

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

GREGORY FELTON,  
Appellant,  
vs.  
DOUGLAS COUNTY; PUBLIC AGENCY  
COMPENSATION TRUST; and APPEALS  
OFFICE of the DEPARTMENT OF  
ADMINISTRATION,  
Respndents

No. 70497

Electronically Filed  
Jun 22 2016 04:33 p.m.  
Tacie K. Lindeman  
Clerk of Supreme Court

DOCKETING STATEMENT  
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District First Department I  
County Carson City Judge Hon. James T. Russell  
District Ct. Case No. 15 OC 00048 1B

**2. Attorney filing this docketing statement:**

Attorney Edward L. Oueilhe, Esq. Telephone 775-684-7555

Firm Nevada Attorney for Injured Workers

Address 1000 E. William Street  
Suite 208  
Carson City, Nevada 89701

Client(s) Gregory Felton

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Robert F. Balkenbush, Esq. Telephone 775-786-2882

Firm Thorndal Armstrong Delk Balkenbush & Eisinger

Address 6590 South McCarran Blvd.  
Suite B  
Reno, Nevada 89509

Client(s) Douglas County

Attorney John D. Hooks, Esq. Telephone 702-366-0622

Firm Thorndal Armstrong Delk Balkenbush & Eisinger

Address 1100 East Bridger Avenue  
PO Drawer 2070  
Las Vegas, Nevada 89125

Client(s) Douglas County

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |  |   |
|--|---|
| <input type="checkbox"/> Judgment after bench trial                | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict               | <input type="checkbox"/> Lack of jurisdiction                           |
| <input type="checkbox"/> Summary judgment                          | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                          | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief         | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction                | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief        | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Gregory Felton vs. Douglas County, Public Agency Compensation Trust, and Appeals Office of the Department of Administration; Case No. 15 OC 00048 1B; the First Judicial District Court of the State of Nevada in and for Carson City; February 2, 2016.

In the Matter of the Industrial Insurance Claim of Gregory Felton; Appeal No.:47863-WDD; Appeals Officer, Nevada Department of Administration; February 4, 2015.

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

The February 4, 2015, Decision and Order of the Appeals Officer was affirmed on Mr. Felton's Petition For Judicial Review with the First District Court.

Mr. Felton argued that the proper review of NRS 616A.065, NRS 616C.420 and NAC 616C.447 was independent review for an error of law. More specifically, Mr. Felton argued that the Appeals Officer committed an error of law because NRS 616A.065 does not prohibit the summing of his deemed volunteer search and rescue wage and his concurrent wages as a Hewlett Packard employee, and NRS 616C.420 and NAC 616C required that Mr. Felton's deemed volunteer wage and actual wage must be summed when determining his average monthly wage.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the Appeals Officer's order presents an error of law because the Appeals Officer incorrectly construed and applied NRS 616A.065 and concluded that where the Legislature in NRS 616C.420 required the Division Industrial Relations to enact regulations which dictate the process by which average monthly wages are to be calculated in NAC 616C.447, Mr. Felton's earned wage and volunteer deemed wage should not be summed to determine Mr. Felton's average monthly wage.

Because NRS 616A.065 does not prohibit the summing of Mr. Felton's deemed wage and his concurrent wage as mandated in NRS 616C.420 and NAC 616C.447, the appeals officer and the reviewing court committed an error of law and abuse of discretion.

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

This appeal has not been before the Nevada Supreme Court previously.



**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

The Appellant asks the Court rule on a substantial issue of first impression.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? 1

Was it a bench or jury trial? Administrative law hearing on 08/25/2014 (1 hour)

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?  
No.

## TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 02/02/2016

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served 04/26/2016

Was service by:

☒ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** 05/23/2016

---

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)(1)

---

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |  |  |
|--|--|
| <input type="checkbox"/> NRAP 3A(b)(1)         | <input type="checkbox"/> NRS 38.205              |
| <input type="checkbox"/> NRAP 3A(b)(2)         | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)         | <input type="checkbox"/> NRS 703.376             |
| <input type="checkbox"/> Other (specify) _____ |  |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

**22. List all parties involved in the action or consolidated actions in the district court:**

**(a) Parties:**

Gregory Felton; Douglas County, Public Agency Compensation Trust; Appeals Office of the Department of Administration.

**(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:**

No Statement of Intent to Participate was filed by the Appeals Office of the Department of Administration at the District Court.

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Appellant seeks independent review of an issue of statutory and regulation construction.

