ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY FELTON,

Appellant,

vs.

Case No.: 70497

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

Respondents.

Appeal from a District Court Order
Denying Petition for Judicial Review
First Judicial District Court, Carson City
Department I
Case No. 15 OC 00048 1B

APPELLANT'S OPENING BRIEF

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17-04071

DISCLOSURE STATEMENT

(NRAP 26.1(a))

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Appellant's parent corporations:

None.

Firms having appeared:

Nevada Attorney for Injured Workers.

Thorndal Armstrong Delk Balkenbush & Eisinger.

Appellant's pseudonyms:

None.

Submitted this 3rd day of February, 2017

NEVADA ATTORNEY FOR INJURED WORKERS

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II.

JURISDICTIONAL STATEMENT

This appeal originates under the Nevada Industrial Insurance Act. On March 6, 2012, the Appellant Gregory Felton injured his left knee while working as a search and rescue volunteer for Douglas County. Mr. Felton's claim for workers' compensation benefits was accepted. On November 11, 2013, the insurer's administrator issued a determination calculating Mr. Felton's average monthly wage at $2,000.00. The wage calculation was limited to Mr. Felton's deemed wage as a volunteer search and rescue worker. Mr. Felton appealed the wage calculation because it failed to include his actual wages from Hewlett Packard.

On February 4, 2015, an administrative law judge, Lorna Ward, Esq., affirmed the average monthly wage calculation of $2,000.00 in a decision and order. A petition for judicial review was filed in the First District Court on behalf of Mr. Felton on March 2, 2015, within 30 days of the final decision and order for which review was sought. NRS 233B.130(2)(b)(d). The petition for judicial review was served upon the office of the appeals officer on March 3, 2015, within 45 days of the filing of the petition. NRS 233B.130(5). On March 6, 2015, an amended petition for judicial review was filed in the First District

Court on behalf of Mr. Felton. NRS 233B.130(2)(b). The amended petition for judicial review was served upon the office of the appeals officer on March 6, 2015, within 45 days off the filing of the petition. NRS 233B.130(5). An order denying the petition for judicial review was filed on February 2, 2016. On April 26, 2016, a notice of entry of order was filed with the district court on behalf of the appellant. A notice of appeal was filed on behalf of the appellant within 30 days of the filing of the notice of entry. NRAP 4(a)(1). The dates of the filing and service establish the timeliness of this appeal. NRAP 28(a)(4).

Article 6, Section 6, of the Nevada Constitution confers appellate jurisdiction of this matter to the Nevada Supreme Court. The Nevada Administrative Procedure Act, specifically NRS 233B.150 and NRAP 3(A)(b)(1), allows a party aggrieved by an administrative hearings decision to obtain review of the decision first in the appropriate district court and then, if necessary, in the Nevada Supreme Court. See also, Dept. Of Motor Vehicles v. Bremer, 113 Nev. 805, 942 P.2d 145 (1997).

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III.

ROUTING STATEMENT

NRAP 17 sets forth a list of case categories that are presumptively assigned to the Court of Appeals. NRAP 17(b)(10) requires administrative agency appeals except those involving tax, water, or public utilities commission determinations be assigned to the Court of Appeals. However in accordance with NRAP 17(a)(11), the Supreme Court may retain jurisdiction over matters raising as a principal issue a question of statewide public importance. The appeals officer committed errors of law in her construction of NRS 616A.065(1), NRS 616A.157, NRS 616C.420 and NAC 616C.447. Mr. Felton raises the statutory construction of NRS 616A.065(1), NRS 616A.157, NRS 616C.420 and NAC 616C.447.

The Nevada Supreme Court should retain jurisdiction over this appeal. The appeal raises as a principal issue a question of statewide public importance. Under the appeals officer's construction of the average monthly wage calculation Mr. Felton and other high wage earners like him will have an economic incentive to refrain from volunteering in the future, . . .

when rural counties rely on those volunteers to provide needed services that would not otherwise be available.

IV.

