IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS,

Appellant,

v.

KEVIN EVANS,

Respondent.

Supreme Court No.: 59089

District Court No.: A-10-623451-J

APPELLANT'S REPLY BRIEF

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
Lewis Brisbois Bisgaard & Smith LLP
6400 S. Fourth Street, Suite 500
Las Vegas, Nevada 89101
Telephone: 702-893-3383
Attorneys for Appellant,
CITY OF LAS VEGAS

MARVIN S. GROSS, ESQ.
Nevada Bar No. 000671
King, Gross & Sutcliffe, Ltd.
3017 W. Charleston Blvd., Suite 50
Las Vegas, Nevada 89102
Telephone: 702-870-3555
Attorneys for Respondent,
KEVIN EVANS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes **Page(s)**

I.

LEGAL ARGUMENT

A. NRS 617.440 IS INAPPLICABLE.

Claimant argues that if he cannot meet the qualifications for the presumptions outlined in NRS 617.453, then he is still entitled to file a claim pursuant to NRS 617.440. Claimant is incorrect that there is no ambiguity in the statute, and in fact his citations to the legislative history do nothing to support his position.

As pointed out by Claimant, the legislative digest accompanying Assembly Bill 496 recognizes that:

> for some specific diseases, such as certain cancers, lung diseases, heart diseases, there is a legal presumption that those disease are compensable under the workers' compensation system when contracted under specific circumstances, such as when contracted by firefighters, police officers and emergency medical attendants.

Thus, the listed diseases are compensable under the workers' compensation system *only* when the specified circumstances are satisfied. Claimants cannot simply decide to file their claims under an entirely different statute if they cannot satisfy those circumstances.

Despite what Claimant argues, not only are the statutes open to interpretation, but his preferred interpretation is baseless when reviewing the legislative history.

B. THE APPEALS OFFICER APPLIED A PRESUMPTION TO CONCLUDE THIS CLAIM IS COMPENSABLE.

Claimant argues that he never attempted to file his claim under NRS 617.453, and that he intended instead to meet the burden of proof outlined in NRS 617.440. As noted above, NRS 617.440 is not applicable here. However, even if the statute could be considered applicable to this case, it is clear that the Appeals Officer did not require Claimant to meet the NRS 617.440 burden. Rather, despite the Appeals Officer's conclusion that Claimant was not entitled to a presumption, she actual needed to apply the presumption in order to reach the conclusion that she reached.

Dr. Melius essentially admitted that his opinion regarding causation was based *solely on Claimant's occupation.* According to Dr. Melius, the combination of chemicals to which firefighters are generally exposed "might be" the cause of Claimant's cancer. In other words, if Dr.

Melius had not been advised of Claimant's specific occupation, he would not be able to establish an affirmative causal connection.

The same problems are inherent in Dr. Michael's opinion. Dr. Michael expressly stated that brain cancer was connected to Claimant's employment considering "the presumptions established by the Nevada statutes." *See* Appellant's Appendix p. 90. Dr. Michael believed the presumptions to be applicable, and based his opinion on them without realizing that they were actually *not* applicable in Claimant's case.

Perhaps it is because causation cannot possibly be established between cancer and firefighters that a presumptive statute was created in the first place, provided claimants can meet listed requirements. After all, both physicians agree that brain cancer has an unknown cause. In any event, Claimant cannot rely on presumptions which are inapplicable. Claimant was required to provide physician opinions that specifically link *his own* brain cancer to *his own* work, rather than opinions which link all instances of brain cancer to the occupation of firefighting as a whole.

Claimant argues that the City "offered no evidence of its own" and therefore this claim must be considered compensable under Dr. Melius' and Dr. Michael's opinions. Again, it is Claimant's obligation under the statutes to demonstrate an affirmative causal link. The legislature designed the workers' compensation statutes such that there would be no bias in favor of claimants, and the legislature placed the burden of proof expressly on claimants. It was not up to the City to rebut physician opinions which were based on an admittedly inapplicable presumptive statute. To put it simply, Claimant did not put forth any evidence which showed a causal link between his cancer and his workplace.

///

///

///

II.

CONCLUSION

The Appellant respectfully requests that this Court reverse the District Court's Order Denying Petition for Judicial Review and find that the Appeals Officer's Decision and Order was contrary to the law, and was not supported by substantial evidence.

Dated this 23 day of February, 2012.

LEWIS BRISBOIS BISGAARD & SMITH LLP

#9019

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
400 S. Fourth Street, Ste. 500
Las Vegas, NV 89101
Attorney for Appellant,
CITY OF LAS VEGAS

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

The brief complies with the formatting requirements of Rule 32(a)(4)(6) and the page requirements of Rule 32(a)(7).

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23 day of February, 2012.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

By: _____ 9019

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
400 S. Fourth Street, Ste. 500
Las Vegas, NV 89101
Attorney for Appellant,
CITY OF LAS VEGAS

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

CERTIFICATE OF MAILING

I hereby certify that on this 23 day of February, 2012, I served the foregoing **APPELLANT'S REPLY BRIEF** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

Jane C. Lucas
City of Las Vegas
400 E. Stewart Avenue
Las Vegas, NV 89101

Marvin S. Gross, Esq.
King, Gross & Sutcliffe, Ltd.
3017 W. Charleston Blvd. Ste. 50
Las Vegas, NV 89102

Appeals Officer Geraldine H. Schwartzer, Esq.
Department of Administration
2200 S. Rancho Drive, Ste. 220
Las Vegas, NV 89101

An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP