

IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 72737

LAURA DEMARANVILLE
SURVIVING SPOUSE OF DANIEL DEMARANVILLE (DECEASED):
Appellant/Cross-Respondent,

v.

EMPLOYERS INSURANCE COMPANY OF NEVADA and
CANNON COCHRAN MANAGEMENT SERVICES, INC.
Respondents,

and

CITY OF RENO
Respondent/Cross-Appellant

Appeal from a District Court Order
Granting in Part and Denying in Part
Petition for Judicial Review
First Judicial District Court
Department II
Case No. 15 OC 00092 1B

JOINT APPENDIX

VOLUME 5 OF 8

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ORIGINAL

BEFORE THE APPEALS OFFICER

)	
In the Matter of the Contested)	Claim No.: 12853C301824
Industrial Insurance Claim of:)	1990204572
)	Hearing No.: 46538-SA
DANIEL DEMARANVILLE, DECEASED)	45822-KD
)	44686-SA
Claimant.)	Appeal No.: 46812-LLW
)	46479-LLW
)	44957-LLW

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

HONORABLE LORNA L. WARD, ESQ.

APPEALS OFFICER

TUESDAY, JANUARY 7, 2015

2:32 P.M.

1050 E. WILLIAM STREET, SUITE 450

CARSON CITY, NEVADA 89701

STATE OF NEVADA
DEPT OF ADMINISTRATION
HEARINGS DIVISION
APPEALS OFFICE
2015 MAY -1 AM 11:31
RECEIVED
AND
FILED

Ordered by: State of Nevada
Department of Administration
1050 E. William Street, Suite 450
Carson City, Nevada 89701

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I N D E X

W I T N E S S E S

WITNESS	DIRECT	CROSS
LAURA DEMARANVILLE	11	28

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1 PROCEEDINGS

2
3 APPEALS OFFICER WARD: The date today is
4 January 7, 2015. This is the time set for hearing in
5 the matter of the Industrial Insurance claim of Daniel
6 Demaranville, deceased. And the real party in interest
7 in this case is his widow, Laura. These are two, three
8 consolidated appeals. The first is number 44957, and
9 the second one is 46479, and the third is 46812.

10 Mrs. Demaranville is present and represented
11 by Evan Beavers. The employer, City of Reno, and I
12 believe CCMSI are represented by Timothy Rowe. And the
13 employer's insurance company in Nevada is represented
14 by Mark Sertic. The first appeal is Mrs.
15 Demaranville's appeal of the May 23rd, 2013
16 determination letter, which denied widows' benefits.
17 And I believe that was from the city of Reno.

18 The second appeal is the insurer's appeal of
19 the October 23rd, 2013 hearing officer's decision, which
20 reversed claim denial. And I believe that also is in
21 reference to the City of Reno.

22 MR. ROWE: No, I think --

23 THE COURT: Is that --

24 MR. SERTIC: That's my appeal.

25 MR. ROWE: That's Mark's appeal.

1 THE COURT: Okay.

2 MR. SERTIC: Yeah. No, it is.

3 THE COURT: Okay. Yes. Right. The third

4 appeal is the employer's appeal of the September 19,

5 2013 determination letter which denied liability for

6 the January 31st, 1990 claim. Okay. All right.

7 So, I have the City of Reno large packet, 178

8 pages, is first. Is there any objection to any of

9 these exhibits, I guess?

10 MR. BEAVERS: No.

11 MR. ROWE: I have none.

12 MR. SERTIC: No.

13 THE COURT: Okay. This one is marked and

14 admitted as Exhibit Number 1.

15 The second one is also from the City of Reno,

16 Mr. Rowe's client, and it is a 36-page exhibit. It's

17 marked and admitted as Exhibit Number 2.

18 And then I have the Employer's Insurance

19 Company exhibits. The first one is 29 pages. It's

20 marked and admitted as Exhibit Number 3. The

21 Employer's Insurance Company supplemental packet is 12

22 pages. It's marked and admitted as Exhibit Number 4.

23 And then the last, from the Employer's Insurance

24 Company, is their second supplemental, 10 pages. It's

25 marked and admitted as Exhibit Number 5.

1 And then I have four exhibits from the
2 claimant, and the first one is 129 pages. It's marked
3 and admitted as Exhibit Number 6. The second exhibit,
4 five pages, is marked and admitted as Exhibit Number 7.
5 The next is claimant's 3rd exhibit. It's four pages.
6 It's marked and admitted as Exhibit Number 8. And
7 finally the claimant's fourth exhibit, 15 pages, is
8 marked and admitted as Exhibit Number 9.

9 Is there going to be any testimony in this
10 case?

11 MR. BEAVERS: I will offer testimony of Mrs.
12 Demaranville.

13 THE COURT: Okay. The only reason I was
14 asking is whether we just needed to go to argument, but
15 okay. All right. So, Mr. Beavers, then your opening
16 statement.

17 MR. BEAVERS: May I have just a moment, Your
18 Honor?

19 THE COURT: Oh, sure. Absolutely.

20 MR. BEAVERS: Thank you, Your Honor.

21 THE COURT: Uh-huh.

22 MR. BEAVERS: A brief opening. I think you've
23 probably (inaudible) issues and how we got here, but,
24 if I may, Dan Demaranville was a long-time police
25 officer with the City of Reno. He retired many years

1 ago, and he died in August of 2012. At the time of his
2 death he was married to the claimant before you this
3 afternoon, Laura Demaranville.

4 She comes to you seeking the benefits to
5 which she's entitled under the Nevada Industrial
6 Insurance Act as the survivor, but she only gets to
7 those benefits, Your Honor, if we show by a
8 preponderance of the evidence that Dan died of heart
9 disease and therefore qualifies under Nevada's
10 heart/lung statute as a police officer. And that's
11 much of the evidence that's gonna be presented to you
12 in document form.

13 Her testimony I will offer just to show some
14 background, show that she's entitled ultimately to the
15 benefits of the surviving spouse, but also, Your Honor,
16 she offered some testimony of a critical period in this
17 case. And that is, that period of time between when
18 Dan Demaranville came out of surgery and the time he
19 died.

20 We have expert testimony, matter of fact,
21 you've got a lot of it in front of you, with Dr.
22 Ruggeroli and Dr. Gomez are both doctors on which the
23 claimant relies to show that the decedent did indeed
24 die of heart disease, therefore is entitled to the

1 heart/lung presumption, and that the claimant is
2 entitled to survivor's benefits.

3 So in the conclusion, when I go to close,
4 Your Honor, I'm going to point to you the statutes to
5 which she relies, for her benefits. I'll refer you to
6 case law that I think is important.

7 And there's two other issues that are
8 presented in the case, although they're probably less
9 important in that determination whether we've proven
10 our -- that she's entitled by a preponderance of the
11 evidence.

12 And that is, the issue of, if she's
13 successful as a claimant, when is the benefit
14 calculated? We're prepared to argue that, according to
15 case law, average monthly wage of Dan Demaranville
16 should be calculated as of the date of his death as
17 opposed to the date of his retirement for the purpose
18 of calculating the survivor's benefit.

19 And there's also an issue that Mr. Sertic's
20 client, Icon, raised below in regards to the timeliness
21 of the claim she filed against that insurer. And we
22 will present some testimony and some law to support the
23 fact that she should be excused if indeed it was late
24 at all.

1 The reason why we have two parties present,
2 Your Honor, is we have one employer, Your Honor, and I
3 can't define for you which one of the parties might
4 ultimately be responsible. But by statute the employee
5 has a cause of action against the employer. We brought
6 in all of the employers we could. Thank you.

7 THE COURT: Thank you. Mr. Rowe?

8 MR. ROWE: Thank you, Your Honor. I agree
9 with Mr. Beavers' basic statements as to what the
10 issues in the case are. Obviously what caused the
11 death will be an important factual issue that needs to
12 be decided.

13 The reason you have two separate insurers
14 involved in the case is that Mr. Demaranville retired
15 in 1990. At the time he retired, Icon was the insuring
16 entity for the City of Reno. The City of Reno did not
17 become a self-insured employer until 1992, and so they
18 are - since 1992 they have been self-insured and they
19 are presently self-insured, but Mr. Demaranville did
20 not work for the city at any time during which it was
21 self-insured.

22 So that's why you have two separate insurers.
23 That is what I would call a sub-issue as to which - you
24 know, which insurer is the responsible entity here.

1 Of course, the city as a self-insured
2 employer takes the position it would be the Icon
3 insurer that would be the entity that is responsible
4 if, indeed, any -- either of the entities is
5 responsible in the case.

6 Thank you.

7 THE COURT: Thank you. And Mr. Sertic?

8 MR. SERTIC: Well, very -- very briefly. The
9 issue is whether Mr. Demaranville died as a result of
10 heart disease. And despite a -- the comments of a
11 couple of physicians in this case, it's our position
12 that the evidence will clearly show that there's no
13 credible medical evidence that would support the
14 finding that his death was caused by heart disease,
15 which is, of course, the claimant has to prove in order
16 to prevail in this case.

17 THE COURT: Thank you. Okay. Mr. Beavers.
18 And Mrs. Demaranville, if you'll have a seat in the
19 witness chair there with the microphone. Your
20 testimony today will be recorded, and I need to place
21 you under oath. Could you please raise your right
22 hand?

23 Do you solemnly swear that the testimony you
24 give today will be the truth, the whole truth, and
25 nothing but the truth, so help you God?

1 WITNESS: Yes, I do.

2 THE COURT: Thank you. Could you please state
3 your first name and spell your last name for the
4 record?

5 WITNESS: Laura Demaranville, D-E-M-A-R-A-N-V-
6 I-L-L-E.

7 THE COURT: Thank you. Go ahead, Mr. Beavers.

8 MR. BEAVERS: Thank you, Your Honor.

9 DIRECT EXAMINATION BY MR. BEAVERS:

10 Q. Ms. Demaranville, were you married to Dan
11 Demaranville?

12 A. Yes.

13 Q. And when did you first meet - may we call him
14 Dan ---

15 A. Yes.

16 Q. -- just to avoid stumbling over that last
17 name? And I apologize.

18 A. Yes.

19 Q. I mean no disrespect. When did you meet Dan?

20 A. 1980.

21 Q. And what was Dan doing for a living at that
22 time?

23 A. He was a detective with the Reno Police
24 Department.

1 Q. Do you recall how long he had been a
2 detective with the Reno Police Department?
3 A. Many, many years before I met him.
4 Q. When did you marry Dan?
5 A. In 1989. April 30th, 1989.
6 Q. Did he retire from Reno PD?
7 A. Yes.
8 Q. When did he retire?
9 A. January of 1990.
10 Q. And what did he do after he retired from Reno
11 PD? Did he continue to earn a living?
12 A. Yes.
13 Q. How?
14 A. He went to work for the -- he was court
15 security officer for the US Marshal Service.
16 Q. All right. Did you and Dan Demaranville have
17 children?
18 A. No.
19 Q. Did he have children prior to your marrying
20 him?
21 A. Yes.
22 Q. How many children?
23 A. Two boys.
24 Q. And how old are those children now?
25 A. One is deceased, and the other one is 55.

1 Q. And not disabled or under a guardianship?
2 A. No.
3 Q. Did there come a time when Dan Demaranville
4 had surgery in 2012?
5 A. Yes.
6 Q. What -- were you privy to his health
7 treatment up to that point of surgery?
8 A. Yes.
9 Q. What do you believe was the need for the
10 surgery?
11 A. Gallbladder.
12 Q. And momentarily, just take us up to where it
13 came to the conclusion that he needed gallbladder
14 surgery?
15 A. About four months prior to surgery Dan
16 started experiencing extreme stomach pain that radiated
17 up his back, vomiting.
18 Q. From the time that you met him to the time
19 that he went in for -- what was the purpose of the
20 surgery?
21 A. The gallbladder surgery.
22 Q. The time he went into gallbladder surgery, do
23 you think you were privy to his health treatment for
24 other ailments?
25 A. Yeah.

1 Q. To your knowledge, did he get annual reviews
2 when he was in law enforcement that were required by
3 his employer?
4 A. Yes.
5 Q. Do you ever -- to your knowledge, was he ever
6 given written instruction there was something he had to
7 cure as a result of his tests?
8 A. No.
9 Q. When you married him, was he a smoker?
10 A. Yes.
11 Q. During the time of the marriage, did he
12 continue to smoke?
13 A. Yes.
14 Q. You didn't make him quit right off the bat?
15 A. I tried.
16 Q. When did he quit smoking?
17 A. Three and a half years before he passed away.
18 Q. Did he drink also?
19 A. Yes.
20 Q. Did he drink up until the time he died, or do
21 you (inaudible) for that?
22 A. No. He didn't quit.
23 Q. He was drinking up until the time of the
24 surgery?
25 A. Yes.

1 Q. Do you know who Katie Ketia is?
2 A. Katie Lyden from ---
3 Q. Lyden, I'm sorry, yes.
4 A. Katie Lyden is the nurse practitioner at
5 Acadia Medical Center.
6 Q. And Acadia Medical Center, is that who saw
7 Dan Demaranville for his principal physician?
8 A. Yes.
9 Q. So who made the determination that Dan had to
10 go to gallbladder surgery?
11 A. Katie Lyden referred him to Dr. Gray, who is
12 an endocrinologist, I believe is his title.
13 Q. Were you with Dan -- first of all, did he go
14 see Dr. Gray?
15 A. Yes.
16 Q. And were you there when he went to see Dr.
17 Gray?
18 A. Yes.
19 Q. And do you remember what Dr. Gray's
20 recommendation was?
21 A. He sent him in for several tests, and it was
22 determined that he needed the gallbladder surgery. And
23 at that point he was referred to a surgeon.
24 Q. And do you remember the name of the surgeon?
25 A. Dr. Myron Gomez.

1 Q. And that was Dr. Gray's referral?

2 A. Yes.

3 Q. What's the time between when you saw Dr. Gray

4 and you recommended Dan for surgery and the time you

5 saw Dr. Gomez?

6 A. Approximately four months.

7 Q. When you went to see Dr. Gomez -- when Dan

8 went to see Dr. Gomez, were you present?

9 A. Yes.

10 Q. And were you present when Dr. Gomez made the

11 recommendation to Dan?

12 A. Yes.

13 Q. And what was the recommendation?

14 A. That he have gallbladder removal.

15 Q. All right. And were you present when Dan

16 went into surgery for gallbladder removal?

17 A. Yes.

18 Q. What's the timeline between the time Dr.

19 Gomez recommended him for surgery and the time he was

20 taken into surgery?

21 A. About four days.

22 Q. Well, let's slow up a little bit. What time

23 of day did Dan's surgery begin?

24 A. It was approximately noon, if I remember

25 right.

1 Q. And did you have an observation about Dan,
2 his health, his condition, before the surgery?
3 A. He was still experiencing the stomach pain
4 and back pain, vomiting, and he went in for this
5 surgery.
6 Q. And were you in the waiting room?
7 A. Yes.
8 Q. How long did the surgery take?
9 A. A little over an hour.
10 Q. And how did you know when it was done?
11 A. Dr. Gomez came out and told me that the
12 surgery had been completed, and everything was fine.
13 Q. Dr. Gomez told you at that point everything
14 was fine?
15 A. Yes.
16 Q. Did he say where the patient was going next?
17 A. That he was going into recovery and that I'd
18 be able to see him shortly.
19 Q. All right. From the time that Dr. Gomez told
20 you everything went fine and Dan was going in to
21 recovery until the time that you went to see Dan in
22 recovery, how long of a period of time was that?
23 A. About five hours, six hours. About six
24 hours.

1 Q. You sat in the waiting room for six hours
2 waiting to see your husband?

3 A. Yes.

4 Q. And when you -- did you finally get in to the
5 recovery room to see Dan?

6 A. Yes.

7 Q. Would you give the appeals officer the
8 benefit of your observations about him?

9 A. When I got in to the recovery room, Dan was
10 on oxygen. He asked me if I had talked to Dr. Gomez,
11 and I said yes, the surgery went fine. There were no
12 surprises. And then Dan threw up, and they took me
13 away while they cleaned him up and put on a clean gown
14 and everything. And the anesthesiologist came over and
15 told me that they wanted to take him to -- they were
16 trying to get him into a room in cardiac intensive care
17 because of his issues with the vomiting and a right
18 bundled branch block.

19 They then told me I could see him -- go back
20 and see him. I was standing there talking to him,
21 holding his hand, and he was trying to sit up, and the
22 nurse said, "What are you doing?" And I said, "Dan,
23 what's wrong?" And he said, "I think I have to vomit
24 again."

1 She told him no, he couldn't sit up. Turned
2 to another nurse. The other nurse says, "Yes, that's
3 what I would do." I don't know what they -- and she
4 says, "He's having a massive myocardial infarction.
5 Get her out of here."

6 At that point, the nurse took me, tried to
7 find a place for me in the recovery room. All the
8 doors were locked on all the rooms, so they put me out
9 in the hallway and said someone would be coming out and
10 all I could hear was them yelling for the crash cart
11 and I was -- they pushed me out in the hallway.

12 Q. So from the time you left the recovery room
13 to the time you went back out in the hallway, how long
14 did you stay before anyone came and told you anything?

15 A. About a half hour.

16 Q. And who was it that came to you next?

17 A. Dr. Gomez and the anesthesiologist. I don't
18 recall his name.

19 Q. Did either one of them speak to you and tell
20 you what the status was?

21 A. Yes.

22 Q. Who spoke?

23 A. Dr. Gomez.

24 Q. And what did he say?

1 A. He said Dan had a massive myocardial
2 infarction. And I said, "Is he going to be okay?" And
3 he said, "No. We lost him." And he said, "Do you want
4 an autopsy?" And at that point I said no, don't. I
5 was in shock and didn't have time to think about it.

6 Q. Were you by yourself?

7 A. There was a nurse that saw me crying and
8 trembling in the hallway. She was from pediatrics.
9 And she insisted on waiting with me until my sisters
10 came. I made a phone call to my sister, and she said
11 they were on their way. And she sat with me until my
12 sisters came. And then the social worker finally came
13 out and asked me what we wanted to do with the body, or
14 where the body should be transported.

15 Q. Were you asked if you wanted to see your
16 husband first?

17 A. Yes. I was asked if I wanted to go in and
18 see him. At that point his best friend had also
19 arrived. Sorry. And I said, "Do you want to go in and
20 see him?" And Don said, "No, I can't."

21 I said -- the nurse told me, or the social
22 worker said, "Remember, he's still all hooked up. Do
23 you want to go in?" And I said no.

24 Q. What arrangements were made for Dan's funeral
25 services?

1 A. Dan always said he wanted to be cremated, so
2 the body was transported to Welton's Funeral Home, and
3 he was cremated. I did have a service. I did have a
4 funeral. And then the following summer my sister and
5 brother-in-law and I rented a -- an SUV and took our
6 three dogs and we drove to South Dakota to spread his
7 ashes.

8 Q. Was Dan from South Dakota?

9 A. Yes.

10 Q. The Black Hills of South Dakota?

11 A. Yes. He wanted his ashes spread near Mount
12 Rushmore, so that's what we did.

13 Q. And you paid for the funeral, you paid for
14 the cremation, and you paid for the ---

15 A. Yes, I did.

16 Q. Did you at some point in time file a claim
17 for survivor benefits as a result of your husband's
18 death?

19 A. Yes, I did.

20 Q. What did you understand to be the benefit?

21 A. He said there was widow -- widows benefits
22 under the heart and lung bill.

23 Q. And how did you -- where did you get that
24 information?

1 A. Several of his friends had told me, and Dan
2 had always said that he was covered under the heart and
3 lung bill, so I contacted Reno Police Protective
4 Association.

5 Q. Your Honor, may I approach the witness? For
6 the benefit of counsel and you also, Judge, I'm about
7 to show the witness what I believe to be the death
8 certificate. And it appears at Exhibit Number 6 at
9 Page 128.

10 THE COURT: Okay.

11 MR. BEAVERS: May I approach?

12 THE COURT: Yes.

13 MR. BEAVERS: Your Honor, this is highlighted.
14 Is that ---

15 THE COURT: That's fine.

16 Q. Ms. Demaranville, I ask that you look at that
17 document.

18 A. Okay.

19 Q. What does that appear to be?

20 A. The death certificate.

21 Q. When you say "the" death certificate, how do
22 you know it's the death certificate?

23 A. The death certificate that was given to me at
24 the funeral home, and it says Washoe County District
25 Certificate of Death.

1 Q. Okay. So you received at least one original?

2 A. Yes.

3 Q. And did you talk to Dr. Gomez -- well, does

4 it appear that Dr. Gomez signed that document down

5 where his signature appears?

6 A. Yes.

7 Q. Authenticated?

8 A. Yes.

9 Q. Did you have any conversation with Dr. Gomez

10 between the time he told you your husband passed away

11 and asked you if you wanted an autopsy and the time you

12 received the death certificate?

13 A. No.

14 Q. So when you got this death certificate did

15 you go about the steps necessary to file a claim for

16 survivor benefits?

17 A. Yes.

18 Q. And you were following the advice of someone

19 at the Protective ---

20 A. Reno Police Protective Association sent out a

21 representative with, I believe it's called a C4 form.

22 Q. And, again, Your Honor, I'd like to approach

23 the witness, and I'll be referring to the C4, which

24 appears in Exhibit 6 at Page 120.

25 THE COURT: Thank you.

1 Q. Again, for the record, I've got highlights on
2 this. Ms. Demaranville, can you identify that
3 document?

4 A. Yes. This is a copy of the C4 form that was
5 brought out to me by the representative from Reno
6 Police Protective Association.

7 Q. There's a heavy bolded line about halfway
8 through that document. And above that is handwritten,
9 handwriting in the blank form, and below there's
10 handwriting. That handwriting above that heavy line,
11 the top half, is that your handwriting?

