Case No. 70497

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY FELTON,
Appellant

vs.

DOUGLAS COUNTY, PUBLIC AGENCY COMPENSATION TRUST, and ALTERNATIVE SERVICE CONCEPTS, LLC,
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

RESPONDENTS' ANSWERING BRIEF

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DISCLOSURE STATEMENT

(NRAP 26.1)

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 Alternative Service Concepts, LLC (ASC), is a foreign limited liability company. ASC has no parent corporation and no stock owned by any publicly held company.

Law firms having appeared for Respondents: Thorndal, Armstrong, Delk, Balkenbush & Eisinger.

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JURISDICTIONAL STATEMENT

This case is an appeal from a district court order denying a petition for judicial review of an administrative law decision made in a contested workers' compensation case.

A. An aggrieved party may obtain review of any final judgment of the district court by appeal to the Supreme Court; and that the appeal shall be taken as in all other civil cases. NRS 233B.150; *see also*, *Dep't of Motor Vehicles v. Bremer*, 113 Nev. 805, 815, 942 P.2d 145 (1997)(Article 6, sections 4 and 8 of Nevada Constitution is authority relating to judicial review). NRAP 4(a) governs the time limit for filing the notice of appeal.

B. The district court's order denying Appellant's petition for judicial review was entered or filed on February 2, 2016. AA 533-45. Written notice of entry this order was served by mail on April 26, 2016. AA 531-46. The notice of appeal was filed on May 23, 2016. AA 548-66. Through inadvertence, it the appears decision made by the Appeals Officer, not the order by the district court denying the petition for judicial review, was annexed to the notice of appeal. AA 548-66.

C. The district court order denying the petition is a final order or judgment.

ROUTING STATEMENT

This matter pertains to an administrative agency appeal, and should presumptively be assigned to the Court of Appeals pursuant to NRAP 17(b)(4).

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

I. Whether the decisions made by the District Court and Appeals Officer violated the law or were otherwise clearly erroneous, arbitrary or capricious or characterized by an abuse of discretion under the facts of the case as required by the standard of review set forth under NRS 233B.135(3).

A. Whether the law governing an injured employee's average monthly wage (AMW) mandates or clearly requires aggregation of earned wages and deemed wages of volunteers when making the determination of an injured employee's average monthly wage (AMW) under a workers' compensation claim.

B. Whether the decisions made by the District Court and Appeals Officer, that the law governing an injured employee's average monthly wage (AMW) does not mandate or clearly require aggregation of earned wages and deemed wages of volunteers, are within the language of the governing law and reasonable under the facts of the case.

I. STATEMENT OF CASE

This matter comes before the Court pursuant to an appeal by Appellant, Gregory Felton (hereinafter "Felton"), from a February 2, 2016 district court order denying a March 5, 2015 amended Petition for Judicial Review filed on by Felton. AA Vol. 3, 518-30; Vol. 2, 425-43.

The procedural history of this case preceding the herein previously referenced district court order denying Felton's amended petition for judicial review is hereafter summarized.

On March 6, 2012, the Petitioner, Gregory Felton (Felton), injured his knee while volunteering on a Douglas County search-and-rescue team. AA Vol. 1, 34-40. Although Felton had volunteered on the search-and-rescue team since 2005, at the time of his work-related injury, and at all times relevant hereto, including the administrative trial of the case on August 25, 2014 , Felton was employed by Hewlett-Packard (HP) as a quality control specialist. AA Vol. 2, 303, 313-17.

Following the March 6, 2012, knee injury, Felton filed a claim for industrial insurance benefits with Douglas County and its workers' compensation insurance carrier, the Public Agency Compensation Trust (PACT).[1] AA Vol. 1, 34-40. The

[1] The Public Agency Compensation Trust is a self-insured association of public employers for workers' compensation claims and, at all times relevant hereto, was the workers' compensation insurance carrier for Douglas County.

PACT then accepted insurance coverage of this claim. AA Vol. 1, 50.

