE; SUBROGATION:** Pursuant to NRS 287.0433 and NRS 287.0465, PEBP may exercise subrogation and reimbursement rights against a member's automobile medical coverage only when its exercise of such rights would prevent a double recovery by the member.

Mr. Damon Haycock  
Executive Officer  
State of Nevada  
Public Employees' Benefits Program  
901 S. Stewart Street, Suite 1001  
Carson City, Nevada 89701

Dear Mr. Haycock:

You have requested an opinion from the Office of the Attorney General whether the Public Employees' Benefits Program of the State of Nevada (PEBP) may subrogate to the rights of its members as against their automobile medical payments coverage<sup>1</sup> when PEBP has paid for medical services under coverage provided by PEBP.

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<sup>1</sup> For further information on automobile medical payments coverage, see NV Ins. Bulletin No. 2004-002 (NV Ins. Bulletin), 2004 WL 4076439 (NV Ins. Bulletin) and NRS 687B.145(3).

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### QUESTION PRESENTED

What are PEBP's subrogation rights and rights of reimbursement with respect to members' automobile medical payments coverage?

### SUMMARY ANSWER

Pursuant to NRS 287.0465, PEBP generally has subrogation and reimbursement rights with respect to automobile medical payments coverage to the extent such coverage is liable for medical expenses paid by PEBP. But these subrogation and reimbursement rights are limited by the Nevada Supreme Court's recognition of the "fundamental principle that an insured is entitled to receive the insurance benefits for which he has paid a premium," *Maxwell v. Allstate Insurance Companies*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986), unless receipt of such benefits would result in a double-recovery to the insured.

Thus, PEBP has a subrogation and reimbursement right to payments made to a member under automobile medical coverage only to the extent that such payments would result in a double-recovery for the member. This would typically occur under circumstances where an insured has incurred a covered loss that is subject to reimbursement by both PEBP and the automobile medical coverage—for example, where there is overlapping automobile medical coverage *after* the PEBP deductible and coinsurance obligation have been met. In contrast, *Maxwell* would prevent subrogation where the only recovery available to the insured is the automobile medical payments coverage—for example, where the PEBP deductible or coinsurance obligation has not yet been met and the member would incur out-of-pocket expenses but for the automobile medical coverage.

### ANALYSIS

A. Statutory Authority for PEBP's Subrogation and Reimbursement Rights.

NRS 287.0465 provides for PEBP's subrogation and reimbursement rights ("subrogation rights") as to any medical expenses it pays and for which a third party is liable, be that liability in tort or contract:

1. If a member incurs an illness or injury for which medical services are payable under the plan for self-insurance established by the Board and *the illness or injury is incurred under circumstances creating a legal liability in some person, other than the member, to pay all or part of the cost of those services*, the Board is subrogated to the right of the member to the extent of all such costs, and may join or intervene in any action by the member or any successor in interest, to enforce that legal liability.

2. If a member or any successor in interest fails or refuses to commence an action to enforce that legal liability, the Board may commence an independent action, after notice to the member or any successor in interest, to recover all costs to which it is entitled. In any such action by the Board, the member may be joined as a third party defendant.

3. If the Board is subrogated to the rights of the member or any successor in interest as provided in subsection 1, the Board has a lien upon the total proceeds of any recovery from the persons liable, whether the proceeds of the recovery are by way of a judgment or settlement or otherwise. Within 15 days after recovery by receipt of the proceeds of the judgment, settlement or other recovery, the member or any successors in interest shall notify the Board of the recovery and pay the Board the amount due to it pursuant to this section. The member or any successors in interest are not entitled to double recovery for the same injury.

4. The member or any successors in interest shall notify the Board in writing before entering any settlement or agreement or commencing any action to enforce the legal liability referred to in subsection 1.

5. As used in this section, "member" means:

(a) An active or retired officer or employee of the State or a dependent of such an officer or employee who is covered under the Program; and

(b) An active or retired officer or employee of a local governmental agency or a dependent of such an officer or employee who is covered under the Program.