12 A. Only where it says massive heart attack after
13 surgery.

14 Q. Somebody else filled that out?

15 A. Yes. Reno Police Protective Association.

16 Q. A particular individual, do you know?

17 A. His name is Jerry Bowden. That's the
18 representative.

19 Q. But right above that heavy line is a
20 signature and a date, 9/5/2012. Is that your
21 signature?

22 A. Yes, it is.

23 Q. So was that document, the top part of it,
24 complete when you signed it?

25 A. Yes.

1 Q. Was the bottom part of it complete when you
2 signed it?

3 A. No.

4 Q. Did you take that document to Dr. Gomez to
5 complete?

6 A. Not until almost a year later.

7 Q. And why almost a year later?

8 A. It sat at CCMSI after they requested -- CCMSI
9 requested a death certificate, marriage certificate,
10 and the C4 form, which I submitted to them, and then
11 back and forth with more documents.

12 Q. So you did file a claim -- it's your
13 understanding a claim was filed on your behalf with
14 CCMSI, correct?

15 A. Yes.

16 Q. And there was a long period of time while
17 CCMSI investigated the claim?

18 A. Exactly.

19 Q. But ultimately you didn't go see Dr. Gomez
20 with the C4 to get his signature until August of the
21 next year?

22 A. Yes.

23 Q. When you secured the doctor's signature, did
24 you see him write what appears on the bottom half of
25 that C4 document?

1 A. I didn't see him personally.

2 Q. So what happened to that claim that was filed
3 on your behalf with CCMSI and the City of Reno?

4 A. After about 10 months I finally got a letter
5 from CCMSI -- CCMSI denying the claim. I contacted
6 RPPA, and they put me in touch with Leslie Bell. I met
7 with Leslie and it was determined that the claim should
8 be filed with Icon.

9 Q. Who is Leslie Bell?

10 A. Leslie Bell is the representative for RPPA.

11 Q. Reno Police Protective ---

12 A. Reno Police Protective Association.

13 Q. So she is someone else that helped you with
14 your claim, correct?

15 A. Yes.

16 Q. So she is someone else that helped you with
17 your claim, correct?

18 A. Yes.

19 Q. Then at some point was there a decision made
20 that you'd file also against the employer's insurance
21 company?

22 A. Yes.

23 Q. And why was that? Why did you file your
24 claim again?

1 A. Because it was determined that they were the
2 insurer.
3 Q. Someone gave you the advice ---
4 A. Yes.
5 Q. -- you could file against them also?
6 A. Yes.
7 Q. And once you got that advice, did you
8 promptly file?
9 A. Yes, we did.
10 Q. What happened to that claim?
11 A. Immediately filed with Icon, the employer's,
12 and the claim was denied, and we went - we went to the
13 hearing officer and it was reversed. And then an appeal
14 was filed.
15 Q. And you have appealed your claim denial to
16 the appeals officer here today?
17 A. Yes.
18 Q. And what is it that you're asking the appeals
19 officer for?
20 A. Widow's benefits.
21 Q. As a result of the death ---
22 A. Yes.
23 Q. -- of Dan Demaranville?
24 A. Yes.

1 MR. BEAVERS: That's all the questions I have
2 of this witness at this time.

3 THE COURT: Mr. Rowe.

4 MR. ROWE: Thank you.

5 CROSS EXAMINATION BY MR. ROWE:

6 Q. Ms. Demaranville, I have a couple of
7 questions. As I understand it, the referral to Dr.
8 Gomez was from Dr. Gray for treatment of the issues
9 related to the gallbladder. Correct?

10 A. Yes.

11 Q. And it's also my understanding from the
12 records that Dr. Gomez had some testing done prior to
13 the surgery. Did he not?

14 A. Yes.

15 Q. And further, it was my understanding that Dr.
16 Gomez didn't find any concerns or issues with going
17 forward on the surgery as a result of that testing. Is
18 that correct?

19 A. Yes.

20 Q. And I would assume then that Dr. Gomez did
21 not inform you that your husband had any kind of heart
22 issues or heart problems prior to the point of surgery.
23 Correct?

24 A. No, he didn't.

1 Q. Okay. It's also true, is it not, that Dr.
2 Gomez did not provide any treatment or any kind of
3 recommendations with respect to any potential heart
4 disease. Correct?

5 A. No.

6 Q. To the best of your knowledge, has Dr. Gomez
7 ever reviewed any of the medical records related to
8 your husband's medical care prior to the point in time
9 you did the surgery?

10 A. I don't know.

11 Q. Okay. Do you know of your own personal
12 knowledge whether Dr. Gomez has ever reviewed any
13 records following the surgery?

14 A. I don't know.

15 MR. ROWE: Okay. That's all the questions I
16 have. Thank you.

17 THE COURT: Mr. Sertic?

18 MR. SERTIC: I don't have any questions.

19 THE COURT: Okay. Anything -- any follow up,
20 Mr. Beavers?

21 MR. BEAVERS: No.

22 THE COURT: Okay. Thank you, Mrs.
23 Demaranville. And you can go ahead and take your seat.
24 Thank you.

1 Okay. I don't think there are any other
2 witnesses. We have a lot of medical evidence that's
3 been filed. So closing arguments. Mr. Beavers.

4 MR. BEAVERS: I think the testimony and the
5 documents will show that Dan Demaranville started
6 employment with the City of Reno Police Department in
7 August of 1969, and he retired in January of 1990.

8 He died August 5, 2012, and at the date of
9 death Laura Demaranville was his surviving spouse. And
10 she's here this afternoon to seek survivor benefits on
11 the basis that Dan died of heart disease. And Nevada's
12 heart/lung statutes, as I said in the opening, allow
13 the conclusive presumption that that disease arose out
14 of and in the course of employment.

15 Your Honor, NRS 617.457 creates that
16 conclusive presumption for police officers if they're
17 employed continuously for five years and if the police
18 officer submitted to physical exams annually and
19 corrected any predisposing conditions when ordered to
20 do so in writing.

21 I would argue, Your Honor, that there's
22 nothing in the record that indicates that Dan was ever
23 ordered to annual exams that he did not take, and I
24 find nothing that can -- well, it's argument. I don't

1 find anything in the record, nothing's been presented
2 to indicate that he refused to take any exams.

3 And it was clear that he was employed
4 continuously, salaried position, for more than five
5 years.

6 In my mind, Your Honor, he satisfies the
7 conclusive presumption in 457 but only if he died of
8 heart disease. You listen to the testimony of the
9 surviving spouse. She was not aware of any heart
10 disease issues prior to his gallbladder surgery. She
11 wasn't aware of any problems with his annual exams.

12 I would direct your attention to what's been
13 admitted as Exhibit 4, which is a compilation of
14 documents taken from -- the City of Reno provided the
15 personnel file, and I think counsel have been through
16 the personnel records, and I think this is Icon's
17 compilation of what appears in that record regarding
18 examinations.

19 And in that exhibit you'll see reference to
20 the fact that the examining physician who's treating
21 him annually tells him to quit smoking and notes that
22 he drinks, but doesn't necessarily give any written
23 recommendations for cures he should take for any heart
24 condition.

1 NRS 617358, Your Honor, would entitle Laura
2 Demaranville, as a surviving spouse, to receive
3 compensation by establishing with a preponderance of
4 the evidence that Dan's heart disease arose out of and
5 in the course of employment.

6 So if you take those two statutes in tandem,
7 Your Honor, 358 and 457, the surviving spouse can only
8 achieve the objective of receiving benefits if she
9 proves that the heart disease was caused -- that his
10 death was caused by the heart disease with a
11 preponderance of the evidence. And I'm here to argue
12 this afternoon that she has met that burden of proof.

13 616c505 sets out her benefits, that she's
14 entitled to the burial expense, not to exceed \$10,000,
15 the cost of transporting the remains, and 66 and 2/3 of
16 Dan's average monthly wage for the rest of her life.

17 So as I stated in opening, Your Honor, we
18 have three issues. Has Laura Demaranville shown by a
19 preponderance of the evidence that Dan did indeed die
20 of heart disease? If so, what is the date of
21 disability for calculating the benefits due her? And
22 that remaining issue raised by Icon earlier, whether or
23 not there was a late filing of the claim.

24 I'll address the late filing issue first,
25 Judge.

1 The surviving spouse's testimony is that she
2 filed initially on the advice of others against the
3 City of Reno, and that claim was handled by its third-
4 party administrator, CCMSI. It was reviewed at length.
5 It was investigated at length. It took an extended
6 period of time. She testified 10 months.

7 But only after that long process had started
8 and was nearly concluded was she told by the third
9 party that she needed to maybe file against the insurer
10 at the time of Dan's retirement. The City of Reno was
11 insured at the date of Dan's retirement, whereas
12 they're self-insured now. So that's what prompted her
13 to file against Icon at that time.

14 If indeed -- well, 616c020 would require the
15 filing of that claim for benefits within one year of
16 the date of death. If indeed she was outside of that
17 one year filing at the time, 616c.025 allows about the
18 only excuse in the statutes for claimants. It allows
19 an excuse for late filing of a claim based upon mistake
20 or ignorance of fact or law.

21 And I would submit to Your Honor that this
22 widow did not -- should not be held to the standard of
23 identifying which one of these two insurers might
24 ultimately be responsible given the fact that the City
25 of Reno was self-insured for one period of time and

1 worker's comp coverage for another period. Whatever
2 that -- wherever that liability should ultimately end
3 up, she should be excused for the late filing against
4 the second insurer.

5 As to the issue of the date of disability for
6 calculating benefits, Your Honor, I'd direct your
7 attention to two cases that support using Dan's average
8 monthly wage received at the date of his death as
9 opposed to the date of retirement.

10 The first one is Mirage v. Nevada Department
11 of Administration at 110 Nevada 257. I cite it for the
12 proposition that the employee is eligible for benefits
13 when the employee is no longer able to continue working
14 due to the occupational disease. Taken in conjunction
15 with the case of Howard v. City of Las Vegas at 121
16 Nevada 691, where our Supreme Court found that a
17 firefighter's date of disability is the date that the
18 fire -- of that particular firefighter's heart attack.

19 Those two cases, I think, Your Honor, lend
20 support to the widow's claim here that the date of
21 disability was the date of Dan's heart attack, which
22 coincided with the date of Dan's death.

23 I direct your attention to Nevada
24 Administrative Code 616.441, earnings on the date the

1 employee is no longer able to work is to be used for
2 calculating the average monthly wage.

3 So I turn next and finally to the key issue
4 of whether or not the claimant has shown by a
5 preponderance of the evidence that Dan Demaranville did
6 indeed die of heart disease.

7 The argument I think that was presented below
8 by one of the insurers is compelling. That just
9 because the heart stopped doesn't mean the heart
10 stopped of heart disease. That may very well be true,
11 but there is a preponderance of the evidence to show
12 that this man did indeed die of heart disease.

13 Let's review the opinions of the experts that
14 we have, Judge, and I will try to cite to your record
15 the best I can as I go through these.

16 The first one is the death certificate that
17 the witness reviewed, and I think we have identified
18 that in Exhibit Number 6 at Page 120.

19 Nobody would have been more intimately
20 familiar with this patient than Dr. Gomez. Dr. Gomez
21 evaluated before surgery. Dr. Gomez was with him in
22 surgery. Dr. Gomez, when he came out of surgery, went
23 to Laura and said he came out of surgery in fine shape.

1 The reason I point that out, Judge, is there
2 was a period of time between when the man left surgery
3 and the time of his death.

4 Dr. Gomez was present through all of those,
5 and he signs this death certificate with that knowledge
6 in mind.

7 Judge, referring to that exhibit, he shows
8 that the date of death, if we can take his signature as
9 authentic, which I believe we can -- you can probably
10 take judicial notice that these are indeed the
11 statements of Dr. Gomez. That if Dan died on August 5,
12 2012, the date Dr. Gomez signed this was just two days
13 later, when it would have still been fresh in his mind.
14 He didn't need to review any medical records. He was
15 present. He created the medical record.

16 Look, Your Honor, at the cause of death.
17 Nevada Administrative Code 441.65 says on that first
18 line whoever completes the death certificate is to show
19 the primary cause. On the second and third line, any
20 underlying cause of death.

21 Dr. Gomez testifies in his death certificate
22 that Dan died of cardiac arrest and the underlying
23 cause of death was arteriosclerotic heart disease.

24 Your Honor, that's the first testament as to
25 what this man died of. That's the first evidence that

1 heart disease was what resulted in his -- how Dan
2 Demaranville came to die.

3 The reason I point it out that Dr. Gomez was
4 intimately familiar with the decedent when he signed
5 this statement is because that death certificate then
6 gets reviewed, analyzed, and opinions given by lots of
7 medical doctors.

8 I direct your attention next to the opinion
9 of Dr. Betts. That appears, Your Honor, in Exhibit 1
10 at page 52. Now, Dr. Betts, as I understand it, was
11 asked to give a record review in this case when it was
12 first being investigated by CCMSI. It's entitled a
13 chart review.

14 But if you go to the second page of Dr.
15 Betts' report, he states clearly in his report no pre-
16 operative medical records are presented for review.
17 You really have nothing more, I'm presuming, than those
18 records that came out of that surgery and the post-
19 operative procedures in the recovery room that failed
20 to save the man's life.

21 When asked the question based on the limited
22 medical records enclosed in this letter, "Are you able
23 to determine the actual cause of death?" No, says Dr.
24 Betts. What's the probability that the death was

1 caused by heart disease? The probability is high, says
2 Dr. Betts, that Mr. Demaranville died of heart disease.

3 Third question, what's the probability his
4 death was caused by something other than heart disease?
5 Dr. Betts says, well, that differential diagnosis may
6 include pulmonary embolism and anesthesia-related
7 complications. However, these are much less likely
8 than heart disease.

9 Fourth question. Because Mr. Demaranville
10 had no history of arteriosclerotic heart disease,
11 that's an assumption that the author makes in asking
12 the question that Dr. Betts answers with. Nearly every
13 one develops arteriosclerotic heart disease to one
14 degree or another, and the first sign of significant
15 arteriosclerotic heart disease is a myocardial
16 infarction. Sometimes this is massive and fatal.

17 In the case of Mr. Demaranville, considering
18 his age and the sudden onset of cardiac insufficiency,
19 it is most likely he suffered a significant myocardial
20 infarction.

21 Question number five. Would an opinion from
22 a cardiologist be helpful? Yes, and I would start with
23 Frank Carrea. He was present at the time of the
24 attempted resuscitation.

1 Six. With the limited information here, are
2 you able to determine if cardiac arrest was caused by
3 some form of heart disease? Not with certainty.
4 Absent an autopsy, which we don't have, a definitive
5 conclusion may not be possible.

6 He wasn't asked, Your Honor, medical
7 probability, reasonable medical probability and
8 preponderance of the evidence. He says, not with
9 certainty. A review of the entire medical record, and
10 he didn't have any pre-operative record, around the
11 patient's pre-operative evaluation and course during
12 surgery procedure may be helpful in clarifying the
13 cause of death.

14 In other words, he doesn't conclusively
15 presume what the cause of death is, but he certainly
16 doesn't disagree with the idea that it could have been
17 heart disease.

18 Next, Your Honor, you have the medical
19 opinion of Dr. Hemaraj, and that is found in your
20 record at Exhibit Number 2, page 28. And I believe
21 this is a record review request by Icon. And I direct
22 your attention to page 4 of that document, which
23 appears at page 31 of Exhibit 2.

24 Here are the questions. I've been asked to
25 determine whether there was any evidence of heart

1 disease prior to August 5, the date of death. And this
2 reviewing doctor says there's no indication from the
3 available documentation of any specific heart disease
4 problem. There is mention as far back as November 2008
5 that the patient had a reported irregular EKG.

6 Second question. Was there any basis for the
7 diagnosis of arteriosclerotic heart disease? Again,
8 that's the finding in the death certificate.

9 And this reviewing doctor, Hemaraj, says,
10 patient had some risk factors prior to surgery that
11 could have led to arteriosclerotic heart disease.
12 These risk factors could have predisposed the patient
13 to an arteriosclerotic condition.

14 That's important because this idea that if
15 there's no solid proof that he was being treated for
16 heart disease prior to that gallbladder surgery, there
17 was indeed risk factors. That shows up in a later
18 evaluation, later opinion.

19 Third question asked of Dr. Hemaraj, was the
20 myocardial infarction due to arteriosclerotic heart
21 disease, or was this most likely a post-op
22 complication?

23 Well, that would solve everything, if we
24 could blame it on something that happened in the
25 surgery or immediately after the surgery. And this

1 doctor says, "It appears the patient had some risk
2 factors that would have led to arteriosclerotic heart
3 disease and would most likely not have been due to some
4 post-operative complication of gallbladder surgery."

5 The next opinion that has been offered into
6 evidence is the opinion of Dr. Ali, and that appears in
7 Exhibit Number 2 at page 33.

8 Beginning on page 35, the doctor is asked
9 particular questions. Was there any evidence of heart
10 disease prior to August 5, 2012? The doctor opines,
11 "There was evidence of cardiovascular disease,
12 hypertension, right bundle branch block, mild left
13 ventricular hypertrophy. There is no evidence in the
14 records provided of coronary artery disease or coronary
15 heart disease, but there is documentation of
16 arteriosclerotic heart disease prior to August 5,
17 2012."

18 Second question, was there any basis for the
19 diagnosis of arteriosclerotic heart disease as noted in
20 the death certificate? Dr. Ali responds, "This
21 reviewer is unable to find any documentation in the
22 records that would support that diagnosis."

23 Doesn't say whether there is or isn't a
24 basis, just that this doctor doesn't find it in these
25 records.

1 Question number 3, was the myocardial
2 infarction due to arteriosclerotic heart disease, or
3 was this most likely a post-op complication? Again,
4 that would certainly resolve the issue. But this
5 doctor says there's no evidence of myocardial
6 infarction, particularly since cardiac enzymes were not
7 drawn. I'll refer you back to this later also, this
8 notion that because there were no cardiac enzymes drawn
9 there's no evidence of infarction.

10 Thus it appears most likely that the cardiac
11 arrest was a post-operative complication. In other
12 words, by default, he can't come up with another
13 excuse.

14 Now, Your Honor, we come to the opinion of
15 Dr. Ruggeroli, and this was the doctor -- Dr.
16 Ruggeroli's first opinion, because he gave two of them,
17 appears as Exhibit 7.

18 I should note for the record, Your Honor,
19 that I posed Dr. Ruggeroli particular questions that
20 can be found -- my letter to the doctor can be found at
21 pages 3, 4, and 5 of Exhibit 7.

22 And in response to my question, "Have you
23 reviewed the records provided with this letter?" He
24 says, "Yes, all available records were reviewed." Your
25 Honor, that is claimant's first exhibit. It's a

1 complete compilation, as best as we can tell, of the
2 records between 1999 and the time of death. That's
3 exactly what this doctor reviewed, and he says yes, I
4 reviewed it.

5 What's your diagnosis of the condition of Mr.
6 Demaranville's heart at the time of his death?
7 Coronary artery disease says this cardiologist.

8 Was the condition of his heart identified in
9 your response above the result of heart disease? Yes.

10 What was the cause of death? Cardiac arrest
11 due to pulseless electrical activity due to -- and I'm
12 gonna use his abbreviation, but we can presume it's
13 coronary artery disease, due to ASCVD. I would argue
14 to Your Honor that he's making reference to
15 arteriosclerotic cardiovascular disease, although the
16 witness isn't here to testify.

17 But Dr. Ruggeroli gives us more than that.
18 He gives his own report, not just responses to
19 questions, and that's found in pages 1 and 2 of that
20 same exhibit.

21 Page 1 he says, "Patient underwent elective
22 laparoscopic" -- I practiced this, Judge. "Cholesystem
23 -- cholecystectomy. Can you do that, Your Honor?

24 THE COURT: Cholecystectomy.

25 MR. BEAVERS: Thank you.

1 THE COURT: I know it's tough. It is.

2 MR. BEAVERS: It is. I mean no offense to the

3 record, but there --

4 THE COURT: They're tongue --

5 MR. BEAVERS: -- but I'll refer to it as a

6 gallbladder surgery.

7 THE COURT: There you go. That's good.

8 MR. BEAVERS: Patient arrived at the PACU, and

9 I presume that means post-anesthesia area. Shortly

10 after arrival, noted to become hypotensive and

11 tachycardic. Examination at that point demonstrated no

12 pulse. Standard resuscitation protocol initiated. He

13 was seen and evaluated by cardiology at that point.

14 He had a bedside echocardiogram involved that

15 demonstrated no spontaneous left ventricular systolic

16 motion. Extended resuscitation efforts. Declared the

17 patient dead.

18 If you go to the next page, at the top of

19 page 2, and this is where he gives his -- the patient

20 had no documented history of antecedent symptomatic

21 coronary artery disease. We concede that, Your Honor.

22 However, multiple cardiovascular risk factors, just as

23 these other doctors have identified, with a baseline

24 abnormal resting electrocardiogram. He's seeing the

25 same thing these other doctors have seen.

1 The patient's baseline electrocardiogram
2 demonstrated abnormalities. In my opinion, the patient
3 had a catastrophic cardiovascular event secondary to
4 occult occlusive arteriosclerosis. In other words, a
5 hidden arteriosclerosis of the coronary arteries
6 leading to that pulseless electrical activity, leading
7 to his death on August 5, 2012.

8 That's Dr. Ruggeroli's opinion, which then
9 gets delivered to Dr. Lagstein. And Dr. Lagstein's
10 opinion is probably the most compelling for the
11 insurers. And it appears in your record. I believe
12 you've identified this one and marked this one as
13 Exhibit 5.

14 The question posed to the doctor appear on
15 Page 4 of the exhibit. Page 2 -- yeah, Page 4 of the
16 exhibit. I'm sorry.

17 The questions posed -- no, I'm correct -- on
18 Page 2 of the exhibit, at the top of the page. Was
19 there any evidence of heart disease prior to August 5?
20 Is there any evidence to support the diagnosis of
21 arteriosclerotic heart disease? Is there any evidence
22 to support the diagnosis of coronary artery disease by
23 Dr. Ruggeroli? Was the deceased's myocardial
24 infarction caused by arteriosclerotic heart disease?

1 And the doctor answers those questions at
2 Page 7 of the exhibit.

3 Question number one. There was no clear
4 evidence of heart disease prior to August 5, 2012. The
5 EKG revealed a right bundle branch block and a right
6 axis deviation, but this by itself is insufficient to
7 document underlying coronary artery disease. There's a
8 borderline left ventricular hypertrophy on the
9 echocardiogram reported on one stress test, but this
10 also is insufficient to diagnose the patient with
11 underlying coronary heart disease.

