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Jul 17 2017 10:17 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

9
10 ROBAIRE PREVOST,

11 Appellant,

12 v.

13 STATE OF NEVADA DEPARTMENT
OF ADMINISTRATION, APPEALS
14 OFFICER, AN AGENCY OF THE
15 STATE OF NEVADA; AND CCMSI,

16 Respondents.

Supreme Court No.: 71473

District Court Case No.: A730918

17 **RESPONDENT'S APPENDIX**
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1 **CERTIFICATE OF MAILING**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on
3 the 14th day of July 2017, service of the attached RESPONDENT'S
4 APPENDIX was made this date by depositing a true copy of the same for mailing,
5 first class mail, and/or electronic service as follows:

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7 KEMP & KEMP, ATTORNEYS AT LAW
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10 STATE OF NEVADA – DEPT. OF CORRECTIONS
11 ATTN: BARBARA LUNA
12 PO BOX 7011
13 CARSON CITY, NV 89702-7011

14 STATE OF NEVADA – RISK MGMT.
15 ATTN: ANA ANDREWS
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17 CARSON CITY, NV 89701-4790

18 CCMSI
19 ATTN: STACI JONES
20 PO BOX 4990
21 CARSON CITY, NV 89702
22 CLAIM NO.: **14C62E378732**

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28 
An employee of LEWIS, BRISBOIS,
BISGAARD & SMITH, LLP

1 0056
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DISTRICT COURT
CLARK COUNTY, NEVADA

ROBAIRE PREVOST,

Petitioner,

v.

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

Respondent.

CASE NO. : A-16-730918-J

DEPT NO. : IV

Hearing Date:

Hearing Time:

INTERESTED UNNAMED RESPONDENT'S SPECIAL APPEARANCE AND MOTION
TO DISMISS PETITION FOR JUDICIAL REVIEW

COMES NOW Interested Unnamed Respondent, CCMSI, by and through its attorneys of
record, DANIEL L. SCHWARTZ, ESQ., and LEWIS BRISBOIS BISGAARD & SMITH LLP, and
hereby enters this Special Appearance for the purpose of filing the instant Motion to Dismiss Petition
for Judicial Review.

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FILED 10/4/18
1812-8243-28141

1 This Motion is based upon all papers and pleadings on file herein; the memorandum of points
2 and authorities attached hereto; and any other further argument and evidence as may properly be
3 presented to the court at the hearing on this Motion.

4 Dated this 26 day of February, 2016.

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7  By

8 DANIEL L. SCHWARTZ, ESQ.

9 Nevada Bar No. 5125

10 2300 W. Sahara Ave. Ste. 300

11 Las Vegas, Nevada 89102

12 Attorneys for Interested Unnamed Respondent

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LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
2016 FEB 27 PM

1 NOTICE OF MOTION

2 PLEASE TAKE NOTICE that Interested Unnamed Respondent will bring its Motion to
3 Dismiss on for hearing on the ____ day of _____, 2016, at _____ a.m./p.m. in
4 Department IV of this Court, or as soon thereafter as counsel may be heard.

5 Dated this 26 day of February, 2016.

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

7
8 

9 Daniel L. Schwartz, Esq.
10 Nevada Bar No. 5125
11 2300 W. Sahara Ave. Ste. 300
12 Las Vegas, NV 89102
13 Attorney for Interested Unnamed Respondent

14 LEWIS
15 BRISBOIS
16 BISGAARD
17 & SMITH LLP
18 ATTORNEYS AT LAW

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF FACTS

4 Workers' compensation claimant ROBAIRE PREVOST (hereinafter "claimant") alleged that
5 atrial fibrillation, anxiety and high blood pressure were caused by the stress of his job as a correctional
6 officer for the Employer, STATE OF NEVADA - DEPARTMENT OF CORRECTIONS (hereinafter
7 "Employer"). Ultimately, Employer's Third Party Administrator, CCMSI (hereinafter
8 "Administrator") denied claimant's workers' compensation claim and he appealed that denial. On
9 April 14, 2015, a Hearing Officer affirmed the determination to deny the claim and the claimant
10 appealed. On January 4, 2016, the Appeals Officer also affirmed claim denial. See Decision and
11 Order, attached as **Exhibit A**.
12

13 Claimant filed a Petition for Judicial Review on January 27, 2016 but did not name all of the
14 parties to the proceedings below. Accordingly, Interested Unnamed Respondent hereby enters this
15 special appearance and moves this Court to dismiss the Petition for Judicial Review.
16

17 II.

18 LEGAL ARGUMENT

19 A. **CLAIMANT HAS FAILED TO COMPLY WITH PROCEDURAL**
20 **REQUIREMENTS.**

21 NRS 233B.130(2) provides the following:

22 2. Petitions for judicial review *must*:

23 (a) **Name as respondents the agency and all parties of record to the**
24 **administrative proceeding;**

24 (b) Be instituted by filing a petition in the district court in and for Carson City, in
25 and for the county in which the aggrieved party resides or in and for the county
26 where the agency proceeding occurred;

(c) Be filed within 30 days after service of the final decision of the agency.

27 (Emphasis added)

28 ...

1 The naming requirements are mandatory and jurisdictional. Washoe County v. Otto, 282 P.3d
2 719, 725 (2012). Since the Court has no authority to conduct judicial review in the absence of a statute,
3 "to invoke a district court's jurisdiction to consider a petition for judicial review, the petitioner must
4 strictly comply with the APA's procedural requirements." *Id.*

5 In the case at bar, the claimant failed to name the third-party administrator, CCMSI, which was
6 a party to the proceedings before the Appeals Officer. The failure to name all parties of record
7 prevented this Court from receiving the requisite record on appeal. Pursuant to the Otto case, this
8 jurisdictional defect cannot be cured after the time for filing a Petition for Judicial Review has run. The
9 Decision and Order is dated January 4, 2016, and the time to file a Petition ran on or about February 3,
10 2016. Claimant filed his defective Petition for Judicial Review on January 27, 2016. The time to
11 file/amend his Petition for Judicial Review has passed. The claimant cannot now correct those errors
12 which divested this Court of jurisdiction.

13
14
15 Secondly, the Petition for Judicial review is deficient under NRS 233B.130(2)(c). Effective
16 July 1, 2015, this law was amended to require that any Petition for Judicial Review be served upon the
17 Attorney General. Petitioner failed to do this as well.

18 Because of the significant procedural defects in Claimant's Petition, this Court must grant
19 Interested Unnamed Respondent's Motion to Dismiss.
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III.

CONCLUSION

Petitioner has failed to comply with statutory requirements in filing his Petition for Judicial Review. As a result, this Court lacks jurisdiction and must dismiss the Petition.

DATED this 26 day of February, 2016.

LEWIS BRISBOIS BISGAARD & SMITH LLP


By _____

Daniel L. Schwartz, Esq.
Nevada Bar No. 5125
2300 W. Sahara Ave. Ste. 300
Las Vegas, NV 89102
Attorney for Interested Unnamed Respondent

LEWIS
BRISBOIS
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ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that I did cause a true copy of **INTERESTED UNNAMED RESPONDENT'S SPECIAL APPEARANCE AND MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW** to be placed in the United States Mail, with first class postage prepaid to:

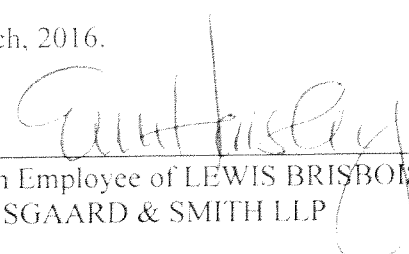
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CCMSI
Attn: Staci Jones
PO Box 4990
Carson City, NV 89702

DATED this 2nd day of March, 2016.


An Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

EXHIBIT

“A”

NEVADA DEPARTMENT OF ADMINISTRATION
BEFORE THE APPEALS OFFICER

FILED
JAN 05 2016
APPEALS OFFICE

In the Matter of the Contested
Industrial Insurance Claim

Claim No.: 14C62E378732

Hearing No.: 1509309-TH

of

Appeal No.: 1510563-GK

ROBAIRE PREVOST
1341 LUCIA DRIVE
LAS VEGAS, NV 89128,

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

Claimant.