On behalf of Douglas County and PACT, and by written determination dated November 11, 2013, the third party claims administrator (Alternative Service Concepts, LLC (ASC), notified Felton that it had calculated his average monthly wage (AMW) under his workers' compensation claim and further advised that its calculations were based upon the statutory deemed wage of a search-and-rescue volunteer. *See*, NRS 616A.157. AA Vol. 1, 14. By written determination dated November 13, 2013, ASC, again on behalf of Douglas County and PACT, awarded Felton a one percent (1%) permanent partial disability (PPD) or whole person impairment (WPI), as a result of his March 6, 2012, knee injury. AA Vol. 1, 17.

Felton disagreed with both ASC's November 11, 2013 determination, as well as ASC's November 13, 2013 determination. Accordingly, Felton appealed these determinations to a Hearing Officer. AA Vol. 1, 10-26. By written decision dated February 20, 2014, the Hearing Officer affirmed both determinations made by ASC and, thereafter, Felton appealed to the Appeals Officer. *Id.* However, Felton later conceded the validity or propriety of the November 13, 2013, determination made by ASC, in which Felton was awarded a 1% PPD or WPI for

his left knee injury. AA Vol. 2, 306, 366-67. Accordingly, the only remaining issue before the Appeals Officer was the Hearing Officer's decision affirming ASC's November 11, 2013, determination that Felton's AMW must be calculated using only the statutory deemed wage of a search-and-rescue volunteer, as opposed to an aggregation of Felton's earned wage at HP and the statutory deemed wage. AA Vol. 2, 306, 366-68.

On August 25, 2014, a trial concerning Felton's AMW was held before the Appeals Officer. AA Vol. 2, 303-35. Having considered the evidence and written arguments submitted by the parties, the Appeals Officer ultimately concluded in a written decision filed and served on February 4, 2015, that Felton was not, as a matter of law, entitled to an AMW based on an aggregation of both his earned wages at HP (his private employer) and his statutory deemed wage as a search-and-rescue volunteer. AA vol. 2, 366-79. Accordingly, the Appeals Officer affirmed the Hearing Officer's decision in Hearing No. 47153-KD, as well as ASC's November 11, 2013 determination which assessed the AMW as a deemed wage of $2,000.00 per month. *Id.*

Felton disagreed with the findings and decision reached by the Appeals Officer and, therefore, on March 5, 2015, Felton filed an amended petition for judicial review with the district court. AA vol. 2, 425-43. Before the district

court, Felton specifically argued that the Appeals Officer committed legal error by failing to aggregate Felton's earned wage at HP and his deemed wage as a search-and-rescue volunteer. In turn, Felton urged the district court to reverse the Appeals Officer's affirmation of ASC's November 11, 2013 AMW determination. Following briefing, and by written order filed on February 2, 2016, the district court denied Felton's amended petition for judicial review. AA Vol. 3, 518-30.

II. STATEMENT OF FACTS

Douglas County, the PACT, and ASC is satisfied with the Statement of Facts in Felton's opening brief. Douglas County, the PACT, and ASC would add, however, the following.

Felton was employed by HP at the time of work-related accidental injury in March 2012, and remained employed by HP at the time of the trial before the Appeals Officer of his AMW under his workers' compensation claim. AA Vol. 2, 303, 313-17.

Felton's work-related accidental injury in March 2012 occurred during the 2012 fiscal year, and the state maximum average monthly wage allowed by law for workers' compensation claims was $5,151.57, and the maximum temporary total disability rate during that fiscal year was $3,434.38. *See,* http://dir.nv.gov/uploadedFiles/dirnvgov/content/WCS/ImportantDocs/MaxComp

