

CASE NO. 71472

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBAIRE PREVOST, Appellant

Electronically Filed
Jun 14 2017 09:01 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, et al.,
Respondent

APPEAL FROM THE
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

APPELLANT'S APPENDIX

James P. Kemp, Esq.
Nevada Bar No. 6375
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Attorney for Appellant

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DISTRICT COURT CIVIL COVER SHEET A- 16- 730918- J

County, Nevada

Case No.

I V

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
ROBAIRE PREVOST	STATE OF NEVADA
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HENDERSON, NV 89011	CARSON CITY, NV 89702
702-351-4512	
Attorney (name/address/phone):	Attorney (name/address/phone):
VIRGINIA L. HUNT, ESQ.	DANIEL L. SCHWARTZ, ESQ.
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LAS VEGAS, NV 89120	LAS VEGAS, NV 89102
702-699-5336	702-893-3383

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property	Torts
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate	Construction Defect & Contract
Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract
Civil Writ	Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input checked="" type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Other Civil Filing	
	Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

JANUARY 27, 2016

Date

Signature of initiating party or representative

See other side for family-related case filings.

APPELLANT'S APPENDIX PAGE 2

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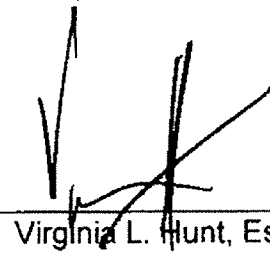
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by error or law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and
- (f) Arbitrary or capricious or characterized by abuse of discretion.

WHEREFORE, Petitioner, prays this Court that briefs be allowed, oral arguments be heard and following a review of the record, that this Court enter its order reversing the above decision of the Appeals Officer.

Dated this 27 day of January, 2016

Respectfully submitted,

By



Virginia L. Hunt, Esq.
Attorney for Petitioner
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Las Vegas, Nevada 89120

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CERTIFICATE OF MAILING

The undersigned, an employee of The Law Offices Of Virginia L. Hunt, does hereby certify that on the date shown below, a true and correct copy of the foregoing document was duly mailed, postage prepaid to the following:

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CLARK COUNTY DISTRICT ATTORNEY
301 EAST CLARK AVENUE, SUITE 100
LAS VEGAS, NV 89101

Dated this _____ day of January, 2016

Employee of The Law Offices of Virginia L. Hunt

EXHIBIT

“A”

1 NEVADA DEPARTMENT OF ADMINISTRATION
2 BEFORE THE APPEALS OFFICER

FILED
JAN 05 2016
APPEALS OFFICE

3
4 In the Matter of the Contested
Industrial Insurance Claim

Claim No.: 14C62E378732

Hearing No.: 1509309-TH

Appeal No. : 1510563-GK

5
6 of
7 ROBAIRE PREVOST
1341 LUCIA DRIVE
8 LAS VEGAS, NV 89128,

Employer:
STATE OF NV - DEPT. OF CORRECTIONS
201 SOUTH ROOP STREET, SUITE 201
CARSON CITY, NV 89701-4790

9 Claimant.

10
11 DECISION AND ORDER

12 The above-captioned appeal came on for hearing before Appeals Officer
13 GREGORY KROHN, ESQ., on August 28, 2015. The claimant, ROBAIRE PREVOST
14 (hereinafter referred to as "claimant"), was represented by his counsel, VIRGINIA HUNT, ESQ.
15 The Employer, STATE OF NEVADA – DEPARTMENT OF CORRECTIONS' Administrator,
16 CCMSI, (hereinafter referred to as "Employer"), was represented by DANIEL L. SCHWARTZ,
17 ESQ., and LEWIS BRISBOIS BISGGARD & SMITH LLP.

18 In a written determination dated March 13, 2015, Administrator denied claimant's
19 claim for industrial insurance benefits. Claimant appealed and in a Decision and Order dated
20 April 14, 2015, the Hearing Officer affirmed Administrator's March 13, 2015 determination.
21 Claimant appealed that Decision to this Court, generating the instant hearing.

22 After hearing the testimony of the witnesses, reviewing the documentary evidence,
23 and considering the arguments of counsel, the Appeals Officer finds and decides as follows:

24 FINDINGS OF FACT

25 1. Prior to the instant alleged heart claim, the claimant, ROBAIRE PREVOST,
26 was seen and treated by Dr. Reza Mojtavavi of Avencia Medical Center from July 2012 through
27 March 2013. (Exhibit A at 65-80.) He was diagnosed on various dates with hypertension and
28 anxiety. (Exhibit A at 169-174.)

1 2. Claimant had an alleged prior industrial heart claim on May 5, 2009. He
2 was initially diagnosed with a "near syncope" and hypertension (Exhibit A at 84, 98), and
3 claimant reported that he had felt anxious (Exhibit A at 95), and he had a history of anxiety
4 attacks. (Exhibit A at 104.) This claim was denied. (Exhibit A at 81-117). There is no indication
5 that the denial was appealed.

6 3. On August 9, 2013 claimant was informed after his annual physical of a
7 need to bring his body weight and BMI within standard, and he was also instructed of a need to
8 bring his triglyceride level under 150, and to control his high blood pressure. (Exhibit A at 50-
9 51.)

10 4. Claimant was seen in March 2014 and June 2014 by Dr. Kimberly Adams
11 of Total Wellness Family Medicine. (Exhibit A at 118-128.) She diagnosed him with
12 hypertension. (Exhibit A at 118, 124, 157.)

13 5. In the instant matter, claimant has had two (2) Form C-4's executed.

14 6. The first Form C-4, was signed by Cardiologist Mock on July 29, 2014,
15 apparently in association with a June 27, 2014 hospitalization, gives a diagnosis of an abnormal
16 EKG, atrial fibrillation, palpitations and hypertension. Dr. Mock was not able to make an
17 industrial causal connection. (Exhibit A at 1)

18 7. The second Form C-4 was finally executed on August 4, 2014, at the
19 Centennial Hills Hospital Emergency Department with a diagnosis of palpitations. Again, the
20 physician completing this form also did not make an industrial causal connection. (Exhibit A at
21 2.)

22 8. An Employer's Report of Industrial Injury or Occupational Disease notes a
23 timely notice of claimant's atrial fibrillation and hypertension claim. (Exhibit A at 3.)

24 9. An Incident Report was executed on July 29, 2014, wherein claimant
25 alleges that atrial fibrillation, anxiety and high blood pressure were caused by the stress of his job
26 as a correctional officer. (Exhibit A at 4-5.)

1 10. Claimant was seen at the Southern Hills Hospital and Medical Center on
2 June 28, 2014, where he was noted as having paroxysmal atrial fibrillation for the second time
3 within a week. It was also noted that claimant had systemic hypertension and alcohol abuse
4 conditions. It is believed that the alcohol abuse comment is in error. Claimant was admitted to
5 the hospital and cardiac testing was performed. Claimant was discharged on or about June 29,
6 2014. (Exhibit A at 6-25.)

7 11. On July 15, 2014, Dr. Adams reported that claimant had severe anxiety
8 from his job. Medications were prescribed, and claimant was referred to a psychiatrist. (Exhibit
9 A at 129-131.)

10 12. On August 2, 2014, claimant was transported by ambulance to the hospital
11 for chest pain and palpitations. (Exhibit A at 26-28.)

12 13. Claimant was seen at the Centennial Hills Hospital Medical Center
13 Emergency Department on August 2, 2014. Claimant was noted as having heart palpitations while
14 at work. It was noted that claimant had recently been diagnosed with atrial fibrillation. Claimant
15 was diagnosed with tachycardia, heart palpitation and a history of atrial fibrillation. Claimant was
16 treated and subsequently discharged. (Exhibit A at 29-49.)

17 14. On August 7, 2014, Dr. Adams saw claimant for a recheck. The
18 assessments were hypertension, atrial fibrillation and anxiety. Medications were increased, and
19 claimant was taken off of work for the next ten (10) weeks. (Exhibit A at 132.)

20 15. On August 12, 2014, Dr. Adams again noted claimant had anxiety issues.
21 Medications were increased. (Exhibit A at 133.)

22 16. On August 21, 2014, Dr. Adams reported that claimant had had an
23 abnormal CTA of the chest and an abnormal event recorder. Claimant was referred to Dr. Mock
24 and UCLA Cardiology. (Exhibit A at 134.)

25 17. On August 27, 2014, the impressions of claimant's Echocardiogram were
26 normal with a trace regurgitant flow, mild insufficiency across the aortic valve, and moderate
27 dysfunction of the LV chamber. (Exhibit A at 128.)

1 18. On September 10, 2014, claimant was informed that the claim was being
2 denied as paroxysmal atrial fibrillation was not considered a disease of the heart, and claimant had
3 not controlled the predisposing high blood pressure and high triglyceride level. It was further
4 noted that a new determination would be rendered following receipt of records from claimant's
5 primary care physicians, Dr. Adams and Dr. Mojtabavi. (Exhibit A at 52-54.)

6 19. On September 11, 2014, Dr. Adams completed a Long Term Disability
7 Standard Insurance Company Form indicating that claimant was permanently disabled from his
8 job effective August 2, 2014. The diagnoses were chest pain, palpitations, and SOB. (Exhibit A
9 at 175-176.) A copy of claimant's job description was also signed by Dr. Adams. (Exhibit A at
10 177.)

11 20. On September 14, 2014, claimant appealed the September 10, 2014
12 determination denying the claim to a Hearing Officer where it was assigned number 1502621-MB.
13 (Exhibit A at 55.)

14 21. On September 20, 2014, Dr. Adams completed another Standard Insurance
15 Company Long-Term Disability form. She again indicated that claimant was permanently, totally
16 disabled from any job function, and treatment was listed as cardiac catheterization, follow-up and
17 medication. (Exhibit A at 178.) On a same-dated, same-type form she indicated that on June 28,
18 2014 claimant had been diagnosed with atrial fibrillation, a history of hypertension, anxiety and
19 chest pains. She opined these problems were industrially related. (Exhibit A at 179.)

20 22. On September 29, 2014, Dr. Bowman, a cardiologist, was asked to perform
21 a review of claimant's hospital records and annual physicals, and to answer several questions after
22 his review, including whether claimant has organic heart disease. (Exhibit A at 56-57.)

23 23. Undated documents from Dr. Adams' office have October 2, 2014 as a fax
24 date at the time. They indicate that claimant's diagnosis is "benign essential hypertension" with
25 no acute diagnoses at that time, and no recorded medications claimant was taking. (Exhibit A at
26 181-183.)

1 24. Following Hearing No. 1502621-MB, the Hearing Officer issued a Decision
2 and Order dated October 7, 2014, remanding the denial of the claim for receipt and review of
3 forthcoming medical reporting from Dr. Adams and Dr. Mojtabavi. (Exhibit A at 58-59.)

4 25. On October 24, 2014, Dr. Adams answered various questions claimant's
5 counsel had asked regarding claimant's treatment. (Exhibit A at 164.) Dr. Adams (although she
6 did not sign the opinion) indicated in handwriting that she revised her October 24, 2014 opinion.
7 She indicated that claimant was compliant in taking his hypertension medication, that Atenolol has
8 a side effect of elevating triglycerides, that claimant was at a healthy BMI before he was disabled
9 from heart disease, and that claimant did not fail to correct predisposing conditions to heart
10 disease. (Exhibit A at 165.)