The plain meaning of a statutory provision may be established by a dictionary definition, including Black's Law Dictionary, of a term or terms used in that provision. *Jones v. Nevada, State Bd. of Med. Exam'rs*, 131 Nev. \_\_\_, 342 P.3d 50 (Adv. Op. 4, Feb. 5, 2015). "Subrogation" is defined by Black's Law Dictionary as "(t)he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the right of the other in relation to the debt or claim, and its rights, remedies, or securities." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979). "Legal liability" is defined by Black's Law Dictionary as a "liability which courts recognize and enforce as between parties litigant." *Id.* at 805. "Legally liable" is defined as "(l)iable under law as interpreted by courts .... Liability imposed by law or liability which law fixes by contract." *Id.* at 806 (emphasis added).

When a statute has a plain meaning—i.e., is subject to only one interpretation—a court must apply that plain meaning. *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857-58, 265 P.3d 688, 690 (2011). As the phrase appears in NRS 287.0465, "legal liability ... to pay all or part of the cost of (medical) services" includes legal liability both in tort and in contract, such that it encompasses contractual obligations between the parties to insurance policies.

The plain meaning rule is not without exception, however. The Nevada Supreme Court has held that there is a "fundamental principle that an insured is entitled to receive the insurance benefits for which he has paid a premium." *Maxwell v. Allstate Insurance Companies*, 102 Nev. 502, 506, 728 P.2d 812, 815 (1986). It has found that principle inapplicable in circumstances where the insured has already received a full recovery, on the basis that application of that principle would sanction double recovery in contravention of another established public policy. *Phelps v. State Farm Mut. Auto. Ins. Co.*, 112 Nev. 675, 680, 917 P.2d 944, 948 (1996). *See also Ellison v. California State Auto. Ass'n*, 106 Nev. 601, 605, 797 P.2d 975, 978 (1990) (limiting *Maxwell* where there is a concern about the insured receiving more than a full recovery). Nevada case law thus establishes a judicial policy limiting subrogation that may diminish a full recovery by the insured.

NRS 287.0465 provides PEBP with authority to subrogate to the rights of members in order to recover payments or reimbursements for a member's medical costs, including costs payable pursuant to policies of automobile medical payments coverage. Automobile medical payments coverage is insurance that is not required by law, but must be offered to an insured under a motor vehicle insurance policy. NRS 687.145(3).

In some cases, subrogation could operate to deny a member the benefit of such coverage. This could occur, for example, where a member incurs medical expenses that fall within the scope of the deductible or coinsurance obligation under the member's insurance with PEBP. If PEBP were to intercept automobile medical payments under these circumstances, the member would be left paying out of his own pocket to meet the deductible or coinsurance obligation despite having secured optional automobile medical payments coverage.

The central benefit of such optional coverage is to avoid the expense of a primary medical insurance deductible or coinsurance obligation in the event of an automobile accident. If subrogation were allowed under these circumstances, it would be less likely for anyone insured by PEBP to secure the benefits of secondary insurance to cover their deductible amount—whether for automobile accidents or otherwise. Any such secondary insurance would be subrogated by PEBP, if PEBP has paid any expenses also covered by such insurance, meaning the member would have paid for something that would, in many instances, not actually provide the intended benefit to the member. It is probable that a court would find this to run afoul of the “fundamental principle” recognized in *Maxwell* “that an insured is entitled to receive the insurance benefits for which he has paid a premium.” 102 Nev. at 506, 728 P.2d at 815. Where PEBP exercises its statutory subrogation right to prevent double recovery by the insured, on the other hand—such as where the member's deductible has been met, and PEBP and the automobile medical coverage are both paying for the same claim—such subrogation would not be barred by *Maxwell*, but would instead fall within the exception recognized in *Phelps* and *Ellison*.

B. Provisions on Subrogation and Coordination of Benefits by Group Health Insurers Do Not Limit PEBP's Ability to Subrogate to the Rights of Members Covered under its Plan of Self Insurance.