MemoFY17.pdf

III. LAW AND ARGUMENT

A. SUMMARY OF ARGUMENT

An earned wage is a wage actually received. A deemed wage is a constructive wage, that is, a wage not actually received, but a wage merely to be utilized when awarding monetary benefits under a workers' compensation claim. To award monetary benefits under a workers' compensation claim, one must first calculate the AMW. At the time that the Appeals Officer and District Court made their respective decisions, namely February 2, 2015, and February 4, 2016, the law did not mandate or require aggregation of earned wages and deemed wages of volunteers when making the determination of an injured employee's average monthly wage (AMW) under a workers' compensation claim. Hence, the Appeals Officer and District Court were at liberty to legally determine under the facts of this case that aggregation of Felton's earned wages and deemed wages as a volunteer was not necessary when making the determination of Felton's AMW under his claim. This legal determination is entitled to great deference, as long as the determination is within the language of the governing law and reasonable under the facts of the case. It is respectfully submitted that this legal determination was within the language of the governing law and reasonable under

the facts of this case. In turn, Douglas County, the PACT and ASC assert that the decision of the Appeals Officer and the District Court must not be set aside, because Felton has not proven and cannot in this appeal prove that these decisions violated the law or were otherwise clearly erroneous, arbitrary or capricious or characterized by an abuse of discretion as required by the standard of review set forth under NRS 233B.135(3). Therefore, Douglas County, the PACT and ASC further assert that these decisions must be affirmed.

B. STANDARD OF REVIEW.

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

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

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

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

The burden of proof is on the party attacking the decision to show that the final decision is invalid. *Id*. Generally, an agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by "substantial evidence." *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); *see also State Indus. Ins. Sys. v. Romero*, 110 Nev. 739, 742, 877 P.2d 541 (1994) (stating that review of an administrative decision is limited to a determination of whether that decision is based on substantial evidence or contains errors of law). "Substantial evidence" is defined as that which "a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).[2] What is more, an agency's interpretation of its own a regulation is clothed with great deference. *City of Reno v. Reno Police Protection Ass'n*, 118 Nev. 889,

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

900, 59 P.3d 1212, 1219 (2002) (Holding that "this court will not readily disturb an administrative interpretation of statutory language"; "an agency charged with the duty of administering the an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] should be given great deference when it is within the language of the statute").

C. APPLICATION OF STANDARD OF REVIEW

1. NRS 616A.130 is the controlling statute with respect to Felton's March 2012 Injury and his average monthly wage

Under Nevada law, except as otherwise provided by a specific statute, the amount of compensation and benefits, and the person or persons entitled thereto, must be determined **as of the date of the accident or injury** to the employee and their rights thereto become fixed as of that date. *See,* NRS 616C.425; *see also,* NAC 616C.441; NAC 616C.429. Felton's left knee injury occurred in March 2012. At that time, there was no specific statute providing that search-and-rescue volunteers were "employees" who had a "deemed wage" for the purpose of insurance coverage and benefits under the Nevada Industrial Insurance Act (NIIA) or the Nevada Occupational Disease Act (NODA). NRS 616A.157 (which "deems" search-and-rescue volunteers "employees" with a "deemed wage" of $2,000.00 per month for the purpose of insurance coverage and benefits under the

NIIA or the NODA) was enacted and became law on May 21, 2013, which is one year and two months *after* the occurrence of Felton's accidental injury. *See* Assembly Bill 206, Chapter 26, Section 1 (2013).[3] Accordingly, as a matter of law, the controlling statute with respect to Felton's March 2012 knee injury is NRS 616A.130. *See* Hearings on Assembly Bill (AB) 206 - Committee on Labor and Energy, 77th Leg. (Nev., March 13, and April 29, 2013). *See also, Note 3,*

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

On the matter of the issue of aggregation of wages from concurrent employment, nowhere in the legislative history of NRS 616A.157 and considerations of its fiscal impact does the Legislature even remotely contemplate that concurrent employment (which most volunteers likely have) would effect the bottom line to be absorbed by the self-insured counties and municipalities. *See* Assembly Bill 206, Chapter 26, Section 1 (2013)(testimony of Assemblyman Michael Sprinkle on April 29, 2013; and testimony of D. Eric Sprately, Washoe County Sheriff's Office on April 29, 2013, and March 13, 2013); (https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/CL/Final/993.pdf; https://www.leg.state.nv.us/Session/77th2013/Minutes/Assembly/CL/Final/437.pdf). Indeed, every indication is to the contrary and the only contemplated change would solely involve exposure from a $100 deemed average monthly wage to a $2000 deemed average monthly wage. Respectfully, it is submitted that the foregoing is consistent with the contentions made by Douglas County, the PACT, and ASC before the Appeals Officer and the District Court in this matter.

supra. NRS 616A.130 specifically provides that, for purposes of calculating workers' compensation benefits, persons engaged in volunteer work for a local public organization may be deemed employees at a deemed wage of $100 per month.[4] *Id.; see also* NAC 616C.129.