11 26. On October 24, 2014, claimant's counsel wrote to Administrator and asked
12 whether a new determination had been made related to claim compensability. Counsel also
13 indicated that claimant had been taken off of work permanently by Dr. Adams, had lost three (3)
14 pounds, and he was regularly taking medication to control his hypertension which has the side
15 effect of increasing triglycerides. Counsel further noted that there is "absolutely no evidence that
16 he abused alcohol or that he was warned about alcohol use." (Exhibit A at 60.)

17 27. On November 3, 2014, Administrator informed claimant that it had received
18 the medical reporting from Drs. Adams and Mojtabavi and this information had been sent to Dr.
19 Bowman for his review and assessment, after which a new determination would be made.
20 (Exhibit A at 61.)

21 28. On November 3, 2014, Administrator informed claimant's counsel that it
22 would issue a new determination following receipt of Dr. Bowman's response. (Exhibit A at 62.)

23 29. On November 19, 2014, Dr. Mock's prescription form indicated that
24 claimant could return to work on "N/A". Claimant was noted as having "significant work related
25 (correctional officer) anxiety assoc. with [illegible] & absenteeism from work. He is advised to
26 pursue an alternative occupation." (Exhibit A at 166.)

1 30. On December 2, 2014, Glenda-Ramos-Rivera with Dr. R. Family Therapy,
2 Inc. wrote claimant that he had been receiving mental health services since September 2014 and
3 had been diagnosed with a severe mental health condition due to stress at work. Further treatment
4 with her was recommended. (Exhibit A at 80.)

5 31. On December 10, 2014, claimant was notified by PERS that his application
6 to total and permanent disability had been approved. (Exhibit A at 167.)

7 32. On December 11, 2014, claimant's counsel wrote to Administrator and
8 stated that the Hearing Officer ordered review of Drs. Adams and Mojtabavi's records and a new
9 determination, and that Administrator send the records to Dr. Bowman. Counsel requested a new
10 determination on his "conclusively presumed heart disease" and requested benefits. (Exhibit A at
11 63.)

12 33. On January 13, 2015, claimant appealed his December 11, 2014 request for
13 a new determination noting alleged "non compliance with Hearing Officer's decision/treatment."
14 (Exhibit p. 185.)

15 34. A hearing was held on February 26, 2015 in regard to claim compensability.
16 In a written Decision and Order dated March 4, 2015, the Hearing Officer remanded for a new
17 determination regarding claim compensability to be issued with ten (10) days of the date of this
18 Order. (Exhibit A at 185-187.) No party appealed that to an Appeals Officer.

19 35. On March 5, 2015, Dr. Bowman noted that there was no evidence of heart
20 disease found in Mr. Prevost's medical records. (Exhibit A at 188.)

21 36. On March 13, 2015, a determination was issued in compliance with the
22 Hearing Officer's Decision and Order dated October 7, 2014. It continued to deny the claim after
23 review of all reporting. (Exhibit A at 189-190.) Claimant, through counsel, appealed that to a
24 Hearing Officer in 1509309-TH. (Exhibit A at 191.)

25 37. Following Hearing No. 1509309-TH, the Hearing Officer issued a Decision
26 and Order dated April 14, 2015, affirming the claim denial determination. (Exhibit A at 195-197.)
27 Claimant appealed. (Exhibit A at 198.)

38. Claimant provided one hundred and ninety-nine (199) pages of evidence which was reviewed and duly considered. (Exhibits 1-2.)

39. These Findings of Fact are based upon substantial evidence within the record.

40. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa.

CONCLUSIONS OF LAW

1. It is the claimant, not the Employer, who has the burden of proving his case, and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

2. In attempting to prove his case, the claimant has the burden of going beyond speculation and conjecture. That means that the claimant must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3. A. Larson, The Law of Workmen's Compensation, §80.33(a).

3. NRS 616A.010 makes it clear that:

A claim for compensation filed pursuant to the provisions of this chapter or chapter 617 of NRS must be decided on its merits and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

4. Claimant is pursuing a claim for an occupational disease. He submitted two (2) Form C-4's. The first one was completed on July 29, 2014 for symptoms he felt while resting at home on June 27, 2014. Dr. Mock from Westside Cardiology diagnosed an abnormal EKG,

1 atrial fibrillation, palpitations, and hypertension and indicated that the conditions were not work
2 related. A second form was completed at Centennial Hills Hospital after claimant felt similar
3 symptoms while at work. The attending physician stated that the heart palpitations and associated
4 symptomology were not work related. Administrator received the claim and consulted a board
5 certified cardiologist. Keith Bowman, M.D., F.A.C.C. reviewed the matter and found no evidence
6 of atherosclerosis, coronary artery disease, or other organic heart disease. Dr. Bowman did not
7 consider claimant's atrial fibrillation and associated symptomology to be a disease of the heart.

8 5. Claimant's family practitioner, Dr. Kimberly Adams, provided conflicting
9 information. She originally indicated claimant was not compliant in taking prescribed medications
10 to control his hypertension, was not at a healthy body mass index (BMI), and that Atenolol did not
11 have a side effect of elevating triglycerides. A couple of weeks later, she revised her responses on
12 all three (3) issues to indicate her patient was compliant with his medications, had a healthy BMI,
13 and that the Atenolol did effect triglyceride levels. At the hearing, Dr. Adams testified and again
14 conflicted her prior opinions. She concluded that Atenolol did not have any effect on triglyceride
15 readings. She further stated that she believed claimant's hypertension and atrial fibrillation would
16 be classified as heart disease. She went on to state that when a patient comes in to see her with
17 symptoms similar to what claimant presented with, it is her practice to refer them to a cardiologist,
18 and that is what she did with claimant. The Appeals Officer did not find Dr. Adams' testimony
19 credible or sufficient to establish a compensable claim.

20 6. Two (2) cardiologists and an attending physician at Centennial Hills
21 Hospital opined that claimant's condition was not work related and/or did not constitute a disease
22 of the heart that would qualify for benefits under Chapter 617 of the Nevada Revised Statutes.

23 7. It was not disputed that claimant has more than five (5) years of full-time
24 continuous, uninterrupted and salaried employment in an occupation that is eligible for benefits
25 under NRS 617.457. However, the preponderance of the credible medical evidence fails to
26 establish that his medical condition qualifies as a disease of the heart. The Appeals Officer finds
27 Dr. Bowman, a board certified cardiologist, to be persuasive on this topic.

28

1 8. It is further noted that this claim also fails under NRS 617.440 as it does not
2 meet the specific criteria set forth under that provision. As such, Administrator properly denied
3 the claim.

4 **DECISION AND ORDER**


5 Claimant, ROBAIRE PREVOST, has failed to establish a compensable industrial
6 claim. There is no medical evidence to link the claimant's condition to his employment as
7 required under NRS 617.⁴⁴⁰ The claimant, by way of his time of employment, is eligible for the
8 presumption created under NRS 617.457. However, the Appeals Officer finds that the medical
9 evidence fails to demonstrate a disease of the heart.

10 IT IS HEREBY ORDERED that the Hearing Officer's Decision and Order dated
11 April 14, 2015 which affirmed Administrator's March 13, 2015 determination is AFFIRMED.

12 IT IS FURTHER ORDERED that Administrator's March 13, 2015 determination
13 to deny the industrial insurance claim, is AFFIRMED.

14 IT IS SO ORDERED.

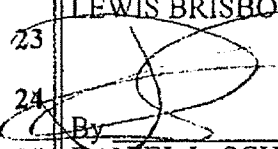
15 DATED this 4th of January, 2015.

16
17 
18 GREGORY A. KROHN, ESQ.
19 Appeals Officer

20 **NOTICE:** Pursuant to NRS 616C.370, should any party desire to appeal this final
21 decision of the Appeals Officer, a Petition for Judicial Review must be filed with the District
22 Court within thirty (30) days after service of this Order.

23 Submitted by:

24 LEWIS BRISBOIS-BISGAARD & SMITH LLP

25 By  _____
26 DANIEL L. SCHWARTZ, ESQ.
27 Nevada Bar No. 005125
28 2300 West Sahara Avenue, Suite 300, Box 28
 Las Vegas, NV 89102
 Attorneys for Employer

CERTIFICATE OF MAILING

Pursuant to NRCP Rule 5(b), I hereby certify that, on the 5th day of January, 2016, I served a true and correct copy of the above and foregoing document entitled **DECISION AND ORDER** by depositing same in the United States Mail, with first-class postage fully prepaid thereon, and addressed as follows:

Robaire Prevost 1341 Lucia Drive Las Vegas, NV 89128	MAILED <input checked="" type="checkbox"/> HAND-DELIVERED <input type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Virginia Hunt, Esq. 3057 E. Warm Springs Rd., Ste. 400 Las Vegas, NV 89120	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Attn: Barbara Luna State of Nevada -- Department of Corrections P.O. Box 7011 Carson City, NV 89702-7011	MAILED <input checked="" type="checkbox"/> HAND-DELIVERED <input type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Attn: Staci Jones Cannon Cochran Management Services, Inc. P.O. Box 4990 Carson City, NV 89702	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Attn: Risk Management State of Nevada Risk Management Division 201 South Roop St., Ste 201 Carson City, NV 89701-4790	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Daniel L. Schwartz, Esq. Lewis Brisbois Bisgaard & Smith LLP 2300 West Sahara Avenue, Suite 300, Box 28 Las Vegas, NV 89102	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>

MAILED

JAN 11 2016

DEPARTMENT OF CORRECTIONS

Christine K. Chees

An employee of the State of Nevada

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

Allen D. Lamm
CLERK OF THE COURT

ROBAIRE PREVOST

Petitioner,

VS.

STATE OF NEVADA; and their Third-Party Administrator, CCMSI, and the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS OFFICE, an Agency of the STATE OF NEVADA,

Respondent,

DEPT NO: IV

**PETITIONER'S OPPOSITION TO MOTION TO DISMISS AND TO AMEND
THE PETITION FOR JUDICIAL REVIEW**

This Amended Petition and Opposition to the Motion to Dismiss is for the purpose of adding the correct Third-Party Administrator as a necessary Respondent as required by NRS 233B.130(2), when filing the Petition for Judicial Review by January 27, 2016 previously. While the correct employer and the Appeals Officer were named as correct Respondents, we did not include CCMSI, the correct Third-Party Administrator for the employer, who is represented by the same attorney. An attached Amended Petition for Judicial Review is attached hereto. It is a jurisdictional defect. However, considering the immediacy of the Amendment within 65 days of the original filing, the court should

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1 knowingly grant the Amended Petition for Judicial Review.

2 The Record on Appeal has just been copied by the Appeals Office to the District
3 Court. We still have 45 days to file the Petitioner's Opening Brief.