12 In other words, the record's not clear that
13 he had heart disease prior to the time of the surgery.

14 The answer to number 2, again, the question
15 is, is there any evidence to support the diagnosis of
16 arteriosclerotic heart disease? There's not enough
17 evidence says Dr. Lagstein, to support a diagnosis of
18 arteriosclerotic heart disease as noted on the death
19 certificate.

20 This is critical, Judge. He says, "The
21 patient did not have an autopsy, and cardiac enzymes
22 were apparently not drawn. Therefore, there's not
23 enough information in evidence to support the
24 diagnosis.

1 Question number three, "Is there any evidence
2 to support the diagnosis of coronary artery disease as
3 reported by Ruggeroli?"

4 Dr. Lagstein's response, "I do not feel there
5 is enough evidence to support Ruggeroli's assertion
6 that the patient had occult occlusive arteriosclerotic
7 heart disease."

8 He doesn't say there's no evidence. He
9 disagrees with the quantity of evidence.

10 Question number four, "Was Mr. Demaranville's
11 myocardial infarction caused by arteriosclerotic heart
12 disease, coronary artery disease, or was it post-
13 operative complication?" Dr. Lagstein says there's no
14 evidence to support the evidence of a myocardial
15 infarction. In the absence of abnormal post-operative
16 EKG and post-operative cardiac enzymes, especially
17 troponin ones.

18 The death therefore is due to some post-
19 operative complication of unclear etiology. That's not
20 definitive but he says it must be something else, some
21 etiology we don't know.

22 Clearly the aforementioned diagnostic test,
23 the aforementioned diagnostic test of the post-
24 operative EKG and post-operative cardiac enzymes,
25 including troponin levels, the aforementioned

1 diagnostic tests with or without an autopsy would have
2 clarified this issue beyond a doubt.

3 He doesn't see any diagnostic test for
4 cardiac enzymes, in this case troponin.

5 So that letter then goes back to Ruggeroli,
6 and Ruggeroli's asked to give an opinion on Lagstein's
7 analysis. And Ruggeroli gives you his second opinion,
8 Your Honor, in Exhibit Number 8.

9 I need to go out of order to show that at the
10 same time I wrote Dr. Ruggeroli providing him
11 Lagstein's opinion, I also provided him in Exhibit 9
12 supplemental medical records, and -- that may have been
13 left out of the records that he reviewed the first
14 time, and basically those are the records of Dr. Gomez
15 and Dr. Carrea taken at the time of -- after the
16 surgery and at the date of death.

17 So with Lagstein's opinion and a complete
18 medical record, Ruggeroli says as follows:

19 "The patient arrived in the recovery room
20 with normal vital signs." The widow testified to that.
21 The widow said that Gomez came out and told her the
22 patient was in good shape.

23 "However, afterwards he became hypotensive
24 and tachycardic. The only witness before you explained
25 that there was a long period of time before she was

1 allowed in to see him, and he was still alive when she
2 saw him, although he was starting to suffer a heart
3 attack."

4 Laboratory evaluation was performed. And if
5 you want to see evidence of that, Your Honor, I direct
6 your attention to Exhibit Number 6, page 1 through 7.
7 This is the only handwritten medical record I can find
8 that I can actually read, because the nurse has good
9 handwriting skills. I hope they pay her well.

10 But in the middle of that Page 127 of Exhibit
11 6, the nurse writes in her response, "At that point
12 laboratory work was sent. Fluid bolus was continued
13 and a vasopressor was started to support the decreased
14 blood pressure. Then I called Dr. Gomez." And she
15 ended up calling code.

16 The reason I point that out to you, Judge, is
17 I think what the nurse is making reference to when she
18 says the laboratory work was sent, compare that with
19 Dr. Ruggeroli's opinion where he says laboratory
20 evaluation was performed. Again, this is post-op.

21 This was remarkable for an elevated Troponin
22 of 0.32. I can't tell you the significance of that,
23 but I can tell you that this doctor read the complete
24 medical records, and he comes away with the idea that

1 these lab work did result in proof of an elevated
2 Troponin level. This is his medical opinion.

3 This is consistent with myocardial necrosis,
4 or heart damage. This laboratory evaluation was
5 obtained at 3:35 p.m., long after he'd come in to the
6 post-op. The patient's condition was worsened with
7 worsening hypotension and increased tachycardic.

8 Ultimately the patient was diagnosed with
9 pulseless electric activity. Resuscitation was
10 terminated at 7:30. Four hours before he was -- he
11 died, they had done these laboratory evaluations of his
12 Troponin levels.

13 Again, Dr. Ruggeroli writes this after he has
14 Lagstein's opinion, and he says, "In my opinion, the
15 patient had underlying occult occlusive coronary artery
16 disease. Cardiac Troponin drawn approximately four
17 hours prior to his death were elevated and consistent
18 with a cardiovascular cause of the patient's death.

19 He bases a lot of his opinion on these
20 Troponin levels that Dr. Lagstein says were never even
21 tested. Indeed, Lagstein goes so far to say that if
22 they were tested it would be conclusive even without an
23 autopsy.

24 I can't explain to you why Dr. Lagstein
25 didn't pick up on that. But I can tell you, Your

1 Honor, that Dr. Ruggeroli must have found it in the
2 record, and it's consistent with the nurse's report.

3 Lastly, I direct your attention to Dr.
4 Carrea's opinion, Judge, and that is found in Exhibit 9
5 on page 15.

6 Now, Dr. Carrea was the cardiologist that was
7 in post-op, and in the early record reviews Dr. Betts
8 and others say, "I can't say what was going on here.
9 We didn't have an autopsy. But the person to ask would
10 be Carrea." Fine. I write Carrea.

11 And my letter to Carrea, Your Honor, is at
12 page 13 of Exhibit 9. I said, "Do you have any medical
13 records we could use, and if we sent you all the
14 medical records would you give us an opinion?" He
15 responded by giving me an opinion.

16 In the middle of page 15, middle paragraph,
17 there were no mention -- there were no mentions of
18 intra operative problems that would have suggested
19 active cardiac issues. The echo findings at the time
20 of his attempted resuscitation of an akinetic left
21 ventricle are consistent with a cardiac etiology for
22 his death. This could possibly have arisen from
23 perioperative cardiac event, that is, around the time
24 of the operation.

1 But, an akinetic left ventricle is the end
2 result of many complications around the time of the
3 operation, and the unsuccessful resuscitation that
4 resulted in death.

5 Although I think it is likely -- although I
6 think it is likely that he had occult cardiac issues
7 that became relevant and ultimately lethal, with the
8 current information at hand I don't think it's possible
9 to state with conviction or certainty that his death
10 resulted from a cardiac event.

11 Your Honor, if you take all of this together
12 what you have is Dr. Gomez, who knew the patient better
13 than anybody and who has correct information, says the
14 man died of heart disease. There's no reason for him
15 to make it up.

16 If this was a botched operation by Dr. Gomez
17 and he was writing a death certificate to fit his
18 malpractice carrier's needs, there's no reason why Dr.
19 Carrea didn't opine on that or the anesthesiologist.
20 There's no reason to believe that he's not correct in
21 his diagnosis.

22 And when Ruggeroli gets that diagnosis he
23 says yes, if you look at the risk factors that's highly
24 likely. And if you look at all the other experts, they
25 don't say conclusively that it couldn't have been this.

1 Only Lagstein comes close to saying Ruggeroli got it
2 wrong, but Lagstein doesn't seem to be looking at the
3 complete record.

4 Your Honor, our standard here is
5 preponderance of the evidence. I direct your attention
6 to the Seaman case at 109 Nevada 8, where the Supreme
7 Court said the claimant need only establish the
8 probability of a causal connection.

9 The McClanahan case, at 117 Nevada 928, where
10 the Supreme Court said in the context of 616c.150,
11 preponderance of the evidence, means simply the greater
12 weight of evidence. This is a pretty low threshold
13 here, Judge. It isn't as conclusive as some of these
14 other experts are shying away from.

15 127 Nevada (inaudible) 45 is the Williams
16 case, and it's very instructive. It's not a worker's
17 comp case. But in that case, Justice Hardesty wrote
18 the opinion for the Court. It actually was a unanimous
19 court.

20 And it comes out of those endoscopy cases out
21 of Las Vegas, and there were issues about medical
22 opinion.

23 Justice Hardesty in that case says, "Once the
24 Plaintiff demonstrates a prima facie case and has met
25 her burden, the defense can traverse the Plaintiff's

1 case in three ways. Either cross-examine the
2 plaintiff's expert" -- did not happen here --
3 "contradict the plaintiff's expert with the defense own
4 expert, and/or propose an independent alternative
5 causation theory."

6 Your Honor, it's not clear which path the
7 insurer's experts took, but there's nothing that
8 conclusively refutes Dr. Gomez and Dr. Ruggeroli's
9 determination of the cause of death.

10 Laura Demaranville has met the preponderance
11 of evidence. Nobody has offered convincingly an
12 independent alternative causation theory. Nobody has
13 contradicted Dr. Ruggeroli or Dr. Gomez, and I ask that
14 you grant her the benefits she's entitled to under the
15 Nevada Industrial Insurance Act. Thank you.

16 THE COURT: Thank you. Mr. Rowe.

17 MR. ROWE: Thank you, Your Honor. I really --
18 there's, I guess, three points I'd want to make in
19 terms of the argument from the City of Reno's
20 perspective as the self-insured employer and the for me
21 -- I'll call it the former employer of the claimant.

22 But I want to start with the causation issue.
23 I'm gonna let Mark deal with the details of the
24 causation issue from the insurer's perspective, but I
25 want to make a couple of points about this. Just -- I

1 would call it from a 10,000 foot level or a common-
2 sense perspective. And the comments are this. You've
3 got a number of opinions, but you have four opinions
4 from cardiologists.

5 And I would suggest to you that the opinions
6 of the cardiologists should be the opinions that carry
7 weight in this case, because they're the ones directly
8 addressing the issue.

9 The other physicians, I'm not sure, are
10 particularly qualified to address the issue, and I take
11 exception to the argument that Dr. Gomez is in a good
12 position to determine cause of death here. Dr. Gomez
13 saw the claimant once four days before the surgery, and
14 then again at the time of surgery.

15 Dr. Gomez did not review any of the records,
16 didn't know what the claimant's history was, had
17 absolutely no evidence that the claimant had
18 arteriosclerotic heart disease, and yet goes so far as
19 to write on the death certificate that it's a
20 contributing cause of death.

21 And I would suggest to you, Your Honor, not
22 only did he not have any records to suggest that;
23 there's just no evidence to suggest that this claimant
24 had any kind of heart disease at any point in this

1 process. So I don't think Dr. Gomez's opinion in this
2 case should carry much weight.

3 THE COURT: Can I just stop you before you get
4 going?

5 MR. ROWE: Yeah.

6 THE COURT: Who are the four cardiologists?

7 MR. ROWE: Dr. Ali, Dr. Lagstein, Dr. Regerio,
8 or Ruggeroli, sorry, and Dr. Carrea.

9 THE COURT: Okay. Dr. Ali?

10 MR. ROWE: Dr. Ali was one of the physicians
11 that Icon used in its initial analysis. Dr. Ali's
12 opinion is on ---

13 THE COURT: Yeah, I see it. I see it.

14 MR. ROWE: -- On page 36.

15 THE COURT: I knew that Pameraju was not.

16 MR. ROWE: Yeah. Pameraju was not, but Dr. Ali
17 was.

18 THE COURT: Okay. All right.

19 MR. ROWE: Okay?

20 THE COURT: Yes.

21 MR. ROWE: So the four cardiology opinions are
22 Ali, Lagstein, Ruggeroli and Carrea.

23 And in trying to -- just in summarization,
24 the way I read these reports, I think Dr. Ali has come
25 to the conclusion there's insufficient evidence to

1 establish that the claimant died of a myocardial
2 infarction.

3 Dr. Lagstein says you can't tell. They --
4 there's this issue of the Troponin levels, and I'll
5 address that briefly, in just a moment.

6 But Ali, Lagstein and Carrea all say, we
7 don't have enough evidence to determine what the actual
8 cause of death is. The only cardiologist that says, "I
9 know what the cause of death was," is Ruggeroli.

10 And so how do we go about determining which
11 of these cardiologists is correct in that? And I would
12 suggest to you, Your Honor, what we do is we look for
13 actual evidence to support that conclusion in the
14 record.

15 And what you do when you look in the record
16 for evidence of arteriosclerotic heart disease, is you
17 come up with zero. There's no evidence that Mr.
18 Demaranville had arteriosclerotic heart disease, and
19 there's no evidence he had any symptoms whatsoever of
20 heart disease.

21 So I'm gonna suggest to you that that opinion
22 is speculative, unless you've got something to really
23 back it up. What Dr. Ruggeroli bases most of his
24 opinion on is the Troponin results that were done in

1 the labs that were taken about 3:30 in the afternoon of
2 the day he died.

3 Now, the actual labs, and Mr. Beavers didn't
4 point these out specifically, but they're on page 10
5 and 11 of Exhibit Number 1 --

6 THE COURT: Exhibit 9? Oh, okay.

7 MR. ROWE: And they do suggest that the
8 specimen that was taken at 3:30 shows an elevated
9 Troponin level, but it's not a highly elevated Troponin
10 level, and I would suggest to you, Your Honor, that the
11 records that Mr. Beavers pointed out earlier of the
12 nurse's note are important in this regard. And those
13 nurse's notes are in two places. They're Exhibit 6,
14 Page 127, and they're Exhibit 2, Page 23.

15 And what those nurse's notes say that is
16 important in that regard -- sorry. Let me get to it.
17 Let me get Exhibit 6. Sorry.

18 THE COURT: Page 23 is the anesthesia records.

19 MR. ROWE: Yeah, I'm sorry, I got the wrong
20 reference there. It's Exhibit 6, Page 127 is where the
21 note is. And the part of the note that I want to refer
22 to is the beginning. It says, "Shortly after arriving
23 in the PACU the recovery room nurse reported that the
24 patient became hypotensive and tachycardic."

1 So, shortly after getting to the recovery
2 room they note he's hypotensive and tachycardic. And
3 I'm sure you know from your medical background that
4 Troponin levels can be caused -- or Troponin levels are
5 evidence of damage to the heart, not necessarily a
6 myocardial infarction. Lots of things can cause
7 elevated Troponin levels, like tachycardic.

8 So, the fact that Dr. Ruggeroli seizes on the
9 high Troponin level I think is a bit of a red herring
10 in this case, because there are indications that he had
11 things going on that could have caused the elevated
12 Troponin level.

13 And again, if you look at what Dr. Carrea and
14 the other cardiologists do here is they look at this
15 and say, "Look. We're just -- we're just not sure. We
16 don't have enough evidence absent basically an
17 autopsy."

18 And I think that is the most reasonable
19 opinion in this case. That's the most reasonable
20 conclusion, given the available evidence that we do
21 have.

22 Shifting gears, Your Honor, I want to shift
23 to the issue of who's the responsible insurer in this
24 case.

1 As indicated, Mr. Demaranville retired from
2 the RPD in 1990. At that point in time, Icon was the
3 insuring entity for the City of Reno.

4 I think that the Daniels case, Employer's
5 Insurance Company versus Daniels, at 122 Nevada 1009,
6 at 145 Pacific 3rd 1024, tells us how you resolve the
7 issue of which insurer is responsible. It applies to
8 the last injurious exposure rule for the point of
9 determining which insurer is responsible in a heart
10 case, where you have multiple insurers that could be
11 responsible.

12 And what the court says is, since a causal
13 relationship between firefighting and heart disease --
14 and of course, in this case we're talking about police
15 work, not firefighters -- and heart disease is
16 conclusively presumed if the firefighter's presumption
17 criteria are met.

18 So the key point here is that the five-year -
19 - employment for five continuous, uninterrupted years
20 is the criterion event. The employer closest in
21 temporal proximity to the disabling event and to whom
22 presumption applies bears the burden of paying the
23 disabled compensation.

24 The insurer in this case that has the most
25 temporal relationship to the date of disability, if we

1 presume that's the date of death in this case, would be
2 Icon, because Mr. Demaranville was not employed with
3 the City of Reno at any point in time that it was self-
4 insured.

5 So if we're looking at the responsible
6 insurers, the City of Reno as a self-insured employer
7 was never qualified -- was not a qualified employer
8 because Mr. Demaranville did not work at any point in
9 time for that entity, i.e., the self-insured City of
10 Reno, for any length of time, let alone the five years
11 continuous uninterrupted work.

12 So, the insurer that has the most temporal
13 relationship, who does qualify, would have been Icon.
14 So it's our position that Icon is the responsible
15 insurer if, in fact, there is enough evidence to prove
16 the actual causation relationship here, which we do not
17 believe is the case.

18 And with that, I'll let Mark go forward on
19 his argument particularly with respect to causation.

20 THE COURT: Mr. Sertic.

21 MR. SERTIC: Thank you, Your Honor.

22 Mr. Rowe is correct, there is no evidence in
23 this case that the claimant had arteriosclerotic heart
24 disease, which I might refer to from now on as just
25 heart disease to make it a bit easier.

1 Cardiac arrest, the heart stopped, does not
2 equate necessarily with heart disease. It could be
3 caused by heart disease, but a cardiac arrest can also
4 be caused by a lot of other reasons that have nothing
5 to do with heart disease, including complications from
6 surgery.

7 Now, I don't think it's material to the
8 outcome of the case, but we really should clear up a --
9 an assertion that's been made that the claimants, or
10 Mr. Demaranville's problems didn't occur until some
11 time after surgery. The evidence is they occurred
12 immediately after surgery, shortly is the word, as soon
13 as he got to the recovery room.

14 And that's at -- I have it -- let me find the
15 exhibit. Exhibit 2, Page 27, are those nurse's notes,
16 and it starts out shortly after arriving in the PACU
17 the recovery room nurse reported the patient became
18 hypotensive and tachycardic.

19 And Dr. Ruggeroli, in Exhibit 7, Page 1,
20 confirms that. He says, shortly after arrival noted to
21 become hypotensive and tachycardic. And then standard
22 cardiopulmonary resuscitation protocol initiated.

23 So he's telling us they started CPR almost
24 immediately.

1 THE COURT: But CPR started clearly in the
2 records at 19:08, 7:08 in the evening.

3 MR. SERTIC: Okay.

4 THE COURT: I mean, that's clear there's a --
5 there's a resuscitation document here.

6 MR. SERTIC: All right.

7 THE COURT: So, you know, it's tough to --
8 it's tough to make all of this come together, really,
9 but.

10 MR. SERTIC: Well, I'll stand corrected. I
11 would have missed that.

12 THE COURT: He died at 19:18, and they -- they
13 started CPR at 19:08. And I can find the record
14 probably, but. I just saw it.

15 MR. SERTIC: Well, you don't need to.

16 THE COURT: Okay.

17 MR. SERTIC: Ruggeroli apparently had that
18 wrong, then.

19 THE COURT: Yeah.

20 MR. SERTIC: But we do know surgery ended at
21 at least 1:32 because in Exhibit 1, Page 6, is the
22 operative report. And it's stamped on Page 6 at 1:32,
23 and on the next page, Page 7, it's dictated at 1:32.

24 THE COURT: I mean, you know, it's just if you
25 look at the nurse's note at 127 it's clear that she's

1 doing it after the fact, and so it's hard to tell when
2 certain things happened, but you can tell that there
3 was a continuing process of trying to bring his blood
4 pressure up for some period of time.

5 MR. SERTIC: By some methods.

6 THE COURT: Until, it looks like, 19:10, when
7 she, this particular nurse, was brought to the bedside.
8 Actually --

9 MR. SERTIC: This nurse, actually.

10 THE COURT: -- I'm not sure this was the
11 nurse, since she intubated the patient, but possibly.

12 MR. SERTIC: Well, whoever wrote this --

13 THE COURT: They were already doing CPR at
14 that point.

15 MR. SERTIC: Right.

16 THE COURT: Yeah.

17 MR. SERTIC: And whoever wrote this shows up
18 at, I think it's 18:10, is what it looks like.

19 THE COURT: Yeah, I think that's --

20 MR. SERTIC: 6:10, and so she's writing from
21 reports from others.

22 THE COURT: She wrote it at 19:30, yeah.

23 MR. SERTIC: Right. But then, right about
24 mid-way it says, "I was called to the patient's bedside
25 at" -- which looks like 18:10.

1 THE COURT: I think it's 19:10. Because the
2 patient was in full arrest at that time.

3 MR. SERTIC: All right. So 7, so she's even
4 later, but --

5 THE COURT: I just -- you know, I just --

6 MR. SERTIC: Again --

7 THE COURT: You know, something was going on
8 pretty much all afternoon.

9 MR. ROWE: Your Honor, for what it's worth,
10 this is identified as an anesthesiology note.

11 THE COURT: yes.

12 MR. ROWE: It may be the anesthesiologist.

13 THE COURT: I think it's the anesthesiologist,
14 yeah. Who was there at the time.

15 MR. BEAVERS: We all thought it was the nurse
16 because you could actually read it.

17 THE COURT: Because the handwriting is
18 legible. So anyway, go ahead. I didn't mean to
19 interrupt you.

20 MR. SERTIC: So, we then have the doctor's
21 reports to look at. And Icon sent off a request to
22 Prium, which is the company they use sometimes for
23 those reports, and the first report they got was from
24 Dr. Pameraju, that's at Exhibit 3, pages 13 to 17. And
25 when they did it, they note that rather than a

1 cardiologist, which is maybe the kind of person you
2 want to do this, that doctor is a doctor of physical
3 medicine and rehabilitation.

4 THE COURT: Uh-huh.

5 MR. SERTIC: And so they then immediately sent
6 out a request again for an actual cardiologist, and
7 then they get Dr. Ali to review it, who's board
8 certified in cardiovascular disease and nuclear
9 cardiology. And that report is at Exhibit 3, Pages 9
10 to 12.

11 And he finds, or she finds, that there's no
12 evidence of coronary artery disease, coronary heart
13 disease, ischemic heart disease, or arteriosclerotic
14 heart disease.