STATEMENT OF THE ISSUES

1. What is the appropriate standard of review in this case?

2. Did the appeals officer commit an error of law?

V.

STATEMENT OF THE CASE

The appellant, Gregory Felton, injured his knee on March 6, 2012, while volunteering for the Douglas County Search-and-Rescue team. Appellant's Appendix ("AA"), 315. On the date of the injury, Mr. Felton was concurrently employed by Hewlett Packard where he did quality control work. AA, 314-315. Mr. Felton had worked as a Douglas County search and rescue volunteer since 2005. AA, 316. The third-party administrator for insurer Public Agency Compensation Trust Douglas County, Alternative Service Concepts ("ASC"), issued a notice of claim acceptance for Mr. Felton's knee injury on July 18, 2012. AA, 206. On November 11, 2013, ASC issued a determination to Mr. Felton calculating average monthly wage based only on the deemed wage of a search and rescue volunteer of $2,000.00 per month pursuant to NRS

616A.157. AA, 287. Alternative Service Concepts's wage calculation did not include Mr. Felton's concurrent wages he earned at Hewlett Packard at the time he was injured.

Mr. Felton timely appealed the wage determination to the Department of Administration's Hearing's Division, and an informal hearing was set before a hearing officer on February 10, 2014. AA, 15. A February 20, 2014, hearing officer's decision affirmed the calculation of Mr. Felton's wage based upon the deemed wage in NRS 616A.157 only. AA, 1. Mr. Felton disagreed with the decision, and he timely appealed to an appeals officer on March 18, 2014. AA, 23. The Nevada Attorney for Injured Workers was appointed to represent Mr. Felton. AA, 26. On August 25, 2014, a hearing was held before appeals officer Whitney Derrah. AA, 303. Because ASC filed a last minute legal memo regarding the application of NAC 616C.447, appeals officer Derrah ordered the parties to submit additional legal briefing as to whether the calculation of Mr. Felton's wage should include his concurrent Hewlett Packard wages. AA, 336-337. On February 4, 2015, appeals officer Lorna Ward, who had taken over the case, entered the decision and order of the appeals officer. AA, 366-379.

Mr. Felton disagreed with the appeals officer's decision and order. On March 2, 2015, he timely filed a petition for judicial review with the First Judicial District Court. AA, 380-389. An order denying the petition for judicial review was filed on February 2, 2016. AA, 518-530. On April 26, 2016, a notice of entry of order was filed with the district court on behalf of the appellant. AA, 531-547. On May 23, 2016, the appellant filed a notice of appeal in the First Judicial District Court. AA, 548-566. Briefing was suspended while the parties participated in the Court's early case settlement program. Briefing was reinstated on October 6, 2016. On December 30, 2016, the parties agreed to permit the appellant to have an enlargement of time until February 3, 2016 to file his opening brief in a stipulation filed with the Court. The Court entered its order on December 30, 2016 granting the appellant until February 3, 2017 to file his opening brief and the parties' joint appendix. The parties were not able to stipulate to a joint appendix by the deadline to file Appellant's Opening Brief.

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VI.

STATEMENT OF FACTS

The appellant, Gregory Felton, injured his knee on March 6, 2012, while participating in an avalanche rescue and simulation. AA, 315. Mr. Felton has assisted with search and rescue for Douglas County since 2005. AA, 316. Mr. Felton had a history of volunteering to help with search and rescue work with various counties when his emergency service skills are needed. Id.

ASC issued a Notice of Claim Acceptance for Mr. Felton's left knee injury on July 18, 2012. AA, 206. An MRI of Mr. Felton's knee injury showed he had a medial meniscal tear. AA, 211. As a result of the accepted knee injury, Mr. Felton had arthroscopic surgery, and a partial meniscectomy was performed on October 17, 2012. AA, 218-219.

Because it was determined that Mr. Felton's industrial accident left him with a permanent injury, ASC scheduled a permanent partial disability rating in an October 8, 2013 letter. AA, 276. On November 11, 2013, ASC issued a letter to Mr. Felton calculating his average monthly wage based only on his deemed wage as a volunteer search and rescue worker under NRS 616A.157.