4 Kindly allow the attached Amended Petition for Judicial Review, which includes the
5 Third-Party Administrator for the employer.
6

7
8 Dated this 10 day of March, 2016
9

10 Respectfully submitted,

11
12
13
14 By _____

15 Virginia L. Hunt, Esq.
16 Law Office of Virginia L. Hunt
17 3057 E. Warm Springs Road, Ste.400
18 Las Vegas, Nevada 89120
19 Attorney for Petitioner
20
21
22
23
24
25
26
27
28

CERTIFICATE OF MAILING

The undersigned, an employee of The Law Offices Of Virginia L. Hunt, does hereby certify that on the date shown below, a true and correct copy of the foregoing document was duly mailed, postage prepaid to the following:

ROBAIRE PREVOST
30 STRADA Di VILLAGGIO
HENDERSON, NV 89011

STATE OF NEVADA – DEPT. OF CORRECTIONS
ATTENTION: BARBARA LUNA
P.O. BOX 7011
CARSON CITY, NV 89702

STATE OF NEVADA – RISK MANAGEMENT
ATTENTION: ANA ANDREWS
201 S. ROOP STREET, SUITE 201
CARSON CITY, NV 89701

CCMSI
P.O. BOX 4990
CARSON CITY, NV 89702

DANIEL SCHWARTZ, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH
2300 W. SAHARA AVENUE, SUITE 300, BOX 28
LAS VEGAS, NV 89102

DEPARTMENT OF ADMINISTRATION
APPEALS DIVISION
2200 SOUTH RANCHO DRIVE, SUITE 220
LAS VEGAS, NV 89102

OFFICE OF THE ATTORNEY GENERAL
555 E. WASHINGTON AVENUE
SUITE 3900
LAS VEGAS, NV 89101

Dated this _____ day of March, 2016

Employee of The Law Offices of Virginia L. Hunt

PET
VIRGINIA L. HUNT, ESQ.
Nevada Bar No.: 000256
LAW OFFICES OF VIRGINIA L. HUNT
3057 E. Warm Springs Road
Las Vegas, Nevada 89120
(702) 699-5336
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

ROBAIRE PREVOST

Petitioner,

vs.

STATE OF NEVADA; and their Third-Party Administrator, CCMSI, and the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS OFFICE, an Agency of the STATE OF NEVADA,

Respondent,

CASE NO: A-16-730918-J
DEPT NO: IV

AMENDED PETITION FOR JUDICIAL REVIEW

COMES NOW, Petitioner, Robaire Prevost, by and through his attorney, Virginia L. Hunt, Esq., of the Law Offices of Virginia L. Hunt, and prays for this Court to judicially review the decision of the Appeals Officer in 1510563-GK, filed on January 5, 2016, attached hereto as Exhibit "A", and made part hereof.

This Petition For Judicial Review is made pursuant to the provisions of NRS 233B.130.

Petitioner claims his substantial rights have been prejudiced because the administrative finding, inferences, conclusions or decisions are:

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

WHEREFORE, Petitioner, prays this Court that briefs be allowed, oral arguments be heard and following a review of the record, that this Court enter its order reversing the above decision of the Appeals Officer.

Dated this 10 day of March, 2016

Respectfully submitted,

By

Virginia L. Hunt, Esq.
Attorney for Petitioner
3057 E. Warm Springs Road
Las Vegas, Nevada 89120

CERTIFICATE OF MAILING

The undersigned, an employee of The Law Offices Of Virginia L. Hunt, does hereby certify that on the date shown below, a true and correct copy of the foregoing document was duly mailed, postage prepaid to the following:

ROBAIRE PREVOST
30 STRADA DI VILLAGGIO
HENDERSON, NV 89011

STATE OF NEVADA – DEPT. OF CORRECTIONS
ATTENTION: BARBARA LUNA
P.O. BOX 7011
CARSON CITY, NV 89702

STATE OF NEVADA – RISK MANAGEMENT
ATTENTION: ANA ANDREWS
201 S. ROOP STREET, SUITE 201
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LAS VEGAS, NV 89102

DEPARTMENT OF ADMINISTRATION
APPEALS DIVISION
2200 SOUTH RANCHO DRIVE, SUITE 220
LAS VEGAS, NV 89102

OFFICE OF THE ATTORNEY GENERAL
555 E. WASHINGTON AVENUE
SUITE 3900
LAS VEGAS, NV 89101

Dated this _____ day of March, 2016

Employee of The Law Offices of Virginia L. Hunt

EXHIBIT

“A”

1 NEVADA DEPARTMENT OF ADMINISTRATION
2 BEFORE THE APPEALS OFFICER
3

FILED
JAN 05 2016
APPEALS OFFICE

4 In the Matter of the Contested
5 Industrial Insurance Claim

Claim No.: 14C62E378732

Hearing No.: 1509309-TH

Appeal No. : 1510563-GK

6 of
7 ROBAIRE PREVOST
8 1341 LUCIA DRIVE
9 LAS VEGAS, NV 89128,

Employer:
STATE OF NV - DEPT. OF CORRECTIONS
201 SOUTH ROOP STREET, SUITE 201
CARSON CITY, NV 89701-4790

Claimant.

10
11 DECISION AND ORDER

12 The above-captioned appeal came on for hearing before Appeals Officer
13 GREGORY KROHN, ESQ., on August 28, 2015. The claimant, ROBAIRE PREVOST
14 (hereinafter referred to as "claimant"), was represented by his counsel, VIRGINIA HUNT, ESQ.
15 The Employer, STATE OF NEVADA – DEPARTMENT OF CORRECTIONS' Administrator,
16 CCMSI, (hereinafter referred to as "Employer"), was represented by DANIEL L. SCHWARTZ,
17 ESQ., and LEWIS BRISBOIS BISGGARD & SMITH LLP.

18 In a written determination dated March 13, 2015, Administrator denied claimant's
19 claim for industrial insurance benefits. Claimant appealed and in a Decision and Order dated
20 April 14, 2015, the Hearing Officer affirmed Administrator's March 13, 2015 determination.
21 Claimant appealed that Decision to this Court, generating the instant hearing.

22 After hearing the testimony of the witnesses, reviewing the documentary evidence,
23 and considering the arguments of counsel, the Appeals Officer finds and decides as follows:

24 FINDINGS OF FACT

25 1. Prior to the instant alleged heart claim, the claimant, ROBAIRE PREVOST,
26 was seen and treated by Dr. Reza Mojtabavi of Avencia Medical Center from July 2012 through
27 March 2013. (Exhibit A at 65-80.) He was diagnosed on various dates with hypertension and
28 anxiety. (Exhibit A at 169-174.)

1 2. Claimant had an alleged prior industrial heart claim on May 5, 2009. He
2 was initially diagnosed with a "near syncope" and hypertension (Exhibit A at 84, 98), and
3 claimant reported that he had felt anxious (Exhibit A at 95), and he had a history of anxiety
4 attacks. (Exhibit A at 104.) This claim was denied. (Exhibit A at 81-117). There is no indication
5 that the denial was appealed.

6 3. On August 9, 2013 claimant was informed after his annual physical of a
7 need to bring his body weight and BMI within standard, and he was also instructed of a need to
8 bring his triglyceride level under 150, and to control his high blood pressure. (Exhibit A at 50-
9 51.)

10 4. Claimant was seen in March 2014 and June 2014 by Dr. Kimberly Adams
11 of Total Wellness Family Medicine. (Exhibit A at 118-128.) She diagnosed him with
12 hypertension. (Exhibit A at 118, 124, 157.)

13 5. In the instant matter, claimant has had two (2) Form C-4's executed.

14 6. The first Form C-4 was signed by Cardiologist Mock on July 29, 2014,
15 apparently in association with a June 27, 2014 hospitalization, gives a diagnosis of an abnormal
16 EKG, atrial fibrillation, palpitations and hypertension. Dr. Mock was not able to make an
17 industrial causal connection. (Exhibit A at 1)

18 7. The second Form C-4 was finally executed on August 4, 2014, at the
19 Centennial Hills Hospital Emergency Department with a diagnosis of palpitations. Again, the
20 physician completing this form also did not make an industrial causal connection. (Exhibit A at
21 2.)

22 8. An Employer's Report of Industrial Injury or Occupational Disease notes a
23 timely notice of claimant's atrial fibrillation and hypertension claim. (Exhibit A at 3.)

24 9. An Incident Report was executed on July 29, 2014, wherein claimant
25 alleges that atrial fibrillation, anxiety and high blood pressure were caused by the stress of his job
26 as a correctional officer. (Exhibit A at 4-5.)
27
28

1 10. Claimant was seen at the Southern Hills Hospital and Medical Center on
2 June 28, 2014, where he was noted as having paroxysmal atrial fibrillation for the second time
3 within a week. It was also noted that claimant had systemic hypertension and alcohol abuse
4 conditions. It is believed that the alcohol abuse comment is in error. Claimant was admitted to
5 the hospital and cardiac testing was performed. Claimant was discharged on or about June 29,
6 2014. (Exhibit A at 6-25.)

7 11. On July 15, 2014, Dr. Adams reported that claimant had severe anxiety
8 from his job. Medications were prescribed, and claimant was referred to a psychiatrist. (Exhibit
9 A at 129-131.)

10 12. On August 2, 2014, claimant was transported by ambulance to the hospital
11 for chest pain and palpitations. (Exhibit A at 26-28.)

12 13. Claimant was seen at the Centennial Hills Hospital Medical Center
13 Emergency Department on August 2, 2014. Claimant was noted as having heart palpitations while
14 at work. It was noted that claimant had recently been diagnosed with atrial fibrillation. Claimant
15 was diagnosed with tachycardia, heart palpitation and a history of atrial fibrillation. Claimant was
16 treated and subsequently discharged. (Exhibit A at 29-49.)

17 14. On August 7, 2014, Dr. Adams saw claimant for a recheck. The
18 assessments were hypertension, atrial fibrillation and anxiety. Medications were increased, and
19 claimant was taken off of work for the next ten (10) weeks. (Exhibit A at 132.)

20 15. On August 12, 2014, Dr. Adams again noted claimant had anxiety issues.
21 Medications were increased. (Exhibit A at 133.)

22 16. On August 21, 2014, Dr. Adams reported that claimant had had an
23 abnormal CTA of the chest and an abnormal event recorder. Claimant was referred to Dr. Mock
24 and UCLA Cardiology. (Exhibit A at 134.)

25 17. On August 27, 2014, the impressions of claimant's Echocardiogram were
26 normal with a trace regurgitant flow, mild insufficiency across the aortic valve, and moderate
27 dysfunction of the LV chamber. (Exhibit A at 128.)

1 18. On September 10, 2014, claimant was informed that the claim was being
2 denied as paroxysmal atrial fibrillation was not considered a disease of the heart, and claimant had
3 not controlled the predisposing high blood pressure and high triglyceride level. It was further
4 noted that a new determination would be rendered following receipt of records from claimant's
5 primary care physicians, Dr. Adams and Dr. Mojtabavi. (Exhibit A at 52-54.)

6 19. On September 11, 2014, Dr. Adams completed a Long Term Disability
7 Standard Insurance Company Form indicating that claimant was permanently disabled from his
8 job effective August 2, 2014. The diagnoses were chest pain, palpitations, and SOB. (Exhibit A
9 at 175-176.) A copy of claimant's job description was also signed by Dr. Adams. (Exhibit A at
10 177.)

11 20. On September 14, 2014, claimant appealed the September 10, 2014
12 determination denying the claim to a Hearing Officer where it was assigned number 1502621-MB.
13 (Exhibit A at 55.)

14 21. On September 20, 2014, Dr. Adams completed another Standard Insurance
15 Company Long-Term Disability form. She again indicated that claimant was permanently, totally
16 disabled from any job function, and treatment was listed as cardiac catheterization, follow-up and
17 medication. (Exhibit A at 178.) On a same-dated, same-type form she indicated that on June 28,
18 2014 claimant had been diagnosed with atrial fibrillation, a history of hypertension, anxiety and
19 chest pains. She opined these problems were industrially related. (Exhibit A at 179.)