15 On Page 12, the doctor specifically says that
16 there's no evidence to support the diagnosis on the
17 death certificate of arteriosclerotic heart disease and
18 there's no evidence of a myocardial infarction as
19 stated on the C4.

20 Now, the doctor bases that on -- and it's my
21 understanding, I digress a bit, from doing research in
22 the last few days, that there is a difference between a
23 -- in medical literature, between a cardiac arrest and
24 a myocardial infarction. As I read the reports, they
25 start a myocardial infarction is basically a cardiac

1 arrest, but one that's caused by ischemia or restricted
2 blood flow or an occlusive problem.

3 THE COURT: I think you're absolutely correct.
4 A myocardial infarction is a heart attack, where you've
5 got ischemia, or dead -- it's an actual -- and I think
6 that an MI is heart disease. And a cardiac arrest can
7 happen for any number -- I think that's what you're
8 getting at.

9 MR. SERTIC: Yes. That was my understanding.

10 THE COURT: Okay.

11 MR. SERTIC: So, this doctor says there's no
12 evidence of myocardial infarction. Now, bases that on
13 the understanding that no cardiac enzymes were drawn,
14 and they got that wrong. They were drawn. But also,
15 contrary to the argument that you heard earlier, that
16 wasn't the conclusive one, with both this doctor and
17 then Dr. Lagstein. There's also no EKG taken and no
18 autopsy taken.

19 So it's three things they wanted to see, and
20 the enzymes clearly were drawn, and, as Mr. Rowe
21 pointed out, again, my understanding by reading the
22 literature, the high, or the elevated troponin levels
23 simply show muscle damage, heart damage, which could be
24 caused by any number of things, including the
25 tachycardic.

1 But that doesn't get you -- muscle damage
2 doesn't get you the pre-existing heart disease. It
3 gets you heart muscle damage.

4 So Dr. Ali says most likely that cardiac
5 arrest was a post-operative complication. The claimant
6 relies heavily on Dr. Gomez both on the C4 and the
7 death certificate where he states that it was heart
8 disease was the cause of this, and, as MR. Rowe pointed
9 out, he has no evidence for making that assertion
10 whatsoever.

11 The cardiologist attending at death, Dr.
12 Carrea, also doesn't really provide any help to the
13 claimant. At Exhibit 1, Pages 12 to 13, is his report.
14 And he concludes that the diagnosis is post-operative
15 hypotension and shock, possible cardiac etiology.

16 Well, first possibilities aren't sufficient
17 here, but cardiac etiology doesn't help us. We
18 understand his heart stopped. The issue is whether the
19 claimant can show that it stopped because of heart
20 disease.

21 And then we come to Dr. Betts, who's at Pages
22 -- it's in more than one spot. I'll refer to it in
23 Exhibit 3, Pages 27 to 29. Frankly, with all due
24 respect, Dr. Betts is all over the place in his
25 opinion. He clearly states on page 28 that he can't

1 determine the actual cause of death. First answer, no,
2 he can't determine it.

3 Then, in answer to number 6, skip down there,
4 he says he can't determine with certainty if the
5 cardiac arrest was caused by some form of heart
6 disease. He says, "You should ask a cardiologist."

7 Because, despite those answers, it does say
8 in number 2 that the probability is high that the
9 claimant died of heart disease. And in number 4 he
10 says he most likely suffered a myocardial infarction.
11 But he has no evidence upon which to make those
12 statements, and frankly, Your Honor, given that he's
13 said yes and no multiple times in the same letter, I
14 don't think anybody can rely on that either way, and so
15 his opinion should not be given much weight.

16 What he does say is, you should ask a
17 cardiologist, which is what Icon did by asking Dr.
18 Lagstein. And that's at Exhibit 4 -- 5, excuse me.
19 Five. I'm gonna refer to Page 7.

20 In answer to question number 1 he says
21 there's no clear evidence of heart disease, even though
22 he notes that he had a right bundle branch block in the
23 past and underlying left ventricular hypertrophy.

24 He says those in and of themselves are
25 insufficient to document underlying coronary artery

1 disease. In answer to number 2, he says there's
2 insufficient evidence to support a diagnosis of
3 arteriosclerotic heart disease as stated in the death
4 certificate.

5 Again, he doesn't know -- he doesn't see that
6 enzymes were drawn, but it's, again, not completely
7 conclusive. He also says there's no EKG, which is
8 correct, and that's something that would have been
9 provided.

10 And then number 4 he says there isn't
11 sufficient evidence to support a diagnosis, and
12 believes that the death is due to post-operative
13 complication of unclear etiology, and that goes to
14 another argument that's been raised.

15 It's been at least implied that it's our
16 responsibility to establish a cause of death or a cause
17 for the cardiac arrest. That's not correct. Under the
18 statutes it's clearly the claimant's burden. And this
19 is an unfortunate case. The claimant clearly had a --
20 his heart stop, but it's their burden to show that it
21 was due to underlying heart disease, and the evidence
22 just doesn't support that in this case.

23 Again, in the interest of time, because the
24 hour's late. Dr. Lagstein, in answer to question
25 three, says there's insufficient evidence to support

1 Dr. Ruggeroli's assertion. And that's frankly
2 unsurprising, since Ruggeroli provides no evidence to
3 support his conclusion that there was occult occlusive
4 arteriosclerotic heart disease.

5 His opinion, Dr. Ruggeroli's, who the
6 claimant mostly relies on, as I understand it, is at
7 Exhibit 7, both in answer to questions and in his
8 report that I cited earlier, and what he comes up with
9 basically, he acknowledges that there is no document,
10 documented history of coronary artery disease, but
11 in his opinion Mr. Demaranville had occult heart
12 disease, hidden, without evidence.

13 Given that there's no evidence of underlying
14 heart disease, it's frankly no wonder that he has to
15 rely on calling it occult or hidden. But frankly, and
16 with all due respect for him, he has no evidence to
17 make that assertion. It's absolute complete
18 speculation.

19 And the claimant then has Dr. Ruggeroli
20 respond to Dr. Lagstein's comments, and that's at
21 Exhibit 9 -- it's gonna be Exhibit 8, which I have now
22 completely misplaced.

23 THE COURT: Actually, I think it's in Exhibit
24 9, the response.

25 MR. SERTIC: Well, Dr. Carrea responds.

1 MR. ROWE: Ruggeroli's second report, Your
2 Honor, is Exhibit 8. Page 4, Exhibit 8.

3 MR. SERTIC: So he then -- it's Dr. Lagstein's
4 report, asked to comment on it. In his response he
5 acknowledges that there is no documented history of
6 coronary artery disease. The best he can say, the best
7 he can come up with, is that Mr. Demaranville had risk
8 factors for it. Well, unfortunately, don't a lot of
9 us? That does not prove coronary artery disease.

10 He does note that he had an elevated troponin
11 level, and that's consistent with heart damage. Well,
12 that, again, isn't really news in this case. We know
13 he was having heart issues. The issue is what caused
14 those.

15 And again, he comes down to saying it was
16 occult coronary artery disease, again, without any
17 evidence to support that. And interestingly, he never
18 actually addresses Dr. Lagstein's report. Doesn't
19 really comment on it at all.

20 And then finally we have the opinion of Dr.
21 Carrea, which is at Exhibit 9, who was the cardiologist
22 called in to the recovery room very late, apparently.
23 He acknowledges at Page 15 that he was briefly in
24 attendance, doesn't have any other knowledge or
25 information, and the best he can say at that date is

1 that the echo findings were consistent with a cardiac
2 etiology, but again, that really isn't helpful for us.
3 Because we need more than cardiac etiology.

4 He says it's possible that it arose from a
5 perioperative cardiac event, and as I understand
6 perioperative it means just during or around or because
7 of the operation.

8 But he says that's a possibility. Again,
9 that's -- possibilities aren't sufficient, but who are
10 we to argue that. That's actually helpful for us, but
11 that doesn't mean he died of heart disease. Again, he
12 states he believed he had occult cardiac issues.
13 Again, no evidence for that. And then finally, and
14 most importantly, he says, "Can't state with conviction
15 or certainty that death resulted from a cardiac event."
16 So he's even backing off the cardiac event thing.

17 Now, we all know we don't need certainty in
18 this business, but we really do need conviction.
19 That's really the probability. And he's the attending
20 cardiologist at the time of death and he can't even get
21 to that, much less the finding that there's heart
22 disease.

23 So, this is a serious matter, and I'm being
24 serious when I say this, that the claimant's evidence
25 for heart disease really comes down to the fact that

1 there is no evidence. That's basically the argument.
2 There's no evidence, so it's occult, and therefore it's
3 there. That's not sufficient.

4 And so because the medical evidence doesn't
5 support the finding at all, much less by a
6 preponderance of the evidence of underlying heart
7 disease which resulted in the death, both insurers'
8 determination should be affirmed. The hearing officer
9 in my case should be reversed.

10 And, because the hour is late, I wanted -- I
11 just have to mention so they're in the record. I don't
12 think you need to get to any of these issues. But it's
13 our position that the claim was untimely. The date of
14 death was August 5, 2012. The C4, which is in the
15 record, is August 20th of the next year.

16 Additionally, Mr. Demaranville was advised --
17 he did take his physical tests. There's no argument
18 there. But he was advised repeatedly in those to stop
19 smoking, which eventually he did, as I understand it,
20 in 2009, but exhibit -- those are set forth in Exhibit
21 4, and there's many references to doctors telling him
22 to stop smoking.

23 So even if he had heart disease, which there
24 isn't evidence of, that statute would preclude the
25 benefits.

1 And then with regard to, again, which
2 employer or which party might be responsible, again, I
3 don't think we get to that issue, but the Supreme Court
4 in the Mirage versus Department of Administration said
5 the date an employee's entitled to benefits for an
6 occupational disease occurs when they're disabled and
7 they can't work, and the evidence is Mr. Demaranville
8 worked really up until his surgery. And so that would
9 have been in 2012. That's when the claim arises.
10 That's when benefits start. And under that it would be
11 the city, not my client, employer's insurance company,
12 that would be responsible. But again, I don't think
13 you get to those. I just wanted to mention them so
14 they're in the record, and with that, we'll close.

15 THE COURT: Thank you. I don't want to rush
16 you, because we're certainly going to take the time.

17 MR. SERTIC: That's fine. We're good.

18 THE COURT: Mr. Beavers?

19 MR. BEAVERS: The only point I would make
20 about this confusion of how quickly after the surgery
21 did resuscitation efforts begin or when did the nurses
22 have cause to believe the patient was suffering a heart
23 attack? You had live testimony of a witness before you
24 today who swore under oath that Dr. Gomez came out
25 after the surgery and said the patient's fine, and then

1 the witness testified that she sat there for five hours
2 before she went in and she talked to Dan Demaranville.
3 Clearly he was not dead at that time.

4 She also testified that she got pushed out of
5 the room about that time. He spoke to her. He asked
6 her questions. When he got sick and started to throw
7 up the second time, that's when the nurse asked her to
8 leave. I submit to Your Honor, that's when these
9 heroic efforts to save the patient started. So there
10 was at least five hours from the time of surgery to the
11 time that Mr. Demaranville really started suffering
12 from this heart attack, and it wasn't shortly after the
13 operation. Thank you.

14 THE COURT: Thank you. Mr. Rowe, anything?

15 MR. ROWE: You know, just because it may have
16 been overlooked, I think the importance of evidence of
17 arteriosclerotic heart disease is particularly
18 important here because the contention is the death was
19 caused by a myocardial infarction. We're not talking
20 about some general cause related to the heart here.
21 We're talking specifically about myocardial infarction,
22 and that's why it's so important that there be some
23 evidence in that record somewhere that he actually had
24 occlusive heart disease of some kind that would have
25 led to myocardial infarction.

1 THE COURT: Okay. All right. Mrs.
2 Demaranville, a written decision will be issued within
3 about 30 days. Thank you very much for coming today.
4 I thank everyone for their complete presentations, and
5 I'm gonna look at all this evidence. Okay? And we can
6 go off the record unless there's anything further.

7 MR. SERTIC: Nothing further, Your Honor.
8 Thank you.

9 MR. ROWE: Thank you.

10 (Proceedings conclude at 4:20 p.m.)
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1 **TITLE: The Contested Industrial Insurance Claim of:**
2 **DANIEL DEMARANVILLE, DECEASED**

3
4 **DATE: January 27, 2015**

5
6 **LOCATION: Carson City, Nevada 89701**
7

8
9 **The below signature certifies that the**
10 **proceedings and evidence are contained fully and**
11 **accurately in the digital audio as reported at the**
12 **proceedings in the above-referenced matter before the**
13 **Department of Administration, Appeals Office.**
14

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16
17 *Jennifer Knight*

18 **JENNIFER KNIGHT**

4/30/2015

19 **TRUST POINT REPORTING**

DATE

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1 CASE NO. 15 OC 00092 1B

2 DEPT NO. II

REC'D & FILED

2015 MAY 14 AM 11:26

SUSAN MERRIWETHER
CLERK

BY  DEPUTY

3
4
5 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR CARSON CITY

7 * * * * *

8 CITY OF RENO,
9 Petitioner,

10 vs.

11 DANIEL DEMARANVILLE[Deceased],
12 EMPLOYER'S INSURANCE COMPANY
13 OF NEVADA, and NEVADA DEPARTMENT
14 OF ADMINISTRATION APPEALS OFFICER,
15 Respondents.

16
17 EMPLOYERS INSURANCE COMPANY OF
18 NEVADA,

19 Cross-Petitioner,

20 vs.

21 CITY OF RENO, DANIEL DEMARANVILLE
22 [Deceased], and NEVADA DEPARTMENT
23 OF ADMINISTRATION APPEALS OFFICER,
24 Cross-Respondents.

25
26 CERTIFICATION OF TRANSMITTAL

27 I, Lorna L. Ward, Appeals Officer under the Department
28 of Administration, Hearing-Appeals Division, for the State of
Nevada, do hereby certify that the hereto attached record
contains and is a full, true, and correct record of all entries
made in my docket, as more particularly set forth in the Index,
relating to that certain cause heretofore pending before me as
such Appeals Officer, and that the annexed and attached papers

1 are all the process and other papers and exhibits relating to
2 the above-entitled action filed with me.

3
4 APPEALS OFFICER

Lorna L. Ward

5 LORNA L. WARD
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1 CASE NO. 15 OC 00092 1B

2 DEPT NO. II

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4

5 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR CARSON CITY

7 * * * * *

8 CITY OF RENO,
Petitioner,

9

vs.

10

11 DANIEL DEMARANVILLE[Deceased],
EMPLOYER'S INSURANCE COMPANY
OF NEVADA, and NEVADA DEPARTMENT
12 OF ADMINISTRATION APPEALS OFFICER,
Respondents.

13

14 EMPLOYERS INSURANCE COMPANY OF
NEVADA,

15

Cross-Petitioner,

16

vs.

17 CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
18 OF ADMINISTRATION APPEALS OFFICER,
Cross-Respondents.

19

20

21 **AFFIRMATION**
Pursuant to NRS 239B.030

22 The undersigned does hereby affirm that the following
document **DOES NOT** contain the social security number of any
23 person:

24


1. Certification of Transmittal

25

APPEALS OFFICER

26

27


LORNA L. WARD

28

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1 CASE NO. 15 OC 00092 1B
2 DEPT NO. II

REC'D & FILED

2016 MAY 14 AM 11:26

SUSAN HERRIWETHER
CLERK

BY 

DEPUTY

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

7 * * * * *

8 CITY OF RENO,
9 Petitioner,

10 vs.

11 DANIEL DEMARANVILLE [Deceased],
12 EMPLOYER'S INSURANCE COMPANY
13 OF NEVADA, and NEVADA DEPARTMENT
14 OF ADMINISTRATION APPEALS OFFICER,
15 Respondents.

16 _____/
17 EMPLOYERS INSURANCE COMPANY OF
18 NEVADA,

19 Cross-Petitioner,

20 vs.


21 CITY OF RENO, DANIEL DEMARANVILLE
22 [Deceased], and NEVADA DEPARTMENT
23 OF ADMINISTRATION APPEALS OFFICER,
24 Cross-Respondents.

25 **AFFIRMATION**
26 Pursuant to NRS 239B.030

27 The undersigned does hereby affirm that the following
28 document **DOES NOT** contain the social security number of any
29 person:

- 30 1. Record on Appeal

31 APPEALS OFFICER

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REC'D & FILED

2015 JUN 22 PM 3:58

SUSAN MERRIWETHER
CLERK

BY  DEPUTY

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

CITY OF RENO,

Petitioner,

Case No. 15 0C 00092 1B

vs.

Department No: 2

DANIEL DEMARANVILLE [Deceased],
EMPLOYER'S INSURANCE COMPANY
OF NEVADA, and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Respondents.

EMPLOYERS INSURANCE COMPANY
OF NEVADA

Cross-Petitioner,

vs.

CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Cross-Respondents,

BRIEF OF CROSS-PETITIONER EMPLOYERS
INSURANCE COMPANY OF NEVADA

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1. There are no corporations that must be disclosed pursuant to this Rule.

Dated this 22nd day of June, 2015.

By: Mark S. Sertic
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3 **TABLE OF AUTHORITIES**

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11 Titanium Metals Corp. v. Clark County, 99 Nev. 397, 663 P. 2d 355 (1983).....10

12 Turk v. Nevada State Prison, 94 Nev. 101, 102, 575 P. 2d 599, 600 (1978).....10

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16 **STATUTES AND REGULATIONS**

17 NRS 223B.1305

18 NRS 223B.1359

19 NRS 617.405...5

20 NRS 617.4575, 6, 9, 10

1
2
3 **I. JURISDICTIONAL STATEMENT**

4 The District Court has jurisdiction over this Petition for Judicial Review pursuant to NRS
5 617.405 and NRS 233B.130. The Appeals Officer filed and served her final Decision in this matter
6 on March 18, 2015. The Petitioner City of Reno filed its Petition for Judicial Review on April 14,
7 2015 which was a timely appeal pursuant to NRS 233B.130. The Cross-Petitioner Employers
8 Insurance Company of Nevada filed its Cross-Petition on April 20, 2015 which was timely pursuant
9 to NRS 233B.130.

10 **II. ISSUES PRESENTED FOR REVIEW**

11 The Appeals Officer held that Mr. DeMaranville's death was the result of pre-existing heart
12 disease rather than the result of complications from the surgery he underwent just hours prior to his
13 death. The Appeals Officer therefore found that the claim qualified for compensation under the
14 police officer's heart disease statute, NRS 617.457. This finding is in error and is clearly erroneous
15 in view of the reliable, probative and substantial evidence on the whole record and is arbitrary and
16 capricious.

17 The Appeals Officer also found that as between Employers Insurance Company of Nevada
18 and the City of Reno as a self-insured employer, that all liability for the claim should lie with the
19 City of Reno under its self-insurance plan and not with Employers Insurance Company of Nevada.
20 While Employers Insurance Company of Nevada contests the Appeals Officer's finding that there is
21 a valid claim under NRS 617.457, it does not contest the finding that, in the event the claim is valid,
22 all liability rests with the City of Reno under its self-insurance plan.

23 **III. STATEMENT OF THE CASE**

24 This case involves two separate claims for workers compensation benefits and two separate
25 insurers. On May 23, 2013 the third-party administrator for the City of Reno denied the Claimant's,
26 (Mr. DeMaranville's widow, Laura DeMaranville), request for death benefits. The Claimant
27 appealed from that determination to the Hearing Officer which appeal was by-passed to the Appeals
28 Officer. On September 19, 2013 Employers Insurance Company of Nevada issued its determination

1 denying the Claimant's request for benefits. The Claimant appealed that determination to the
2 Hearing Officer which reversed that determination. Employers Insurance Company of Nevada then
3 appealed that Decision to the Appeals Officer. The City of Reno also appealed from the September
4 23, 2013 determination by Employers Insurance Company of Nevada, which appeal was by-passed
5 from the Hearing Officer directly to the Appeals Officer. The Appeals Officer, in her Decision of
6 March 18, 2015, reversed the Hearing Officer's Decision in the Employers Insurance Company of
7 Nevada case, affirmed the September 19, 2013 determination by Employers Insurance Company of
8 Nevada which denied the claim and reversed the May 23, 2013 determination by the third-party
9 administrator for the City of Reno which denied the claim. The effect of the Appeals Officer's
10 Decision was to find that the Claimant had established a valid claim and that full liability therefor
11 rested with the City of Reno under its self-insurance plan.

12 13 **IV. STATEMENT OF FACTS**

14 Mr. DeMaranville worked as a police officer for the City of Reno, retiring in 1990. See
15 Record on Appeal at page 128, (Hereinafter, "ROA ____"). On August 5, 2012 Mr. DeMaranville died
16 while in the recovery room after undergoing gall bladder surgery. The Claimant's wife sent a C4
17 form to the City of Reno on September 5, 2012. ROA127. The Claimant's wife sent an uncompleted
18 C4 to Employers Insurance Company of Nevada, (hereinafter "EICON"), on July 8, 2013. ROA 364,
19 381. That C4 was not properly completed by the physician until August 20, 2013. ROA 365.

20 The death certificate states the cause of death as cardiac arrest as a consequence of
21 atherosclerotic heart disease. ROA 367. The C4 form lists the diagnosis as a myocardial infarction.
22 ROA 365. However no autopsy was performed to verify this diagnosis and the medical reporting
23 does not support these findings. In order to qualify for benefits under the police officer's heart
24 disease statute, NRS 617.457, it is not sufficient that Mr. DeMaraville's heart stopped functioning.
25 Rather, the Claimant must establish that the death was the result of underlying heart disease and not
26 from some other cause such as complications from the surgery he underwent shortly before he died.

27 The medical evidence does not support a finding that Mr. DeMaranville's death was the
28 result of underlying heart disease.