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered "No" to question 24, complete the following:**

**(a) Specify the claims remaining pending below:**

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)): NRAP 3A(b)**

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Gregory Felton  
Name of appellant

06/22/2016  
Date

Nevada, Carson City  
State and county where signed

Edward L. Oueilhe, Esq.  
Name of counsel of record

  
Signature of counsel of record

## CERTIFICATE OF SERVICE

I certify that on the 22nd day of June, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Robert F. Balkenbush, Esq.  
Thorndal Armstrong et al  
6590 South McCarran Blvd., Suite B  
Reno, NV 89509-6112

John D. Hooks, Esq.  
Thorndal Armstrong et al  
1100 East Bridger Avenue  
PO Drawer 2070  
Las Vegas, NV 89701

Dated this 22nd day of June, 2016

  
Signature

1 Edward L. Oueilhe, Esq., deputy  
Nevada Bar No. 08218  
2 Nevada Attorney for Injured Workers  
1000 East William Street, Suite 208  
3 Carson City, Nevada 89701  
Attorney for Petitioner,  
4 Gregory Felton

REC'D & FILED

2016 APR 26 PM 3:00

SUSAN MERRIWETHER  
CLERK

BY V. Alegria  
DEPUTY

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7  
8 IN AND FOR CARSON CITY

9 GREGORY FELTON,

10 Petitioner,

11 vs.

CASE NO. 15 OC 00048 1B

12 DOUGLAS COUNTY; PUBLIC AGENCY  
COMPENSATION TRUST; and APPEALS  
13 OFFICE of the DEPARTMENT OF  
ADMINISTRATION,

DEPT. NO. 1

14 Respondents.  
15 \_\_\_\_\_/

16 NOTICE OF ENTRY OF ORDER


17 TO: DOUGLAS COUNTY AND PUBLIC AGENCY COMPENSATION  
18 TRUST; and

19 TO: ROBERT F. BALKENBUSH, Esq., its attorney.

20 PLEASE TAKE NOTICE that an Order was entered in the  
21 above-entitled matter on the 2nd day of February, 2016. A copy  
22 of said Order is attached hereto.

23 DATED this 25th day of April, 2016.

24 NEVADA ATTORNEY FOR INJURED WORKERS

25   
26 Edward L. Oueilhe, Esq., deputy  
Nevada Bar No. 08218  
27 1000 East William Street, Suite 208  
Carson City, Nevada 89701  
Attorney for Petitioner,  
28 Gregory Felton



**ATTACHMENT**

**ATTACHMENT**

REC'D & FILED

2016 FEB -2 AM 8: 57

SUSAN HERRIWEATHER  
CLERK

RY                       
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY

GREGORY FELTON,

Case No. 15-OC-00048-1B

Petitioner,

Dept. No. 1

vs.

DOUGLAS COUNTY, PUBLIC AGENCY  
COMPENSATION TRUST,  
ALTERNATIVE SERVICE CONCEPTS,  
LLC, and the NEVADA DEPARTMENT OF  
ADMINISTRATION APPEALS OFFICER  
WHITNEY DERRAH

**ORDER DENYING**  
**PETITION FOR JUDICIAL REVIEW**

Respondents.

\_\_\_\_\_/

This matter comes before the Court pursuant to an amended Petition for Judicial Review filed on March 5, 2015, by Petitioner, Gregory Felton. The Petitioner's Opening Brief in this matter was filed on June 1, 2015, and on August 7, 2015, Respondents, Douglas County and the Public Agency Compensation Trust, filed their Answering Brief. On October 7, 2015, the Petitioner filed his Reply Brief and the matter was submitted to the Court for decision on November 3, 2015.

I.

**PROCEDURAL HISTORY**

On March 6, 2012, the Petitioner, Gregory Felton (Felton), injured his knee while volunteering on a Douglas County search-and-rescue team. Although Felton had volunteered on the search-and-rescue team since 2005, at the time of the injury (and at all times relevant

1 hereto) Felton was employed by Hewlett-Packard (HP) as a quality control specialist.

2 Following the March 6, 2012, knee injury, Felton filed a claim for industrial insurance  
3 benefits with Douglas County and its workers' compensation insurance carrier, the Public  
4 Agency Compensation Trust (PACT).<sup>1</sup> On behalf of Douglas County and PACT, and by written  
5 determination dated November 11, 2013, the third party claims administrator (Alternative  
6 Service Concepts, LLC (ASC), notified Felton that it had calculated his average monthly wage  
7 (AMW) under his workers' compensation claim and further advised that its calculations were  
8 based upon the statutory deemed wage of a search-and-rescue volunteer. By written  
9 determination dated November 13, 2013, ASC, again on behalf of Douglas County and PACT,  
10 awarded Felton a one percent (1%) permanent partial disability (PPD) or whole person  
11 impairment (WPI), as a result of his March 6, 2012, knee injury.