NRS Chapter 689B contains provisions (NRS 689B.034<sup>2</sup> and NRS 689B.063<sup>3</sup>) authorizing subrogation and governing coordination of benefits for group health insurance plans. Regulations in NAC Chapter 689B also address these subjects. See NAC 689B.180 and NAC 689B.195. These provisions could perhaps be interpreted to limit PEBP's authority to pursue reimbursement from a member's automobile medical payments coverage. They are, however, inapplicable to PEBP except as they pertain to the prompt payment of claims.

NRS Chapter 287, the chapter governing PEBP and authorizing it to issue health coverage under a self-insured plan of insurance, expressly limits the applicability of NRS Chapter 689B and its associated regulations. Rules governing subrogation and coordination of benefits are not among the provisions that govern or relate to PEBP.

PEBP's plan of self-insurance providing its members health coverage is authorized by NRS 287.0433, which reads: "The Board may establish a plan of life, accident or health insurance and provide for the payment of contributions into the Program Fund, a schedule of benefits and the disbursement of benefits from the Program Fund."

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<sup>2</sup> NRS 689B.034:

1. Every policy of group health insurance must contain a provision which reduces the insurer's liability because of benefits under other valid group coverage. To the extent authorized by the Commissioner, such a provision may include subrogation.

2. A provision for subrogation may include a lien upon any recovery by an insured from a third person for the cost of medical benefits paid by the insurer for injuries incurred as a result of the actions of the third person. The lien may not exceed the amount paid by the insurer.

<sup>3</sup> NRS 689B.063:

1. When a policy of group insurance is primary, its benefits are determined before those of another policy and the benefits of another policy are not considered. When a policy of group insurance is secondary, its benefits are determined after those of another policy. Secondary benefits may not be reduced because of benefits under the primary policy. When there are more than two policies, a policy may be primary as to one and may be secondary as to another.

2. The benefits payable under a policy of group health insurance may not be reduced because of any benefits payable under health insurance on a franchise plan or first-party coverage under an automobile insurance policy.

3. As used in this section, "a policy of group insurance" includes Medicare. (Added to NRS by 1987, 848; A 1989, 1250; 1995; 1995, 1629; 2013, 3620).

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NRS 689B.034 and NRS 689B.063 are not included among the provisions made applicable to PEBP's health insurance offered pursuant to a plan of self-insurance:

If the Board provides health insurance through a plan of self-insurance, it shall comply with the provisions of NRS 689B.255, 695G.150, 695G.160, 695G.162, 695G.164, 695G.1645, 695G.1665, 695G.167, 695G.170 to 695G.173, inclusive, 695G.177, 695G.200 to 695G.230, inclusive, 695G.241 to 695G.310, inclusive, and 695G.405, *in the same manner as an insurer that is licensed pursuant to title 57 of NRS is required to comply with those provisions.*

NRS 287.04335 (emphasis added).<sup>4</sup>

NRS 689B.255, the only provision of NRS Chapter 689B made applicable to PEBP by the above provision, concerns the prompt payment of claims. It does not concern either subrogation or coordination of benefits. Under the plain language of NRS 287.04355, or alternatively the canon of interpretation *expressio unius est exclusio alterius*,<sup>5</sup> the provisions of NRS Chapter 689B and NAC Chapter 689B concerning subrogation and coordination of benefits are inapplicable to PEBP.

PEBP's subrogation is not affected by the subrogation provision of NRS 689B.034 or the coordination of benefits provision of NRS 689B.063, because those provisions are inapplicable to PEBP.

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<sup>4</sup> As yet uncodified amendments to NRS 287.04335, which will take effect on January 1, 2018, are found in SB 262 (2017), and AB 249 (2017). These do not address subrogation and, therefore, do not change the analysis herein.

<sup>5</sup> *Department of Taxation v. DaimlerChrysler Services North America, LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Nevada law ... provides that omissions of subject matters from statutory provisions are presumed to have been intentional.").

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CONCLUSION

Pursuant to NRS 287.0433 and NRS 287.0465, PEBP may exercise subrogation and reimbursement rights against a member's automobile medical coverage only when its exercise of such rights would prevent a double recovery by the insured, such that it would not interfere with the "fundamental principle that an insured is entitled to receive the insurance benefits for which he has paid a premium."

Sincerely,  
ADAM PAUL LAXALT  
Attorney General

By: 

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