DECISION AND ORDER

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

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

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

FINDINGS OF FACT

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

28

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

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

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

7 CONCLUSIONS OF LAW

8 1. It is the claimant, not the Employer, who has the burden of proving his case,
9 and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100
10 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div.,
11 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).
12

13 2. In attempting to prove his case, the claimant has the burden of going
14 beyond speculation and conjecture. That means that the claimant must establish the work
15 connection of his injuries, the causal relationship between the work-related injury and his
16 disability, the extent of his disability, and all facets of the claim by a preponderance of all of the
17 evidence. To prevail, a claimant must present and prove more evidence than an amount which
18 would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849
19 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774,
20 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, §80.33(a).
21

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

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

26 4. Claimant is pursuing a claim for an occupational disease. He submitted two
27 (2) Form C-4's. The first one was completed on July 29, 2014 for symptoms he felt while resting
28 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 
26 By _____
27 DANIEL L. SCHWARTZ, ESQ.
28 Nevada Bar No. 005125
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CERTIFICATE OF MAILING

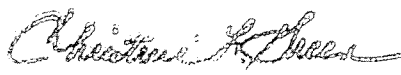
Pursuant to NRCP Rule 5(b), I hereby certify that, on the 6th day of January, 2016, I served a true and correct copy of the above and foregoing document entitled **DECISION AND ORDER** by depositing same in the United States Mail, with first-class postage fully prepaid thereon, and addressed as follows:

Robaire Prevost 1341 Lucia Drive Las Vegas, NV 89128	MAILED <input checked="" type="checkbox"/> HAND-DELIVERED <input checked="" 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 checked="" 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

U.S. DEPT. OF JUSTICE


An employee of the State of Nevada

18

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Interested Unnamed Respondent's Special Appearance and Motion to Dismiss Petition for Judicial Review:



Does not contain the Social Security number of any person.

- OR -



Contains the Social Security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law.)

- or -

B. For the administration of a public program or for an application for a federal or state grant.

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW


Daniel L. Schwartz, Esq.

Attorneys for Unnamed Respondent CCMSI

3/2/15
Date

1 **RPLY**
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*

11
12 **DISTRICT COURT**
13
14 **CLARK COUNTY, NEVADA**
15

16 ROBAIRE PREVOST,

17
18 Petitioner,

19
20 v.

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

24
25 Respondent.

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

Hearing Date: April 6, 2016
Hearing Time: 9:00 A.M.

26
27 **INTERESTED UNNAMED RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO**
28 **DISMISS PETITION FOR JUDICIAL REVIEW**

COMES NOW Interested Unnamed Respondent, CCMSI, by and through its attorneys of
record, DANIEL L. SCHWARTZ, ESQ., and LEWIS BRISBOIS BISGAARD & SMITH LLP, and
hereby enters this Reply In Support of Its Motion to Dismiss Petition for Judicial Review.

///

///

///

///

///

///

2d

REPLY

In his Opposition, Petitioner concedes that not naming CCMSI in the underlying Petition for Judicial review "is a jurisdictional defect." Though Petitioner has attempted to remedy the omission by filing an Amended Petition over one month after the deadline to file/amend, the jurisdictional defect that Petitioner has acknowledged is fatal to the instant appeal. Not only is NRS 233B.130(2) explicit and unambiguous on the subject, the Nevada Supreme Court has held that "the statutory time limit to appeal a worker's compensation claim is **mandatory and jurisdictional**." State Indus. Ins. Sys. v. Partlow - Hursh, 101 Nev. 122, 125 (1985)(emphasis added).

There is no further analysis to be done. It does not matter how long after the deadline that Petitioner has attempted to correct the defect. The date for naming all proper parties has passed. The underlying Petition is jurisdictionally barred. Interested Unnamed Respondent CCMSI's Motion to Dismiss must be granted.

CONCLUSION

Petitioner has failed to comply with statutory requirements in filing his Petition for Judicial Review. As a result, this Court lacks jurisdiction and must dismiss the Petition.

DATED this 21 day of March, 2016.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By

Daniel L. Schwartz, Esq.

Nevada Bar No. 5125

2300 W. Sahara Ave. Ste. 300

Las Vegas, NV 89102

Attorney for Interested Unnamed Respondent

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that I did cause a true copy of **INTERESTED UNNAMED RESPONDENT'S SPECIAL APPEARANCE AND MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW** to be placed in the United States Mail, with first class postage prepaid to:

Virginia Hunt, Esq.
3057 E. Warm Springs Road, Ste. 400
Las Vegas, NV 89120

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

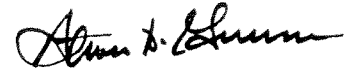
CCMSI
Attn: Staci Jones
PO Box 4990
Carson City, NV 89702

DATED this 21st day of March, 2016.


An Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

22



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 FOR LEAVE**
) **TO FILE SUPPLEMENTAL**
) **OPPOSITION TO MOTION TO DISMISS**

) Hearing Date: _____

) Hearing Time: _____

COMES NOW the Petitioner, by and through counsel, JAMES P. KEMP, ESQUIRE, and
moves that this Honorable Court grant him leave to file the attached proposed Supplemental
Opposition to Motion to Dismiss.(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
important arguments on his behalf;

- 1 2) That Petitioner's new counsel has recognized these important arguments, including the
2 unforeseen and unrecognized incompetence of Ms. Hunt due to terminal illness, and the
3 substantial compliance of the original Petition for Judicial Review with the requirements
4 of NRS 233B.130 to name all parties to the underlying administrative proceedings; and
5
6 3) The Respondents will suffer no prejudice by permitting the Supplemental Opposition or
7 any potential prejudice may be ameliorated by a continuance to permit the Respondents
8 to file a Supplemental Reply.

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

11 DATED 5/17/16

12 /s/ James P. Kemp
13 JAMES P. KEMP, ESQ.
14 Nevada Bar No. 6375
15 KEMP & KEMP, Attorneys at Law
16 7435 W. Azure Drive, Suite 110
17 Las Vegas, Nevada 89130
18 (702) 258-1183/fax 258-6983
19 jp@kemp-attorneys.com
20 Attorney for Petitioner.

21 **NOTICE OF MOTION**

22 TO THE DEFENDANT AND ITS COUNSEL OF RECORD:

23 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will
24 bring the above and foregoing Motion on for hearing before the Court, in the above referenced
25 Department of the Court, on the 29 day of JUNE, 2016, at 9:00A o'clock
26 _____M. or as soon thereafter as the Court may allow

27 DATED 5/17/16

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

Petitioner's new counsel has noted that there are two important arguments to make on Petitioner's behalf. First is that Ms. Hunt's unknown and unappreciated competence issues due to her illness, that the Petitioner had no knowledge or notice of, should not prevent Petitioner from being able to amend the caption of his Petition for Judicial Review to reflect all parties who are named in the body of and attachments to the Petition and such amendment should relate back to the date of the filing. Second, the Petition for Judicial Review in this case substantially complied with the requirement in NRS 233B.130 that all parties to the administrative proceeding be named as

parties in the Judicial Review proceeding. Respondent CCMSI was named in the body of the Petition through incorporation by reference of the administrative decision that was also attached as an exhibit. Further, CCMSI and its attorney in the administrative proceeding were both served with a copy of the Petition for Judicial Review. Therefore CCMSI was named as a party and served with the Petition for Judicial Review and the failure to include its name in the caption of the Petition was merely a “technical dereliction” that does not preclude the Petitioner’s right to review. *Civil Serv. Comm’n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002)¹

II. ARGUMENT

The District Court has inherent authority to manage and control the litigation including the ability to apply flexibility in the application of its own rules and orders. *Dornbach v. Tenth Jud. Dist. Ct.*, 324 P.3d 369, 373-74 (Nev. 2014). As is commonly done the court may permit supplemental briefing to cover matters that were not initially perceived as important issues. This case presents just such a situation. Ms. Hunt was unknowingly terminally ill at the time that she filed the Petition for Judicial Review. Both at that time and when she filed the Opposition in this matter she did not have all of her faculties about her. This impacted both the original filing of the Petition for Judicial Review and her Opposition to the Motion to Dismiss.