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

Pursuant to the principles of statutory construction, which apply to administrative regulations [5], NRS 616A.130, which establishes a **specific** deemed wage for persons engaged in volunteer work, would control over the **general** rule set forth in NAC 616C.447.

In *New Bethlehem Volunteer Fire Co. v. Workmen's Compensation Appeal Board*, 654 A.2d 267 (Pa. Commonw. Ct. 1995), the claimant suffered a disabling injury during the course of his work as a volunteer firefighter and was concurrently employed at a local manufacturing company. *New Bethlehem*, 654

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[4] In this matter, ASC, as the third party administrator, improperly assessed Felton's deemed average monthly wage (AMW)as being $2000.00 per month. Notwithstanding, Felton has continued to contest the propriety of his AMW and, therefore, it is respectfully submitted that this Court may determine that Felton's proper deemed AMW is in fact $100.00 per month as required by NRS 616A.130.

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

A.2d at 267-68. Pennsylvania workers' compensation act (like Nevada's) contained both a statute **specifically** characterizing volunteer firefighters as deemed employees with deemed wages for purposes of benefits under the act [6] and Pennsylvania also had a statute **generally** allowing the combination of wages from concurrent employment. [7] *Id.* at 642. The court in *New Bethlehem* focused on the language of the two statutes and the rules of statutory interpretation. The court noted that "where there are two statutory provisions in conflict with each other, and this conflict is irreconcilable, the specific provision controls over the general provisions." 1 Pa.C.S. § 1933 and *Paxon Maymar, Inc. v. Pennsylvania Liquor Control Bd.*, 11 Pa.Commonw. Ct. 136, 312 A.2d 115 (1973). The court explained that the statute relating to the combination of concurrent wages was a **general** rule of aggregation and that the **specific** statute allowing for a deemed wage for a volunteer firefighter was a specific and narrow "exception to that rule, as a person who performs the task of volunteer fire fighting as well as working a primary job

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[6] The statute provides that when injured during the course of employment as a volunteer firefighter "there is 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).

[7] "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(e).

is not in a concurrent employment situation." *New Bethlehem*, 654 A.2d at 268.

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

A similar logic and statutory interpretation was employed by the Supreme Court of Connecticut in *Going v. Cromwell Fire District* 159 Conn. 53, 267 A.2d 428 (1970), and again in *Wislocki v. Town of Prospect*, 224 Conn. 479, 619 A.2d 842 (1993). The Connecticut workers' compensation act also contained both a statute **specifically** characterizing volunteer firefighters as deemed employees with deemed wages for purposes of benefits under the act (C.G.S.A. § 7-314(a))[8] and a

[8] C.G.S.A. § 7-314(a)(b) provides that "[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."

statute **generally** allowing the combination of wages from concurrent employment (C.G.S.A. § 31-310). [9] Notably, the court in *Going* stressed that:

> "It is significant that section 31-310, as quoted above, provides in part that the employee's 'average weekly wages shall be calculated upon the basis of wages earned from all such employers' but that section 7-314a (b), in this 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.' "

Going, 159 Conn. at 60. The court reasoned that it was plausible to suppose that the legislature devised the latter method of computation to protect the volunteer

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[9] The Connecticut statute governing the combining of wages from concurrent employment allows aggregation 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:

> Where the injured employee has worked for more than one employer as of the date of the injury and the average weekly wage received from the employer in whose employ the injured employee was injured, as determined under the provisions of this section, are insufficient to obtain the maximum weekly compensation rate from the employer under section 31-309, prevailing as of the date of the 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.