20 22. On September 29, 2014, Dr. Bowman, a cardiologist, was asked to perform
21 a review of claimant's hospital records and annual physicals, and to answer several questions after
22 his review, including whether claimant has organic heart disease. (Exhibit A at 56-57.)

23 23. Undated documents from Dr. Adams' office have October 2, 2014 as a fax
24 date at the time. They indicate that claimant's diagnosis is "benign essential hypertension" with
25 no acute diagnoses at that time, and no recorded medications claimant was taking. (Exhibit A at
26 181-183.)

1 24. Following Hearing No. 1502621-MB, the Hearing Officer issued a Decision
2 and Order dated October 7, 2014, remanding the denial of the claim for receipt and review of
3 forthcoming medical reporting from Dr. Adams and Dr. Mojtabavi. (Exhibit A at 58-59.)

4 25. On October 24, 2014, Dr. Adams answered various questions claimant's
5 counsel had asked regarding claimant's treatment. (Exhibit A at 164.) Dr. Adams (although she
6 did not sign the opinion) indicated in handwriting that she revised her October 24, 2014 opinion.
7 She indicated that claimant was compliant in taking his hypertension medication, that Atenolol has
8 a side effect of elevating triglycerides, that claimant was at a healthy BMI before he was disabled
9 from heart disease, and that claimant did not fail to correct predisposing conditions to heart
10 disease. (Exhibit A at 165.)

11 26. On October 24, 2014, claimant's counsel wrote to Administrator and asked
12 whether a new determination had been made related to claim compensability. Counsel also
13 indicated that claimant had been taken off of work permanently by Dr. Adams, had lost three (3)
14 pounds, and he was regularly taking medication to control his hypertension which has the side
15 effect of increasing triglycerides. Counsel further noted that there is "absolutely no evidence that
16 he abused alcohol or that he was warned about alcohol use." (Exhibit A at 60.)

17 27. On November 3, 2014, Administrator informed claimant that it had received
18 the medical reporting from Drs. Adams and Mojtabavi and this information had been sent to Dr.
19 Bowman for his review and assessment, after which a new determination would be made.
20 (Exhibit A at 61.)

21 28. On November 3, 2014, Administrator informed claimant's counsel that it
22 would issue a new determination following receipt of Dr. Bowman's response. (Exhibit A at 62.)

23 29. On November 19, 2014, Dr. Mock's prescription form indicated that
24 claimant could return to work on "N/A". Claimant was noted as having "significant work related
25 (correctional officer) anxiety assoc. with [illegible] & absenteeism from work. He is advised to
26 pursue an alternative occupation." (Exhibit A at 166.)

1 30. On December 2, 2014, Glenda-Ramos-Rivera with Dr. R. Family Therapy,
2 Inc. wrote claimant that he had been receiving mental health services since September 2014 and
3 had been diagnosed with a severe mental health condition due to stress at work. Further treatment
4 with her was recommended. (Exhibit A at 80.)

5 31. On December 10, 2014, claimant was notified by PERS that his application
6 to total and permanent disability had been approved. (Exhibit A at 167.)

7 32. On December 11, 2014, claimant's counsel wrote to Administrator and
8 stated that the Hearing Officer ordered review of Drs. Adams and Mojtabavi's records and a new
9 determination, and that Administrator send the records to Dr. Bowman. Counsel requested a new
10 determination on his "conclusively presumed heart disease" and requested benefits. (Exhibit A at
11 63.)

12 33. On January 13, 2015, claimant appealed his December 11, 2014 request for
13 a new determination noting alleged "non compliance with Hearing Officer's decision/treatment."
14 (Exhibit p. 185.)

15 34. A hearing was held on February 26, 2015 in regard to claim compensability.
16 In a written Decision and Order dated March 4, 2015, the Hearing Officer remanded for a new
17 determination regarding claim compensability to be issued with ten (10) days of the date of this
18 Order. (Exhibit A at 185-187.) No party appealed that to an Appeals Officer.

19 35. On March 5, 2015, Dr. Bowman noted that there was no evidence of heart
20 disease found in Mr. Prevost's medical records. (Exhibit A at 188.)

21 36. On March 13, 2015, a determination was issued in compliance with the
22 Hearing Officer's Decision and Order dated October 7, 2014. It continued to deny the claim after
23 review of all reporting. (Exhibit A at 189-190.) Claimant, through counsel, appealed that to a
24 Hearing Officer in 1509309-TH. (Exhibit A at 191.)

25 37. Following Hearing No. 1509309-TH, the Hearing Officer issued a Decision
26 and Order dated April 14, 2015, affirming the claim denial determination. (Exhibit A at 195-197.)
27 Claimant appealed. (Exhibit A at 198.)

38. Claimant provided one hundred and ninety-nine (199) pages of evidence which was reviewed and duly considered. (Exhibits 1-2.)

39. These Findings of Fact are based upon substantial evidence within the record.

40. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa.

CONCLUSIONS OF LAW

1. It is the claimant, not the Employer, who has the burden of proving his case, and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

2. In attempting to prove his case, the claimant has the burden of going beyond speculation and conjecture. That means that the claimant must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3. A. Larson, The Law of Workmen's Compensation, §80.33(a).

3. NRS 616A.010 makes it clear that:

A claim for compensation filed pursuant to the provisions of this chapter or chapter 617 of NRS must be decided on its merits and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

4. Claimant is pursuing a claim for an occupational disease. He submitted two (2) Form C-4's. The first one was completed on July 29, 2014 for symptoms he felt while resting at home on June 27, 2014. Dr. Mock from Westside Cardiology diagnosed an abnormal EKG,

1 atrial fibrillation, palpitations, and hypertension and indicated that the conditions were not work
2 related. A second form was completed at Centennial Hills Hospital after claimant felt similar
3 symptoms while at work. The attending physician stated that the heart palpitations and associated
4 symptomology were not work related. Administrator received the claim and consulted a board
5 certified cardiologist. Keith Bowman, M.D., F.A.C.C. reviewed the matter and found no evidence
6 of atherosclerosis, coronary artery disease, or other organic heart disease. Dr. Bowman did not
7 consider claimant's atrial fibrillation and associated symptomology to be a disease of the heart.

8 5. Claimant's family practitioner, Dr. Kimberly Adams, provided conflicting
9 information. She originally indicated claimant was not compliant in taking prescribed medications
10 to control his hypertension, was not at a healthy body mass index (BMI), and that Atenolol did not
11 have a side effect of elevating triglycerides. A couple of weeks later, she revised her responses on
12 all three (3) issues to indicate her patient was compliant with his medications, had a healthy BMI,
13 and that the Atenolol did effect triglyceride levels. At the hearing, Dr. Adams testified and again
14 conflicted her prior opinions. She concluded that Atenolol did not have any effect on triglyceride
15 readings. She further stated that she believed claimant's hypertension and atrial fibrillation would
16 be classified as heart disease. She went on to state that when a patient comes in to see her with
17 symptoms similar to what claimant presented with, it is her practice to refer them to a cardiologist,
18 and that is what she did with claimant. The Appeals Officer did not find Dr. Adams' testimony
19 credible or sufficient to establish a compensable claim.

20 6. Two (2) cardiologists and an attending physician at Centennial Hills
21 Hospital opined that claimant's condition was not work related and/or did not constitute a disease
22 of the heart that would qualify for benefits under Chapter 617 of the Nevada Revised Statutes.

23 7. It was not disputed that claimant has more than five (5) years of full-time
24 continuous, uninterrupted and salaried employment in an occupation that is eligible for benefits
25 under NRS 617.457. However, the preponderance of the credible medical evidence fails to
26 establish that his medical condition qualifies as a disease of the heart. The Appeals Officer finds
27 Dr. Bowman, a board certified cardiologist, to be persuasive on this topic.

28

1 8. It is further noted that this claim also fails under NRS 617.440 as it does not
2 meet the specific criteria set forth under that provision. As such, Administrator properly denied
3 the claim.

4 **DECISION AND ORDER**


5 Claimant, ROBAIRE PREVOST, has failed to establish a compensable industrial
6 claim. There is no medical evidence to link the claimant's condition to his employment as
7 required under NRS 617.⁴⁴⁰ The claimant, by way of his time of employment, is eligible for the
8 presumption created under NRS 617.457. However, the Appeals Officer finds that the medical
9 evidence fails to demonstrate a disease of the heart.

10 IT IS HEREBY ORDERED that the Hearing Officer's Decision and Order dated
11 April 14, 2015 which affirmed Administrator's March 13, 2015 determination is AFFIRMED.

12 IT IS FURTHER ORDERED that Administrator's March 13, 2015 determination
13 to deny the industrial insurance claim, is AFFIRMED.

14 IT IS SO ORDERED.


15 DATED this 4th of January, 2015.

16
17 
18 GREGORY A. KROHN, ESQ.
19 Appeals Officer

20 **NOTICE:** Pursuant to NRS 616C.370, should any party desire to appeal this final
21 decision of the Appeals Officer, a Petition for Judicial Review must be filed with the District
22 Court within thirty (30) days after service of this Order.

23 Submitted by:

24 LEWIS BRISBOIS-BISGAARD & SMITH LLP

25 By 
26 DANIEL L. SCHWARTZ, ESQ.
27 Nevada Bar No. 005125
28 2300 West Sahara Avenue, Suite 300, Box 28
 Las Vegas, NV 89102
 Attorneys for Employer

CERTIFICATE OF MAILING

Pursuant to NRCP Rule 5(b), I hereby certify that, on the 5th day of January, 2016, I served a true and correct copy of the above and foregoing document entitled **DECISION AND ORDER** by depositing same in the United States Mail, with first-class postage fully prepaid thereon, and addressed as follows:

Robaire Prevost 1341 Lucia Drive Las Vegas, NV 89128	MAILED <input checked="" type="checkbox"/> HAND-DELIVERED <input type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Virginia Hunt, Esq. 3057 E. Warm Springs Rd., Ste. 400 Las Vegas, NV 89120	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Attn: Barbara Luna State of Nevada – Department of Corrections P.O. Box 7011 Carson City, NV 89702-7011	MAILED <input checked="" type="checkbox"/> HAND-DELIVERED <input type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Attn: Staci Jones Cannon Cochran Management Services, Inc. P.O. Box 4990 Carson City, NV 89702	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Attn: Risk Management State of Nevada Risk Management Division 201 South Roop St., Ste 201 Carson City, NV 89701-4790	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>
Daniel L. Schwartz, Esq. Lewis Brisbois Bisgaard & Smith LLP 2300 West Sahara Avenue, Suite 300, Box 28 Las Vegas, NV 89102	MAILED <input type="checkbox"/> HAND-DELIVERED <input checked="" type="checkbox"/> FACSIMILE <input type="checkbox"/> ELECTRONIC MAIL <input type="checkbox"/>

RECEIVED

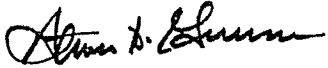
JAN 13 2016

THE CLERK OF
THE SUPREME COURT

Christina K. Deen

An employee of the State of Nevada

1 NEOJ
2 DANIEL L. SCHWARTZ, ESQ.
3 Nevada Bar No. 5125
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
5 2300 W. Sahara Ave. Ste. 300
6 Las Vegas, Nevada 89102
7 Telephone: (702) 893-3383
8 FAX: (702) 366-9563
9 *Attorneys for Interested Unnamed Respondent*
10 *CCMSI*


CLERK OF THE COURT

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

10 ROBAIRE PREVOST,
11
12 Petitioner,
13
14 v.

CASE NO. : A-16-730918-J
DEPT NO. : IV

13 STATE OF NEVADA and DEPARTMENT OF
14 ADMINISTRATION, APPEALS OFFICER, an
15 Agency of the STATE OF NEVADA
16
17 Respondent.