In this case, under the circumstances of Ms. Hunt’s illness and death, it would be equitable and proper for the court to permit the Petitioner and his new counsel to bring forth additional arguments that were not made by Ms. Hunt, apparently due to her terminal illness and its interference with her professional competence in the last two months of her life. The attached

¹ Petitioner is aware that in *Washoe County v. Otto*, 282 P.3d 719, 128 Nev. at n. 9 (2012) the Supreme Court of Nevada indicated that *Civil Serv. Comm’n* was overruled to the extent that it may have been read to mean that a total failure to name a party as required by NRS 233B.130 (2)(a) was considered a “technical dereliction” rather than a jurisdictional defect. However, the *Otto* case is factually 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 proposed Supplemental Opposition to the Motion to Dismiss (Ex. 1) should be permitted to be
2 filed by the Court. Supplemental briefing is commonly ordered by courts at initial hearings of
3 motions. The Petitioner is proactively bringing the need for supplemental briefing to the court's
4 attention ahead of time.

5 No prejudice will be visited on the Respondents in this matter. The Petitioner has no
6 objection to any necessary continuances for the Respondents to be able to file a Supplemental Reply
7 to the Supplemental Opposition. Therefore, the Petitioner respectfully requests that the court
8 permit this supplemental briefing. The Petitioner should not be prejudiced by his former counsel's
9 terminal illness and death which he had no knowledge or notice of until it was too late for him to
10 take any action.

11 As is set forth in the proposed Supplemental Opposition to the Motion to Dismiss (Ex. 1)
12 the court should be able to apply equitable principles of fairness to permit the amendment of the
13 caption in this case to reflect the names of all of the parties to the administrative proceeding who
14 were, in fact, named in the body of the Petition by incorporation by reference to the administrative
15 decision which was also attached as an exhibit to the Petition. The Petitioner, Mr. Prevost, had no
16 knowledge or notice that his attorney Ms. Hunt was gravely and terminally ill. Ms. Hunt did not
17 know that she was terminally ill at the time that she filed the Petition for Judicial Review and she did
18 not appreciate the impact that the illness was having on her competency to practice law. Under
19 these circumstances, Ms. Hunt having passed away leaving Mr. Prevost to pick up the pieces of this
20 case, it is inequitable not to permit amendment under the specific facts of this case. Respondent
21 CCMSI will suffer no prejudice as it will be able to fully participate in the matter, filing briefs and
22 making arguments in the case.

23 Further, the only infirmity in the original Petition for Judicial Review is that Respondent
24 CCMSI was left out of *the caption*. CCMSI was in fact named in the Petition through incorporation
25
26
27
28

1 by reference, and attachment as an exhibit, of the Appeals Officer' Decision and Order. Also,
2 CCMSI and its attorney were both timely served with the Petition for Judicial Review so they were
3 given proper notice. This satisfies the requirements of naming all parties under NRS 233B.130(2)(a).
4 The failure to include CCMSI in the caption was merely a "technical dereliction" that does not
5 preclude the Petitioner's right to review. *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42
6 P.3d 268 (2002)
7

8 These arguments are more fully set forth in the proposed Supplemental Opposition. The
9 court should, in fairness, permit the filing of the Supplemental Opposition, and consider these
10 arguments in the course of deciding the Motion to Dismiss.

11 III. CONCLUSION

12 Based upon the foregoing, the court should grant this Motion for Leave to File
13 Supplemental Opposition to Motion to Dismiss and direct that the attached proposed Supplemental
14 Opposition (Ex. 1) be filed forthwith and permit the Respondent any appropriate time to file a
15 Supplemental Reply if it so desires.
16

17
18 DATED 5/17/16

/s/ James P. Kemp
JAMES P. KEMP, ESQ.
Nevada Bar No. 6375
KEMP & KEMP, Attorneys at Law
7435 W. Azure Drive, Suite 110
Las Vegas, Nevada 89130
(702) 258-1183/fax 258-6983
jp@kemp-attorneys.com
Attorney for Plaintiff

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 17th day of May 2016.

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

EXHIBIT 1

EXHIBIT 1

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 SUPPLEMENTAL**
) **OPPOSITION TO MOTION TO DISMISS**

) Hearing Date: 6/8/2016

) Hearing Time: 9:00 a.m.

COMES NOW the Petitioner, by and through counsel, JAMES P. KEMP, ESQUIRE, and
moves that this Honorable Court deny the Respondent CCMSI's Motion to Dismiss. This motion is
brought on the following grounds:

- 1) Petitioner substantially complied with the naming requirements of NRS 233B.130(2)(a)
by naming the Respondents in the body of the Petition through incorporation by
reference of the administrative Decision and Order which named the Respondents and
which was also attached as an exhibit to the Petition for Judicial Review. Further,
Respondent CCMSI and its counsel were both served with the Petition for Judicial
Review and had actual notice of the Petition. The failure to include Respondent CCMSI
in the caption of the Petition for Judicial Review was a mere technical dereliction which

1 does not affect the court's jurisdiction and does not preclude the Petitioner's right to
2 review. *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002); *but see*
3 *Washoe County v. Otto*, 282 P.3d 719, 128 Nev. at n. 9 (2012) (*Civil Serv. Comm'n* overruled
4 to the extent that it may have been read to hold that a **total failure** to name a party
5 would amount to a mere technical dereliction where the petitioner there did not name
6 the specific taxpayers as respondents and did not include their names in the body of the
7 petition, in any attachment, and did not serve them with the petition.)
8

- 9 2) Petitioner should be permitted to amend the caption of his Petition for Judicial Review
10 to include in the caption the name of Respondent CCMSI which was inadvertently
11 omitted and such amendment should relate back to the original filing date under NRCP
12 Rule 15 (c). Under the specific facts of this case where the omission from the caption
13 appears to have been a product of his former counsel's lack of competence based upon
14 her terminal illness the Petitioner, in equity and good conscience, should be permitted to
15 amend. Petitioner had no knowledge of his counsel's terminal illness and its effect on
16 her competence and to prejudice him with dismissal under these circumstances is an
17 intolerable miscarriage of justice.
18

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

21 DATED _____

22 _____
23 JAMES P. KEMP, ESQ.
24 Nevada Bar No. 6375
25 KEMP & KEMP, Attorneys at Law
26 7435 W. Azure Drive, Suite 110
27 Las Vegas, Nevada 89130
28 (702) 258-1183/fax 258-6983
jp@kemp-attorneys.com
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 the failure of Ms. Hunt, on behalf of Petitioner, 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 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 abilities and her ability to competently practice law near the end of her life. Specifically, Ms. Hunt was experiencing cognitive difficulties which directly affected her written communication skills. (Id.) When Ms. Hunt would write things they would come out wrong, and as the disease progressed, would even come out garbled and nonsensical. (Id.) The Petitioner, Mr. Prevost, had no knowledge or notice that Ms. Hunt was ill and having trouble with her ability to represent him.

Petitioner's new counsel has noted that there are two important arguments to make on Petitioner's behalf. First is that Ms. Hunt's unknown and unappreciated competence issues due to her illness, that the Petitioner had no knowledge or notice of, should not in equity and good conscience prevent him from being able to amend the caption of his Petition for Judicial Review to

1 reflect all parties who are named in the body and attachments of and to the Petition and such
2 amendment should relate back to the date of the filing. Second, the Petition for Judicial Review in
3 this case substantially complied with the requirement in NRS 233B.130 that all parties to the
4 administrative proceeding be named as parties in the Judicial Review proceeding. Respondent
5 CCMSI was named in the body of the Petition through incorporation by reference of the
6 administrative decision that was also attached as an exhibit. Further, CCMSI and its attorney in the
7 administrative proceeding were both served with a copy of the Petition for Judicial Review.
8 Therefore CCMSI was named as a party and served with the Petition for Judicial Review and the
9 failure to include its name in the caption of the Petition was merely a "technical dereliction" that
10 does not preclude the Petitioner's right to review. *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-
11 90, 42 P.3d 268 (2002)¹

12 13 II. ARGUMENT

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

19
20 Further, the Petition for Judicial Review as filed in this case substantially complied with NRS
21 233B.130(2)(a) in that the Petition named Respondent CCMSI in the body of the Petition through
22 the incorporation by reference of the Appeals Officer's Decision and Order which was also attached

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 to the Petition and made a part thereof. The Petition was served on CCMSI and its attorney giving
2 proper notice. The mere failure to include the name of CCMSI in the caption of the Petition is a
3 mere "technical dereliction" that should not result in dismissal of the judicial review action.