12 Felton disagreed with both ASC's November 11, 2013 determination, as well as ASC's  
13 November 13, 2013 determination. Accordingly, Felton appealed these determinations to a  
14 Hearing Officer. By written decision dated February 20, 2014, the Hearing Officer affirmed both  
15 determinations made by ASC and, thereafter, Felton appealed to the Appeals Officer. However,  
16 Felton later conceded the validity or propriety of the November 13, 2013, determination made by  
17 ASC, in which Felton was awarded a 1% PPD or WPI for his left knee injury. Accordingly, the  
18 only remaining issue before the Appeals Officer was the Hearing Officer's decision affirming  
19 ASC's November 11, 2013, determination that Felton's AMW must be calculated using only the  
20 statutory deemed wage of a search-and-rescue volunteer, as opposed to an aggregation of  
21 Felton's earned wage at HP and the statutory deemed wage.

22 On August 25, 2014, a trial was held before the Appeals Officer. Having considered the  
23 evidence and written arguments submitted by the parties, the Appeals Officer ultimately  
24 concluded in a written decision filed and served on February 4, 2015, that Felton was not, as a  
25

---

26 <sup>1</sup> The Public Agency Compensation Trust is a self-insured association of public employers for workers'  
27 compensation claims and, at all times relevant hereto, was the workers' compensation insurance carrier for Douglas  
28 County.

1 matter of law, entitled to an AMW based on an aggregation of both his earned wages at HP (his  
2 private employer) and his statutory deemed wage as a search-and-rescue volunteer. Accordingly,  
3 the Appeals Officer affirmed the Hearing Officer's decision in Hearing No. 47153-KD, as well as  
4 ASC's November 11, 2013 determination which assessed the AMW as a deemed wage of  
5 \$2,000.00 per month.

6 Felton disagreed with the findings and decision reached by the Appeals Officer and,  
7 therefore, on March 5, 2015, Felton filed the present amended Petition for Judicial Review. The  
8 Petitioner specifically argues that the Appeals Officer committed legal error by failing to  
9 aggregate Felton's earned wage at HP and his deemed wage as a search-and-rescue volunteer. As  
10 such, the Petitioner urges the Court to reverse the Appeals Officer's affirmation of ASC's  
11 November 11, 2013 determination.

## 12 II.

### 13 DISCUSSION

#### 14 A. STANDARD OF REVIEW.

15 A reviewing Court may remand or affirm the final decision or set it aside in whole or in  
16 part only if substantial rights of the petitioner have been prejudiced because the final decision of  
17 the agency is:

- 18 (a) In violation of constitutional or statutory provisions;
- 19 (b) In excess of the statutory authority of the agency;
- 20 (c) Made upon unlawful procedure;
- 21 (d) Affected by other error of law;
- 22 (e) Clearly erroneous in view of the reliable, probative, and  
23 substantial evidence on the whole record; or
- 24 (f) Arbitrary or capricious or characterized by abuse of  
discretion.

25 NRS 233B.135(3). Since the parameters of judicial review are established by statute, judicial  
26 review of a final decision of an agency must be conducted by the Court without a jury and  
27 confined to the record. *See, NRS 233B.135(1); see also, Employment Security Dept. v. Cline,*  
28

1 109 Nev. 74, 847 P.2d 736, 739 (1993)(stating that in reviewing an administrative agency  
2 decision appellate courts are limited to the agency record and to the determination of whether the  
3 administrative body acted arbitrarily or capriciously.).

4 The burden of proof is on the party attacking the decision to show that the final decision  
5 is invalid. *Id.* Generally, an agency's conclusions of law, which will necessarily be closely related  
6 to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are  
7 supported by "substantial evidence." *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806  
8 (1986); *see also State Indus. Ins. Sys. v. Romero*, 110 Nev. 739, 742, 877 P.2d 541 (1994)  
9 (stating that review of an administrative decision is limited to a determination of whether that  
10 decision is based on substantial evidence or contains errors of law). "Substantial evidence" is  
11 defined as that which "a reasonable mind might accept as adequate to support a conclusion."  
12 *Richardson v. Perales*, 402 U.S. 389, 401 (1971).<sup>2</sup> What is more, an agency's interpretation of its  
13 own a regulation is clothed with great deference. *City of Reno v. Reno Police Protection Ass'n*,  
14 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002) (Holding that "this court will not readily disturb  
15 an administrative interpretation of statutory language").