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

Accordingly, in light of the sound reasoning employed in the foregoing authorities, it is respectfully submitted that the **specific** language of NRS 616A.130 (which provides a volunteer with a deemed wage of $100.00 per month) controls over the **general** language of NAC 616C.447. Additionally, regulations cannot be read to expand the scope of the statutes governing them and regulations that cannot be read any other way are invalid.[10]

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[10] In *Meridian Gold v. Nevada Dep't of Taxation*, 119 Nev. 630, 81 P.3d 5116 (2003), the Nevada Supreme Court stressed that

> "[w]hen determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing." 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

3. Applicable case law from Nevada and a majority of other jurisdictions supports non-aggregation of wages from dissimilar, concurrent employment.

According to Larson's treatise on workers' compensation law, the rule adopted by a majority of jurisdictions throughout the United States holds that the earnings of an injured worker may be combined if, and only if, the various employments were "related" or "similar," otherwise these jurisdictions [11] bar

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authority of the agency or is otherwise arbitrary and capricious."

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.

[11] In *Hart's Exxon Service Station v. Prater,* 268 Ark.961, 597 S.W.2d 130 (1980), the claimant sustained a compensable injury while working at a service station while concurrently employed as a janitor with the school district. In holding that the his compensation was properly based on service station wages rather than the combined incomes of 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." *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).

In *Thompson v. STS Holdings*, 711 S.E. 2d 827 (N.C. Ct. App. 2011) in applying the related employment rule 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. 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

aggregation of wages from dissimilar concurrent employment. *See* A. Larson, *Larson's Workers' Compensation Law* § 93.03[1][a] (2011). This is commonly referred to as the related-employment rule. *Id*.

While Nevada courts have not specifically addressed the related-employment rule, in *Ayala v. Caesars Palace*, 119 Nev. 232, 71 P.3d 490 (2003), the Nevada Supreme Court seemingly endorsed the sound reasoning behind this rule. In *Ayala*, the claimant fractured her ankle while working as a banquet waitress for Caesars Palace, but provided wage information to Caesar's third party administrator (TPA) that included her income as a cashier for the Mirage. *Ayala*, 119 Nev. at 234. Upon further investigation, the TPA issued a determination reducing the claimant's AMW and excluding the wages she earned as a cashier. Ultimately, the Nevada Supreme Court concluded that the wage adjustment was warranted and the Nevada Supreme Court noted that "the record reflects that Ayala had left her position at the Mirage before the injury, so her employment [at the Mirage] was not a concurrent employment under NAC 616C.447.

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specific." *Id*. (emphasis in original). *See 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").

Furthermore, **she worked there as a cashier, not as a banquet waitress**. Therefore, CDS properly excluded those wages from its calculation." *Id.* at 240. (Emphasis added).

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

4. Nevada law does not mandate or clearly require the aggregation of earned wages and deemed wages for volunteers such as Felton.

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

"Except as otherwise provided in subsection 3, 'average monthly wage'

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[12] Felton's earned wages from his HP job was $12,500.00 per month. Felton was working at HP at the time of the incurrence of his knee injury as a volunteer for Douglas County in March 2012. Felton was still employed at HP at the time of the trial on his AMW in late August 2014. In brief, the knee injury did not cause Felton to lose his job at HP.

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."

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

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

> 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).

It is respectfully submitted that the plain language of the above-cited statute and regulation does not mandate or clearly require the aggregation of both earned and deemed wages when calculating the average monthly wage (AMW). The relevant statute and regulation (NRS 616A.065 and NAC 616C.447) specifically utilize the disjunctive "or" with respect to the sources of wages of the AMW - not the conjunctive "and," and not "and/or." The plain meaning of the cited statute and regulation, therefore, allows or permits the AMW to be calculated by "the sum of the wages earned" ***or*** "the sum of the wages deemed to have been earned." The statute and regulation speaks for themselves and certainly do not mandate or clearly require that the AMW be calculated by considering "the sum of wages earned" ***and*** "the sum of wages deemed to be earned," as urged by Felton. Accordingly, based on Nevada law alone, the aggregation of earned and deemed wages was not mandated or clearly required when calculating the AMW for a volunteer such as Felton.