4 **A. THE COURT SHOULD INVOKE ITS EQUITABLE POWERS TO PERMIT**
5 **AMENDMENT TO THE CAPTION OF THE PETITION FOR JUDICIAL**
6 **REVIEW.**

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

13 The Supreme Court of Nevada has recognized the equitable power of the court to permit
14 amendment after a statute of limitations has expired "where the true defendant, although unnamed,
15 had actual knowledge of the institution of the action, knew that it was the proper defendant, and
16 was not in any way misled to its prejudice." *Bender v. Clark Equip. Co.*, 111 Nev. 844, 846, 897 P.2d
17 208 (1995) *citing and quoting* *Nurenberger Hercules-Werke v. Virostek*, 107 Nev. 873, 878, 822 P.2d 1100,
18 1104 (1991) Such is the case here where CCMSI was actually identified as a party in the
19 administrative decision that was incorporated by reference in the Petition as well as attached to the
20 Petition. CCMSI and its attorney were served with the Petition and certainly knew that it was a
21 proper respondent to the Petition. It was not misled in any way to its prejudice. The only infirmity
22 is the failure to list CCMSI in the caption. Dismissal under these facts would seem to be a very
23 harsh and inequitable result. Ms. Hunt was experiencing symptoms of her illness which included
24 cognitive deficits that affected her writing (See Declaration of Jason Mills, Esq. attached). This
25 disability, that was not perceived and had not been diagnosed at the time that the Petition was filed,
26
27
28

appears to have caused the mistake in failing to put CCMSI in the caption of the Petition. This is a mere technical dereliction that should not result in dismissal of the Petition which would prevent Mr. Prevost from having his case adjudicated on its merits. Determination on the merits is the overriding preference of the courts of this state. *Hansen v. Universal Health Servs*, 112 Nev. 1245, 1247-1248, 924 P.2d 1345 (1996) In *Hansen*, the Supreme Court of Nevada refused to dismiss an appeal that had been affected by the inexcusable neglect of the appellant's attorney rather than the conduct of the appellant himself. It was seen as inequitable to deny the appellant a decision on the merits in that case based upon the mistake or misconduct of his attorney (who was issued monetary sanctions instead of dismissal). The same is the case here. It is simply insufferable to dismiss this appeal against Mr. Prevost because of the extremely technical error of his dying attorney. The failure to list CCMSI in the caption should not result in dismissal. Amendment should be permitted and the amendment should relate back to the date of filing. See NRCP Rule 10(a) and Rule 15(c). The Motion to Dismiss should be denied.

B. WASHOE COUNTY v OTTO IS FACTUALLY DISTINGUISHABLE FROM THIS CASE.

Washoe County v. Otto, 128 Nev. Adv. Op. No. 40, 282 P.3d 719 (2012), is distinguishable from the facts here because in *Otto*, the respondent taxpayers were not identified by name in the caption or body of the petition for judicial review or in an attached exhibit to the petition. *Id.* at 723. Here, by attaching the Appeals Officer's order to the Petition for Judicial Review, the Petitioner clearly identified the proper parties to the Judicial Review proceedings. This is sufficient to meet the requirements of NRS 233B.130(2)(a), which requires that "the agency and all parties of record to the administrative proceeding" be named as respondents, but does not specifically require that the parties be named in the caption to the Petition. See *Cooksey v. Cargill Meat Solutions Corp.*, 831 N.W.2d 94, 103-04 (Iowa 2013) (concluding that in evaluating the statutory naming requirement, "the contents of a petition seeking review of an administrative action should be evaluated in its entirety"

1 and that identifying the respondents in the body of the petition and serving respondents with notice
2 satisfies the requirement). The Petitioner here served the Petition on Respondent CCMSI and,
3 although Petitioner also did not expressly name the Respondent CCMSI in the body of the Petition,
4 the Appeals Officer's Decision and Order that identified the parties to the administrative
5 proceeding, attached as an exhibit, is incorporated by reference into the body and made a part of the
6 Petition. *See Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980) (concluding that
7 naming the employer in an exhibit attached to a petition for judicial review meets the statutory
8 naming requirement); *cf.* NRCP 10(c) (“(c) **Adoption by Reference; Exhibits.** Statements in a
9 pleading may be adopted by reference in a different part of the same pleading or in another pleading
10 or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part
11 thereof for all purposes.). *Otto* is simply not factually the same as this case. In *Otto* the Petitioner
12 Washoe County did not name the taxpayers who were parties to the administrative action AT ALL.
13 Not in the body and not in any attachment incorporated by reference. Washoe County was even
14 given an opportunity to amend, a list of the appropriate parties was available to it to attach as an
15 exhibit, and it still failed to identify the taxpayer parties by name in ANY PART or in ANY
16 FASHION in its petition and it failed to serve them with the petition or the amended petition. The
17 Supreme Court was astounded by this failure to name the parties even after being afforded the
18 opportunity to amend and the failure to serve them with the petition. *Otto* is factually
19 distinguishable because the Petitioner here incorporated the identity of Respondent CCMSI into the
20 body of the Petition as well as attaching the Appeals Officer's Decision and Order as an exhibit
21 which is part of the Petition for all purposes under NRCP Rule 10(c). The only thing that is missing
22 is the name in the caption and that should be ruled a technical dereliction rather than a grave
23 jurisdictional defect under *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002).
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27
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KEMP & KEMP
ATTORNEYS AT LAW
7435 W. Azure Drive, Suite 110
LAS VEGAS, NEVADA 89130
Tel. (702) 258-1183 • Fax (702) 258-6983

1 Based upon the substantial compliance with NRS 233B.130(2)(a) in the naming of CCMSI,
2 that fact that it was served with the Petition and had notice of it, the lack of prejudice to CCMSI,
3 and the mere technical dereliction in failing to list CCMSI in the caption, the court should deny the
4 Motion to Dismiss and set a briefing schedule in this matter.
5

6
7 III. CONCLUSION

8 Based upon the foregoing, the court should deny the Motion to Dismiss. It would be
9 inequitable to not permit amendment of the caption and the Petitioner's Petition for Judicial Review
10 substantially complied with the requirements of NRS 233B.130(2)(a).
11

12 DATED _____

13 _____
14 JAMES P. KEMP, ESQ.
15 Nevada Bar No. 6375
16 KEMP & KEMP, Attorneys at Law
17 7435 W. Azure Drive, Suite 110
18 Las Vegas, Nevada 89130
19 (702) 258-1183/fax 258-6983
20 jp@kemp-attorneys.com
21 Attorney for Plaintiff
22
23
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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 _____

JAMES P. KEMP, ESQ.

AFFIDAVIT OF JASON D. MILLS

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

JASON D. MILLS being first duly sworn upon oath deposes, states, and affirms:

1. That, under penalty of perjury, I am personally aware and have knowledge of all matters set-forth herein, and I know them to be true except those matters which are stated upon information and my belief which are stated to the best of my knowledge and I believe them to be true.
2. That I am an attorney who at all times mentioned herein is duly licensed to practice law in the State of Nevada, County of Clark; Nevada Bar Number 007447.
3. That I am a managing member of the law firm Neeman & Mills, PLLC, and have been so since its formation in January 2001.
4. That my professional contact information is Neeman & Mills, PLLC, c/o Jason D. Mills, Esq., 1201 S. Maryland Pkwy, Las Vegas, NV 89104, (702) 822-4444.
5. That I practice primarily in the field of claimant's workers' compensation law.
6. That I was a professional colleague of deceased attorney Virginia L. Hunt, Esq.
7. On March 2, 2016 I received a text message from Ms. Hunt's cell phone number that was garbled and didn't make complete sense to me. I attempted a clarification text back to Ms. Hunt but she did not respond.
8. On March 8, 2016 Ms. Hunt and I spoke for a few minutes via telephone wherein she confided in me that she had cancer was professionally worried about her writing work product. Specifically, she said what she was thinking and what she was writing were often not the same thing. She said that she would like to meet with me and some other workers' compensation attorney colleagues whom she trusted to discuss these issues

1 and more.