16 **B. NRS 616A.130 IS THE CONTROLLING STATUTE WITH RESPECT TO FELTON'S MARCH**  
17 **2012 INJURY AND HIS AVERAGE MONTHLY WAGE**

18 Under Nevada law, except as otherwise provided by a specific statute, the amount of  
19 compensation and benefits, and the person or persons entitled thereto, must be determined as of  
20 the date of the accident or injury to the employee and their rights thereto become fixed as of  
21 that date. *See*, NRS 616C.425; *see also*, NAC 616C.441; NAC 616C.429. As noted above,  
22 Felton's left knee injury occurred in March 2012. At the time of the injury at issue, there was no  
23 specific statute providing that search-and-rescue volunteers were "employees" who had a  
24 "deemed wage" for the purpose of insurance coverage and benefits under the Nevada Industrial  
25 Insurance Act (NILA) or the Nevada Occupational Disease Act (NODA). The Petitioner cites  
26 NRS 616A.157 on numerous occasions throughout his briefs; however, NRS 616A.157 was

---

27 <sup>2</sup> *See also, State Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1  
28 (1986)(Substantial evidence is "that quantity and quality of evidence which a reasonable [person] could accept as  
adequate to support a conclusion").

1 enacted and became law on May 21, 2013, which is one year and two months *after* the  
2 occurrence of Felton's accidental injury. *See* Assembly Bill 206, Chapter 26, Section 1 (2013).<sup>3</sup>  
3 Accordingly, as a matter of law, the controlling statute with respect to Felton's March 2012 knee  
4 injury is NRS 616A.130. *See* Hearings on Assembly Bill (AB) 206 - Committee on Labor and  
5 Energy, 77th Leg. (Nev., March 13, and April 29, 2013). NRS 616A.130 specifically provides  
6 that, for purposes of calculating workers' compensation benefits, persons engaged in volunteer  
7 work for a local public organization may be deemed employees at a deemed wage of \$100 per  
8 month.<sup>4</sup> *Id.*; *see also* NAC 616C.129.

- 9       1.       According to the rules of statutory construction, NAC 616C.447 cannot be  
10       read to permit the aggregation of earned and deemed wages for volunteers  
11       such as Felton.

12       Pursuant to the principles of statutory construction, which apply to administrative  
13       regulations<sup>5</sup>, NRS 616A.130, which establishes a specific deemed wage for persons engaged in  
14       volunteer work, would control over the general rule set forth in NAC 616C.447.

15       In *New Bethlehem Volunteer Fire Co. v. Workmen's Compensation Appeal Board*, 654  
16       A.2d 267 (Pa. Commonw. Ct. 1995), the claimant suffered a disabling injury during the course of

---

17       <sup>3</sup> The Court notes that the Appeals Officer appears to have applied NRS 616A.157 retroactively to the matter  
18       at bar. In part, the foregoing is evidenced by the Appeals Officer's affirmation of ASC's November 11, 2013  
19       determination. Substantive statutes, such as NRS 616A.157, are presumed to operate *prospectively*, unless it is clear that  
20       the drafters intended the statute to be applied retroactively. *Sandpointe Apts., LLC v. Eighth Judicial Dist. Court*, 129  
21       Nev. \_\_\_, 313 P.3d 849, 853 (2013) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273, (1994)). There is simply  
22       no indication that the Nevada Legislature intended NRS 616A.157 to be applied retroactively. As such, NRS 616A.130  
23       applies to the matter at bar and the statutory deemed wage at the time of Felton's injury was \$100.00 per month.

24       On the matter of the issue of aggregation of wages from concurrent employment, Nowhere in the legislative  
25       history of NRS 616A.157 and considerations of its fiscal impact does the Legislature even remotely contemplate that  
26       concurrent employment (which most volunteers likely have) would effect the bottom line to be absorbed by the self-  
27       insured counties and municipalities. Indeed, every indication is to the contrary and the only contemplated change would  
28       solely involve exposure from a \$100 deemed average monthly wage to a \$2000 deemed average monthly wage. The  
29       foregoing is consistent with the arguments made by Douglas County and PACT and the Decision and Order of the  
30       Appeals Officer in this matter.

31       <sup>4</sup> Notwithstanding, in this matter, ASC, as the third party administrator, improperly assessed Felton's deemed  
32       average monthly wage (AMW) as being \$2000.00 per month, and neither Douglas County nor the PACT appealed from  
33       this determination. Hence, as a matter of equitable estoppel and waiver, in this matter, Felton's deemed AMW is  
34       \$2,000.00 per month. *See, Browning v. Young Electric Sign Co.*, 113 Nev. 420, 936 P.2d 322 (1997).