16 NOTICE OF ENTRY OF ORDER

17 TO: ALL INTERESTED PARTIES AND TO THEIR RESPECTIVE COUNSEL.

18 YOU, AND EACH OF YOU, PLEASE TAKE NOTICE that an **ORDER GRANTING**
19 **INTERESTED UNNAMED RESPONDENT'S MOTION TO DISMISS AND DENYING**
20 **PETITIONER'S MOTION TO AMEND** was signed by the Honorable Kerry Earley and
21 entered with the Clerk of the Court in the above-captioned matter on the 21st day of June, 2016,
22 a copy of which is attached hereto and made a part hereof.¹

23 ///

24 ///

25 ///

26
27 ¹ **NOTICE:** Pursuant to NRCF Rule 4, should any party desire to appeal this final District Court Order, the notice
28 of appeal must be filed with the clerk of the District Court after entry of a written judgment or order, and no later
than thirty (30) days after the date that the written notice of entry of the judgment or order appealed from is served.

1 Dated this 28 day of June, 2016.

2 Respectfully Submitted:

3 LEWIS BRISBOIS BISGAARD & SMITH LLP

4
5 By: 

6 DANIEL L. SCHWARTZ, ESQ.

7 Nevada Bar No. 5125

8 2300 W. Sahara Ave. Ste. 300

9 Las Vegas, Nevada 89102

10 Attorneys for Interested Unnamed Respondent

11 CCMSI

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on the 28th day of June, 2016, I did cause a true copy of a **NOTICE OF ENTRY OF ORDER** to be placed in the United States Mail, with first class postage prepaid to:

JAMES P. KEMP, ESQ.
KEMP & KEMP, ATTORNEYS AT LAW
7435 W. AZURE DRIVE, SUITE 110
LAS VEGAS, NEVADA 89130

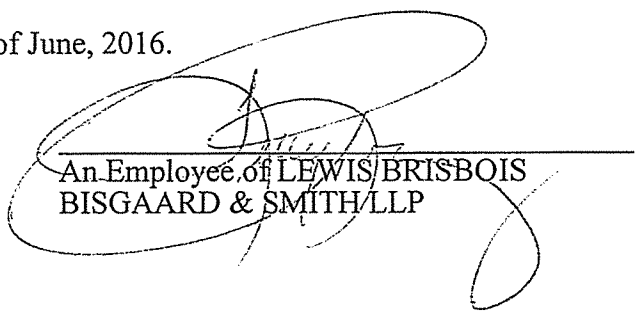
APPEALS OFFICER GREGORY A. KROHN
2200 S RANCHO DRIVE, SUITE 220
LAS VEGAS, NV 89102
APPEAL NO.: **1510563-GK**

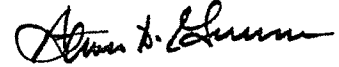
STATE OF NEVADA – DEPT. OF CORRECTIONS
ATTN: BARBARA LUNA
PO BOX 7011
CARSON CITY, NV 89702-7011

STATE OF NEVADA – RISK MGMT.
ATTN: ANA ANDREWS
201 S. ROOP STREET, STE. 201
CARSON CITY, NV 89701-4790

CCMSI
ATTN: STACI JONES
PO BOX 4990
CARSON CITY, NV 89702
CLAIM NO.: **14C62E378732**

DATED this 28th day of June, 2016.


An Employee of LEWIS BRISBOIS
BISGAARD & SMITH/LLP



CLERK OF THE COURT

1 **ORDR**
2 DANIEL L. SCHWARTZ, ESQ.
3 Nevada Bar No. 5125
4 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
5 2300 W. Sahara Ave. Ste. 300
6 Las Vegas, Nevada 89102
7 Telephone: (702) 893-3383
8 FAX: (702) 366-9563
9 *Attorneys for Interested Unnamed Respondent*
10 *CCMSI*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 ROBAIRE PREVOST,
10
11 Petitioner,

CASE NO. : A-16-730918-J
DEPT NO. : IV

11 v.

12 STATE OF NEVADA and DEPARTMENT OF
13 ADMINISTRATION, APPEALS OFFICER, and
14 Agency of the STATE OF NEVADA

Respondent.

15 **ORDER GRANTING INTERESTED UNNAMED RESPONDENT'S**
16 **MOTION TO DISMISS AND**
17 **DENYING PETITIONER'S MOTION TO AMEND**

18 After careful review and consideration of Interested Unnamed Respondent's
19 Motion to Dismiss Petitioner's Petition for Judicial Review, Petitioner's Opposition, Petitioner's
20 Motion to Amend, Interested Unnamed Respondent's Reply thereto, and all points, arguments
21 and authorities contained therein, and good cause appearing,

22 ///

23 ///

24 ///

1 IT IS HEREBY ORDERED that Interested Unnamed Respondent's Motion to
2 Dismiss Petitioner's Petition for Judicial Review, is GRANTED.

3 IT IS FURTHER ORDERED that Petitioner's Motion to Amend is accordingly
4 DENIED.


5 Therefore, it is ordered that Petitioner's Petition for Judicial Review is hereby
6 dismissed with prejudice.

7 DATED this 21 day of June, 2016.

8
9
10 
11 DISTRICT COURT JUDGE
KERRY EARLEY


12 Submitted by:

13 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

14
15 By: 
16 DANIEL L. SCHWARTZ, ESQ.
17 Nevada Bar No. 5125
2300 W. Sahara Ave. Ste. 300
18 Las Vegas, Nevada 89102
Attorneys for Interested Unnamed Respondent
CCMSI

19
20 Approved as to form and content by:

21 **KEMP & KEMP, Attorneys at Law**

22
23 By: 
24 James P. Kemp, Esq.
25 Nevada Bar No. 6375
7435 W. Azure Drive, Suite 110
26 Las Vegas, Nevada 89130
27
28


CLERK OF THE COURT

JAMES P. KEMP, ESQUIRE
Nevada Bar No. 006375
KEMP & KEMP
7435 W. Azure Drive, Suite 110
Las Vegas, NV 89130
(702) 258-1183/258-6983(fax)
jp@kemp-attorneys.com
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

ROBAIRE PREVOST,

Petitioner,

vs.

STATE OF NEVADA and DEPARTMENT
OF ADMINISTRATION, APPEALS
OFFICER, an Agency of the STATE OF
NEVADA,

Respondents.

) Case No.: A-16-730918-J

) Dept. No. IV

) **PETITIONER'S MOTION TO**
) **RECONSIDER ORDER GRANTING**
) **MOTION TO DISMISS AND FOR**
) **REHEARING PURSANT TO NRCP**
) **RULE 60(b) AND EDCR 2.24**

) Hearing Date: _____

) Hearing Time: _____

COMES NOW the Petitioner, by and through counsel, JAMES P. KEMP, ESQUIRE, and moves that this Honorable Court, pursuant to NRCP Rule 60(b) and EDCR 2.24 reconsider its order granting dismissal to Respondent CCMSI (Ex. 1) This motion is brought on the following grounds:

- 1) That the Petitioner's former counsel, Virginia Hunt, was unknowingly terminally ill when she originally filed the Petition for Judicial Review and did not fully appreciate the gravity of her health situation and its effect on her competence when the original Opposition was filed in this matter. The nature of her illness affected her cognitive and communication skills such that she was not competent and capable of properly representing the Petitioner at that time and did not appreciate and make certain

1 important arguments on his behalf and this constituted mistake, inadvertence, or
2 excusable neglect upon which the court should, pursuant to NRCP Rule 60(b) and
3 EDCR 2.24, grant relief from the Order dismissing this case and permit the Petitioner to
4 amend the caption of the Petition for Judicial Review to reflect all parties that were
5 named in the body and attachments to the Petition and who were also properly served
6 with the Petition;

- 7
- 8 2) That Petitioner's new counsel has recognized the mistake, inadvertence, and excusable
9 neglect and moved to supplement the Opposition to the Motion to Dismiss, but that
10 Motion to Supplement was denied as moot and never heard after the court issued its
11 order dismissing the case. Important arguments, including the unforeseen and
12 unrecognized incompetence of Ms. Hunt due to terminal illness, and the substantial
13 compliance of the original Petition for Judicial Review with the requirements of NRS
14 233B.130 to name all parties to the underlying administrative proceedings should in
15 equity and good conscience be considered by the court.
16

17 This Motion is brought based upon the papers and pleadings on file herein, the attached
18 Points and Authorities, and such oral argument as the court may allow at the hearing of the matter.

19 DATED 7/11/16

20 /s/ James P. Kemp
21 JAMES P. KEMP, ESQ.
22 Nevada Bar No. 6375
23 KEMP & KEMP, Attorneys at Law
24 7435 W. Azure Drive, Suite 110
25 Las Vegas, Nevada 89130
26 (702) 258-1183/fax 258-6983
27 jp@kemp-attorneys.com
28 Attorney for Petitioner.

NOTICE OF MOTION

TO THE DEFENDANT AND ITS COUNSEL OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the Court, in the above referenced Department of the Court, on the 17 day of August, 2016, at 9:00 o'clock A M. or as soon thereafter as the Court may allow

DATED 7/11/16

/s/ James P. Kemp
JAMES P. KEMP, ESQ.
Attorney for Petitioner

POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On April 4, 2016 Petitioner's former counsel, Virginia Hunt, passed away shortly after learning that she had been suffering from a terminal illness. (See obituary at <http://obits.reviewjournal.com/obituaries/lvrj/obituary.aspx?pid=179525289>). Prior to her diagnosis with the terminal illness she had filed the Petition for Judicial Review in this matter on January 27, 2016. When she did so, she did not include Respondent CCMSI *in the caption* of the Petition; however CCMSI was named in the body of the Petition and CCMSI and its attorney, Daniel Schwartz, Esq., were both served with the Petition. CCMSI filed a Motion to Dismiss due to Ms. Hunt, on behalf of Petitioner, forgetting to put CCMSI in the caption of the Petition.

By the time that Ms. Hunt filed the Opposition to CCMSI's Motion to Dismiss on March 10, 2016, she was so ill that she had approximately 25 days to live. The Declaration of Jason Mills, Esq. is attached hereto as Exhibit 2 and sets forth his knowledge of Ms. Hunt's state of mind and what she related as to her present sense impression of how the illness impacted her cognitive

1 abilities and her ability to competently practice law near the end of her life. The Petitioner, Mr.
2 Prevost, had no knowledge or notice that Ms. Hunt was ill and having trouble with her ability to
3 represent him.