AA, 287. Mr. Felton appealed ASC's determination believing the wages from his concurrent employment should be included in the calculation for his average monthly wage.

On the date of the injury Mr. Felton was concurrently employed by Hewlett Packard doing quality control work. AA, 314-315. Mr. Felton has worked for Hewlett Packard a sum total of 20 years at the time of his accident. AA, 314. Mr. Felton's Hewlett Packard pay stubs indicate that his average monthly wage from that job was $12,500.00 a month. AA, 295-301. It is uncontested that if Mr. Felton's deemed wage and his concurrent Hewlett-Packard wage were used to determine his average monthly wage Mr. Felton would be entitled to the State maximum under Nevada's workers' compensation law. AA, 312. If Mr. Felton's concurrent wages were combined he would be limited to a maximum wage replacement of $3,438.38 a month, which is 66 2/3% of the current Nevada maximum for benefits for fiscal year 2012. See, NRS 616A.065 and NRS 616C.475.

VII.

SUMMARY OF THE ARGUMENT

Mr. Felton, who was acting as a search and rescue volunteer at the time injury appealed the calculation of his

average monthly wage because the current calculation failed to sum concurrent wages from his Hewlett Packard employment and his deemed wage as search and rescue volunteer. The issues before the Court are ones of statutory construction and public policy.

NRS 616A.065(1) does not prohibit Mr. Felton's deemed wage and his concurrent Hewlett Packard wage to be summed in accordance with NAC 616C.447. NRS 616A.065(1) is construed to set a limit on the calculation of an average monthly wage, rather than a prohibition on the summing of deemed and concurrent wages when calculating a claimant's average monthly wage. NRS 616A.065(1) does not require deemed and concurrent employment be related or similar before wages may be summed when calculating an average monthly wage. The Legislature in enacting NRS 616C.420 mandated that the Administrator at the Division of Industrial Relations enact regulations governing the calculation of average monthly wages. The Administrator's enactment of NAC 616C.446 dictates the process by which a claimant's average monthly wage is to be calculated. NAC 616C.420 requires that Mr. Felton's deemed wage as a search and rescue volunteer under NRS 616A.157 and his concurrent employment with Hewlett Packard be summed to

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calculate average monthly wage. Public policy dictates that Mr. Felton's average monthly wage be calculated under NAC 616C.420.

VIII.

ARGUMENT

A. The proper standard for review in regards to the construction of NRS 616A.065(1), NRS 616A.157, NRS 616C.420 and NAC 616C.447 is independent review for an error of law.

On issues of law it is appropriate for the reviewing court to make an independent judgment rather than use a more deferential standard of review. Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 849 P.2d 267 (1993). A "pure legal question" is a question that is not dependent upon, and must necessarily be resolved without reference to any fact in the case before the court. Beavers v. State Dep't of Motor Vehicles and Pub. Safety, 109 Nev. 435, 438 n.1, 851 P.2d 432 (1993). The reviewing court may undertake independent review of the administrative construction of a statute. State Indus. Ins. Sys. v. Campbell, 109 Nev. 997, 999, 862 P.2d 1184 (1993). The State Supreme Court has affirmed the independent review of the administrative construction of a statute in Elizondo v. Hood Mach., Inc., 129 Nev. Adv. Rep. 84, 312 P.3d 479, 482 (2013). In accordance with Elizondo a de novo standard of review is applied when this Court

addresses a question of law, including the administrative construction of statutes. Id. The Supreme Court decides pure legal questions without deference to an agency determination. Id.

Thus, independent review is proper in this case because the appeals officer's construction of NRS 616A.057 caused her to conclude that NAC 616C.447 does not require Mr. Felton's average monthly wage calculation include the sum of his concurrent deemed wage in NRS 616A.157 and his Hewlett Packard wages.