35       <sup>5</sup> Nevada has recognized that the rules of statutory construction apply to administrative regulations. *Meridian  
36       Gold Co. v. State ex rel. Department of Taxation*, 119 Nev. 630, 81 P.3d 516 (2003).

1 his work as a volunteer firefighter and was concurrently employed at a local manufacturing  
2 company. *New Bethlehem*, 654 A.2d at 267-68. Pennsylvania workers' compensation act (like  
3 Nevada's) contained both a statute specifically characterizing volunteer firefighters as deemed  
4 employees with deemed wages for purposes of benefits under the act <sup>6</sup> and Pennsylvania also had  
5 a statute generally allowing the combination of wages from concurrent employment. <sup>7</sup> *Id.* at 642.  
6 The court in *New Bethlehem* focused on the language of the two statutes and the rules of statutory  
7 interpretation. The court noted that "where there are two statutory provisions in conflict with  
8 each other, and this conflict is irreconcilable, the specific provision controls over the general  
9 provisions." 1 Pa.C.S. § 1933 and *Paxon Maymar, Inc. v. Pennsylvania Liquor Control Bd.*, 11  
10 Pa.Commonw. Ct. 136, 312 A.2d 115 (1973). The court explained that the statute relating to the  
11 combination of concurrent wages was a general rule of aggregation and that the specific statute  
12 allowing for a deemed wage for a volunteer firefighter was a specific and narrow "exception to  
13 that rule, as a person who performs the task of volunteer fire fighting as well as working a  
14 primary job is not in a concurrent employment situation." *New Bethlehem*, 654 A.2d at 268.

15 In *Snyder v. Workmen's Compensation Appeal Bd.* 654 A.2d 641 (Pa. Commonw. Ct.  
16 1995), and *Borough of Hensdale v. Workmen's Compensation Appeal Bd.*, 659 A.2d 70 (Pa.  
17 Commonw. Ct. 1995), the courts affirmed that volunteer firefighters were treated "differently  
18 from other claimants who are permitted to add their concurrent wages for the purpose of  
19 calculating their average weekly wage under Section 309(e) of the Act, 77 P.S. § 582(e), up to  
20 the amount which would secure for them the greatest maximum benefit, that is, [granting]  
21 benefits which equal the statewide average weekly wage." *Borough*, 659 A.2d at 76.

22 A similar logic and statutory interpretation was employed by the Supreme Court of  
23 Connecticut in *Going v. Cromwell Fire District* 159 Conn. 53, 267 A.2d 428 (1970), and again in  
24 *Wislocki v. Town of Prospect*, 224 Conn. 479, 619 A.2d 842 (1993). The Connecticut workers'

---

25  
26 <sup>6</sup> The statute provides that when injured during the course of employment as a volunteer firefighter "there is  
27 an irrebuttable presumption that his wages shall be at least equal to the Statewide average weekly wage for the purpose  
of computing his compensation..." 77 P.S. § 1031(b).

28 <sup>7</sup> "Where the employee is working under concurrent contracts with two or more employers, his wages from all  
such employers shall be considered as if earned from the employer liable for compensation." 77 P.S. § 582(c).



1 compensation act also contained both a statute specifically characterizing volunteer firefighters  
2 as deemed employees with deemed wages for purposes of benefits under the act (C.G.S.A. § 7-  
3 314(a))<sup>8</sup> and a statute generally allowing the combination of wages from concurrent employment  
4 (C.G.S.A. § 31-310).<sup>9</sup> Notably, the court in *Going* stressed that:

5 "It is significant that section 31-310, as quoted above, provides in part that  
6 the employee's 'average weekly wages shall be calculated upon the basis of  
7 wages earned from all such employers' but that section 7-314a (b), in this  
8 connection, provides a different method of computation, viz., '(f)or the  
purpose of this section, the average weekly wage of a volunteer fireman shall  
be construed to be the average production wage in the state as determined by  
the labor commissioner under the provisions of section 31-309.' "

9 *Going*, 159 Conn. at 60. The court reasoned that it was plausible to suppose that the legislature  
10 devised the latter method of computation to protect the volunteer firefighter in cases where  
11 wages "actually" earned by them, if any, might be wholly inadequate as a basis for determining  
12 their disability benefits. *Id.* The Connecticut Supreme Court summarized that "[w]here there are  
13 two inconsistent methods of computation such as we have in the present case, the method of  
14 computation which covers the subject matter in specific terms, herein as particularly applied to  
15 volunteer firemen, will prevail over the general language of another statute which might  
16 otherwise prove controlling." *Going*, 159 Conn. at 60. (Emphasis added).