2 9. On Saturday, March 12, 2016, along with Ms. Hunt's brother Geoffrey Hunt,
3 members of her staff, and two other workers' compensation attorneys I did meet with
4 Ms. Hunt at her office to discuss her condition and to discuss the management of her
5 existing workers' compensation case load.
6

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

11 11. Ms. Hunt further disclosed to some of us at the meeting that it was important that she
12 have a select group of attorneys review her work product because she was worried
13 that her legal writing and work product was adversely impacted by the cancer she was
14 suffering from.
15


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

18 13. FURTHER YOUR AFFIANT SAYETH NAUGHT.

19 DATED this 17 of May 2017

20 
21 JASON D. MILLS, ESQ.
22

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

25 
26 NOTARY PUBLIC
27 In and for said county and State
28

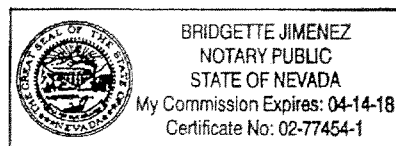


EXHIBIT 2

EXHIBIT 2

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STATE OF NEVADA)
) ss
COUNTY OF CLARK)

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14 suffering from.
15

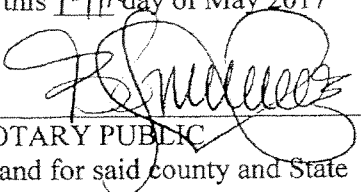
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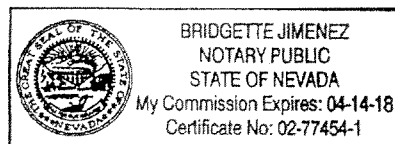
18 13. FURTHER YOUR AFFIANT SAYETH NAUGHT.

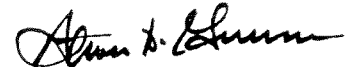
19 DATED this 17 of May 2017

20 
21 JASON D. MILLS, ESQ.
22

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

25 
26 NOTARY PUBLIC
27 In and for said county and State
28





CLERK OF THE COURT

1 **OPP**
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*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 ROBAIRE PREVOST,

11 Petitioner,

12 v.

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

16 Respondent.

CASE NO. : A-16-730918-J

DEPT NO. : IV

Hearing Date: **June 29, 2016**

Hearing Time: **9:00 A.M.**

17 **INTERESTED UNNAMED RESPONDENT'S OPPOSITION TO PETITIONER'S**
18 **MOTION FOR LEAVE TO FILE SUPPLEMENTAL OPPOSITION TO MOTION TO**
19 **DISMISS**

20 COMES NOW Interested Unnamed Respondent, CCMSI, by and through its attorneys of
21 record, DANIEL L. SCHWARTZ, ESQ., and LEWIS BRISBOIS BISGGARD & SMITH LLP, and
22 hereby enters this Opposition to Petitioner's Motion for Leave to File Supplemental Opposition to
23 Motion to Dismiss.

24 ///

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26 ///

27

28

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

1 This Opposition is based upon all papers and pleadings on file herein; the memorandum of
2 points and authorities attached hereto; and any other further argument and evidence as may properly
3 be presented to the court at the hearing on Petitioner's Motion.

4 Dated this 25 day of May, 2016.

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7 By

8 DANIEL L. SCHWARTZ, ESQ.

9 Nevada Bar No. 5125

10 2300 W. Sahara Ave. Ste. 300

11 Las Vegas, Nevada 89102

12 Attorneys for Interested Unnamed Respondent

13
14 LEWIS
15 BRISBOIS
16 BISGAARD
17 & SMITH LLP
18 ATTORNEYS AT LAW

OPPOSITION

Petitioner's Motion has provided no legal support for allowing a Supplemental Opposition. The only argument that Petitioner's new counsel has made is that Petitioner should get a second chance to brief this case because Petitioner's prior counsel has unfortunately passed away. Though the passing of Petitioner's prior counsel is truly tragic, that in and of itself does not warrant supplemental briefing on this case. Further, the arguments of Petitioner's new counsel would be more properly heard in a legal malpractice setting after the resolution of the instant case.

As a preliminary matter, it should be noted that Petitioner's new counsel has gone to great lengths in attempting to establish that Petitioner's prior counsel was incompetent at the time that she filed both the subject Petition for Judicial Review and Opposition to Unnamed Respondent's Motion to Dismiss. Further, Petitioner's new counsel has also attempted to shoehorn new arguments into this case regarding why he believes Unnamed Respondent's Motion to Dismiss should be denied. However, the scope of the instant motion is limited to whether Petitioner is even allowed to brief those arguments. As such, the hearing on Petitioner's instant Motion should be confined accordingly.

A. Allowing Supplemental Briefing Would Not Change The Outcome Of This Case

Petitioner has cited Dornbach v. Tenth Judicial Dist. Court of Nev., 324 P.3d 369 (Nev. 2014) for the proposition that supplemental briefing should be allowed because "the District Court has inherent authority to manage and control litigation including the ability to apply flexibility in the application of its own rules and orders." However, as noted in Unnamed Respondent's underlying Motion to Dismiss, the naming requirements of NRS 233B.130(2) are *mandatory* and jurisdictional. Washoe County v. Otto, 282 P.3d 719, 725 (2012). There is no argument that Petitioner can make which remedies the naming defect in the subject Petition. There is no flexibility provided in either NRS 233B.130 or Otto. Allowing any supplemental briefing would not change the outcome in this case and would only serve to unnecessarily consume further judicial resources.

B. The Competence of Petitioner's Prior Counsel Is Immaterial

Without entering into a discussion on whether or not Ms. Hunt was competent at the time she filed the Petition and Opposition in question, put simply, Ms. Hunt's competence should not be the subject of inquiry before this court. By Mr. Kemp's logic, every single legal document filed by Ms. Hunt in the last months of her life is fair game to dispute based on competence. Every disputed document would need a competency hearing before resolution of the case, posthumously subjecting Ms. Hunt to the scrutiny of every single fact finder she was in front of at the end of her career.

Quite frankly, it is offensive to the profession that Mr. Kemp believes that by virtue of Ms. Hunt's illness and passing prior to resolution of the issue at hand, Mr. Kemp should now be allowed to cherry pick issues which he believes can be resolved favorably by claiming Ms. Hunt was incompetent.

The proper venue for the discussion of whether or not prior counsel was competent is in legal malpractice. In essence, Mr. Kemp is alleging that Petitioner will suffer and is suffering harm because Ms. Hunt first failed to properly caption the Petition and then failed to make certain arguments about why the first failure should be excused. Mr. Kemp is making a textbook argument for malpractice.¹ Such a discussion has no place in a hearing on whether this Court has jurisdiction over an appeal.

If Mr. Kemp wishes to take over for Ms. Hunt on the instant case, Mr. Kemp should be held to the briefing that is already on record. Then, after a verdict is rendered on the underlying Motion, if Petitioner believes that he could have obtained a more favorable outcome if the case was handled better, Petitioner can bring a malpractice lawsuit against Ms. Hunt's estate. This is precisely the scenario which supports maintenance of malpractice insurance.

¹ Under Nevada law, to establish a claim of legal malpractice, a plaintiff must demonstrate the following: " 1 the existence of an attorney-client relationship, 2 a duty owed to the client by the attorney, 3 breach of that duty, and 4 the breach [is the actual and] proximate cause of the client's damages." Kahn v. Morse & Mowbray, 121 Nev. 464, 477 n.16 (2005)(citations excluded)

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CONCLUSION

Petitioner has failed to justify any supplemental briefing on the instant case. Petitioner's Motion for Leave to File Supplemental Opposition to Motion to Dismiss should be denied.

DATED this 25 day of May, 2016.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By


Daniel L. Schwartz, Esq.