4 Petitioner's new counsel has noted that there are two important arguments to make on
5 Petitioner's behalf. First is that Ms. Hunt's unknown and unappreciated competence issues due to
6 her illness, that the Petitioner had no knowledge or notice of, should not prevent Petitioner from
7 being able to amend the caption of his Petition for Judicial Review to reflect all parties who are
8 named in the body of and attachments to the Petition and such amendment should relate back to
9 the date of the filing. Second, the Petition for Judicial Review in this case substantially complied
10 with the requirement in NRS 233B.130 that all parties to the administrative proceeding be named as
11 parties in the Judicial Review proceeding. Respondent CCMSI was named in the body of the
12 Petition through incorporation by reference of the administrative decision that was also attached as
13 an exhibit. Further, CCMSI and its attorney in the administrative proceeding were both served with
14 a copy of the Petition for Judicial Review. Therefore CCMSI was named as a party and served with
15 the Petition for Judicial Review and the failure to include its name in the caption of the Petition was
16 merely a "technical dereliction" that does not preclude the Petitioner's right to review. *Civil Serv.*
17 *Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002)¹

18
19
20 On May 17, 2016 Petitioner's new counsel filed a motion seeking leave to file a supplemental
21 opposition containing the arguments that are now set forth herein. That motion was set for hearing
22 on June 29, 2016 at 9:00 a.m. However, before that motion could be heard the court granted the
23

24 ¹ Petitioner is aware that in *Washoe County v. Otto*, 282 P.3d 719, 128 Nev. at n. 9 (2012) the Supreme
25 Court of Nevada indicated that *Civil Serv. Comm'n* was overruled to the extent that it may have been
26 read to mean that a total failure to name a party as required by NRS 233B.130 (2)(a) was considered
27 a "technical dereliction" rather than a jurisdictional defect. However, the *Otto* case is factually
28 distinguishable from both *Civil Serv. Comm'n* and the present matter in that it in *Otto*, Washoe County
had totally failed to name the taxpayers in question in the body or any attachment, even AFTER it
had been given an opportunity to amend.

1 motion to dismiss by written order on June 21, 2016. (Ex. 1) Written notice of entry of that order
2 was filed and served on June 28, 2016. (Ex. 1) The court denied the motion seeking to file a
3 supplemental opposition as being moot in light of the dismissal. Petitioner now, through this
4 motion, seeks reconsideration of the court's dismissal of this Petition for Judicial Review.

5
6 **II. ARGUMENT**

7 **A. NRCP RULE 60(b) AND EDCR RULE 2.24 PROVIDE A BASIS FOR**
8 **RECONSIDERATION OF THE DISMISSAL OF THIS CASE**

9 The court has inherent authority to correct what it perceives to be a mistake in its rulings.
10 *Bucy v. Nevada Const. Co.*, 125 F. 2d 213 (9th Cir.1942). NRCP Rule 60(b) states in relevant part as
11 follows:

12 **RULE 60. RELIEF FROM JUDGMENT OR ORDER**

13 ...

14 (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered**
15 **Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may
16 relieve a party or a party's legal representative from a final judgment, order, or
17 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or
18 excusable neglect; ... The motion shall be made within a reasonable time, and for
19 reasons (1), (2), and (3) not more than 6 months after the proceeding was taken or
20 the date that written notice of entry of the judgment or order was served. A motion
21 under this subdivision (b) does not affect the finality of a judgment or suspend its
22 operation. This rule does not limit the power of a court to entertain an independent
23 action to relieve a party from a judgment, order, or proceeding, or to set aside a
24 judgment for fraud upon the court. ... [T]he procedure for obtaining any relief from
25 a judgment shall be by motion as prescribed in these rules or by an independent
26 action.

27 EDCR Rule 2.24 states as follows:

28 **Rule 2.24. Rehearing of motions.**

(a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

(b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any

1 other motion. A motion for reconsideration does not toll the 30-day period for filing
2 a notice of appeal from a final order or judgment.

3 (c) If a motion for rehearing is granted, the court may make a final
4 disposition of the cause without reargument or may reset it for reargument or
5 resubmission or may make such other orders as are deemed appropriate under the
6 circumstances of the particular case.

7 Under the specific facts of this case, the court has equitable power to permit the amendment
8 of the caption to the Petition for Judicial Review based upon the fact that unbeknownst to both the
9 Petitioner Mr. Prevost and his former attorney Virginia Hunt, Ms. Hunt was terminally ill and the
10 illness adversely affected her ability and competence to practice law. (Declaration of Jason Mills,
11 Esq. attached hereto)

12 Further, the Petition for Judicial Review as filed in this case substantially complied with NRS
13 233B.130(2)(a) in that the Petition named Respondent CCMSI in the body of the Petition through
14 the incorporation by reference of the Appeals Officer's Decision and Order which was also attached
15 to the Petition and made a part thereof. The Petition was served on CCMSI and its attorney giving
16 proper notice. The mere failure to include the name of CCMSI in the caption of the Petition is a
17 mere "technical dereliction" that should not result in dismissal of the judicial review action.

18 **B. THE COURT SHOULD INVOKE ITS EQUITABLE POWERS TO**
19 **PERMIT AMENDMENT TO THE CAPTION OF THE PETITION FOR**
20 **JUDICIAL REVIEW.**

21 In this case the terminal illness of Ms. Hunt, which was unbeknownst to Petitioner Mr.
22 Prevost, adversely impacted her ability and competence to practice law. Ms. Hunt had decades of
23 experience practicing workers' compensation law in Nevada and had herself formerly served as an
24 Appeals Officer in the Department of Administration. It is simply unfathomable that she would
25 have made such a basic error in the absence of extraordinary circumstances, such as her terminal
26 illness in this case.

27 The Supreme Court of Nevada has recognized the equitable power of the court to permit
28

1 amendment after a statute of limitations has expired “where the true defendant, although unnamed,
2 had actual knowledge of the institution of the action, knew that it was the proper defendant, and
3 was not in any way misled to its prejudice.” *Bender v. Clark Equip. Co.*, 111 Nev. 844, 846, 897 P.2d
4 208 (1995) *citing and quoting* *Nurenberger Hercules-Werke v. Virostek*, 107 Nev. 873, 878, 822 P.2d 1100,
5 1104 (1991) Such is the case here where CCMSI was actually identified as a party in the
6 administrative decision that was incorporated by reference in the Petition as well as attached to the
7 Petition. CCMSI and its attorney were served with the Petition and certainly knew that it was a
8 proper respondent to the Petition. It was not misled in any way to its prejudice. The only infirmity
9 is the failure to list CCMSI in the caption. Dismissal under these facts would seem to be a very
10 harsh and inequitable result. Ms. Hunt was experiencing symptoms of her illness which included
11 cognitive deficits that affected her writing (See Declaration of Jason Mills, Esq. attached). This
12 disability, that was not perceived and had not been diagnosed at the time that the Petition was filed,
13 appears to have caused the mistake in failing to put CCMSI in the caption of the Petition. This is a
14 mere technical dereliction that should not result in dismissal of the Petition which would prevent
15 Mr. Prevost from having his case adjudicated on its merits. Determination on the merits is the
16 overriding preference of the courts of this state. *Hansen v. Universal Health Servs*, 112 Nev. 1245,
17 1247-1248, 924 P.2d 1345 (1996) In *Hansen*, the Supreme Court of Nevada refused to dismiss an
18 appeal that had been affected by the inexcusable neglect of the appellant’s attorney rather than the
19 conduct of the appellant himself. It was seen as inequitable to deny the appellant a decision on the
20 merits in that case based upon the mistake or misconduct of his attorney (who was issued monetary
21 sanctions instead of dismissal). The same is the case here. It is simply insufferable to dismiss this
22 appeal against Mr. Prevost because of the extremely technical error of his dying attorney. The
23 failure to list CCMSI in the caption should not result in dismissal. Amendment should be permitted
24 and the amendment should relate back to the date of filing. *See* NRCP Rule 10(a) and Rule 15(c).
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1 The Motion to Dismiss should have been denied. The court should grant this Motion to Reconsider
2 and vacate the dismissal order and permit the Petitioner to amend the caption.

3 **C. WASHOE COUNTY v OTTO IS FACTUALLY DISTINGUISHABLE**
4 **FROM THIS CASE.**

5 *Washoe County v. Otto*, 128 Nev. Adv. Op. No. 40, 282 P.3d 719 (2012), is distinguishable from
6 the facts here because in *Otto*, the respondent taxpayers were not identified by name in the caption
7 or body of the petition for judicial review or in an attached exhibit to the petition. *Id.* at 723. Here,
8 by attaching the Appeals Officer's order to the Petition for Judicial Review, the Petitioner clearly
9 identified the proper parties to the Judicial Review proceedings. This is sufficient to meet the
10 requirements of NRS 233B.130(2)(a), which requires that "the agency and all parties of record to the
11 administrative proceeding" be named as respondents, but does not specifically require that the
12 parties be named in the caption to the Petition. *See Cooksey v. Cargill Meat Solutions Corp.*, 831 N.W.2d
13 94, 103-04 (Iowa 2013) (concluding that in evaluating the statutory naming requirement, "the
14 contents of a petition seeking review of an administrative action should be evaluated in its entirety"
15 and that identifying the respondents in the body of the petition and serving respondents with notice
16 satisfies the requirement). The Petitioner here served the Petition on Respondent CCMSI and,
17 although Petitioner also did not expressly name the Respondent CCMSI in the body of the Petition,
18 the Appeals Officer's Decision and Order that identified the parties to the administrative
19 proceeding, attached as an exhibit, is incorporated by reference into the body and made a part of the
20 Petition. *See Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980) (concluding that
21 naming the employer in an exhibit attached to a petition for judicial review meets the statutory
22 naming requirement); *cf.* NRCP 10(c) ("(c) **Adoption by Reference; Exhibits.** Statements in a
23 pleading may be adopted by reference in a different part of the same pleading or in another pleading
24 or in any motion. **A copy of any written instrument which is an exhibit to a pleading is a part**
25 **thereof for all purposes.**). *Otto* is simply not factually the same as this case. In *Otto* the Petitioner
26
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1 Washoe County did not name the taxpayers who were parties to the administrative action AT ALL.
2 Not in the body and not in any attachment incorporated by reference. Washoe County was even
3 given an opportunity to amend, a list of the appropriate parties was available to it to attach as an
4 exhibit, and it still failed to identify the taxpayer parties by name in ANY PART or in ANY
5 FASHION in its petition and it failed to serve them with the petition or the amended petition. The
6 Supreme Court was astounded by this failure to name the parties even after being afforded the
7 opportunity to amend and the failure to serve them with the petition. *Otto* is factually
8 distinguishable because the Petitioner here incorporated the identity of Respondent CCMSI into the
9 body of the Petition as well as attaching the Appeals Officer's Decision and Order as an exhibit
10 which is part of the Petition for all purposes under NRCP Rule 10(c). The only thing that is missing
11 is the name in the caption and that should be ruled a technical dereliction rather than a grave
12 jurisdictional defect under *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002).
13

14 Based upon the substantial compliance with NRS 233B.130(2)(a) in the naming of CCMSI,
15 that fact that it was served with the Petition and had notice of it, the lack of prejudice to CCMSI,
16 and the mere technical dereliction in failing to list CCMSI in the caption, the court should have
17 denied the Motion to Dismiss and permitted amendment of the caption and the case to move
18 forward and set a briefing schedule in this matter. The court should grant this Motion to
19 Reconsider and vacate its dismissal order and let this case proceed on its merits.
20

21 ///

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23 ///

III. CONCLUSION

Based upon the foregoing, the court should reconsider and deny the Motion to Dismiss. It would be inequitable to not permit amendment of the caption. The Petitioner's Petition for Judicial Review substantially complied with the requirements of NRS 233B.130(2)(a) and it should be permitted to proceed on the merits.