17 Accordingly, in light of the sound reasoning employed in the foregoing authority, this  
18 Court finds that the specific language of NRS 616A.130, that the deemed wage of a volunteer is

19 \_\_\_\_\_  
20 <sup>8</sup> C.G.S.A. § 7-314(a)(b) provides that "[f]or the purpose of this section, the average weekly wage of a volunteer  
21 fireman shall be construed to be the average production wage in the state as determined by the labor commissioner under  
the provisions of section 31-309."

22 <sup>9</sup> The Connecticut statute governing the combining of wages from concurrent employment allows aggregation  
23 up to the legislative maximum average weekly wage in a pro rata calculation which may involve the Second Injury Fund  
but otherwise simply allows for combining wages from concurrent employers. C.G.S.A. § 31-310, states in pertinent part:

24 Where the injured employee has worked for more than one employer as of the date of the injury  
25 and the average weekly wage received from the employer in whose employ the injured employee was  
26 injured, as determined under the provisions of this section, are insufficient to obtain the maximum  
27 weekly compensation rate from the employer under section 31-309, prevailing as of the date of the  
28 injury, the injured employee's average weekly wages shall be calculated upon the basis of wages earned  
from all such employers in the period of concurrent employment not in excess of fifty-two weeks prior  
to the date of the injury...The remaining portion of the applicable compensation rate shall be paid from  
the Second Injury Fund upon submission to the Treasurer by the employer or the employer's insurer of  
such vouchers and information as the Treasurer may require.



1 \$100.00 a month, would control over the general language of NAC 616C.447. Additionally,  
2 regulations cannot be read to expand the scope of the statutes governing them and regulations  
3 that cannot be read any other way are invalid.<sup>10</sup>

4 **C. APPLICABLE CASE LAW FROM NEVADA AND A MAJORITY OF OTHER JURISDICTIONS**  
5 **SUPPORTS THE NON-AGGREGATION OF WAGES FROM DISSIMILAR, CONCURRENT**  
6 **EMPLOYMENT.**

7 According to Larson's treatise on workers' compensation law, the rule adopted by a  
8 majority of jurisdictions throughout the United States holds that the earnings of an injured  
9 worker may be combined if, and only if, the various employments were "related" or "similar,"  
10 otherwise these jurisdictions "bar aggregation of wages from dissimilar concurrent employment."  
11 See A. Larson, *Larson's Workers' Compensation Law* § 93.03[1][a] (2011). This is commonly  
12 referred to as the related-employment rule. *Id.*

13 While Nevada courts have not specifically addressed the related-employment rule, in

---

14 <sup>10</sup> In *Meridian Gold v. Nevada Dep't of Taxation*, 119 Nev. 630, 81 P.3d 5116 (2003), the Nevada Supreme  
15 Court stressed that

16 "[w]hen determining the validity of an administrative regulation, courts generally give 'great  
17 deference' to an agency's interpretation of a statute that the agency is charged with enforcing."  
18 However, we "will not hesitate to declare a regulation invalid when the regulation violates the  
constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the  
agency or is otherwise arbitrary and capricious."

19 *Meridian Gold*, 119 Nev. at 635; see also *Public Agency Comp. Trust v. Blake*, 127 Nev. Adv. Op. 77, 265 P.3d 694  
(2011); see generally 73 C.J.S. Public Administrative Law and Procedure § 172.

20 <sup>11</sup> In *Hart's Exxon Service Station v. Prater*, 268 Ark.961, 597 S.W.2d 130 (1980), the claimant sustained a  
21 compensable injury while working at a service station while concurrently employed as a janitor with the school district.  
22 In holding that the his compensation was properly based on service station wages rather than the combined incomes of  
23 both employments, the Arkansas Court of Appeals noted that "the risk insured by a policy of workers' compensation  
could not be determined with any degree of accuracy if compensation rates were computed on incomes outside the  
covered employment" and that "[t]he premiums received by the insurance carrier to cover the risk must be determinable."  
24 *Hart's Exxon*, 268 Ark. at 965. The court further explained that to remain solvent, the insurance carriers must receive  
a premium "commensurate with the risk." *Id.* (emphasis in original).

25 In *Thompson v. STS Holdings*, 711 S.E. 2d 827 (N.C. Ct. App. 2011) in applying the related employment rule  
26 even in the face of a vastly lower weekly wage for the employee, the court reasoned that "the General Assembly enacted  
our workers' compensation act considering what it deemed "fair and just" to both parties." *Thompson*, 711 S.E.2d at 832.  
27 The court noted that had the Legislature intended to authorize the Commission in the exceptional cases to "combine those  
wages from any concurrent employment, we think it would have been equally specific." *Id.* (emphasis in original). See  
28 also, *In the Matter of Russell*, 37 E.C.A.B. 567 (1986)(federal appeals board recognizing the majority rule holding that  
in "[f]ollowing the precedents of the New York courts and of this Board, and the majority rule in other jurisdictions,  
earnings from dissimilar private employment cannot be considered in computing appellant's pay rate for purposes of  
compensation").