Nevada Bar No. 5125

2300 W. Sahara Ave. Ste. 300

Las Vegas, NV 89102

Attorney for Interested Unnamed Respondent

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that I did cause a true copy of **INTERESTED UNNAMED RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS** 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

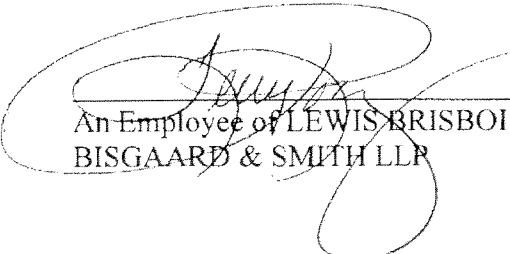
Appeals Officer Gregory A. Krohn
2200 S Rancho Drive, Suite 220
Las Vegas, NV 89102
Appeal No.: 1510563-GK

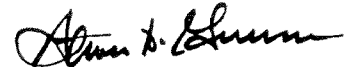
State of Nevada – Dept. of Corrections
Attn: Barbara Luna
PO Box 7011
Carson City, NV 89702-7011

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 25 day of May, 2016.


An Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP



CLERK OF THE COURT

1 **OPP**
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*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 ROBAIRE PREVOST,

11 Petitioner,

12 v.

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

16 Respondent.

CASE NO. : A-16-730918-J

DEPT NO. : IV

Hearing Date: **August 17, 2016**

Hearing Time: **9:00 A.M.**

17 **INTERESTED UNNAMED RESPONDENT'S OPPOSITION TO PETITIONER'S**
18 **MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS AND FOR**
19 **REHEARING PURSUANT TO NRCP RULE 60(b) AND EDCR 2.24**

20 COMES NOW Interested Unnamed Respondent, CCMSI, by and through its attorneys of
21 record, DANIEL L. SCHWARTZ, ESQ., and LEWIS BRISBOIS BISGGARD & SMITH LLP, and
22 hereby enters this Opposition to Petitioner's Motion To Reconsider Order Granting Motion To
23 Dismiss And For Rehearing Pursuant To NRCP Rule 60(b) and EDCR 2.24.

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1 This Opposition is based upon all papers and pleadings on file herein; the memorandum of
2 points and authorities attached hereto; and any other further argument and evidence as may properly
3 be presented to the court at the hearing on Petitioner's Motion.

4 Dated this 17 day of July, 2016.

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7 By

8 DANIEL E. SCHWARTZ, ESQ.

9 Nevada Bar No. 5125

10 2300 W. Sahara Ave. Ste. 300

11 Las Vegas, Nevada 89102

12 Attorneys for Interested Unnamed Respondent

13
14 LEWIS
15 BRISBOIS
16 BISGAARD
17 & SMITH LLP
18 ATTORNEYS AT LAW

OPPOSITION

Other than spurious legal arguments, Petitioner's new counsel has provided nothing new for this Court to consider regarding the already decided Motion to Dismiss. There is absolutely no reason to revisit this case. Petitioner's Petition for Judicial Review was properly dismissed. Further, as Petitioner has made almost verbatim arguments from his original Motion for Supplemental Briefing, Respondents hereby incorporate all argument and citations contained in their Opposition to Petitioner's Motion for Supplemental Briefing.

A. NRCP 60(b) and EDCR Rule 2.24

Petitioner's new counsel cites to NRCP 60(b) and EDCR 2.24 for the proposition that his matter should be reheard. However, in support of his request for rehearing, counsel merely reiterates his argument from his underlying Motion to Supplement, i.e. that Petitioner's prior counsel was ill when she filed the Petition and that, in new counsel's opinion, the Petition "substantially complied" with NRS 233B.130(2)(a). The court has already ruled on these arguments and found them lacking. Simply restating faulty arguments does not amount to "mistake, inadvertence, surprise, or excusable neglect." In fact, though counsel has explicitly cited to the "mistake, inadvertence, surprise, or excusable neglect" portion of NRCP60(b), he has not explained how this section applies to the instant case.

B. Equity

The only allusion to a new argument that counsel attempts to make is alleging that this Court "has the equitable power to permit the amendment of the caption to the Petition for Judicial Review" but makes no citation to any support for such a claim. The reason that counsel does not have a citation for this proposition is because it is contrary to Nevada law. The instant case involves an appeal of an administrative decision.

1 On that subject, the court explained in Washoe Cty. v. Otto, 282 P.3d 719, 724 (Nev. 2012):

2 Generally, "[c]ourts have no inherent appellate jurisdiction over official
3 acts of administrative agencies except where the legislature has made
4 some statutory provision for judicial review." Crane v. Continental
5 Telephone, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Thus,
6 "[w]hen the legislature creates a specific procedure for review of
7 administrative agency decisions, such procedure is controlling." Id.; see
8 also Fitzpatrick v. State, Dep't of Commerce, 107 Nev. 486, 488, 813
9 P.2d 1004, 1005 (1991) (applying this reasoning to the APA); 73A
C.J.S. Public Administrative Law and Procedure § 338 (2004) ("Since
jurisdiction is dependent on statutory provisions, the extent of the
jurisdiction is limited to that conferred by statute, and courts may lack
jurisdiction under, or in the absence of, statutory provisions."

10 As such, regarding administrative decisions, this court only has jurisdiction over matters
11 specifically regulated by statute. There is no equity. It is strict statutory interpretation. In this case, the
12 statute is NRS 233B.130 which requires specific parties to be named in a Petition for Judicial Review.
13 If the proper parties are not named, the statute is not satisfied, and this Court has no jurisdiction to
14 hear the Petition. NRS 233B.130(6) even clearly states that "[t]he provisions of this chapter are the
15 exclusive means of judicial review." There is no provision for equity. Respectfully, this Court does
16 not have the authority to grant the relief that Petitioner is requesting.

17 Petitioner's new counsel cites to several cases dealing with when the exercise of equity is
18 appropriate. However, all cases cited by Petitioner deal with civil lawsuits and do not control in the
19 instant matter.
20

21 **C. Washoe County v. Otto**

22 Despite already briefing this issue, Petitioner's new counsel felt the need to re-brief Otto, this
23 time including a citation to a case that Otto overruled. Petitioner's new counsel already argued, and
24 lost, that the Petition for Judicial Review substantially complied with NRS 233B.130. However,
25 substantial compliance is not the standard. Otto clearly states that "[n]othing in the language of [NRS
26 233B.130] suggests that its requirements are anything but mandatory and jurisdictional."
27 Otto, 282 P.3d at 725.
28

Petitioner attempts to distinguish Otto based on the fact that the Petition in Otto did not include any reference to certain necessary parties, whereas Petitioner's Petition has references to proper parties in an Exhibit. Though this may be true, the holding in Otto is not fact specific, nor does this factual difference even matter. The Supreme Court of Nevada clearly indicated that its holding was based on general principles of statutory interpretation:

When interpreting a statute, we first look to its language, and when the language used has a certain and clear meaning, we will not look beyond it. NRS 233B.130(2) states that petitions for judicial review "must" name all parties of record. The word "must" generally imposes a mandatory requirement. Further, this court has previously held that the "[f]iling requirements [paragraph (c) of NRS 233B.130(2)] are mandatory and jurisdictional." Given that the word "must" applies to both the filing requirement of NRS 233B.130(2)(c) and the naming requirement of NRS 233B.130(2)(a), we see no reason to treat the naming requirement any differently. We thus conclude that, pursuant to NRS 233B.130(2)(a), **it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement.**

Id. (internal citations omitted)(emphasis added)

Otto is clear and NRS 233B.130 is clear; Petitions for Judicial Review of administrative decisions **must** name all parties of record. There is no equity to add names beyond the statutory deadline. There is no provision allowing an Exhibit to function as an addendum to the caption. There is no provision for "substantial compliance." Though it may be harsh, both the legislature and judiciary have spoken to this issue and determined that dismissal is appropriate when a Petitioner has failed to comply with NRS 233B.130.

As a final note, incredibly, even after noting that it had been overruled, Petitioner has cited to Civil Service Commission v. District Court, for the proposition that Petitioner's failure to properly name all parties was a "technical dereliction" and should therefore be excused. 118 Nev. 186, 42 P.3d 268 (2002). The Court in Otto unambiguously held that "in Civil Service Commission v. District Court, we noted that 'technical derelictions do not generally preclude a party's right to review.' To the

1 extent that Civil Service Commission holds that a petition for judicial review that fails to comply with
2 the NRS 233B.130(2)(a) naming requirement may nonetheless invoke the district court's jurisdiction,
3 however, it is overruled." Otto, 282 P.3d at 725 n.9. Petitioner's citation to Civil Service Commission
4 is reckless and borderline malpractice given its status as overruled.