1 Mr. DeMaranville exited surgery at approximately 1:32 p.m. on August 5, 2012. ROA 133.
2 He died at approximately 7:18 p.m. that same day. ROA 367. The documented medical evidence
3 establishes that Mr. DeMaranville began having serious medical problems shortly after surgery.
4 "Shortly after arriving in the PACU the recovery room nurse reported that the patient became
5 hypotensive and tachycardic." ROA 551. The death certificate lists the cause of death as "cardiac
6 arrest" due to "Atherosclerotic heart disease." The death certificate was signed by the surgeon, Dr.
7 Gomez. There is no evidence whatsoever that Dr. Gomez is a cardiologist and there is no evidence
8 that Dr. Gomez had any knowledge that Mr. DeMaranville had any preexisting heart conditions.
9 ROA 70, lines 15-24.

10 Dr. Carrea was the cardiologist who was called to the recovery room after Mr. DeMaranville
11 became distressed. In his report completed on the date of death he provided a diagnosis of
12 "Postoperative hypotension and shock, possible cardiac etiology." ROA 140. It is notable that Dr.
13 Carrea does not ascribe the death to any underlying heart disease. Subsequently, the Claimant sought
14 a further opinion from him. In that report Dr. Carrea, after noting that he has "no knowledge of other
15 medical records or information regarding the patient," stated:

16 The echo findings at the time of his attempted resuscitation of an akinetic left
17 ventricle are consistent with a cardiac etiology for his death. This could possibly arise
18 from a perioperative cardiac event. But an akinetic left ventricle is the end result of
19 many perioperative complications and unsuccessful resuscitations that result in death.
20 Although I think it is likely that he had occult cardiac issues that became relevant and
21 ultimately lethal during his cholecystectomy, with the current information at hand, I
22 don't think it is possible to state with conviction or certainty that his death resulted
23 from a cardiac event. ROA 583.

24 Dr. Lagstein, board certified in cardiovascular disease and nuclear cardiology, was also asked
25 for an opinion. He found that there was insufficient evidence to diagnose Mr. DeMaranville as
26 having any underlying coronary artery disease and there was insufficient evidence to support the
27 diagnosis of arteriosclerotic heart disease as stated on the death certificate. ROA 415. He also
28 opined:

There is no evidence to support diagnosis [sic] of myocardial infarction in the
absence of abnormal postoperative EKG and postoperative cardiac enzymes,
especially troponin-I level. There was no evidence of underlying arteriosclerotic heart
disease. Therefore, the death is due to a postoperative complication of unclear

1 etiology. Clearly, the aforementioned diagnostic test with or without autopsy would
2 have clarified this issue beyond any doubts. ROA 416

3 Dr. Yasmine S. Ali, M.D., who is board certified in Internal Medicine and Cardiovascular
4 Disease reviewed the medical records in this matter. Dr. Ali's review report indicates there was no
5 documentation in the records that would support a diagnosis of atherosclerotic heart disease as noted
6 on the death certificate. ROA 372-375. Dr. Ali's report also noted there was no evidence in the
7 records of coronary artery disease, coronary heart disease or ischemic heart disease. Dr. Ali also
8 found that "there is no evidence of a myocardial infarction, particularly since cardiac enzymes were
9 not drawn, a 12-lead ECG showing evidence of myocardial infarctions is absent, and an autopsy was
10 not performed. Thus, it appears most likely that the cardiac arrest was a post-operative
11 complication." ROA 375.

12 Dr. Ruggeroli also provided an opinion at the request of the Claimant. In his report of May
13 21, 2014 he opined that "the patient had no document [sic] history of antecedent symptomatic
14 coronary artery disease. However, multiple cardiovascular risk factors with a baseline abnormal
15 resting electrocardiogram. In my opinion, the patient had a catastrophic cardiovascular event
16 secondary to occult occlusive atherosclerosis of the coronary arteries leading to pulseless electrical
17 activity not responsive to cardiopulmonary resuscitation leading to his death on August 5, 2012."
18 ROA 557. Thus, it was Dr. Ruggeroli's opinion that Mr. DeMaranville died of a hidden heart disease
19 for which no evidence existed. In a subsequent report Dr. Ruggeroli reiterated that Mr. DeMaranville
20 had no documented history of coronary artery disease but opined that he had "underlying occult
21 occlusive coronary artery disease." He did note that an enzyme test was performed which showed an
22 elevated troponin level. He stated this was consistent with "myocardial necrosis or heart damage,"
23 and consistent with a "cardiovascular cause of the patient's death." ROA 566.

24 Dr. Betz was also asked for an opinion. He states that he cannot determine the actual cause of
25 death. ROA 391. He also states that he is not able to determine whether the death was caused by
26 some form of heart disease. ROA 392. Remarkably, after giving these specific answers he goes on
27 to state that the probability is high that Mr. DeMaranville died of heart disease. ROA 391. It is
28 therefore difficult to give any credit to his opinion especially given that he is not a cardiologist.
Similarly, the opinion of Dr. Pemmaraju is not worthy of weight given that he is a physical medicine

1 and rehabilitation specialist and not a cardiologist. ROA 376-380.

2 The City of Reno denied the Claimant's claim on May 23, 2013. ROA 182-183.

3 Employers Insurance Company of Nevada denied the Claimant's claim on September 19,
4 2013. ROA 368-370.

5 The Claimant appealed both denials and on March 18, 2015 the Appeals Officer issued her
6 Decision in which she found that Mr. DeMaranville died as the result of heart disease and that full
7 liability for the claim rests with the City of Reno under its self-insurance plan. ROA 16- 26.

8 **V. SUMMARY OF ARGUMENT**

9 In order for the claim to be accepted under the police officer's heart disease statute, NRS
10 617.457, Mr. DeMaranville's death must have been caused not merely by a stoppage of his heart, (a
11 cardiac arrest), but by heart disease. The two are not synonymous. Stoppages of the heart can occur
12 for a variety of reasons not including heart disease, such as trauma or complications from surgery.

13 Four cardiologists reviewed this matter and issued opinions. Three of those cardiologists
14 opined that there was insufficient evidence to conclude that the cause of death was heart disease. The
15 only cardiologist who did opine that heart disease was the cause of death was Dr. Ruggeroli.
16 However, even he acknowledged that there was no documented history of heart disease; nonetheless
17 he concluded that Mr. DeMaranville suffered from occult, i.e. hidden, heart disease, despite the lack
18 of evidence therefor.

19 The Appeals Officer, relying primarily on the opinion of Dr. Ruggeroli and most importantly
20 on a misreading and mischaracterization of Dr. Lagstein's report, found that Mr. DeMaranville did
21 die of heart disease. ROA 16-26. This finding is unsupported by the evidence and is arbitrary and
22 capricious.

23 **VI. ARGUMENT**

24 **A. STANDARD OF REVIEW**

25 NRS 223B.135 provides that a reviewing court may set aside a decision of an administrative
26 agency if the decision is:

- 27 (a) In violation of constitutional or statutory provisions;
28 (b) In excess of the statutory authority of the agency;

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

In reviewing a decision of an administrative agency, it is function of the court to determine if the agency acted arbitrarily, capriciously or contrary to law and to determine if the decision was supported by the evidence. Turk v. Nevada State Prison, 94 Nev. 101, 102, 575 P. 2d 599, 600 (1978). An administrative decision is arbitrary and capricious if it is made in disregard of the facts and circumstances involved. Meadow v. Civil Service Board, 105 Nev. 624, 627, 781 P. 2d 772, 774 (1989). The Nevada Supreme Court has not hesitated to reverse administrative decisions that are arbitrary and capricious, including those by appeals officers in workers' compensation cases. Installation & Dismantle, Inc. v. SIIS, 110 Nev. 930, 933, 879 P. 2d 58, 60 (1994). See also, Titanium Metals Corp. v. Clark County, 99 Nev. 397, 663 P. 2d 355 (1983); Leslie v. Archie, 89 Nev. 550, 516 P. 2d 469 (1973).

The correct standard of review in this case is whether the Appeals Officer's Decision is arbitrary and capricious in light of the substantial evidence in the record. Substantial evidence has been defined as "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." Jourdan v. SIIS, 109 Nev. 497, 499, 853 P.2d 99, 101 (1993), citing State. Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, n.1, 729 P.2d 497, 498, n.1 (1986) (quoting Robertson Transp. Co. v. P.S.C., 159 N.W.2d 636, 368 (Wis. 1968)). The Decision of the Appeals Officer in this case is not supported by the record, is arbitrary and capricious and should be reversed.

B. THE DECISION OF THE APPEALS OFFICER IS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY THE RECORD

This claim was brought under the police officer's heart disease statute, NRS 617.457. That statute provides a conclusive presumption that heart disease is a compensable occupational disease for anyone who worked as a police officer for five consecutive years. It is undisputed that Mr. DeMaranville did work as a police officer for the City of Reno for more than five years. Therefore,

1 under that statute, the Claimant would be entitled to certain benefits if it is established that Mr.
2 DeMaranville's death was caused by heart disease. This statute requires that the deceased suffered
3 from heart disease and not simply a stoppage of the heart, (i.e. a cardiac arrest). Otherwise, every
4 death of a police officer would be compensable since at death, from whatever cause, the heart does
5 eventually stop. The evidence in this case does not support a finding that Mr. DeMaranville had
6 heart disease.
7

8 Three out of four cardiologists concluded that there was insufficient evidence to conclude
9 that the death was the result of heart disease.

10 Dr. Carrea, stated "I don't think it is possible to state with conviction or certainty that his
11 death resulted from a cardiac event." ROA 583.

12 Dr. Ali, indicated that there was no documentation in the records that would support a
13 diagnosis of atherosclerotic heart disease as noted on the death certificate. ROA 372-375. Dr. Ali's
14 report also noted there was no evidence in the records of coronary artery disease, coronary heart
15 disease or ischemic heart disease.
16

17 Dr. Lagstein found that there was insufficient evidence to diagnose Mr. DeMaranville as
18 having any underlying coronary artery disease and there was insufficient evidence to support the
19 diagnosis of arteriosclerotic heart disease as stated on the death certificate. ROA 415.

20 Both Dr. Ali and Dr. Lagstein ascribe the cause of death to postoperative complications.
21

22 The Appeals Officer ignored those three opinions and instead relied upon the opinion of Dr.
23 Ruggeroli. She did so despite the fact that Dr. Ruggeroli acknowledged that Mr. DeMaranville had
24 no history of coronary artery disease and simply opined that he died from a "a catastrophic
25 cardiovascular event secondary to occult occlusive atherosclerosis of the coronary arteries." ROA
26 557. Essentially, it is Dr. Ruggeroli's opinion that Mr. DeMaranville died of a hidden heart disease
27 for which no evidence existed.
28

1 The Appeals Officer relied heavily on the fact that Dr. Ruggeroli noted that Mr.
2 DeMaranville had an elevated troponin level. ROA 6. This reliance is severely misplaced. Dr.
3 Ruggeroli opined that this test was consistent with "myocardial necrosis or heart damage." ROA
4 566. However, the test was taken at approximately 3:30 p.m. ROA 579. This was after Mr.
5 DeMaranville has already been suffering from tachycardia. ROA 551. Increased troponin levels can
6 be caused by many things other than heart disease, including tachycardia, trauma or even strenuous
7 exercise. See University of Maryland Medical Center Website:
8 <http://umm.edu/health/medical/ency/articles/troponin-test>. Thus, all this test established is that Mr.
9 DeMaranville had some damage to his heart, the cause of which is likely the tachycardia. It does not
10 establish that he had underlying heart disease.
11

12 The Appeals Officer, in rejecting Dr. Lagstein's opinion, and as an essential finding in her
13 Decision, wrote: "However, Dr. Lagstein notes that the troponin I "test with or without autopsy
14 would have clarified this issue beyond any doubts." ROA 7, lines 7-9. This is not correct. This is not
15 at all what Dr. Lagstein stated. Here is what Dr. Lagstein stated:
16

17 There is no evidence to support diagnosis [sic] of myocardial infarction in the
18 absence of abnormal postoperative EKG and postoperative cardiac enzymes,
19 especially troponin-I level. There was no evidence of underlying arteriosclerotic heart
20 disease. Therefore, the death is due to a postoperative complication of unclear
21 etiology. Clearly, the aforementioned diagnostic test with or without autopsy would
22 have clarified this issue beyond any doubts. ROA 416

23 Despite the use of the singular "test," Dr. Lagstein was clearly referring to both of the
24 diagnostic tests he mentioned: i.e. a postoperative EKG and cardiac enzyme test. That is the only
25 reasonable reading of that statement. Even if one were to assume he was referring to only one of the
26 two tests he mentioned, there is no evidence to support the Appeals Officer's conclusion that he was
27 referring to the enzyme test rather than the EKG. The Appeals Officer mischaracterized Dr.
28 Lagstein's opinion. He stated that both the enzyme test and the EKG were important, not merely the

1 enzyme test. This finding constitutes an essential and critical part of her Decision. This is incorrect
2 and arbitrary and capricious.

3 It should also be noted that Dr. Ali also found that not only was the cardiac enzymes test
4 important but so too was a 12-lead ECG. ROA 375. It is also significant that both Dr. Lagstein and
5 Dr. Ali noted that no autopsy was performed. ROA 375, 415.

6
7 The evidence simply does not support a finding that Mr. DeMaranville died as a result of
8 heart disease. The only evidence pointing in that direction is the elevated enzyme test, which is fully
9 explained by the tachycardia that Mr. DeMaranville suffered after the operation. The key finding by
10 the Appeals Officer that Dr. Lagstein stated the enzyme test would be conclusive is incorrect and
11 based upon a mischaracterization of his report. Thus, the Appeals Officer's finding that Mr.
12 DeMaranville died as the result of heart disease is conclusory, without support in the evidence and
13 arbitrary and capricious.
14

15 16 **VII. CONCLUSION**

17 Employers Insurance Company of Nevada respectfully requests that its Cross-Petition for
18 Judicial Review be granted and the Appeals Officer's Decision that Mr. DeMaranville died as a
19 result of heart disease be reversed.

20
21 Dated this 22nd day of June, 2015.

22
23 SERTIC LAW LTD.

24
25
26 By: Mark S. Sertic
27 Mark S. Sertic
28 Attorneys for Cross-Petitioner/Respondent
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ATTORNEY'S CERTIFICATE

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

☐ This brief has been prepared in a proportionally spaced typeface using [state name and version of word-processing program] in [state font size and name of type style]; or

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

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.


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1 DATED this 21st day of June, 2015.

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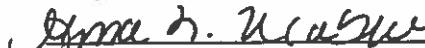
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of Sertic Law Ltd., Attorneys at Law, over the age of eighteen years, not a party to the within matter, and that on the 22 day of June, 2015, I deposited for mailing at Reno, Nevada, with postage fully prepaid, a true copy of the foregoing or attached document, addressed to:

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AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm to the best of his knowledge that the foregoing document does not contain the social security number of any person.

Dated on this 22 day of June, 2015.


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BY *[Signature]*
DEPUTY

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

* * * * *

CITY OF RENO,
Petitioner,
vs.
DANIEL DEMARANVILLE [Deceased],
EMPLOYER'S INSURANCE COMPANY
OF NEVADA, and NEVADA
DEPARTMENT OF ADMINISTRATION
APPEALS OFFICER,
Respondents.

Case No. 15 OC 00092 1B
Dept. No. II

PETITIONER'S OPENING BRIEF

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15	NRS 617.430(1).....	6,8
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17	NRS 617.457	3,5,6,8
18	NRS 617.457(1).....	8
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JURISDICTIONAL STATEMENT

1
2 1. Jurisdiction is conferred on the District Court pursuant to NRS 233B.130
3 and NRS 616C.370.

4 2. The Decision and Order of the Appeals Officer at issue in this proceeding
5 was filed on March 18, 2015. The Petition for Judicial Review was timely filed on April
6 14, 2015.

ISSUES PRESENTED FOR REVIEW

1
2 1. Was the finding that Mr. DeMaranville died as a result of heart disease
3 supported by substantial evidence when the record contains no evidence of heart
4 disease?

5 2. Did a Department of Administration Appeals Officer improperly hold that
6 the City, which became self-insured in 2002, was the insurer responsible for Mr.
7 DeMaranville's heart disease when he was last employed by the City in 1990, when
8 EICON insured the City?

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EICON appealed the Hearing Officer Decision to an Appeals Officer. Additionally, DeMaranville appealed the CCMSI determination letter dated May 23, 2013, and the City appealed the EICON determination letter dated September 19, 2013. The three appeals were consolidated, and on March 18, 2015, the Appeals Officer reversed the Hearing Officer Decision, finding that the City was liable for the claim and EICON was not. This Petition seeks a reversal of that Decision.

STATEMENT OF FACTS

Daniel DeMaranville worked as a police officer for the City of Reno ("City") from 1969 through his retirement in 1990. (ROA 017, 128.) It is undisputed that when Mr. DeMaranville retired in 1990, the City was insured by the Employer's Insurance Company of Nevada ("EICON"). (ROA 022.) The City became self-insured in 2002.

On August 5, 2012, Mr. DeMaranville died following laparoscopic cholecystectomy (gallbladder removal) surgery. (ROA 133 – 134, 143.) At the time of his death, Mr. DeMaranville was employed by AKAL Security as a security officer for the U.S. Marshal's Office. (ROA 184, 188.)

Mr. DeMaranville's widow, claimant Laura DeMaranville, filed an occupational disease claim with the City. (ROA 127.) On May 23, 2013, the City denied the claim based on a lack of medical evidence establishing that heart disease caused Mr. DeMaranville's death. (ROA 130 - 131.) DeMaranville appealed the City's determination. (See ROA 125.) The parties then agreed to bypass the hearing officer directly to the Appeals Officer pursuant to NRS 616C.315. (ROA 125.)

DeMaranville also submitted the claim to EICON, the City's insurer at the time of Mr. DeMaranville's 1990 retirement. (ROA 184 – 188.) On September 19, 2013, EICON also denied the claim upon finding that there was no evidence that Mr. DeMaranville died as a result of heart disease. (ROA 321 – 323.) DeMaranville appealed EICON's determination. (ROA 361.) On October 28, 2013, the Hearing Officer reversed EICON's determination and ruled that EICON was liable for the claim because Mr. DeMaranville died from heart disease. (ROA 361-363.) EICON appealed the Hearing Officer Decision to an Appeals Officer. (ROA 670.)

In the meantime, the City also appealed EICON's September 19, 2013 determination. (See ROA 324.) The parties then agreed to bypass the hearing officer directly to the Appeals Officer pursuant to NRS 616C.315. (ROA 324.)

The three appeals were consolidated before the Appeals Officer. (ROA 642 - 643.) Various medical opinions concerning the cause of Mr. DeMaranville's death

1 were submitted into evidence before the Appeals Officer. (See ROA 019 – 021.) The
2 Appeals Officer principally relied upon the opinion of Charles Ruggeroli, M.D., who
3 opined that DeMaranville experienced a catastrophic cardiovascular event secondary
4 to underlying occult occlusive atherosclerosis of the coronary arteries leading to his
5 death. (ROA 021 – 022.) The Appeals Officer found that Mr. DeMaranville's heart
6 disease was compensable as an occupational disease under NRS 617.457. (ROA
7 022.) She also found the applicable date of disability to be August 5, 2012, the date of
8 Mr. DeMaranville's death. (ROA 022.) She then concluded that the City as a self-
9 insured employer was liable for the claim. (ROA 24.) Accordingly, the Appeals Officer
10 also concluded that EICON, who insured the City through 2002, was not liable for the
11 claim. (ROA 024-025.) The Appeals Officer reversed the Hearing Officer's October
12 28, 2013 decision finding EICON liable for the claim; reversed the City's May 23, 2013
13 determination letter denying the claim; and affirmed EICON's September 19, 2013
14 determination letter denying the claim. (ROA 025.)

15 The City requested judicial review and a partial stay of the Appeals Officer's
16 March 18, 2015 Decision. (ROA 010 - 015.) On April 16, 2015, the Appeals Officer
17 denied the stay motion. (ROA 008.)

18 On April 15, 2015, in compliance with the Appeals Officer Decision, the City
19 issued its determination accepting the claim for death benefits pursuant to NRS
20 616C.505. The determination also established the monthly benefit for the death
21 benefits at \$1,683.85, the maximum allowable wage on the date of Mr. DeMaranville's
22 retirement from the City in 1990.

23 The City now requests judicial review of the Appeals Officer Decision on the
24 grounds that the Appeals Officer Decision fails to address the last injurious exposure
25 rule; erroneously uses the date of disability, rather than the date of exposure, to
26 determine which insurer is liable; and is affected by error of law.

ARGUMENT

I. ARGUMENT SUMMARY

The City maintains that the evidence fails to establish that Mr. DeMaranville died as a result of heart disease. However, to the extent that Mr. DeMaranville's death was the result of heart disease, the conclusive presumption set forth in NRS 617.451 establishes that Mr. DeMaranville's heart disease is an occupational disease caused by his employment with the City as a police officer. Hence, if Mr. DeMaranville died as a result of heart disease, DeMaranville is entitled to death benefits pursuant to NRS 617.430(1).

The primary question addressed by this brief is which insurer is liable for those benefits. The parties do not dispute that the City was insured by EICON when Mr. DeMaranville retired in 1990. EICON remained the City's insurer until 2002, when the City became self-insured. The Appeals Officer ruled that the City is the liable insurer because it was self-insured on the date Mr. DeMaranville became disabled in 2012. In so holding, the Appeals Officer committed clear legal error.

Problematically, the Appeals Officer's Decision makes no mention of the last injurious exposure rule. But the last injurious exposure rule is determinative in this case because it places full liability on the insurer who covered the risk at the time of the most recent injury that bears a causal relation to the disability. Thus, it is the date of the employee's last exposure to the disease-causing agent on the job that determines which insurer is liable, not the date that the employee eventually becomes disabled as an eventual result of that exposure. Accordingly, courts applying the last injurious exposure rule, including in cases of a single employer but multiple insurers, hold that an insurer whose coverage begins after an employee has left employment is not liable for disability arising out of that uncovered employment.

This comports with commonsense: an insurer who covered the employer beginning in 2002 should not be liable for injuries the employer caused from 1969-

1 1990, regardless of when those injuries resulted in disability. The City never exposed
2 Mr. DeMaranville to heart-disease causing agents while it was self-insured. EICON
3 covered that risk. Accordingly, the City respectfully submits the Appeals Officer
4 Decision misinterprets applicable law in holding that the insurer who covered the risk
5 of exposure on the date of disability in 2012 is liable for the claim instead of the insurer
6 who covered the risk of exposure on the date of the last exposure in 1990.