DATED 7/11/16

/s/ James P. Kemp
JAMES P. KEMP, ESQ.
Nevada Bar No. 6375
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Attorney for Petitioner

KEMP & KEMP
ATTORNEYS AT LAW
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Tel. (702) 258-1183 ♦ Fax (702) 258-6983

CERTIFICATE OF SERVICE

This is to certify that, in accordance with the court's rules, on the date indicated below the within and foregoing document was served via the court's Wiznet e-file and serve system to the following persons or parties:

Daniel L. Schwartz, Esq.
2300 W. Sahara Ave, Ste 300 Box 28
Las Vegas, NV 89102-4375

And by First Class U.S. Mail, Postage prepaid addressed to the following:

ROBAIRE PREVOST
30 STRADA Di VILLAGGIO
HENDERSON, NV 89011

STATE OF NEVADA –DEPT. OF CORRECTIONS
ATTENTION: JUSTIN HARRIS
P.O. Box 7011
CARSON CITY, NV 89702

STATE OF NEVADA-RISK MANAGEMENT
ATTENTION: ANA ANDREWS
201 S. ROOP STREET, SUITE 201
CARSON CITY, NV 89701

CCMSI
P.O. BOX 4990
CARSON CITY, NV 89702

DEPARTMENT OF ADMINISTRATION
APPEALS DIVISION
2200 SOUTH RANCOH DRIVE, SUITE 220
LAS VEGAS, NV 89102

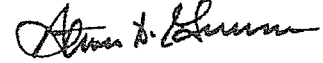
CLARK COUNTY DISTRICT ATTORNEY
301 EAS CLARK AVENUE, SUITE 100
LAS VEGAS, NV 89101

DATED this 11th day of July 2016.

/s/ James P. Kemp
JAMES P. KEMP, ESQ.

EXHIBIT 1

EXHIBIT 1



CLERK OF THE COURT

1 NEOJ
2 DANIEL L. SCHWARTZ, ESQ.
3 Nevada Bar No. 5125
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
5 2300 W. Sahara Ave. Ste. 300
6 Las Vegas, Nevada 89102
7 Telephone: (702) 893-3383
8 FAX: (702) 366-9563
9 *Attorneys for Interested Unnamed Respondent*
10 *CCMSI*

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA
9

10 ROBAIRE PREVOST,

11 Petitioner,

12 v.

13 STATE OF NEVADA and DEPARTMENT OF
14 ADMINISTRATION, APPEALS OFFICER, an
Agency of the STATE OF NEVADA

15 Respondent.

CASE NO. : A-16-730918-J
DEPT NO. : IV

16 NOTICE OF ENTRY OF ORDER

17 TO: ALL INTERESTED PARTIES AND TO THEIR RESPECTIVE COUNSEL.

18 YOU, AND EACH OF YOU, PLEASE TAKE NOTICE that an **ORDER GRANTING**
19 **INTERESTED UNNAMED RESPONDENT'S MOTION TO DISMISS AND DENYING**
20 **PETITIONER'S MOTION TO AMEND** was signed by the Honorable Kerry Earley and
21 entered with the Clerk of the Court in the above-captioned matter on the 21st day of June, 2016,
22 a copy of which is attached hereto and made a part hereof.¹

23 ///

24 ///

25 ///

26
27 ¹ **NOTICE:** Pursuant to NRCP Rule 4, should any party desire to appeal this final District Court Order, the notice
28 of appeal must be filed with the clerk of the District Court after entry of a written judgment or order, and no later
than thirty (30) days after the date that the written notice of entry of the judgment or order appealed from is served.

1 Dated this 28 day of June, 2016.

2 Respectfully Submitted:

3 LEWIS BRISBOIS BISGAARD & SMITH LLP

4
5 By: 

DANIEL L. SCHWARTZ, ESQ.

6 Nevada Bar No. 5125

7 2300 W. Sahara Ave. Ste. 300

8 Las Vegas, Nevada 89102

9 Attorneys for Interested Unnamed Respondent
10 CCMSI
11
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on the 20th day of June, 2016, I did cause a true copy of a **NOTICE OF ENTRY OF ORDER** to be placed in the United States Mail, with first class postage prepaid to:

JAMES P. KEMP, ESQ.
KEMP & KEMP, ATTORNEYS AT LAW
7435 W. AZURE DRIVE, SUITE 110
LAS VEGAS, NEVADA 89130

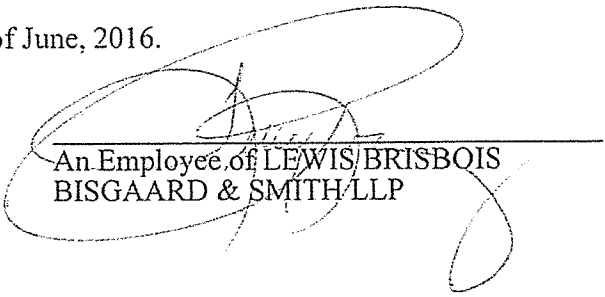
APPEALS OFFICER GREGORY A. KROHN
2200 S RANCHO DRIVE, SUITE 220
LAS VEGAS, NV 89102
APPEAL NO.: **1510563-GK**

STATE OF NEVADA – DEPT. OF CORRECTIONS
ATTN: BARBARA LUNA
PO BOX 7011
CARSON CITY, NV 89702-7011

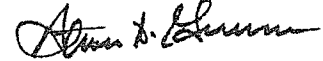
STATE OF NEVADA – RISK MGMT.
ATTN: ANA ANDREWS
201 S. ROOP STREET, STE. 201
CARSON CITY, NV 89701-4790

CCMSI
ATTN: STACI JONES
PO BOX 4990
CARSON CITY, NV 89702
CLAIM NO.: **14C62E378732**

DATED this 20th day of June, 2016.


An Employee of LEWIS BRISBOIS
BISGAARD & SMITH/LLP

1 **ORDR**
2 DANIEL L. SCHWARTZ, ESQ.
3 Nevada Bar No. 5125
4 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
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9 *Attorneys for Interested Unnamed Respondent*
10 *CCMSI*



CLERK OF THE COURT

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 ROBAIRE PREVOST,

10 Petitioner,

11 v.

12 STATE OF NEVADA and DEPARTMENT OF
13 ADMINISTRATION, APPEALS OFFICER, and
14 Agency of the STATE OF NEVADA

Respondent.

CASE NO. : A-16-730918-J
DEPT NO. : IV

15 **ORDER GRANTING INTERESTED UNNAMED RESPONDENT'S**
16 **MOTION TO DISMISS AND**
17 **DENYING PETITIONER'S MOTION TO AMEND**

18 After careful review and consideration of Interested Unnamed Respondent's
19 Motion to Dismiss Petitioner's Petition for Judicial Review, Petitioner's Opposition, Petitioner's
20 Motion to Amend, Interested Unnamed Respondent's Reply thereto, and all points, arguments
21 and authorities contained therein, and good cause appearing,

22 ///

23 ///

24 ///

1 IT IS HEREBY ORDERED that Interested Unnamed Respondent's Motion to
2 Dismiss Petitioner's Petition for Judicial Review, is GRANTED.

3 IT IS FURTHER ORDERED that Petitioner's Motion to Amend is accordingly
4 DENIED.


5 Therefore, it is ordered that Petitioner's Petition for Judicial Review is hereby
6 dismissed with prejudice.

7 DATED this 21 day of June, 2016.

8
9
10 
DISTRICT COURT JUDGE
KERRY EARLEY

11
12 Submitted by:

13 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

14
15 By: 
16 DANIEL L. SCHWARTZ, ESQ.
17 Nevada Bar No. 5125
2300 W. Sahara Ave. Ste. 300
18 Las Vegas, Nevada 89102
Attorneys for Interested Unnamed Respondent
CCMSI

19
20 Approved as to form and content by:

21 **KEMP & KEMP, Attorneys at Law**


22
23 By: 
24 James P. Kemp, Esq.
25 Nevada Bar No. 6375
7435 W. Azure Drive, Suite 110
26 Las Vegas, Nevada 89130

EXHIBIT 2

EXHIBIT 2

1

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and more.

9. On Saturday, March 12, 2016, along with Ms. Hunt's brother Geoffrey Hunt, members of her staff, and two other workers' compensation attorneys I did meet with Ms. Hunt at her office to discuss her condition and to discuss the management of her existing workers' compensation case load.

10. Prior to that meeting beginning, Ms. Hunt disclosed to some of us at the meeting that her cancer was not only in her lungs, but was also in her brain and other parts of her body.

11. Ms. Hunt further disclosed to some of us at the meeting that it was important that she have a select group of attorneys review her work product because she was worried that her legal writing and work product was adversely impacted by the cancer she was suffering from.


12. After the meeting on March 12, 2016 I do not recall any other conversations with Ms. Hunt again; she died on April 4, 2016.

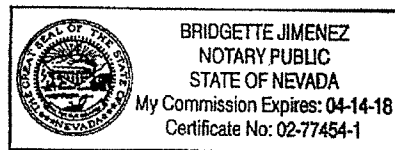
13. FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 17 of May 2017


JASON D. MILLS, ESQ.

SUBSCRIBED AND SWORN to before me
on this 17th day of May 2017


NOTARY PUBLIC
In and for said county and State



**DISTRICT COURT
CLARK COUNTY, NEVADA**

CASE NO. : A-16-730918-J
DEPT NO. : IV

NOTICE OF ENTRY OF ORDER

YOU, AND EACH OF YOU, PLEASE TAKE NOTICE that an **ORDER DENYING PETITIONER'S MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS AND FOR REHEARING PURSUANT TO NRCP RULE 60(b) AND EDCR 2.24** was signed by the Honorable Kerry Earley on August 30, 2016 and entered with the Clerk of the Court in the above-captioned matter on the 1st day of September, 2016, a copy of which is attached hereto and made a part hereof.¹

111

4836-0161-3880.1 / 26990-1048

1 Dated this 2nd day of September, 2016.

2 Respectfully Submitted:

3 LEWIS BRISBOIS BISGAARD & SMITH LLP

4
5 By: 

6 DANIEL L. SCHWARTZ, ESQ.

7 Nevada Bar No. 5125

8 2300 W. Sahara Ave. Ste. 300

9 Las Vegas, Nevada 89102

10 Attorneys for Interested Unnamed Respondent

11 CCMSI

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard &
3 Smith LLP and that on the ____ day of September, 2016, I did cause a true copy of a **NOTICE**
4 **OF ENTRY OF ORDER** to be placed in the United States Mail, with first class postage prepaid
5 to:

6 JAMES P. KEMP, ESQ.
7 KEMP & KEMP, ATTORNEYS AT LAW
8 7435 W. AZURE DRIVE, SUITE 110
9 LAS VEGAS, NEVADA 89130

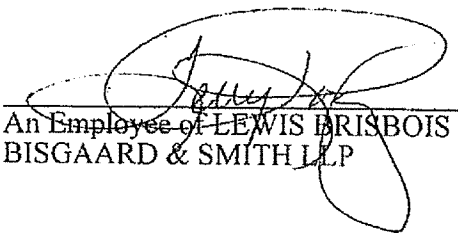
10 APPEALS OFFICER GREGORY A. KROHN
11 2200 S RANCHO DRIVE, SUITE 220
12 LAS VEGAS, NV 89102
13 APPEAL NO.: **1510563-GK**