B. The Appeals Officer committed an error of law when concluding NRS 616A.065(1) does not permit Mr. Felton's deemed wage and his concurrent wage to be summed in accordance with NAC 616C.447 when calculating his average monthly wage.

NRS 616A.065 is a definition statute that identifies sources of wages used to calculate average monthly wage. The plain language in NRS 616A.065(1) does not state deemed wages or earned wages may not be combined when calculating average monthly wage. Additionally, there is no added requirement that those wages must be for related employment. NRS 616A.065 evidences that the Legislature knows how to separate categories of wages and place limits on defining wages when the need arises. NRS 616A.065 states in relevant part:

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

(a) The monthly wage actually received or deemed to have been received by the employee on the date of the accident or injury to the employee, excluding remuneration from employment:

(1) Not subject to the Nevada Industrial Insurance Act or the Nevada Occupational Diseases Act; and

(2) For which coverage is elective, but has not been elected; **or**

(b) One hundred fifty percent of the state average weekly wage as most recently computed by the Employment Security Division of the Department of Employment, Training and Rehabilitation during the fiscal year preceding the date of the injury or accident, multiplied by 4.33. [Emphasis Added.]

The Court in Cleghorn v. Hess, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993) stated, "when the language of a statute is clear on its face, its intention must be deduced from such language." NRS 616A.065(1)(a) clearly identifies two sources of monthly wages to be used when calculating an average monthly wage: received wages and deemed wages.

The appeals officer in her order erroneously construed "monthly wage actually received or deemed to have been received by the employee on the date of the accident" in NRS 616A.065 to exclude the summing of a deemed wage and wages received from concurrent employment. The modifier "or" at the end of subsection (1)(a)(2) evidences that monthly received wages and

deemed wages are to be included in the calculation of an average monthly wage, but the actual received or deemed average monthly wage may never be more than the one-hundred-fifty percent limit set forth in subsection (1)(b). Although the appeals officer read the "or" in subsection (1)(a)(2) in the disjunctive, if the statute is to be read in a manner accomplishing the purpose of the statute the "or" must be construed as an "and" setting forth two sources of monthly wages that are to be included as being received on the day of the accident or injury. The modifier "or" in subsection (1)(a) between "monthly wage actually received or deemed to have been received by the employee" acts as an "and" to link the following requirement in the phrase "on the date of the accident or injury to the employee." Under subsection (1)(a), an injured employee is limited to a monthly wage received on the date of the accident or injury but not at the exclusion of the other wage source. It is the obvious intent of the Legislature that both received wages or deemed wages are limited to date of the accident or injury and the "or' must be read as conjunctive. 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 21.14 (7th ed. 2009)(it is important not to read the word "or" too strictly where to do so would render the

language of the statute dubious). If the "or" in subsection 1(a) is read as disjunctive the phrase "monthly wage actually received" is not connected to the requirement that monthly wages are calculated "on the date of the accident or injury to the employee," which would lead to an inoperable statute.

As the Nevada Supreme Court noted previously, the terms "and" and "or" are interchangeable in statutory interpretation when the disjunctive would render the statute inoperable. Desert Irrigation, Ltd. v. State, 113 Nev. 1049, 1056, 944 P.2d 835, 840, (1997). The Desert Irrigation Court stated:

> Interpreting "or" as either "and" or "or" is an accepted practice in questions of statutory construction. "There has been a great laxity in the use of terms 'and' and 'or' such that the terms are interchangeable and one may be substituted for the other . . . ." 1A C. Dallas Sands, Sutherland Statutory Construction § 21.14 (4th ed. 1985). Moreover, a strict interpretation of "or" should be avoided if it leads to a potentially dubious result.

In addition, under the appeals officer's construction of NRS 616A.057(1), Mr. Felton could choose calculating his wage benefit on the wages he receives from Hewlett Packard rather than the deemed wage as a search and rescue volunteer. There is no statutory requirement in NRS 616A.065 that limits a claimant to only those monthly wages paid by the injury employer, but rather . . .

those monthly wages are limited to the date of the accident of injury.