7 Additionally, the Appeals Officer's determination that Mr. DeMaranville died as a
8 result of heart disease is not supported by the evidence submitted by the parties. The
9 City therefore requests this Court to reverse the Appeals Officer Decisions because it
10 is affected by error of law and because the factual findings are not supported by
11 substantial evidence.

12 **II. STANDARD OF REVIEW**

13 The District Court "review[s] an administrative Appeals Officer's determination
14 of questions of law, including statutory interpretation, de novo." *United Exposition*
15 *Serv. Co. v. S/IS*, 190 Nev. 28, 30, 849 P.2d 267, 269 (1993). An administrative
16 agency's factual findings must be reversed if they are arbitrary, capricious, not
17 supported by substantial evidence, or affected by prejudicial legal error. NRS
18 233B.135(3); *United Exposition Serv. Co.*, 109 Nev. at 423, 851 P.2d at 424; *State Tax*
19 *Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 127 Nev.
20 *Adv. Op. 31*, 254 P.3d 601, 603 (2011). "Substantial evidence is that which a
21 'reasonable mind might accept as adequate to support a conclusion.'" *State Emp't*
22 *Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)
23 (superseded by statute on other grounds) (quoting *Richardson v. Perales*, 402 U.S.
24 389, 401 (1971)).

25 Because this appeal involves questions of law, this Court conducts a de novo
26 review. To the extent that the Appeals Officer made factual errors in her Decision, her
27 findings are reviewed under the substantial evidence standard.

28 ///

1 **III. THE EVIDENCE DOES NOT SUPPORT THE FINDING THAT MR.**
2 **DEMARANVILLE DIED AS A RESULT OF HEART DISEASE**

3 The Appeals Officer concluded that Mr. DeMaranville died as a result of a
4 catastrophic cardiovascular event secondary to underlying occult atherosclerotic heart
5 disease. (ROA 21). But there is no evidence in the record that Mr. DeMaranville
6 actually had atherosclerotic heart disease of some kind that would have led to a
7 catastrophic cardiac event. Moreover, the Appeals Officer completely overlooked the
8 conclusions of Dr. Carrea, the cardiologist in attendance at the time of Mr.
9 Demaranville's death, who explained why it was not possible to conclude with
10 conviction or certainty that a cardiac event caused Mr. Demaranville's death. (ROA
11 583). As a number of physicians indicated it was simply not possible to determine
12 what caused Mr. Demaranville's death in absence of an autopsy. Accordingly, the
13 Appeals Officers' Decision is speculative, arbitrary and is not supported by substantial
14 evidence. It should be reversed.

15 **IV. IF MR. DEMARANVILLE DIED AS A RESULT OF HEART DISEASE, EICON**
16 **IS LIABLE BECAUSE IT COVERED THE RISK OF EXPOSURE WHEN MR.**
17 **DEMARANVILLE WAS LAST EXPOSED**

18 NRS 617.457 creates a conclusive presumption that heart disease in police
19 officers who are employed for five or more years in a "continuous, uninterrupted and
20 salaried" position is an occupational disease arising out of and in the course of
21 employment. NRS 617.457(1). This conclusive presumption, commonly known as the
22 "firefighters' presumption," applies even when the heart disease is not discovered until
23 after the police officer has retired. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 601-
24 02, 959 P.2d 519, 522-23 (1998). Here, the parties do not dispute that if Mr.
25 DeMaranville died as a result of heart disease, the presumption would apply, and
26 DeMaranville would be entitled to death benefits pursuant to NRS 617.430(1).

27 The question presented here is which insurer is liable for those benefits. The
28 Hearing Officer held EICON, as the insurer who covered the City during Mr.
DeMaranville's employment, is liable. The Appeals Officer reversed, holding that the

insurer who covered the City when Mr. DeMaranville became disabled 22 years after his retirement is liable.

But the Appeals Officer's decision is at odds with the last injurious exposure rule, which "places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 696, 709 P.2d 172, 176 (1985) (quoting 4 Larson, *The Law of Workmen's Compensation* § 95.20 (1984)). In this case, the carrier who covered the risk at the time of Mr. DeMaranville's most recent injury that resulted in his 2012 heart attack was EICON, the insurer in place when Mr. DeMaranville retired in 1990. Mr. DeMaranville could not have been injured on the job after 1990 because was no longer on the job after 1990.

Notably, the Appeals Officer's decision makes no mention of the last injurious exposure rule. (See generally ROA 016 – 25.) The Appeals Officer did not discuss whether and how the last injurious exposure rule applies, in spite of requesting additional briefing from the parties regarding which insurer was liable (ROA 585-86), briefing on the issue of the last injurious exposure rule by the parties (ROA 039 – 31, 36-37, 40), and oral argument at hearing (ROA 102-103). The error in the Appeal Officer's holding is compounded by the failure to even address the last injurious exposure rule, which is determinative in this case.

A. The Last Injurious Exposure Rule Applies in Successive Insurer Cases, Especially Those Involving Occupational Disease Manifesting After Retirement

On at least five occasions, the Nevada Supreme Court has adopted the last injurious exposure rule set forth in Larson's *Workers' Compensation Law* ("Larson's") to hold that "[f]ull liability is placed on the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability."¹ (Emphasis added.)

¹ *Las Vegas Housing Auth. v. Root*, 116 Nev. 864, 868, 8 P.3d 143, 146 (2000) (in occupational disease cases, the last injurious exposure rule "places full liability upon the carrier covering the risk at the time of

Continued . . .

Though the Nevada Supreme Court has never had the occasion to determine how to apportion liability among successive insurers, both Larson's and the majority of jurisdictions apply the last injurious exposure rule in successive insurer cases. Larson *Worker's Compensation Law* § 153.02[1] (2011) (This rule . . . is the majority rule in successive insurer cases, either by judicial adoption or by express statutory provision.") (citations omitted); see also, e.g., *Dep't of Labor & Indus. of State of Wash. v. Fankhauser*, 849 P.2d 1209, 1213 n. 2 (Wash. 1993) (en banc) ("A majority of states follow the last injurious exposure rule in occupational disease cases involving successive insurers."); *Runft v. SAIF Corp.*, 739 P.2d 12, 15 n.2 (Or. 1987) (En Banc) ("The 'last injurious exposure' rule also applies . . . to cases in which an employer is successively insured by two or more carriers."); *Fid. & Guar. Ins. Co. v. Polk Cnty.*, 20 S0.3d 383, 387 (Fl. Ct. App. 2009) (holding in a successive insurer case that the last injurious exposure rule "applies in cases involving long-term exposure to conditions that cumulatively result in a disease.").

"The last injurious exposure rule is particularly useful for allocating liability in occupational disease cases, which often involve a number of insurers." Larson *Worker's Compensation Law* § 153.02[5] (2011). The reason for utilizing the rule in successive insurer occupational disease cases was set forth by the Washington Supreme Court, sitting En Banc:

Under this rule, the last 'insurer covering the risk during the most recent exposure bearing a causal relation to the disability' is liable for the entire amount of the workers' compensation award As a rule for assignment of responsibility, the last injurious exposure rule avoids the usual difficulty in determining which insurer should be held responsible

the most recent injury that bears a causal relation to the disability") (quoting *Jesch*, 101 Nev. at 696, 709 P.2d at 176); 4 A. Larson, *The Law of Workmen's Compensation* § 95.20 (1984)); *Collett Elec. v. Dubovik*, 112 Nev. 193, 197, 911 P.2d 1192, 1195 (1996) (citing 4 Larson, *Workmen's Compensation Law* § 95.20 (1984)); *State Indus. Ins. Sys. v. Vernon*, 106 Nev. 128, 130, 787 P.2d 792, 793 (1990) (quoting 4 Larson *Workmen's Compensation Law* § 95.20 (1986)); *State Indus. Ins. Sys. v. Swinney*, 103 Nev. 17, 19, 731 P.2d 359, 360 (1987) (citing 4 Larson *Workmen's Compensation Law* § 95.20 (1986)); *Jesch*, 101 Nev. at 696, 709 P.2d at 176 (quoting 4 Larson, *The Law of Workmen's Compensation* § 95.20 (1984)).

1 for what percentage of the award, as required under an apportionment
2 system. In occupational disease cases, this determination is particularly
3 difficult because the worker often received multiple exposures over a
long period of time. . . . The last injurious exposure rule avoids this
problem by assigning responsibility to the last insurer at risk.

4 *Fankhauser*, 849 P.2d at 1213 (citations omitted).

5 Further, the last injurious exposure rule solves the "awkward problem produced
6 by a stress on disability [that] comes about when actual disability overtakes the
7 employee when he or she is no longer working in an employment that contributes to
8 his or her condition, or when, although working in these continued harmful conditions,
9 his or her status is no longer that of employee. In these circumstances . . . , the carrier
10 on the risk at the time of the last injurious exposure is generally held liable." Larson
11 *Worker's Compensation Law* § 153.02[6][c] (2011) (citing cases).

12 Indeed, the Nevada version of the rule places liability on the "carrier covering
13 the risk," i.e. the insurance provider, at the time of the most recent injury. In workers'
14 compensation cases, Nevada looks to Larson's as authority, and Larson's applies the
15 rule to successive insurer cases involving occupational disease resulting in post-
16 retirement disability. Respectfully, so should this Court.

17 **B. The Last Injurious Exposure Rule Places Liability on EICON, the**
18 **Insurer Who Covered the Risk When Mr. DeMaranville Was Last**
Exposed

19 In this case, the firefighter's presumption establishes that a police officer's
20 employment exposes the officer to heart disease-causing agents that can result in
21 heart disease that is occupational, much like working with asbestos exposes a worker
22 to disease-causing agents that can result in the occupational disease of
23 mesothelioma. Under the plain language of the last injurious rule as quoted by the
24 Nevada Supreme Court, full liability is placed upon the carrier covering the risk at the
25 time of the most recent injury that bears a causal relation to the disability. "Once the
26 date of disability is determined, the determination of which insurer is liable is
27 accomplished by simply searching backward to find the last time when claimant was
28 exposed to the disease causing substance." Larson *Worker's Compensation Law* §

1 153.02[6][a] (2011) (footnote omitted). Hence it is the date of the most recent
2 disability-causing exposure that determines which insurer is liable, not the date of
3 disability.

4 The Appeals Officer committed legal error when she held that it was the date of
5 Mr. DeMaranville's disability that determined which insurer was liable in this case.
6 Specifically, the Appeals Officer held that because Mr. DeMaranville became disabled
7 in 2012 when the City was self-insured, the City is the liable insurer. However, while
8 "[t]he date of disability for an occupational disease may be used as the date of
9 accident for purposes of timing the employee's claim for benefits, . . . that does not
10 resolve the issue of which employer or which insurance carrier is responsible for the
11 claim." *Fid. & Guar. Ins. Co. v. Polk Cnty.*, 20 So.3d 383, 386 (Fl. Ct. App. 2009)
12 ("*Fidelity*").

13 In fact, the Florida Court of Appeal reversed a trial court decision that relied
14 upon the date of disability to hold that the second insurer was liable in a very similar
15 successive insurer case. *Fidelity*, 20 So.3d at 385-86. As did the Appeals Officer in
16 this case, the trial court erroneously held in *Fidelity* that the new insurer, who took over
17 after the claimant had retired from the County, was liable for the claimant's disability
18 resulting from a disease she had last been exposed to while the County was covered
19 by the first insurer. *Id.* at 386. The Court of Appeal reversed because under the last
20 injurious **exposure** rule, it is "the date of last **exposure**, not . . . the date of
21 manifestation, the date of diagnosis of the disease, or the date of disability" that
22 determines which insurer is liable. *Id.* (emphasis added). In fact, the court explicitly
23 rejected the insurer's "effort to make the trigger for coverage on this workers'
24 compensation claim become the date when the disease manifested itself rather than
25 the date of last exposure." *Id.* Instead, liability lies on "the carrier on the risk when the
26 claimant is last exposed to the hazards of the disease." *Id.* Therefore, because
27 *Fidelity* involved "a case of an occupational disease that first manifests itself after the
28 period of employment had ended," the original insurer, not the one who took over after

1 the employee had retired, was required to pay the claimant's benefits. *Id.* at 387-88.

2 The same analysis applies here. In this case, as in *Fidelity*, Mr. DeMaranville's
3 heart disease first manifested itself after his employment ended. Mr. DeMaranville
4 was last exposed to heart-disease causing agents by virtue of his employment as a
5 police officer in January 1990. Liability therefore lies on EICON because it was "the
6 carrier on the risk when the claimant [wa]s last exposed to the hazards of the disease."
7 *Id.* at 386; see also *Ramey*, 134 F.3d at 959-60 (applying last injurious exposure rule
8 to hold that the last employer/insurer to expose the claimant to potentially injurious
9 noise was liable for the claimant's hearing loss). As in *Fidelity*, the insurer who did not
10 provide coverage until well after the employee stopped working should not be held
11 liable. It is the date of exposure, not the date of disability that eventually results from
12 that exposure many years later, that is determinative.

13 In another analogous case, *Enyard v. Consolidated Underwriters*, 390 S.W.2d
14 417 (Mo. Ct. App. 1965), the claimant developed silicosis in 1960, 17 years after his
15 employment that exposed him to silica dust ended in 1943. *Id.* at 419. None of his
16 later employment exposed the claimant to silica dust. *Id.* at 420. Like DeMaranville,
17 the claimant in *Enyard* filed a claim against two insurers: (1) American, who covered
18 the claimant's employer at the time of his disability in 1960, and (2) defendant
19 Consolidated, who covered the claimant's employer when claimant was employed
20 there. *Id.* at 421. Consolidated advanced the exact argument that EICON advanced
21 below and the Appeals Officer found persuasive:

22 Consolidated contends that the liability, if any, of [the employer] first
23 accrued and attached at the time of injury, which, in an occupational
24 disease case, it says, occurs at the onset of disability which occurred in
25 April of 1960, and that the insurer, on the risk at the time of the injury, is
liable for the loss sustained. It says the award should be reversed as to
it because Consolidated's policy was not in effect in 1960 and had
terminated 14 year prior to the onset of disability.

26 *Id.* at 423. The Missouri Court of Appeal rejected this argument, holding that
27 Consolidated was liable because "Consolidated was the insurer at the time of the last
28 exposure, although the *compensable* injury and disability did not occur until after the

1 termination of the employment." *Id.* at 426. "The insurance carrier of the employer at
2 the time of the employee's most recent exposure [is] liable." *Id.* at 429. EICON, the
3 insurance carrier of the City at the time of Mr. DeMaranville's most recent exposure, is
4 liable here. *See also Underwriters at Lloyds, London v. Alaska Industrial Bd.*, 160 F.
5 Supp. 248, 251-52 (D. Alaska 1958) (in an issue of first impression, rejecting the
6 argument that liability should be apportioned between two insurers to hold that
7 insurance carrier which was on employer's risk on last day of worker's harmful
8 exposure to tuberculosis was solely liable for compensation for disability from
9 tuberculosis); *Falcon v. American Cyanamid*, 534 A.2d 403, 406 (N.J. Super. Ct. App.
10 Div. 1987) (holding that the insurer who covered the employer when the claimant was
11 last exposed to a carcinogen that caused bladder cancer many years later was liable
12 for the disability claim resulting therefrom).

13 In another occupational disease case involving successive insurers,
14 *Weyerhaeuser Co. v. Tri*, 814 P.2d 629 (Wash. 1991) (En Banc), the Washington
15 Supreme Court applied the last injurious exposure rule to allocate liability between the
16 state fund and a self-insurer providing mandatory coverage under Washington's
17 workers' compensation act. *Id.* at 630 (citing 4 Larson, *Workmen's Compensation* §
18 95.20). In *Weyerhaeuser*, employees had suffered hearing loss as result of
19 occupational noise. *Id.* A portion of the loss occurred while the state insured
20 Weyerhaeuser, but the most recent hearing loss occurred **after** Weyerhaeuser became
21 self-insured. *Id.* The court held that Weyerhaeuser was liable for the entire award
22 under the last injurious exposure rule because Weyerhaeuser was the last insurer
23 covering the risk during the most recent exposure that led to disability. *Id.* By
24 analogy, if in this case Mr. DeMaranville's most recent exposure occurred while the
25 City was self-insured, then the City would be liable. But Mr. DeMaranville's most
26 recent exposure that caused his disability occurred in 1990, before the City became
27 self-insured. Because EICON was the last insurer covering the risk during the most
28 recent exposure that caused Mr. DeMaranville's disability, EICON is liable in this case.

1 Courts deciding asbestos cases hold similarly. In *General Ship Service v.*
2 *Director, Office of Workers' Compensation Programs*, 938 F.2d 960 (9th Cir. 1991),
3 the claimant filed for death benefits after her husband died in 1985 from lung cancer
4 that arose from occupational exposure to asbestos. *Id.* at 961. The decedent had last
5 been exposed to asbestos by his employer in 1944. *Id.* Under the last injurious
6 exposure rule, the insurer who covered the employer during 1944 was liable for the
7 death benefits, without regard to who insured the employer at the time of decedent's
8 death in 1985. *Id.* at 962. The date of the employee's last exposure to asbestos
9 determined which insurer was liable, not the date of his eventual death as a result of
10 exposure to asbestos over 40 years later. *Id.*; see also *Lloyd E. Mitchell, Inc. v. Md.*
11 *Cas. Co.*, 595 A.2d 469, 478 (Md. Ct. App. 1991) (holding that "the insurer is required
12 to provide a defense for [the employer] against all personal injury asbestos-related
13 suits brought by plaintiffs allegedly exposed to [the employer's] asbestos products
14 during the policy period, regardless of when the alleged asbestos-related injuries
15 became manifest"). The same result should apply here. The date of DeMaranville's
16 last exposure to the disease-causing agent determines which insurer is liable, not the
17 date of his death as a result of exposure to the disease-causing agent over 22 years
18 later. EICON, who covered the risk of exposure on the date of Mr. DeMaranville's last
19 exposure, is liable.

20 Similarly, in *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593 (9th Cir. 1989), the
21 Ninth Circuit applied the last injurious exposure rule to determine which insurer was
22 liable for the payment of death benefits where there had been only one employer. *Id.*
23 at 596. In that case, Mr. Lustig died from lung cancer caused by exposure to asbestos
24 while working for a single employer, Todd, from 1961 through January 1984. *Id.* at
25 594. Traveler's provided coverage through 1976, and Aetna provided coverage
26 thereafter. *Id.* The Ninth Circuit applied the last injurious exposure rule to hold that
27 Aetna was "the responsible carrier" because "Aetna provided coverage during the last
28 approximately eight years of Mr. Lustig's employment at Todd. During this period, Mr.

1 Lustig was exposed to asbestos. As the carrier who last insured Todd during Mr.
2 Lustig's tenure of employment, Aetna is liable for the full amount of the claim." *Id.*
3 Hence, even where there is only one employer, the last injurious exposure rule holds
4 the carrier who last insured the employer during the decedent's "tenure of
5 employment" is liable for the disability caused by that employment. See *id.* In this
6 case, the carrier who last insured the City during Mr. DeMaranville's "tenure of
7 employment" is EICON. EICON is liable.

8 **C. Nevada Law is Consistent With Holding the Last Insurer to Cover**
9 **the Risk of Exposure Liable**

10 Though Nevada courts have not yet had the opportunity to address the specific
11 question of successive insurer liability under the last injurious exposure rule, Nevada
12 case law does recognize that the insurer who last covered the risk is the liable insurer.
13 Although *Employers Insurance Co. of Nevada v. Daniels*, 122 Nev. 1009, 145 P.3d
14 1024 (2006) is not directly on point because it involves the application of the last
15 injurious exposure rule to determine which of two employers was liable for the
16 claimant's disabling heart disease, *Daniels* does recognize that the carrier who last
17 covered the risk, versus the carrier at the time of eventual disability, is the responsible
18 insurer.

19 In *Daniels*, the Appeals Officer assigned liability to the claimant's first employer,
20 the City, based upon his first manifestation of heart disease, even though Daniels did
21 not become disabled until working for the second employer, Bechtel. *Id.* at 1013, 145
22 P.3d at 1026-27. The Nevada Supreme Court reversed, holding that in the special
23 circumstance where two employers are subject to the firefighters' presumption, "the
24 last injurious exposure rule places responsibility for disability compensation on
25 Bechtel." *Id.*, 145 P.3d at 1027. In other words, it is the employer/insurer who **last**
26 **exposed** the claimant to the disease-causing agent that is liable for the disability
27 resulting therefrom. In *Daniels*, the claimant was last injuriously exposed to the
28 conditions that caused his heart disease by working as a firefighter for his second

1 employer, and the second employer was held liable.

2 In applying the last injurious exposure rule, the *Daniels* court relied upon
3 another Nevada Supreme Court decision, *Jesch*:

4 In *SIIS v. Jesch*, we concluded that a claim for death benefits under
5 Nevada's Occupational Disease Act was viable. Even though the
6 decedent had been exposed to asbestos while working for numerous
7 employers in Nevada, the last injurious exposure rule placed
responsibility for compensation on the last employer whose work
environment had a causal relationship to the decedent's asbestos-
related disease.

8 *Daniels*, 122 Nev. at 1016, 145 P.3d at 1029 (citing *Jesch*, 101 Nev. at 696, 709 P.2d
9 at 176-77). Because Mr. Jesch had not been exposed to asbestos by the most recent
10 employer prior to his death, the Court remanded to determine which of his previous
11 employers was the last to expose him to asbestos. *Jesch*, 101 Nev. at 698, 709 P.2d
12 178. Thus, it was the date of Mr. Jesch's last injurious exposure that determined
13 liability, not the date of disability. Hence, *Jesch* is consistent with every other
14 jurisdiction that holds that it is the date of last exposure, not the date of disability, that
15 determines who is liable for an occupational disease claim. Respectfully, the Appeals
16 Officer committed legal error by using the date of disability to determine liability.