1 *Ayala v. Caesars Palace*, 119 Nev. 232, 71 P.3d 490 (2003), the Nevada Supreme Court  
2 seemingly endorsed the sound reasoning behind this rule. In *Ayala*, the claimant fractured her  
3 ankle while working as a banquet waitress for Caesars Palace, but provided wage information to  
4 Caesar's third party administrator (TPA) that included her income as a cashier for the Mirage.  
5 *Ayala*, 119 Nev. at 234. Upon further investigation, the TPA issued a determination reducing the  
6 claimant's AMW and excluding the wages she earned as a cashier. Ultimately, the Nevada  
7 Supreme Court concluded that the wage adjustment was warranted and the Nevada Supreme  
8 Court noted that "the record reflects that Ayala had left her position at the Mirage before the  
9 injury, so her employment [at the Mirage] was not a concurrent employment under NAC  
10 616C.447. Furthermore, she worked there as a cashier, not as a banquet waitress. Therefore,  
11 CDS properly excluded those wages from its calculation." *Id.* at 240. (Emphasis added).

12 Accordingly, based on the Nevada Supreme Court's analysis in *Ayala*, it appears that  
13 Nevada is inclined to follow the majority of jurisdictions in utilizing the so-called related-  
14 employment rule. As applied to the matter at bar, the related-employment rule would not support  
15 the aggregation of Felton's earned wages as a quality control specialist at HP and his deemed  
16 wages as a search-and-rescue volunteer with Douglas County, as Felton's employment at HP is  
17 completely dissimilar to his activities as a search-and-rescue volunteer.

18 **1. Nevada Law Does Not Support the Aggregation of Earned Wages and**  
19 **Deemed Wages for Volunteers Such as Felton.**

20 Generally, the average monthly wage for an injured employee covered under the Nevada  
21 Industrial Insurance Act is governed by NRS 616A.065, which provides as follows:

22 "Except as otherwise provided in subsection 3, 'average monthly wage' means  
the lesser of:

- 23 (a) The monthly wage actually received or deemed to have been received by  
24 the employee on the date of the accident or injury to the employee,  
excluding remuneration from employment:  
25 (1) Not subject to the Nevada Industrial Insurance Act or the Nevada  
Occupational Diseases Act; and  
26 (2) For which coverage is elective, but has not been elected; or  
27 (b) One hundred fifty percent of the state average weekly wage as most recently  
computed by the Employment Security Division of the Department of  
28 Employment, Training and Rehabilitation during the fiscal year preceding  
the date of the injury or accident, multiplied by 4.33."

1 NRS 616A.065(1). (Emphasis added).

2 The Nevada legislature has delegated by statute to the Administrator of the Division of  
3 Industrial Relations the authority to promulgate the method of determining the average monthly  
4 wage. *See* NRS 616C.420; *see also* NRS 6161A.400; and NAC 616A.420-447. Accordingly, the  
5 Division of Industrial Relations has issued NAC 616C.447, which provides as follows:

6 The average monthly wage of an employee who is employed by two or more  
7 employers covered by a private carrier or by a plan of self-insurance on the  
8 date of a disabling accident or disease is equal to the sum of the wages  
9 earned *or* deemed to have been earned at each place of employment. The  
insurer shall advise an injured employee in writing of his or her entitlement  
to compensation for concurrent employment at the time of the initial payment  
of the compensation.

10 (Emphasis added).

11 The Court finds that the plain language of the above-cited statute and regulation appears  
12 to bar the aggregation of both earned and deemed wages when calculating the average monthly  
13 wage (AMW). The relevant statute and regulation (NRS 616A.065 and NAC 616C.447)  
14 specifically utilize the disjunctive "or" with respect to the statutory components of the AMW -  
15 not the conjunctive "and," and not "and/or." The plain meaning of the cited statute and  
16 regulation allow for the AMW to be calculated by "the sum of the wages earned" *or* "the sum of  
17 the wages deemed to have been earned." The statute and regulation speaks for themselves and  
18 certainly do not mandate or clearly permit that the AMW be calculated by considering "the sum  
19 of wages earned" *and* "the sum of wages deemed to be earned," as suggested by the Petitioner.  
20 Accordingly, based on the plain, unambiguous wording of the relevant statute and regulation, the  
21 aggregation of earned and deemed wages appears to be barred when calculating the AMW for a  
22 volunteer such as Felton.