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

Lastly, there is no evidence of any public policy adopted by the Legislature showing an intention that Nevada counties, municipalities, and towns, etcetera, to take on immeasurable and unforeseen liabilities based on possible alternative

employment by its volunteers. Likewise, there is no evidence of any public policy adopted by the Legislature showing an intention to permit through administrative regulations modification of the unambiguous statutory definition of the AMW of volunteers. The language of NRS 616A.130 exists to provide coverage for volunteers at a reasonable rate and has only been expanded by specific provisions adopted by the Nevada Legislature, none of which applied to Felton on March 6, 2012, the date of his accident.[13] *See* NRS 616A.157 (date of enactment May 21, 2013).

In addition, volunteer organizations (such as Douglas County Search-and-Rescue) generally have no knowledge of the concurrent salary or wages of its volunteers, and often no knowledge of concurrent employment at all. Hence, Douglas County, the PACT, and ASC respectfully submit that it would be roundly unfair to private or public employers to apply NAC 616C.447 to volunteers so as to permit aggregation of wages from concurrent employment.[14]

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[13] Volunteers are, frankly, fortunate to have coverage under the Nevada Industrial Insurance Act or Nevada Occupational Disease Act. Apart from such coverage, it seems that a volunteer assumes the risk associated with the activity he/she volunteers to perform.

[14] The unfairness can also be seen in a converse example. One can only imagine the reaction of a private employer thrown into such a situation as Felton intends to place Douglas County. A private employer insures his employees for workers' compensation with the expectation of replacing their potential lost wages

IV. CONCLUSION

In accordance with the foregoing, Douglas County, the PACT, and ASC respectfully request this Court to affirm the District Court's February 2, 2016, order denying Felton's petition for judicial review, and to affirm the Appeals Officer's February 4, 2015, decision and order, that rejected Felton's request for aggregation of his wages from concurrent employment at HP (wages earned or received) with his statutory deemed wage as a volunteer.

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from a work-related injury through workers' compensation insurance that is based on the wages the employees are paid by that employer. Upon injury and disability from such private employment, however, the injured employee alleges that he happens to also be a volunteer firefighter when not employed by the private employer. The injured employee then asserts that his average monthly wage must be determined by considering not only his earned wages through private employment but also his deemed wages of $2,000.00 per month due to his concurrent employment as a volunteer firefighter. Such an aggregation is repugnant, and would be rejected. *See,* NRS 616A.145

V. CERTIFICATE OF COMPLIANCE

CERTIFICATION PURSUANT TO N.R.A.P. 32(A)(4)-(6) and N.R.A.P. 28-2

I certify that:

1. Pursuant to N.R.A.P. 32(A)(4)-(6) and N.R.A.P. Rule 28-2, the attached answering brief is

   [X] Proportionately spaced, has a typeface of 14 point font or more and contains 5,139 words.

   or is

   ❑ Monospaced, has 10.5 or less characters per inch and contains words or _____ lines of text.

2. The attached brief is not subject to the type-volume limitations of Nevada Rules App. 32(A)(4-6) because

   [X] This brief complies with N.R.A. P. 32(a)(7), and is an answering brief that does not exceed 30 pages;

      ❑ This brief complies with a page or size-volume limitation established by a separate court order date _____ and is

      [X] Proportionately spaced, has a typeface of 14 point font or more and contains 5,139 words,

      or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains ____ pages or ____ words or ____ lines of text.

3. 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 N.R.A. P. 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. 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.

There are no related cases of which Appellee is aware.

RESPECTFULLY SUBMITTED this 10TH day of April, 2017.

THORNDAL ARMSTRONG
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of the law firm of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, and on this date, I caused to be served via the Supreme Court's e-filing system, a true and correct copy of the foregoing document, addressed to the following:

DATED this 10th day of April, 2017.

/s/ Natalie Steinhardt