17 V. CONCLUSION

18 The City maintains that the Appeals Officer's Decision that Mr. DeMaranville
19 died as a result of heart disease is unsupported by the evidence. But if heart disease
20 caused Mr. DeMaranville's death, Nevada law presumes that Mr. DeMaranville's
21 employment as a police officer exposed him to heart-disease causing agents that may
22 have eventually resulted in his death 22 years after he retired. EICON covered the
23 risk of that exposure during Mr. DeMaranville's tenure of employment. Hence, EICON
24 is liable for death or disability arising from that exposure pursuant to the last injurious
25 exposure rule. The Appeals Officer's Decision committed legal error by holding the
26 insurer who began covering the City 12 years after Mr. DeMaranville's retirement
27 responsible for benefits arising from Mr. DeMaranville's death.

28 For these reasons, the City respectfully requests reversal of the Appeals Officer

1 Decision and an order holding EICON liable for the claim.

2 Dated this 25th day of June, 2015.

3 McDONALD CARANO WILSON LLP

4
5 By: J.E. Rowe

6 TIMOTHY E. ROWE, ESQ.

7 P. O. Box 2670

8 Reno, NV 895005-2670

9 Attorneys for the Petitioner

10 CITY OF RENO

11 **AFFIRMATION**

12 Pursuant to NRS 239B.030

13 The undersigned does hereby affirm that the preceding **PETITION FOR**
14 **JUDICIAL REVIEW** filed in the First Judicial District Court of the State of Nevada,
15 does not contain the social security number of any person.

16 J.E. Rowe
17 Timothy E. Rowe, Esq.
18 Attorney for Petitioner
19 CITY OF RENO

20 Date 6-25-15

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP, and that on the on the 25th day of June, 2015, I served the preceding **PETITIONER'S OPENING BRIEF** by placing a true and correct copy thereof in a sealed envelope and requesting Reno-Carson Messenger Service hand-deliver said document to the following party at the address listed below:

Appeals Officer
Department of Administration
1050 E. William Street, Suite 450
Carson City, Nevada 89701

Evan Beavers, Esq.
Nevada Attorney for Injured Workers
1000 E. William Street, Suite 208
Carson City, NV 89701

A true and correct copy of the within document was also served via U.S. Mail at Reno, Nevada, on the parties/address referenced below:

Mark Sertic, Esq.
5975 Home Gardens Drive
Reno, NV 89502

City of Reno
Risk Management
P.O. Box 1900
Reno, Nevada 89505

Lisa Jones
CCMSI
P.O. Box 20068
Reno, NV 89515-0068


Carole Davis

422422

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4
5
6
7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 *****

10 CITY OF RENO,

11 Petitioner,

Case No. 150C000921B

12 vs.

Department No: II

13 DANIEL DEMARANVILLE [Deceased],
14 EMPLOYER'S INSURANCE COMPANY
15 OF NEVADA, and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

16 Respondents.
17 _____/

18 EMPLOYERS INSURANCE COMPANY
19 OF NEVADA

20 Cross-Petitioner,

21 vs.

22 CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

23 Cross-Respondents.
24 _____/

25 **ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW**
26
27
28

Petitioner Employers Insurance Company of Nevada, (“EICON”), has filed a Cross-Petition for Judicial Review seeking the reversal of that part of the Appeals Officer’s Decision which found that the claim qualified for compensation under the police officer’s heart disease statute, NRS 617.457. Petitioner the City of Reno, (“CITY”), has filed a Petition for Judicial Review seeking the reversal of the Appeals Officer’s Decision finding the claim to be compensable and also finding that the CITY is the responsible insurer for the claim, and that EICON is not responsible for the claim.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the Cross-Petition for Judicial review filed by EICON is granted and the Decision of the Appeals Officer finding that the claim is compensable under NRS 617.457 is reversed.

IT IS HEREBY ORDERED that the Petition for Judicial review filed by the CITY is granted with respect to the Appeals Officer's Decision finding that the claim is compensable under NRS 617.457. That part of the Appeals Officer's Decision is reversed. The finding by the Appeals Officer that the CITY is the responsible insurer for the claim, and that EICON is not responsible for the claim, is thus moot. Therefore, to the extent the CITY's Petition for Judicial review seeks to reverse that part of the Appeals Officer's Decision, it is denied.

Dated: _____, 2015.

DISTRICT COURT JUDGE

Submitted by:
Mark S. Sertic
Nevada Bar No. 403
5975 Home Gardens Drive
Reno, Nevada 89502
(775) 327-6300
Attorneys for Cross-Petitioner/Respondent
Employers Insurance Company of Nevada

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BEFORE THE APPEALS OFFICER

FILED

JUL 16 2015

DEPT. OF ADMINISTRATION
APPEALS OFFICER

5 In the Matter of the Contested
6 Industrial Insurance Claim of:

) Claim No: 12853C301824

) Hearing No: 52796-KD

) Appeal No: 53387-LLW

8 DANIEL DEMARANVILLE, DECEASED,

9 Claimant.
10

NOTICE OF APPEAL AND ORDER TO APPEAR

- 11
12 1. **ALL PARTIES IN INTEREST ARE HEREBY NOTIFIED** that a hearing will be held
by the Appeals Officer, pursuant to NRS 616 and 617 on:

13 **DATE:** Monday, October 5, 2015

14 **TIME:** 2:30PM

15 **PLACE:** DEPT OF ADMINISTRATION, APPEALS OFFICE
1050 E. WILLIAMS STREET, SUITE 450
CARSON CITY, NV 89701

- 16 2. The **INSURER** shall comply with NAC 616C.300 for the provision of documents in the
17 Claimant's file relating to the matter on appeal.
- 18 3. **ALL PARTIES** shall comply with NAC 616C.297 for the filing and serving of information to
be considered on appeal.
- 19 4. Pursuant to NRS 239B.030(4), any document/s filed with this agency must have all social
20 security numbers redacted or otherwise removed and an affirmation to this effect must be
attached. The documents otherwise may be rejected by the Hearings Division.
- 21 5. Pursuant to NRS 616C.282, any party failing to comply with NAC 616C.274-.336 shall be
22 subject to the Appeals Officer's orders as are necessary to direct the course of the Hearing.
- 23 6. Any party wishing to reschedule this hearing should consult with opposing counsel or parties,
and immediately make such a request to the Appeals Office in writing supported by an affidavit.
- 24 7. The injured employee may be represented by a private attorney or seek assistance and advice
25 from the Nevada Attorney for Injured Workers.

26 **IT IS SO ORDERED.**

Lorna L. Ward

27 **LORNA L WARD**
28 **APPEALS OFFICER**

1 NEVADA DEPARTMENT OF ADMINISTRATION
2 BEFORE THE APPEALS OFFICER

3 1050 E. WILLIAM, SUITE 450
4 CARSON CITY, NV 89701

FILED

JUL 16 2015

DEPT. OF ADMINISTRATION
APPEALS OFFICER

6 In the Matter of the Contested
7 Industrial Insurance Claim of:

} Claim No: 12853C301824

} Hearing No: 52796-KD

} Appeal No: 53387-LLW

9 DANIEL DEMARANVILLE, DECEASED,)

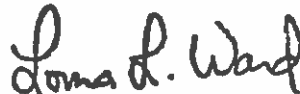
10 Claimant.
11

12 ORDER FOR APPOINTMENT OF
13 NEVADA ATTORNEY FOR INJURED WORKERS

14 The Appeals Officer, having received and considered the Claimant's
15 written request for the appointment of the Nevada Attorney for Injured Workers;
16 finds the Claimant would be better served by legal representation and accordingly;

17 IT IS HEREBY ORDERED the Nevada Attorney for Injured Workers
18 is hereby appointed, pursuant to NRS 616A.450 to represent the Claimant in this
19 matter.

20 IT IS SO ORDERED.

21 

22 LORNA L WARD
23 APPEALS OFFICER
24
25
26
27
28

REQUEST FOR HEARING BEFORE THE APPEALS OFFICER
NEVADA DEPARTMENT OF ADMINISTRATION
HEARINGS DIVISION

In the matter of the Contested
Industrial Insurance Claim of:

Hearing Number: 52796-KD
Claim Number: 12853C301824

DANIEL DEMARANVILLE, DECEASED
C/O LAURA DEMARANVILLE
PO BOX 261
VERDI, NV 89439

CITY OF RENO
ATTN ANDRENA ARREY GUE
PO BOX 1900
RENO, NV 89505

I WISH TO APPEAL THE HEARING OFFICER DECISION DATED: June 24, 2015

(Please attach a copy of the Hearing Officer's Decision)

PERSON REQUESTING APPEAL: (circle one) CLAIMANT EMPLOYER/INSURER

REASON FOR APPEAL: disagree with decision

If you are represented by an attorney or other agent, please print the name and address below.

Name of Attorney or Representative

Laura Demaranville
Person requesting this hearing (please print)

Address

Laura Demaranville
Person requesting this hearing (signature)

City, State, Zip Code

Telephone Number

345-10530
Telephone Number

7-7-15
Date

WILL AN INTERPRETER BE REQUIRED?

YES []

NO ☒

If so, what language: _____

NOTICE

If the Hearing Officer Decision is appealed, CLAIMANTS are entitled to free legal representation by the Nevada Attorney for Injured Workers (NAIW). If you want NAIW to represent you, please sign below:

Laura Demaranville
Claimant's signature

345-10530
Claimant's Telephone Number

If you are appealing the Hearing Officer's decision, file this form no later than thirty (30) days after that decision at:

NEVADA DEPARTMENT OF ADMINISTRATION
APPEALS OFFICE
1050 E. WILLIAMS STREET SUITE 450
CARSON CITY, NV 89701
(775) 687-8420

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AND
RECEIVED

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STATE OF NEVADA
DEPT OF ADMINISTRATION
HEARINGS DIVISION
APPEALS OFFICE

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2:30

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
HEARINGS DIVISION

In the matter of the Contested
Industrial Insurance Claim of:

Hearing Number: 52796-KD
Claim Number: 12853C301824

DANIEL DEMARANVILLE, DECEASED
C/O LAURA DEMARANVILLE
PO BOX 261
VERDI, NV 89439

CITY OF RENO
ATTN ANDRENA ARREYGUE
PO BOX 1900
RENO, NV 89505

BEFORE THE HEARING OFFICER

The Claimant's widow's request for Hearing was filed on May 26, 2015 and a Hearing was scheduled for June 17, 2015. The Hearing was held on June 17, 2015, in accordance with Chapters 616 and 617 of the Nevada Revised Statutes.

The Claimant was present with her representative, Leslie Bell. The self-insured Employer was represented by Timothy Rowe, Esquire. Also present was Mark Sertic, Esquire, by telephone conference call, representing Employers Insurance Company of Nevada.

ISSUE

The Claimant appealed from the Insurer's determination dated April 15, 2015. The issue before the Hearing Officer is calculation of death benefits.

DECISION AND ORDER

The determination of the Insurer is hereby **AFFIRMED**.

In Appeal number 44957-LLW, the self-insured Employer, City of Reno, was found liable for a claim for compensation under the Heart and Lung Bill and the third-party administrator, CCMSI, was ordered to pay death benefits. The insurer calculated the award of death benefits based on the Claimant's retirement date, January 12, 1990, the instant appeal. At the time of his death, the Claimant was employed in security at the Federal Court House and his wages exceeded the state maximum for entitlement to compensation. The Appeals Officer determined the Claimant became entitled to compensation on the date of his disablement, August 5, 2012. As such, the Claimant's widow is requesting recalculation of death benefits based on the wages earned for the twelve week period preceding his death. However, after review of the representations made, the Hearing Officer finds the determination of the Insurer is proper. Unless concurrent employment is relevant, wages used to calculate the AMW are determined by the primary employment in which the injury occurs. In the instant matter, the wages earned would be 0. However, in good faith, the Insurer calculated benefits based on the last date wages were earned which was the date of retirement from the City of Reno.

In the Matter of the Contested
Industrial Insurance Claim of
Hearing Number:
Page two


DANIEL DEMARANVILLE, Deceased
52796-KD

NAC 616C.444 provides the average monthly wage of an employee who permanently or temporarily changes to a job with different duties, rate of pay, or hours of employment, must be calculated using only information concerning payroll which relates to his or her primary job at the time of the accident. The preceding sections apply in calculating the average monthly wage for such an employee.

APPEAL RIGHTS

Pursuant to NRS 616C.345(1), should any party desire to appeal this final Decision and Order of the Hearing Officer, a request for appeal must be filed with the Appeals Officer within thirty (30) days of the date of the decision by the Hearing Officer.

IT IS SO ORDERED this 24th day of June, 2015.


Katherine Diamond, Hearing Officer

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was deposited into the State of Nevada Interdepartmental mail system, **OR** with the State of Nevada mail system for mailing via United States Postal Service, **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Suite 400, Carson City, Nevada, to the following:

DANIEL DEMARANVILLE, DECEASED
C/O LAURA DEMARANVILLE
PO BOX 261
VERDI, NV 89439

LESLIE BELL
RENO POLICE PROTECTIVE ASSOCIATION
PO BOX 359
RENO NV 89504

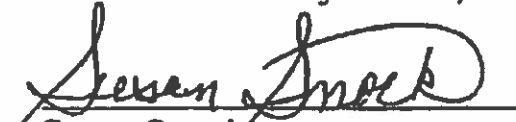
CITY OF RENO
ATTN ANDRENA ARREYGUE
PO BOX 1900
RENO, NV 89505

CCMSI
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RENO, NV 89515-0068

TIMOTHY ROWE, ESQ
PO BOX 2670
RENO NV 89505

MARK SERTIC, ESQ
5975 HOME GARDENS DRIVE
RENO NV 89502

Dated this 24th day of June, 2015.


Susan Smock
Employee of the State of Nevada

1 CERTIFICATE OF MAILING

2 The undersigned, an employee of the State of Nevada, Department of Administration,
3 Hearings Division, does hereby certify that on the date shown below, a true and correct copy of
4 the foregoing NOTICE OF APPEAL AND ORDER TO APPEAR was duly mailed, postage
5 prepaid OR placed in the appropriate addressee runner file at the Department of Administration,
6 Hearings Division, 1050 E. Williams Street, Carson City, Nevada, to the following:

7 DANIEL DEMARANVILLE, DECEASED
8 C/O LAURA DEMARANVILLE
9 PO BOX 261
10 VERDI, NV 89439

11 NAIW
12 1000 E WILLIAM #208
13 CARSON CITY NV 89701

14 CITY OF RENO
15 ATTN ANDRENA ARREYGUE
16 PO BOX 1900
17 RENO, NV 89505

18 TIMOTHY ROWE, ESQ
19 PO BOX 2670
20 RENO NV 89505

21 LESLIE BELL
22 RENO POLICE PROTECTIVE ASSOCIATION
23 PO BOX 359
24 RENO NV 89504

25 EMPLOYERS INSURANCE COMP OF NV
26 PO BOX 539004
27 HENDERSON, NV 89053

28 MARK SERTIC, ESQ
5975 HOME GARDENS DRIVE
RENO NV 89502

CCMSI
PO BOX 20068
RENO NV 89515-0068

Dated this 16th day of July, 2015.



Kristi Fraser, Legal Secretary II
Employee of the State of Nevada

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1 MARK S. SERTIC, ESQ.
2 SERTIC LAW LTD.
3 Nevada Bar No.: 403
4 5975 Home Gardens Drive
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6 Telephone: (775) 327-6300
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8 *Attorneys for Respondent/Cross-Petitioner*
9 *Employers Insurance Company of Nevada*

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BY V. Alegria DEPUTY

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

CITY OF RENO,

Petitioner,

Case No. 150C000921B

vs.

Department No: II

DANIEL DEMARANVILLE [Deceased],
EMPLOYER'S INSURANCE COMPANY
OF NEVADA, and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Respondents.

EMPLOYERS INSURANCE COMPANY
OF NEVADA

Cross-Petitioner,

vs.

CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Cross-Respondents,


STIPULATION TO EXTEND BRIEFING SCHEDULE

The parties hereto, by and through their respective attorneys of record, hereby stipulate and agree as follows:

- 1 1. Respondent Laura Demaranville, surviving spouse of Daniel Demaranville, deceased,
2 shall have to and including Friday, August 28, 2015, to file her brief(s) in response to the
3 opening briefs filed by Petitioner City of Reno and Cross-Petitioner Employers Insurance
4 Company of Nevada.
5
6 2. Respondent Employers Insurance Company of Nevada, shall have to and including
7 Friday, August 28, 2015, to file its brief in response to the opening brief filed by
8 Petitioner City of Reno.


9 DATED this 23rd day of July, 2015.

10
11 SERTIC LAW LTD.

12
13 By: 
14 MARK S. SERTIC, ESQ.
15 Nevada Bar No. 403
16 5975 Home Gardens Drive
17 Reno, Nevada 89502
18 *Attorneys for Respondent/Cross-Petitioner*
19 *Employers Insurance Company of Nevada*

20 DATED this 23rd day of July, 2015.

21 McDONALD CARANO WILSON LLP

22
23 By: 
24 TIMOTHY E. ROWE, ESQ.
25 Nevada Bar No. 1000
26 100 W. Liberty St., 10th Floor
27 Reno, NV 89505
28 (775) 788-2000
Attorneys for Respondent City of Reno

1 DATED this 21st day of July, 2015.

2
3 NEVADA ATTORNEY FOR INJURED WORKERS

4
5
6 By: 
EVAN BEAVERS, ESQ.

7 Nevada Bar No. 3399
8 1000 East William St., Suite 208
9 Carson City, NV 89701

10 *Attorneys for Respondent Laura Demaranville,*
11 *surviving spouse of Daniel Demaranville, deceased*
12
13
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7 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR CARSON CITY**

9 *****

10 CITY OF RENO,

11 Petitioner,

Case No. 150C000921B

12 vs.

Department No: II

13
14 DANIEL DEMARANVILLE [Deceased],
15 EMPLOYER'S INSURANCE COMPANY
16 OF NEVADA, and NEVADA DEPARTMENT
17 OF ADMINISTRATION APPEALS OFFICER

18 Respondents.
19 _____ /

20 EMPLOYERS INSURANCE COMPANY
21 OF NEVADA

22 Cross-Petitioner,

23 vs.

24 CITY OF RENO, DANIEL DEMARANVILLE
25 [Deceased], and NEVADA DEPARTMENT
26 OF ADMINISTRATION APPEALS OFFICER

27 Cross-Respondents,
28 _____ /

29 **ORDER REGARDING BRIEFING SCHEDULE**

30 Based upon the Stipulation of the parties, and good cause appearing therefor:

31 IT IS HEREBY ORDERED that:

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1. Respondent Laura Demaranville, surviving spouse of Daniel Demaranville, deceased, shall have to and including Friday, August 28, 2015, to file her brief(s) in response to the opening briefs filed by Petitioner City of Reno and Cross-Petitioner Employers Insurance Company of Nevada.
2. Respondent Employers Insurance Company of Nevada, shall have to and including Friday, August 28, 2015, to file its brief in response to the opening brief filed by Petitioner City of Reno.

DATED this ____ day of July, 2015.

DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of July, 2015 I placed a copy of the forgoing Order in the United States Mail, postage prepaid, addressed as follows;

Tim E. Rowe, Esq.
McDonald Carano Wilson LLP
P.O. Box 2670
Reno, Nevada 89505

Evan Beavers, Esq.
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Carson City, Nevada 89701

Mark S. Sertic, Esq.
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C. COOPER
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1 Evan Beavers, Esq.
2 Nevada Bar No. 3399
3 Nevada Attorney for Injured Workers
4 1000 East William Street, Suite 208
5 Carson City, Nevada 89701
6 Attorney for Respondent Laura DeMaranville
7 Surviving Spouse of Daniel DeMaranville

8
9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR CARSON CITY

12 CITY OF RENO,

13 Petitioner,

14 vs.

CASE NO. 15 OC 00092 1B

15 DANIEL DEMARANVILLE [DECEASED];
16 EMPLOYERS INSURANCE COMPANY OF
17 NEVADA; and APPEALS OFFICE of the
18 DEPARTMENT OF ADMINISTRATION,

DEPT. NO. II

19 Respondents.
20 _____/

21 RESPONDENT'S ANSWERING BRIEF
22 TO
23 OPENING BRIEF OF CROSS-PETITIONER
24 EMPLOYERS INSURANCE COMPANY OF NEVADA

25 ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

26 MCDONALD CARANO WILSON
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29 ATTORNEY FOR CROSS-PETITIONER

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2200 South Rancho Drive, Suite 230
Las Vegas, NV 89102 (702) 486-2830

DISCLOSURE STATEMENT
(NRAP 26.1)

The undersigned counsel of record certifies that the following are persons and entities as described n NRAP 26.1(1) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Respondent's parent corporations: None

Firms having appeared: Nevada Attorney for Injured Workers

Respondent's pseudonyms: None

Submitted this 28th day of August, 2015.

NEVADA ATTORNEY FOR INJURED WORKERS



Evan Beavers, Esq.
Nevada Bar No. 3399
1000 East William, Suite 208
Carson City, Nevada 89701
Attorney for Respondent
Laura DeMaranville

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I.
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1 II.

2 JURISDICTIONAL STATEMENT

3 Pursuant to NRAP 28(b)(1), the respondent adopts the cross-
4 petitioner's jurisdictional statement.

5 III.

6 STATEMENT OF THE ISSUES

7 1. Whether the appropriate standard for review
8 requires deference to the appeals officer's findings of fact.

9 2. Whether the appeals officer's finding that
10 the decedent died of heart disease is supported by substantial
11 evidence.

12 3. Whether the appeals officer's conclusion that
13 the insurer failed to prove its alternative theory of causation
14 is an abuse of discretion.

15 IV.

16 STATEMENT OF THE CASE

17 This case arises from the Nevada Occupational Diseases
18 Act, NRS Chapter 617. The workers' compensation claim at issue
19 was decided by an administrative law judge and that decision is
20 now before the district court upon petition for judicial review
21 brought pursuant to the Nevada Administrative Procedure Act, NRS
22 Chapter 233B.

23 Laura DeMaranville, the claimant below and the
24 respondent here, is the surviving spouse of Daniel DeMaranville,
25 a retired Reno policeman who died August 5, 2012.

26 Ms. DeMaranville made claim for workers' compensation benefits
27 known as death benefits pursuant to NRS 617.430. Ms.