5
6 **CONCLUSION**

7 Petitioner has failed to justify a rehearing on the instant case. There is no new evidence, no
8 showing of mistake, inadvertence, surprise, or excusable neglect, and no new argument other than the
9 inclusion of an overruled case. Petitioner's Motion To Reconsider Order Granting Motion To Dismiss
10 And For Rehearing Pursuant To NRCP Rule 60(b) and EDCR 2.24 should be denied.

11 DATED this 19 day of July, 2016.

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13
14 By _____

Daniel L. Schwartz, Esq.

Nevada Bar No. 5125

2300 W. Sahara Ave. Ste. 300

Las Vegas, NV 89102

Attorney for Interested Unnamed Respondent

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Interested Unnamed Respondent's Special Appearance and Motion to Dismiss Petition for Judicial Review:

☒ Does not contain the Social Security number of any person.

- OR -

☐ Contains the Social Security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law.)

- or -

B. For the administration of a public program or for an application for a federal or state grant.

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

Daniel L. Schwartz, Esq.
Attorneys for Unnamed Respondent CCMSI

Date

7/19/15

57

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that I did cause a true copy of **INTERESTED UNNAMED RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS AND FOR REHEARING PURSUANT TO NRCP RULE 60(b) AND EDCR 2.24** 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

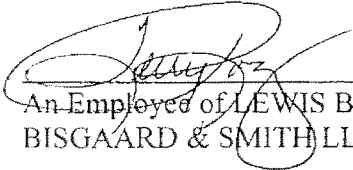
Appeals Officer Gregory A. Krohn
2200 S Rancho Drive, Suite 220
Las Vegas, NV 89102
Appeal No.: 1510563-GK

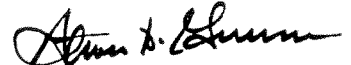
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CCMSI
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Claim No.: 14C62E378732

DATED this 19th day of July, 2016.


An Employee of LEWIS BRISBOIS
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CLERK OF THE COURT

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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 REPLY TO OPPOSITION**
) **TO MOTION TO RECONSIDER ORDER**
) **GRANTING MOTION TO DISMISS AND**
) **FOR REHEARING PURSUANT TO NRCP**
) **RULE 60(b) AND EDCR 2.24**

) Hearing Date: 8/17/16

) Hearing Time: 9:00 A.M.

COMES NOW the Petitioner, by and through counsel, JAMES P. KEMP, ESQUIRE, and
hereby Replies to Respondent CCMSI's Opposition to Petitioner's Motion to Reconsider. This
reply is brought on the following grounds:

- 1) That the court vacated as moot the Petitioner's motion seeking leave to file a
supplemental opposition without hearing or considering the merits of the argument,
thus, the court has never actually ruled on the merits;
- 2) That the Petition for Judicial Review did substantially comply with NRS 233B.130(2)(a)
because it did "name" the Respondent CCMSI as a party within the Petition and CCMSI
was served with the Petition just like all other parties. There is a specific and discreet
legal question as to what it means to actually "name" a party and the persuasive authority

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1 cited by the Petitioner holds that so long as a party's "name" appears in the Petition in a
2 manner showing the person or entity to be a party to the proceeding below, then that
3 party has been "named" for purposes of NRS 233B.130(2)(a). The statute in no way
4 specifies the manner by which a party must be "named" and, thus, the statute is silent
5 and ambiguous on the point. Rules of statutory construction permit the court to
6 construe the identification of a party within the filed Petition as "named" for purposes
7 of the statute. What *Washoe County v. Otto* actually says is "Thus, when a petitioner fails
8 to name in its petition each party of record to the underlying administrative
9 proceedings, the petition is jurisdictionally defective and must be dismissed." 128
10 Nev.Adv.Opn. 40 at 1 (August 8, 2012) (Emphasis added) The case DOES NOT
11 actually say that the party must be named in the *caption*, only in the *petition*. Also at 7-8 of
12 the *Otto* opinion: "We thus conclude that, pursuant to NRS 233B.130(2)(a), it is
13 mandatory to name all parties of record in a petition for judicial review of an
14 administrative decision, and a district court lacks jurisdiction to consider a petition that
15 fails to comply with this requirement." (Emphasis added) Nowhere in *Otto* or in the
16 language of the statute is there a mandate that the party must be named in the caption as
17 opposed to in some other part of the Petition.
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20 This Reply is brought based upon the papers and pleadings on file herein, the attached
21 Points and Authorities, and such oral argument as the court may allow at the hearing of the matter.

22 DATED 8/10/16

23 /s/ James P. Kemp
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2 **POINTS AND AUTHORITIES**

3 I. REPLY ARGUMENT

4 **A. THE MERITS OF PETITIONER'S ARGUMENTS REGARDING THE**
5 **FACTUAL AND LEGAL DISTINCTIONS BETWEEN THIS CASE AND**
6 **WASHOE COUNTY v. OTTO HAVE NOT YET BEEN ADDRESSED.**

7 In its Opposition Respondent CCMSI contends, with respect to the arguments made in
8 Petitioner's Motion to File Supplemental Opposition, that "The court has already ruled on these
9 arguments and found them lacking." (Opps. at 3:15; *see also* 4:22-25) That is incorrect. The court
10 denied the Motion to File Supplemental Opposition on the grounds that it was moot because of the
11 decision to dismiss. The court did not reach the merits and when the undersigned had his staff
12 contact the court about the hearing on the Motion to File Supplemental Opposition the court's staff
13 informed that the hearing was being vacated, the motion denied as moot, and that the proper
14 procedure would be to file a motion seeking reconsideration. That is why this motion has been filed
15 as Petitioner wishes to have his legal arguments addressed by the court on the merits.

16
17 The mistake involved in this matter is the fact that Respondent CCMSI was named in the
18 Petition in the body and the incorporation of the attached Appeals Officer decision. The failure to
19 include CCMSI in the caption is not, as a matter of law, grounds to dismiss the Petition for Judicial
20 Review. That is the type of technical dereliction that should not generally result in dismissal under
21 *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002). That case was overruled in
22 *Washoe County v. Otto*, 128 Nev. Adv. Op. No. 40, 282 P.3d 719 (2012) only to the extent that the
23 Supreme Court of Nevada held that the total failure to name a party in the petition was a
24 jurisdictional defect.¹ Specifically, the Supreme Court said, "Thus, when a petitioner fails to name
25 in its petition each party of record to the underlying administrative proceedings, the petition is

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27 ¹ The case and its "technical derelictions" rule was not entirely overruled in
28 *Otto* as Respondent CCMSI argues in its Opposition at 5:23-6:4

jurisdictionally defective and must be dismissed.” 128 Nev.Adv.Opn. 40 at 1 (August 8, 2012) (Emphasis added) The case DOES NOT actually say that the party must be named in the *caption*, only in the *petition*. Also at 7-8 of the *Otto* opinion: “We thus conclude that, pursuant to NRS 233B.130(2)(a), it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement.” (Emphasis added) Nowhere in *Otto* or in the language of the statute is there a mandate that the party must be named in the caption as opposed to in some other part of the Petition. Therefore, to dismiss this case where CCMSI was named in the Petition, but not the caption, was a mistake. It was a mere technical dereliction that can be easily amended without offending the requirements of NRS 233B.130(2)(a) or causing any prejudice to any party.

B. EQUITY.

Respondent CCMSI claims that the court has no equitable powers in this matter. Respondent faults the Petitioner for not having any specific case citations that pertain to the precise issue here, whether or not equity can be applied to permit the amendment of the caption of the Petition for Judicial Review where Respondent CCMSI is otherwise named in the body and the incorporated attachments to the Petition. This is a case of first impression. There is no specific binding authority on the issue one way or the other. The Petitioner did provide citations in the Motion to cases where analogously amendments have been equitably granted.