The appeals officer also erroneously concluded that received wages and deemed wages must come from related employment. This determination simply lacks foundation. The reviewing court should not go beyond the reasonable import of the words of a statute. Los Angeles v. Eighth Judicial Dist. Court, 58 Nev. 1, 13, 67 P.2d 1019, 1023 (1937); see also State v. Loveless, 62 Nev. 17, 23, 136 P.2d 236, 239 (1943). A reading of NRS 616A.065 evidences the Legislature did not intend the deemed and concurrent wages must be from related employment as the appeals officer concluded in her order. There is no statutory source for a related employment requirement under the Nevada Industrial Insurance Act. If there was a related employment requirement all concurrent wages would have to be from related employment before those wages could be included in an average monthly wage calculation. The full-time nurse who also worked as a part-time card dealer would not be permitted to combine employment wages when calculating his or her average monthly wage.

. . .

The Nevada Supreme Court has stated when it comes to statutory construction, "we should not speculate beyond the reasonable import of words." Los Angeles v. Eighth Judicial Dist. Court, 58 Nev. 1, 13, 67 P.2d 1019, 1023 (1937). The Court should not speculate as to the reasonable meaning of the words in this instance. Because workers' compensation is uniquely legislative the Court has in the past refused to imply provisions not expressly included in the legislative scheme. See Weaver v. State Indus. Ins. Sys., 104 Nev. 305, 306, 756 P.2d 1195, 1195 (1988)(the Court refused to infer that the legislature allowed interest on the delayed payment of compensation benefits when at that time there was no statutory interest provision). To imply a related employment requirement as proffered by the appeals officer the Court would be creating elements in the law outside of the legislative process. Therefore, the Court should not adopt a related employment rule where the Legislature has not already done so.

C. The appeals officer committed an error of law by failing to properly sum petitioner's deemed wage and his concurrent wage when calculating his average monthly wage in accordance with NAC 616C.447.

The regulation governing the calculation of a given average monthly wage is NAC 616C.447. NAC 616C.447 states that deemed

wages are to be combined with earned wages if an injured worker is concurrently employed. NAC 616C.447 states in relevant part:

> The average monthly wage of an employee who is employed by two or more employers covered by a private carrier or by a plan of self-insurance on the date of a disabling accident or disease **is equal to the sum of the wages 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. [Emphasis added].

The language of NAC 616C.447 dictates that Mr. Felton's deemed wage as a search and rescue volunteer should be added to his concurrent wage from Hewlett Packard when his average monthly wage is calculated. As noted in the appeals officer's order, "[t]he Nevada Legislature has delegated by statute to the Administrator for the Division of Industrial Relations (Administrator or DIR) the authority to promulgate the method of determining the average monthly wage." The appeals officer's legal error was in failing to order the respondents to sum petitioner's concurrent wage and deemed wage in accordance with NAC 616C.447.

As the Nevada Supreme Court stated in Ronnow v. Las Vegas, 57 Nev. 332, 342, 65 P.2d 133, 136 (1937), "grants of power are not to be so construed as to defeat the intent of the Legislature or to withhold what is given either expressly or by necessary and

fair implication." The Legislature in NRS 616C.420 explicitly ordered and entrusted the Administrator to enact regulations which dictate the process by which average monthly wage is to be calculated. As commanded in NRS 616C.420, the Administrator enacted NAC 616C.447 as the method to calculate an average monthly wage in the specific situation where concurrent employment wages are involved. NAC 616C.447 does not exceed the bounds of the Administrator's authority nor is it ambiguous. The appeals officer was required to give effect to the resulting regulation.