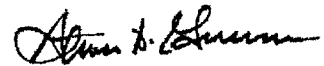
14 STATE OF NEVADA – DEPT. OF CORRECTIONS
15 ATTN: BARBARA LUNA
16 PO BOX 7011
17 CARSON CITY, NV 89702-7011

18 STATE OF NEVADA – RISK MGMT.
19 ATTN: ANA ANDREWS
20 201 S. ROOP STREET, STE. 201
21 CARSON CITY, NV 89701-4790

22 CCMSI
23 ATTN: STACI JONES
24 PO BOX 4990
25 CARSON CITY, NV 89702
26 CLAIM NO.: **14C62E378732**

27 DATED this 2nd day of September, 2016.

28 
An Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP



CLERK OF THE COURT

1 **ORDR**
2 DANIEL L. SCHWARTZ, ESQ.
3 Nevada Bar No. 5125
4 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
5 2300 W. Sahara Ave. Ste. 300
6 Las Vegas, Nevada 89102
7 Telephone: (702) 893-3383
8 FAX: (702) 366-9563
9 *Attorneys for Interested Unnamed Respondent*
10 *CCMSI*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **ROBAIRE PREVOST,**

10 **Petitioner,**

11 **v.**

12 **STATE OF NEVADA and DEPARTMENT OF**
13 **ADMINISTRATION, APPEALS OFFICER, and**
14 **Agency of the STATE OF NEVADA**

14 **Respondent.**

CASE NO. : A-16-730918-J
DEPT NO. : IV

15 **ORDER DENYING PETITIONER'S MOTION TO RECONSIDER ORDER**
16 **GRANTING MOTION TO DISMISS AND FOR REHEARING PURSUANT TO NRCP**
17 **RULE 60(b) AND EDCR 2.24**

18 After careful review and consideration of Petitioner's Motion to Reconsider Order
19 Granting Motion to Dismiss and for Rehearing Pursuant to NRCP Rule 60(b) and EDCR 2.24,
20 Interested Unnamed Respondent CCMSI's Opposition, and Petitioner's Reply thereto, and all
21 points, arguments and authorities contained therein, and good cause appearing.

22 **///**

23 **///**

24 **///**

1 IT IS HEREBY ORDERED that Petitioner has not shown the existence of a
2 manifest error of law or fact upon which the Order granting the Motion to Dismiss was based,
3 nor that there was an intervening change of in controlling law, nor that the Motion to Reconsider
4 and for Rehearing is necessary to prevent manifest injustice.

5 IT IS FURTHER ORDERED that Petitioner has not presented newly-discovered
6 or previously unavailable evidence.

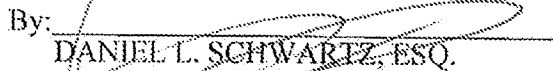
7 IT IS FURTHER ORDERED that Petitioner's Motion to Reconsider and for
8 Rehearing is accordingly DENIED.

9
10 DATED this 30 day of August, 2016.

11
12 
13 DISTRICT COURT JUDGE
14 KERRY EARLEY *KE*


15 Submitted by:

16 LEWIS BRISBOIS BISGAARD & SMITH LLP

17
18 By: 
19 DANIEL L. SCHWARTZ, ESQ.
20 Nevada Bar No. 5125
21 2300 W. Sahara Ave. Ste. 300
22 Las Vegas, Nevada 89102
23 Attorneys for Interested Unnamed Respondent
24 CCSI

25 Approved as to form and content by:

26 KEMP & KEMP, Attorneys at Law

27 By: 
28 James R. Kemp, Esq.
Nevada Bar No. 6375
7435 W. Azure Drive, Suite 110
Las Vegas, Nevada 89130


CLERK OF THE COURT

JAMES P. KEMP, ESQUIRE
Nevada Bar No. 006375
KEMP & KEMP
7435 W. Azure Drive, Suite 110,
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(702) 258-1183
(702) 258-6983 (fax)
jp@kemp-attorneys.com
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

ROBAIRE PREVOST,

Petitioner,

vs.

STATE OF NEVADA and DEPARTMENT
OF ADMINISTRATION, APPEALS
OFFICER, an Agency of the STATE OF
NEVADA,

Respondents

Case No.: A-16-730918-J

Dept. No. IV

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN to the District Court, Supreme Court of Nevada and all Respondents including those that are set forth in the Certificate of Service which are incorporated herein by reference, that the above-named Petitioner, ROBAIRE PREVOST, by and through his counsel of record, JAMES P. KEMP, ESQUIRE, hereby appeals to the Supreme Court of Nevada from the District Court's Order GRANTING Respondent CCMSI's Motion to Dismiss the Petition for Judicial Review, said Order of the District Court having been entered on June 27, 2016, and the September 2, 2016 District Court Order DENYING Petitioner's Motion to Reconsider and for relief under NRCP Rule 60(b).

DATED: October 3, 2016

/s/ James P. Kemp
JAMES P. KEMP, ESQUIRE
Nevada Bar No. 006375
7435 W. Azure Drive, Suite 110,
Las Vegas, NV 89130
Attorney for Petitioner

KEMP & KEMP
ATTORNEYS AT LAW
7435 W. Azure Dr., Suite 110
LAS VEGAS, NEVADA 89130
Tel. (702) 258-1183 ♦ Fax (702) 258-6983

CERTIFICATE OF SERVICE

This is to certify that, in accordance with the court's rules, on the date indicated below the within and foregoing document was served via the court's Wiznet e-file and serve system to the following persons or parties:

Daniel L. Schwartz, Esq.
2300 W. Sahara Ave, Ste 300 Box 28
Las Vegas, NV 89102-4375

And by First Class U.S. Mail, Postage prepaid addressed to the following:

ROBAIRE PREVOST
30 STRADA Di VILLAGGIO
HENDERSON, NV 89011

STATE OF NEVADA –DEPT. OF CORRECTIONS
ATTENTION: BARBARA LUNA
P.O. Box 7011
CARSON CITY, NV 89702

STATE OF NEVADA-RISK MANAGEMENT
ATTENTION: ANA ANDREWS
201 S. ROOP STREET, SUITE 201
CARSON CITY, NV 89701

CCMSI
P.O. BOX 4990
CARSON CITY, NV 89702

DEPARTMENT OF ADMINISTRATION
APPEALS DIVISION
2200 SOUTH RANCOH DRIVE, SUITE 220
LAS VEGAS, NV 89102

CLARK COUNTY DISTRICT ATTORNEY
301 EAS CLARK AVENUE, SUITE 100
LAS VEGAS, NV 89101

DATED this 3rd day of October 2016.

/s/ James P. Kemp
JAMES P. KEMP, ESQ.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUANITA WALTER,
Appellant,
vs.
DOMINO'S PIZZA LLC,
Respondent.

No. 71543

FILED

FEB 27 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.


Appellant sought judicial review of an appeals officer's decision affirming closure of her claim without a permanent partial disability evaluation. The district court dismissed the petition under NRS 233B.130(2)(a), which requires the petition to name the agency and all parties of record to the administrative proceeding. *See Washoe Cty. v. Otto*, 128 Nev. 424, 432-33, 282 P.3d 719, 725 (2012) (providing that a party seeking judicial review of an administrative agency's decision must strictly comply with the Administrative Procedure Act's jurisdictional procedural requirements, including those set forth in NRS 233B.130(2), to invoke the district court's jurisdiction). This appeal followed.

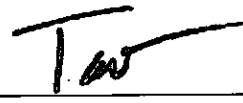
On appeal, appellant provides only a summary list of purported district court errors without developing any arguments or providing any explanation as to these alleged errors. With regard to the district court's determination that appellant failed to comply with NRS 233B.130(2)(a), appellant's statement of district court error simply provides "[p]roper [n]ames were not listed." But appellant does not assert

17-900379

that she somehow satisfied NRS 233B.130(2)(a)'s requirements by merely naming her employer in the petition or otherwise explain why she believes the dismissal of her petition on this basis was improper. Consequently, we decline to consider this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (refusing to consider appellate challenges not supported by cogent argument). And because appellant failed to demonstrate that the district court incorrectly found that she failed to name all parties of record in the petition, we necessarily affirm the court's determination that this failure deprived the court of jurisdiction over the petition such that dismissal was required. *See* NRS 233B.130(2)(a); *Otto*, 128 Nev. at 432-33, 282 P.3d at 725.

It is so ORDERED.¹


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas Smith, District Judge
Juanita Walter
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

¹In light of our resolution of this matter, we need not reach appellant's remaining appellate arguments.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KYLE KRCH,

Appellant,

vs.

JOSEPH DECKER, ADMINISTRATOR;

AND THE STATE OF NEVADA

DEPARTMENT OF BUSINESS AND

INDUSTRY, REAL ESTATE DIVISION,

Respondents.

No. 69903

FILED

MAR 06 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a petition for judicial review for lack of subject matter jurisdiction. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Kyle Krch filed a petition for judicial review challenging a Decision against him by the Nevada Real Estate Commission (Commission), which arose from a proceeding under the Administrative Procedure Act (APA). However, Krch omitted the Commission from the caption and failed to serve the petition upon it, instead naming only Joseph Decker and the Nevada Real Estate Division (Division) as a respondent. The Division moved to dismiss the petition for lack of subject matter jurisdiction under NRS 233B.130(2)(a), which the district court granted.¹

Krch appeals the dismissal to this court, arguing that *Washoe County v. Otto*, 128 Nev. ___, ___, 282 P.3d 719, 725 (2012) is either

¹We do not recount the facts except as necessary to our disposition.


distinguishable or should be overturned in light of various other sources of Nevada law. First, we decline to adopt Krch's invitation to overturn *Otto*. See Nev. Const. art. 6, § 4; see also NRAP 36(c) (a published opinion creates mandatory precedent).² Thus, we turn to Krch's argument that *Otto* is distinguishable. We review a district court's interpretation of caselaw de novo. *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 877 (2014).

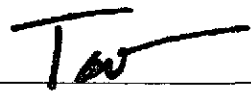
Below, the district court declined to distinguish this case from *Otto*, determining "*Otto* did not find a description of the missing parties within the body of the petition would have rendered the petition compliant." We agree. *Otto* is clear that the procedural requirements of the APA are jurisdictional and must be strictly followed, and Krch did not strictly follow them. See *Otto*, 128 Nev. at ___, 282 P.3d at 725 ("Nothing in the language of [NRS 233B.130(2)] suggests that its requirements are anything but mandatory and jurisdictional."). Further, the plain language of the statute specifically requires that petitions for judicial review must "name as respondents the agency and all parties of record to the administrative proceeding." NRS 233B.130(2)(a) (emphasis added). Krch admits in his opening brief that "The Petition did not name the Commission as a respondent in the caption." Therefore, both *Otto* and the

²Accordingly, we need not reach Krch's related arguments regarding whether the supreme court's holding in *Washoe County v. Otto*, 128 Nev. ___, ___, 282 P.3d 719, 725 (2012) was inconsistent with other aspects of Nevada law.

plain language of the statute compel affirmance.

Accordingly, we ORDER the judgment of the district court
AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Elliott A. Sattler, District Judge
Robert L. Eisenberg, Settlement Judge
Holland & Hart LLP/Reno
Attorney General/Carson City
Attorney General/Las Vegas
Washoe District Court Clerk