23 2. Sound public policy militates against exposing private or public employers to  
24 unknown liability concerning a volunteer's concurrent employment.

25 Lastly, there is no evidence of any public policy adopted by the legislature showing an  
26 intention that Nevada counties, municipalities, and towns, etcetera, to take on immeasurable and  
27 unforeseen liabilities based on possible alternative employment by its volunteers. Likewise, there  
28 is no evidence of any public policy adopted by the legislature showing an intention to permit

1 through administrative regulations modification of the unambiguous statutory definition of the  
2 AMW of volunteers. The language of NRS 616A.130 exists to provide coverage for volunteers at  
3 a reasonable rate and has only been expanded by specific provisions adopted by the Nevada  
4 Legislature, none of which applied to the Petitioner on March 6, 2012, the date of his accident.<sup>12</sup>  
5 See NRS 616A.157 (date of enactment May 21, 2013).

6 In addition, volunteer organizations (such as Douglas County Search-and-Rescue)  
7 generally have no knowledge of the concurrent salary or wages of its volunteers, and often no  
8 knowledge of concurrent employment at all. Hence, in this Court's opinion it would be roundly  
9 unfair to private or public employers to apply NAC 616C.447 to volunteers so as to permit  
10 aggregation of wages from concurrent employment.

11 **III.**

12 **CONCLUSION**

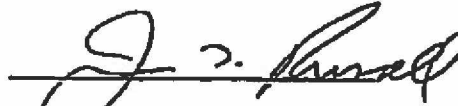
13 In accordance with the rules of statutory construction, applicable case law and  
14 sound public policy, the Court affirms the Appeals Officer's February 4, 2015, decision and  
15 order, with respect to the non-aggregation of wages from concurrent employment.

16 **JUDGMENT**

17 Therefore, good cause appearing,

18 IT IS HEREBY ORDERED that the Petition for Judicial Review is hereby DENIED.

19 Dated this 2nd day of February, 2016.

20  
21   
22 HON. JAMES T. RUSSELL  
23 DISTRICT COURT JUDGE  
24  
25

26  
27 <sup>12</sup> Volunteers are, frankly, fortunate to have coverage under the Nevada Industrial Insurance Act. Apart from  
28 such coverage, it seems to this Court that a volunteer assumes the risk associated with the activity he/she volunteers to perform.

1 Proposed Order Submitted by:  
2 ROBERT F. BALKENBUSH, ESQ.  
3 State Bar No. 1246  
4 Thorndal, Armstrong, Delk, Balkenbush & Eisinger  
5 6590 S. McCarran, Suite B  
6 Reno, Nevada 89509  
7 Attorneys for Respondents,  
8 Douglas County and  
9 Public Agency Compensation Trust  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 2<sup>nd</sup> day of February, 2016, I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing Order addressed as follows:

Edward L. Oueilhe, Esq.  
1000 E. William Street, Suite 208  
Carson City, NV 89701

Robert F. Balkenbush, Esq.  
6900 S. McCarran, Suite B  
Reno, NV 89509



Angela Jeffries  
Judicial Assistant, Dept. 1

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on this date I deposited for mailing at Carson City, Nevada, a true and correct copy of the within and foregoing NOTICE OF ENTRY OF ORDER all caps addressed to:

GREGORY FELTON  
PO BOX 2130  
STATELINE NV 89449

and that on this date, I prepared for hand delivery, via Reno Carson Messenger Service, a true and correct copy of the aforementioned document to the following party at the address below:

ROBERT F BALKENBUSH ESQ  
THORNDAL ARMSTRONG ET AL  
6590 S MCCARRAN BLVD #B  
RENO NV 89509-6112

and that on this date, I prepared for hand-delivery a true copy of the attached document addressed to:

APPEALS OFFICE  
DEPARTMENT OF ADMINISTRATION  
1050 EAST WILLIAM STREET, SUITE 450  
CARSON CITY NV 89701

DATED: April 26, 2016

SIGNED: Taney L. Sherwood

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the  
preceding:

NOTICE OF ENTRY OF ORDER

filed in Case Number: 15 OC 00048 1B

X Does not contain the Social Security Number of any  
person.

-OR-

Contains the Social security Number of a person as  
required by:

A. A specific State or Federal law, to wit:

-or-

B. For the administration of a public program or  
for an application for a Federal or State  
grant.

  
Signature

4/25/16  
Date

EDWARD L. OUEILHE, ESQ., deputy  
Nevada Attorney for Injured Workers

Attorney for Petitioner,  
Gregory Felton