D. Mr. Felton is entitled to the maximum average monthly wage amount under NRS 616A.065(1)(b).

NRS 616A.065(1)(b) shields insurers from paying the actual wage losses of high earners such as Mr. Felton by use of the maximum wage limit. NRS 616A.065(1)(b) dictates that the maximum wage in Nevada for calculating average monthly wage must not be more than one-hundred-fifty percent of the state average weekly wage as computed by the Employment Security Division of the Department of Employment, Training and Rehabilitation. Mr. Felton was injured during fiscal year 2012. The maximum average monthly wage per NRS 616A.065(1)(b) for 2012 was limited at

$5,157.57. Therefore it cannot be argued that the counties that rely upon volunteers will be subject to endless un-quantified wage replacement compensation.

E. The appeals officer committed legal error when she concluded NAC 616C.447 modifies NRS 616A.065 and the search and rescue statute NRS 616A.157.

In Public Agency Comp. Trust v. Blake, 127 Nev. 863, 869, 265 P.3d 694, 697 (2011), the Court stated, "administrative regulations cannot contradict the statute they are designed to implement." (citation omitted). NAC 616C.447 implements the method of determining average monthly wage in conformance with NRS 616C.420. Nothing in NRS 616A.065 or NRS 616A.157 prohibits the summing of concurrent employment wages, both earned and deemed. In light of Blake it cannot be argued that NAC 616C.447 contradicts the implementation statute NRS 616C.420.

F. Public Policy dictates that Mr. Felton's Average monthly wage be calculated under NAC 616C.447.

The Nevada Legislature commonly uses a deemed wage in order to protect volunteers who provide valuable public services. See volunteer health practitioners (NRS 616A.207), civil air patrol volunteers (NRS 616A.140), volunteer firefighters (NRS 616A.145), volunteer ambulance service providers (NRS 616A.155), volunteer search and rescue (NRS 616A.157), volunteer peace officers (NRS

616A.160), volunteer junior traffic patrols (NRS 616A.170), volunteer workers at the Department of Health and Human Services (NRS 616A.205), and members of the Nevada Legislature (NRS 616A.185). These special statutes indicate just how important public policy is to support and provide for citizens voluntarily serving in their communities.

Under the appeals officer's construction of the average monthly wage calculation Mr. Felton and other high wage earners like him will have an economic incentive to refrain from volunteering in the future.

IX.

CONCLUSION

Based on the foregoing it is respectfully submitted that the Supreme Court should enter an order concluding that the appeals officer's decision denying the inclusion of Mr. Felton's monthly actual wage and his volunteer monthly deemed wage was made upon an error of law. Thus, the Court should REVERSE the district court's denial of judicial review with instructions to remand the matter to the appeals officer requiring that Mr. Felton's average monthly wage shall be based upon the sum of his

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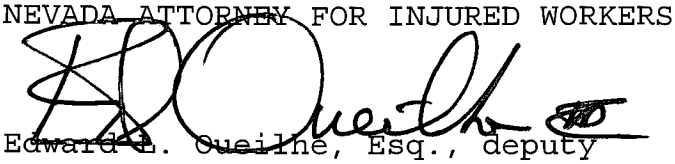
deemed wage as a search and rescue volunteer as well his Hewlett Packard wage earned at the time of his injury.

RESPECTFULLY SUBMITTED this 3rd day of February, 2017.

NEVADA ATTORNEY FOR INJURED WORKERS



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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

____ This brief has been prepared in a proportionally spaced typeface using Word Perfect X3 in Times Roman font size 14; or

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2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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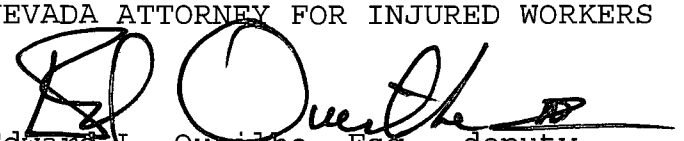
__X__ Does not exceed __30__ pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume

number, if any, of the transcript or appendix where the matter relied on is to be found. 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 3rd day of February, 2017.

NEVADA ATTORNEY FOR INJURED WORKERS



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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 APPELLANT'S OPENING BRIEF addressed to:

ROBERT F BALKENBUSH ESQ
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DATED: February 3, 2017

SIGNED: Tanya L. Sherwood