Respondent CCMSI likewise cites no binding authority that eliminates or restricts the court’s equitable powers to permit amendment to the caption. Respondent’s citation to the statutory language of NRS 233B.130 and the *Otto* case is not dispositive of the issue. When the facts are that the Petition names Respondent CCMSI in the body and incorporated attachment, and served CCMSI and its attorney with the Petition, there is a legal question of whether or not dismissal is required or if the caption can be amended to reflect the content of the Petition. That is the specific

1 legal question here and it is an issue of first impression as there is no authority to be cited addressing
2 the issue.

3 As noted in the Motion, the *Otto* case is distinguishable on its facts. In that case Washoe
4 County utterly failed to name all of the affected taxpayer parties including Mr. Otto. In fact the
5 County apparently refused to name the taxpayers when it was given leave to amend by the District
6 Court. The County had a list of all of the affected taxpayers that it could have attached to its petition
7 and it did not do so.² That is completely different from Mr. Prevost's case here where Respondent
8 CCMSI is named in the body of the Petition through incorporation of an attachment. This is a
9 question of statutory construction and law that is impacted by considerations of equity. What was
10 the intent of the legislature in enacting NRS 233B.130(2)(a)? Was it to make sure that all parties
11 were included, served, and had a chance to participate in the judicial review? Or was it to set a trap
12 to harshly throw injured employees out of court on a technicality? A plain reading of the statute and
13 the inference to be drawn from the language of the provision is that the legislature merely wanted to
14 make sure that parties to the administrative action were given notice and an opportunity to
15 participate as a party. In *Otto*, the taxpayer parties were not given that opportunity. In this case
16 CCMSI was and is. This Motion should be granted, dismissal vacated, and Petitioner given leave to
17 amend the caption of the Petition.
18
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21 ² From *Otto* at page 5 [prior to ultimately dismissing] "Although the district
22 court denied the motion to dismiss, it ordered Washoe County to name all of
23 the affected taxpayers and serve them within 30 days, noting that Exhibit A
24 attached to the State Board's decision included a list of taxpayers affected
25 by the decision." Washoe County failed to attach the Exhibit A list. The
26 Supreme Court decision implies that if that list had been included in the body
27 or an attachment the District Court could have denied dismissal: "In February
28 2010, Washoe County filed its amended petition and recharacterized the
respondent parties as "Certain Taxpayers" instead of "Certain Taxpayers
(Unidentified)." Relying on NRCP 5(b), Washoe County purportedly served by
mail each of the taxpayers who were listed in Exhibit A to the State Board's
decision. The mailing consisted of a one-page, condensed version of the
amended petition. Inexplicably, however, Washoe County did not attach Exhibit
A to its amended petition or name any taxpayer individually in the caption, in
the body of the amended petition, or in an attachment. Rather, it merely
defined "Certain Taxpayers" as those people "who were named as parties to the
matter before the State Board . . . ," as it had done in its original petition
for judicial review." *Id.* (Emphasis added)

1 C. WASHOE COUNTY v OTTO IS FACTUALLY DISTINGUISHABLE
2 FROM THIS CASE AND THERE IS A LEGAL QUESTION DUE TO
3 LATENT AMBIGUITY IN NRS 233B.130(2)(a)

4 As noted above, NRS 233B.130(2)(a) is ambiguous in terms of what it means to "Name as
5 respondents the agency and all parties of record to the administrative proceeding." Does that mean
6 the name of the Respondent must appear in the caption, or is it sufficient, as here, to name the party
7 in the body of the petition or through an incorporated and/or attached document. The facts of *Otto*
8 did not uncover this latent ambiguity in the statute. This case does. What does it mean to "name" a
9 party in the petition? As noted above, the purpose of the statute appears to be to make sure that
10 everybody that was involved as a party in the administrative proceeding be given notice and the
11 opportunity to participate as a party on judicial review. The purpose of the statute cannot
12 reasonably be said to be the legislature wanting to set a trap to dismiss cases on technicalities. To
13 reach the conclusion that the legislature intended the measure to be such a trap would require
14 significant evidence. There does not appear to be any such evidence of legislative intent. Petitioner
15 knows of no evidence showing that the legislature wanted to trick or trap people.

16 *Washoe County v. Otto*, 128 Nev. Adv. Op. No. 40, 282 P.3d 719 (2012), is distinguishable
17 from the facts here because in *Otto*, the respondent taxpayers were not identified by name in the
18 caption or body of the petition for judicial review or in an attached exhibit to the petition. *Id.* at 723.
19 Here, by attaching the Appeals Officer's order to the Petition for Judicial Review, the Petitioner
20 clearly identified the proper parties to the Judicial Review proceedings. This is sufficient to meet the
21 requirements of NRS 233B.130(2)(a), which requires that "the agency and all parties of record to the
22 administrative proceeding" be named as respondents, but does not specifically require that the
23 parties be named in the caption to the Petition. See *Cooksey v. Cargill Meat Solutions Corp.*, 831 N.W.2d
24 94, 103-04 (Iowa 2013) (concluding that in evaluating the statutory naming requirement, "the
25 contents of a petition seeking review of an administrative action should be evaluated in its entirety"
26 27 28

1 and that identifying the respondents in the body of the petition and serving respondents with notice
2 satisfies the requirement). The Petitioner here served the Petition on Respondent CCMSI and,
3 although Petitioner also did not expressly name the Respondent CCMSI in the body of the Petition,
4 the Appeals Officer's Decision and Order that identified the parties to the administrative
5 proceeding, attached as an exhibit, is incorporated by reference into the body and made a part of the
6 Petition. *See Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980) (concluding that
7 naming the employer in an exhibit attached to a petition for judicial review meets the statutory
8 naming requirement); cf. NRCP 10(c) (“(c) **Adoption by Reference; Exhibits.** Statements in a
9 pleading may be adopted by reference in a different part of the same pleading or in another pleading
10 or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part
11 thereof for all purposes.³). *Otto* is simply not factually the same as this case. In *Otto* the Petitioner
12 Washoe County did not name the taxpayers who were parties to the administrative action AT ALL.
13 Not in the body and not in any attachment incorporated by reference. (See fn. 2 above) Washoe
14 County was even given an opportunity to amend, a list of the appropriate parties was available to it
15 to attach as an exhibit, and it still failed to identify the taxpayer parties by name in ANY PART or in
16 ANY FASHION in its petition and it failed to serve them with the petition or the amended petition.
17 The Supreme Court was astounded by this failure to name the parties even after being afforded the
18 opportunity to amend and the failure to serve them with the petition. *Otto* is factually
19 distinguishable because the Petitioner here incorporated the identity of Respondent CCMSI into the
20 body of the Petition as well as attaching the Appeals Officer's Decision and Order as an exhibit
21 which is part of the Petition for all purposes under NRCP Rule 10(c). The only thing that is missing
22 is the name in the caption and that should be ruled a technical dereliction rather than a grave
23 jurisdictional defect under *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 189-90, 42 P.3d 268 (2002).
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27 ³ This would include for purposes of parties that should appear in the
28 caption.

1 Based upon the substantial compliance with NRS 233B.130(2)(a) in the naming of CCMSI,
2 that fact that it was served with the Petition and had notice of it, the lack of prejudice to CCMSI,
3 and the mere technical dereliction in failing to list CCMSI in the caption, the court should have
4 denied the Motion to Dismiss and permitted amendment of the caption and the case to move
5 forward and set a briefing schedule in this matter. The court should grant this Motion to
6 Reconsider and vacate its dismissal order and let this case proceed on its merits.
7

8 III. CONCLUSION

9 Based upon the foregoing, the court should reconsider and deny the Motion to Dismiss. It
10 would be inequitable to not permit amendment of the caption. The Petitioner's Petition for Judicial
11 Review substantially complied with the requirements of NRS 233B.130(2)(a), particularly given the
12 ambiguities of what it means to "name" a party in a petition. This matter should be permitted to
13 proceed on the merits.
14

15 DATED 8/10/16
16

/s/ James P. Kemp
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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
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And by First Class U.S. Mail, Postage prepaid addressed to the following:

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30 STRADA Di VILLAGGIO
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STATE OF NEVADA -DEPT. OF CORRECTIONS
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STATE OF NEVADA-RISK MANAGEMENT
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DATED this 10th day of August 2016.

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