28 DeMaranville made claim against the City of Reno and against

1 Employers Insurance Company of Nevada (EICON). At the time the
2 decedent retired in 1990, EICON was the workers' compensation
3 insurer for the City of Reno. At the time of death, the City was
4 self-insured and its claims were administered by Cannon Cochran
5 Management Services, inc. (CCMSI).

6 NRS 617.457 provides a conclusive presumption that
7 heart disease causing the death of a retired police officer
8 arises out of and in the course of employment, and is therefore
9 compensable for workers' compensation benefits. NRS 617.420 and
10 NRS 616C.505 provide that the officer's surviving spouse is
11 entitled to death benefits including contribution for burial
12 expenses and 66 2/3 percent of the decedent's average monthly
13 wage payable for the life of the surviving spouse.

14 CCMSI, on behalf of the City, denied Ms. DeMaranville's
15 claim for death benefits alleging the medical record did not
16 prove Mr. DeMaranville's death was caused by heart disease.
17 EICON denied the widow's claim for similar reason. Ms.
18 DeMaranville's appeal of the CCMSI determination, by stipulation,
19 bypassed the Department of Administration Hearing Division's
20 hearing officer for the purpose of proceeding directly to an
21 appeals officer. Ms. DeMaranville's appeal of the EICON
22 determination was presented to a hearing officer who ruled the
23 claim for death benefits was compensable. EICON appealed that
24 decision to the appeals officer. The City appealed EICON's
25 determination, also, and by stipulation that appeal by-passed the
26 hearings officer. All three appeals-the claimant's, EICON's and
27 the City's- were consolidated for hearing before Appeals Officer
28 Lorna L. Ward on January 7, 2015.

1 In the Decision of the Appeals Officer filed March 18,
2 2015, the appeals officer found that Daniel DeMaranville died of
3 heart disease, concluded Laura DeMaranville is entitled to death
4 benefits and determined the City of Reno is liable for the
5 payment of those benefits.

6 The City timely filed in district court its petition
7 for judicial review of the appeals officer's decision. EICON
8 timely filed its notice to participate and filed its "Brief of
9 Cross-Petitioner Employers Insurance Company of Nevada" in the
10 district court action. This brief filed by Laura DeMaranville is
11 in response to EICON's brief.

12 V.

13 STATEMENT OF FACTS

14 Daniel DeMaranville was as a Reno police officer in a
15 full-time, continuous, uninterrupted and salaried position from
16 1969 until his retirement in 1990. ROA 053-054. He was a contract
17 security officer serving in the federal courthouse in Reno in
18 August of 2012. ROA 054.

19 On August 5, 2012, Mr. DeMaranville was admitted to
20 Renown Regional Medical Center in Reno for an elective
21 laparoscopic cholecystectomy (removal of the gallbladder). ROA
22 570. The surgeon was Myron Gomez, M.D. ROA 570. The
23 anesthesiologist was Terry A. Ellis, M.D. ROA 570. Dr. Gomez
24 dictated at 1:32 p.m., at the conclusion of the surgery, that his
25 patient had tolerated the procedure well and was transferred to
26 recovery in stable condition. ROA 571. Various specimens for
27 laboratory testing were taken during the afternoon while Mr.
28 DeMaranville was in PACU. ROA 577-580. Included in the lab

1 reports was Dr. Gomez' order for troponin I levels at 3:45 p.m.
2 and the results reported at 4:11 p.m. ROA 579.

3 Laura DeMaranville confirmed the surgery began about
4 noon (ROA 058) and took a little over an hour (ROA 059). She
5 testified that Dr. Gomez personally confirmed shortly after
6 surgery that everything went fine. ROA 059. She testified she
7 waited nearly six hours after that before she was allowed to
8 visit her husband. ROA 060. During that visit in the recovery
9 room Mr. DeMaranville spoke to his wife and asked questions about
10 her conversation with Dr. Gomez. ROA 060. He then tried to sit
11 up and complained he felt sick. ROA 060-061. A nurse stated Dan
12 was having a massive myocardial infarction, and Ms. DeMaranville
13 was promptly escorted out of the PACU. ROA 061.

14 According to the notes of the anesthesiologist, Dr.
15 Ellis, he was called to the patient's bedside and determined Mr.
16 DeMaranville was in full cardiac arrest. ROA 551. According to
17 the Code Blue Record, chest compressions began at 7:08 p.m., but
18 resuscitation ended at 7:18 p.m. with the death of the patient.
19 ROA 547.

20 Frank Carrea, M.D., the attending cardiologist that
21 day, was summoned to the PACU. ROA 575-576. CPR was being
22 performed. ROA 576. Dr. Carrea recommended aggressive doses of
23 medications. ROA 576. Dr. Carrea noted in his report that an
24 echo machine had been ordered and a brief echo was done which
25 demonstrated no motion in the left ventricular wall. ROA 576.
26 Shortly after that, the decision was made to cease efforts at
27 resuscitation. ROA 576.
28

1 Dr. Gomez counseled Ms. DeMaranville, who was still
2 waiting outside the PACU. ROA 061-062. He explained Dan had
3 passed away. ROA 062. He explained that she could request an
4 autopsy. ROA 062; 573. She declined and began the grieving
5 process. ROA 062; 573. Two days later, on August 7, 2012, Dr.
6 Gomez completed the death certificate identifying the cause of
7 death as cardiac arrest due to, or as a consequence of,
8 atherosclerotic heart disease. ROA 552.

9 Laura DeMaranville initiated her claim for benefits
10 arising from her husband's death by completing form C-4 September
11 5, 2012, and submitting it to CCMSI, the claims administrator for
12 the City of Reno. ROA 067. In the C-4 form Ms. DeMaranville
13 recited the cause of death Dr. Gomez identified in the death
14 certificate-cardiac arrest and atherosclerotic heart disease.
15 Dr. Gomez, who completed the C-4 form, noted myocardial
16 infarction in the diagnosis. ROA 553.

17 After sourcing medical records on the decedent, CCMSI
18 submitted records to Jay E. Betz, M.D., to opine on the cause of
19 death. ROA 177-178. By letter dated May 13, 2013, Dr. Betz
20 stated he could not determine the cause of death based on the
21 limited medical records submitted to him. ROA 179-181. By
22 letter dated May 23, 2013, CCMSI notified Ms. DeMaranville of its
23 determination to deny her claim for benefits due to lack of
24 information establishing the cause of death and no medical
25 records establishing heart disease. ROA 182-184. Ms.
26 DeMaranville appealed that determination to the Hearings Division
27 and representatives for the City and Ms. DeMaranville stipulated
28 to by-pass the hearing officer and proceed, instead, directly to

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1 hearing before an appeals officer. ROA 689-691.

2 After CCMSI denied her claim, Ms. DeMaranville
3 submitted the C-4 form to EICON as the insurer for the City of
4 Reno at the time Mr. DeMaranville retired in 1990. ROA 381.
5 EICON submitted medical records to Prium, a record review
6 service. By informal review dated September 3, 2013, Sankar
7 Pemmaraju, D.O., opined the patient had risk factors that would
8 have led to atherosclerotic heart disease and that the myocardial
9 infarction would most likely not have been due to postoperative
10 complication. ROA 376-381.

11 Next EICON asked another physician with Prium to
12 conduct a record review. By informal review dated September 16,
13 2013, Yasmine S. Ali, M.D., opined that the records she reviewed
14 showed evidence of cardiovascular disease and atherosclerotic
15 heart disease prior to the time of Mr. DeMaranville's gallbladder
16 surgery. ROA 372-375. However, Dr. Ali did not find in the
17 records she reviewed sufficient documentation to support
18 atherosclerotic heart disease as the cause of death as stated in
19 the death certificate. ROA 375. Dr. Ali concluded there was no
20 evidence of myocardial infarction, "particularly since cardiac
21 enzymes were not drawn," and there was no ECG and no autopsy.
22 According to Dr. Ali, "[i]t appears most likely that the cardiac
23 arrest was a post-operative complication. ROA 375.

24 After receiving Dr. Ali's opinion letter, EICON, by
25 determination letter to Laura DeMaranville dated September 19,
26 2013, denied liability for the claim on the basis that there was
27 no medical reporting to support the diagnosis of atherosclerotic
28 heart disease and myocardial infarction. ROA 368-370. That

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1 determination was appealed by the claimant to the hearing officer
2 who ruled the claim against EICON was compensable. ROA 361-363.
3 That decision was appealed by EICON. ROA 668-674. The City also
4 appealed EICON's determination letter to the claimant, and that
5 appeal proceeded directly to the appeals officer by stipulation.
6 ROA 646-650. Eventually, all appeals were be consolidated for
7 presentation to the appeals officer. ROA 642-643; 654-655.

8 In preparation for hearing before the appeals officer,
9 the claimant submitted medical records to Charles E. Ruggeroli,
10 M.D., a Las Vegas cardiologist, with a request for his opinion as
11 to the cause of death and the accuracy of the findings in the
12 death certificate. ROA 420-554; 555-561. Dr. Ruggeroli opined
13 that the cause of Dan DeMaranville's death was "a catastrophic
14 cardiovascular event secondary to occult occlusive
15 atherosclerosis of the coronary arteries." ROA 557. While Dr.
16 Ruggeroli acknowledged there was no documented history of
17 coronary artery disease, multiple risk factors for
18 atherosclerotic vascular disease were remarkable. ROA 556. Dr.
19 Ruggeroli confirmed he reviewed the records provided; confirmed
20 Daniel DeMaranville died of heart disease; and confirmed his
21 opinions were stated to a reasonable degree of medical
22 probability. ROA 559-560.

23 EICON then delivered Dr. Ruggeroli's opinion to Zev
24 Lagstein, M.D., also a Las Vegas cardiologist, along with some
25 medical records, for his review and opinion. ROA 409-410. Dr.
26 Lagstein, in his letter of August 31, 2014, disagreed with Dr.
27 Ruggeroli. ROA 411-416. Dr. Lagstein concluded there was not
28 enough evidence in the records he reviewed to support a diagnosis

1 of arteriosclerotic heart disease as noted in the death
2 certificate.¹ ROA 415. Furthermore, there is "no evidence to
3 support a diagnosis of myocardial infarction in the absence of
4 abnormal postoperative EKG and postoperative cardiac enzymes,
5 especially troponin I level." ROA 416. Dr. Lagstein, believing
6 there was no postoperative EKG and cardiac enzymes were not drawn
7 (ROA 415), concluded "the death is due to a postoperative
8 complication of unclear etiology." ROA 416. He closed his
9 opinion by stating there was "no evidence to support a diagnosis
10 of myocardial infarction in the absence of abnormal postoperative
11 EKG and postoperative cardiac enzymes, especially troponin I
12 level." ROA 416.

13 Dr. Lagstein's opinion letter was shared with Dr.
14 Ruggeroli for a follow-up opinion, along with additional reports
15 and notes from Renown records covering the period of the surgery
16 and the time in the PACU. ROA 565-565; 569-580. Dr. Ruggeroli
17 responded by report dated October 13, 2014, restating his
18 findings of multiple cardiovascular risk factors for coronary
19 artery disease and then referred to specific details in the
20 medical record focusing on the events from the conclusion of the
21 surgery to the time of death. ROA 566. Dr. Ruggeroli noted the
22 patient arrived in the PACU with normal vital signs, but after
23 becoming hypotensive and tachycardic (low blood pressure and
24 rapid heart beat) laboratory evaluation was obtained at 3:35
25 p.m., which proved remarkable for elevated troponin levels

26
27 ¹Dr. Gomez, in the death certificate, referred to
28 atherosclerotic heart disease, the most common form of
arteriosclerotic heart disease. See Stedman's Medical Dictionary
162 (27th ed. 2000).

1 consistent with heart damage. ROA 566. Dr. Ruggeroli then
2 confirmed his opinion that the patient had underlying occult
3 occlusive coronary artery disease. ROA 566. Dr. Ruggeroli
4 concluded his opinion by pointing out that cardiac enzymes
5 (troponin I level) drawn approximately four hours prior to Daniel
6 DeMaranville's death were elevated and consistent with a
7 cardiovascular cause of the patient's death. ROA 566.

8 The appeals officer found Dr. Ruggeroli's opinion
9 persuasive and credible. ROA 022. In particular, the appeals
10 officer found "Dr. Ali and Dr. Lagstein were apparently unaware
11 of the troponin I level prior to Mr. DeMaranville's death and
12 therefor those opinions are of little weight except to affirm the
13 importance of the levels to determine the cause of death. Daniel
14 DeMaranville died of heart disease." ROA 022.

15 EICON now petitions the district court to review the
16 appeals officer's findings and conclusions, and prays for
17 reversal of the finding that Dan DeMaranville died as a result of
18 heart disease.

19 VI.

20 SUMMARY OF THE ARGUMENT

21 The evidence presented to the appeals officer
22 supporting a finding of heart disease as the cause of Daniel
23 DeMaranville's death was substantial. The appeals officer's
24 reliance on Dr. Ruggeroli's opinion was not arbitrary or
25 capricious. The appeals officer's refusal to find, instead, that
26 Mr. DeMaranville died of complications from gallbladder surgery
27 was not an abuse of her discretion.
28

1 A. The appropriate standard of review for this case is
2 deference to the appeals officer's findings of facts.

3 The standard for the district court to review the
4 decision of the administrative law judge is found in NRS
5 233B.135. The review must be confined to the record. NRS
6 233B.135(1)(b). The final decision of the agency shall be deemed
7 reasonable and lawful until reversed and the burden of proof is
8 on the party attacking or resisting the decision. NRS
9 233B.135(2). The court shall not substitute its judgment for
10 that of the agency as to weight of evidence on a question of
11 fact. NRS 233B.135(3). The court may remand or set aside the
12 final decision if the decision is clearly erroneous in view of
13 the reliable, probative and substantial evidence on the whole
14 record (NRS 233B.135(3)(e)) or arbitrary or capricious or
15 characterized by abuse of discretion (NRS 233B.135(3)(f)).

16 EICON argues the decision of Appeals Officer Ward is
17 arbitrary and capricious and not supported by the record.
18 According to the insurer, three out of the four cardiologists
19 offering opinions to the appeals officer found insufficient
20 evidence to conclude Daniel DeMaranville's death was caused by
21 heart disease.

22 The appeals officer made the factual finding that
23 Daniel DeMaranville died of heart disease. Given EICON's
24 challenge to the appeals officer's finding of this critical fact,
25 the district court must look for substantial evidence which would
26 support the finding. NRS 233B.135(3)(e). The court must inquire
27 whether the appeals officer's factual determinations are
28 reasonably supported by evidence of sufficient quality and

1 quantity. See Nassiri v. Chiropractic Physicians' Bd. of Nev.,
2 130 Nev. Adv. Op. 27, 327 P.3d 487, 489 (2014) (citing Elizondo v.
3 Hood Machine, Inc., 129 Nev. Adv. Op. 84, 312 P.3d 479 (2013)).

4 The substantial evidence standard "contemplates
5 deference to those determinations on review, asking only whether
6 the facts found by the administrative factfinder are reasonably
7 supported by sufficient, worthy evidence in the record." Nassiri
8 at 490. The appeals officer's factual findings should only be
9 overturned if not supported by evidence a reasonable mind could
10 accept as adequately supporting her conclusions. See Nev. Dept.
11 of Corrections v. York Claims Services, Inc., 131 Nev. Adv. Op.
12 25, 348 P.3d 1010, 1013 (2015) quoting Nassiri. See also
13 Elizondo at 482 (the court will not reweigh the evidence or
14 revisit an appeals officer's credibility determination, quoting
15 City of Las Vegas v. Lawson, 126 Nev. __, __, 245 P.3d 1175, 1178
16 (2010)); Vrendenburg v. Sedgwick CMS, 124 Nev. 553, 557, 188 P.3d
17 1084 (2008) (the court may not substitute its judgment for that of
18 the appeals officer as to the weight of the evidence on a
19 question of fact); and Nellis Motors v. State, 124 Nev. 1263,
20 1269, 197 P.3d 1061 (2008) (the agency's decision should be
21 affirmed unless it is shown the decision prejudiced substantial
22 rights).

23 B. The appeals officer's finding that the decedent
24 died of heart disease is supported by substantial evidence.

25 The primary factual determination by the appeals
26 officer was that Dr. Ruggeroli's opinion that Daniel DeMaranville
27 died of heart disease, after review of all the others, was more
28 persuasive and credible. EICON attacks this finding by arguing

1 the other cardiologists reviewing the medical records found
2 insufficient evidence to conclude heart disease was the cause of
3 death.²

4 EICON proffered the opinion of Dr. Ali who concluded
5 she was unable to find in the records she was provided any
6 documentation that would support a diagnosis of atherosclerotic
7 heart disease as noted on the death certificate. ROA 372-375.
8 EICON also proffered the opinion of Dr. Lagstein to rebut Dr.
9 Ruggeroli's report. Dr. Lagstein likewise concluded the medical
10 records he reviewed did not contain enough evidence to support a
11 diagnosis of arteriosclerotic heart disease as noted in the death
12 certificate. ROA 411-416. A compilation of the particular
13 records Dr. Ali and Dr. Lagstein reviewed is not in evidence.

14 Conversely, the records provided Dr. Ruggeroli were
15 admitted into evidence just as they were presented and reviewed
16 by the claimant's chief witness. Evidence Exhibit #6 (ROA 420-
17 554) and Evidence Exhibit #9 (ROA 555-561) contain a compilation
18 of pertinent medical records on Dan DeMaranville from 1999 until
19 his death in the PACU. As early as 2004 Mr. DeMaranville was
20 noted to have abnormal electrocardiogram (EKG or ECG) results on

21
22 ²The physicians identified at hearing as cardiologists are
23 Dr. Ruggeroli, Dr. Lagstein, Dr. Ali and Dr. Carrea. ROA 098.
24 The appeals officer did not address the reporting of Dr. Carrea,
25 but Dr. Carrea was not provided records to review and in response
26 to being asked if he had any records and if he could provide an
27 opinion responded with his observations of the patient in the
28 PACU. He stated he had no records or information about the
patient before surgery, that the records of the surgery and
recovery did not mention intraoperative problems suggesting
cardiac issues, and although "it is likely that he [DeMaranville]
had occult cardiac issues that became relevant and ultimately
lethal" he could not state with conviction that death resulted
from a cardiac event. ROA 581-583.

1 examination or unusual heartbeats and was diagnosed with right
2 branch bundle block, although his condition was such that he
3 continued to be cleared for work. ROA 426; 448-451; 456; 470-
4 473; 478; 521-523; 543. While EICON attempts to impeach Dr.
5 Ruggeroli's conclusions by arguing the other cardiologists failed
6 to find proof of cardiac arrest due to atherosclerotic heart
7 disease, that argument lacks weight given that there is no proof
8 that the experts were all reviewing the same complete record.

9 In the opinion of Dr. Ruggeroli, the cardiac enzymes
10 identified as troponins drawn four hours prior to Mr.
11 DeMaranville's death were elevated and consistent with a
12 cardiovascular cause of death. ROA 566. Compare this with the
13 findings of Dr. Ali and Dr. Lagstein who both opined that
14 elevated troponin levels would have been conclusive (ROA 375;
15 416) but neither doctor saw the cardiac enzyme testing in the
16 record. Clearly, there was sufficient and worthy evidence
17 presented to the appeals officer to find Dr. Ruggeroli's opinion
18 more persuasive and more credible than the opinions of EICON's
19 experts. See Nassiri at 490 (deference given to findings of fact
20 supported by sufficient, worthy evidence in the record).

21 EICON seeks to argue to the district court that the
22 appeals officer misunderstood Dr. Lagstein's opinion. According
23 to the argument now presented, Dr. Lagstein would have found the
24 combination of a postoperative EKG and cardiac enzyme testing
25 determinative for myocardial infarction. EICON does not take the
26 opportunity to explain why, if their expert was looking for both
27 tests, he does not find in the record the notes of Dr. Gomez and
28 Dr. Carrea which show that both tests were conducted and the

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1 results reported.

2 Appeals Officer Ward reviewed the record more closely
3 than either Dr. Ali or Dr. Lachstein. Not only does the
4 administrative law judge find in the PACU records the testing Dr.
5 Ruggeroli cites to, but the judge also carefully reviewed that
6 record to consider EICON's closing argument that death came so
7 shortly after leaving surgery that complications from surgery
8 were the cause of death. The decision of the appeals officer
9 notes the patient left surgery at approximately 1:45 p.m. and was
10 taken to the recovery room in good condition. ROA 017. At some
11 point the patient became hypotensive and tachycardic. ROA 017.
12 At 3:35 p.m., according to the time line noted in the PACU
13 records, troponin I enzymes were drawn. ROA 017. The appeals
14 officer notes that Daniel DeMaranville did not die until 7:18
15 p.m. ROA 017.

16 Laura DeMaranville testified she saw the patient her
17 husband nearly six hours after surgery and, even though he was
18 getting sick, he was capable of conversing with her. ROA 060.
19 None of the expert opinions proffered by EICON explained in any
20 detail how the cause of death was a complication of surgery if
21 the patient was in good condition leaving surgery and death came
22 more than nearly six hours later while the patient was being
23 well-attended in the PACU. Dr. Ali and Dr. Lagstein dismissed
24 heart disease as the cause of death but both doctors failed to
25 address the interval of time after the patient left surgery and
26 both ignored the records on testing that took place in the PACU.
27 Deference must be granted to the administrative law judge's
28 findings and the weight she gave Dr. Ruggeroli's opinions. See

1 Vrendenburg at 562 (so long as a causal nexus exists, the
2 evidence supporting the appeals officer's decision on causation
3 need not be conclusive, and may even be conflicting).

4 C. The appeals officer's conclusion that the
5 insurer failed to prove its alternative theory of causation is
6 not an abuse of discretion.

7 NRS 233B.135(3) allows the district court to remand or
8 set aside the appeals officer's decision only if the decision is
9 clearly erroneous or arbitrary or capricious or characterized by
10 an abuse of discretion. According to EICON's view of the
11 evidence, it was an abuse of discretion for the appeals officer
12 to find credible Dr. Ruggeroli's opinion the decedent had occult,
13 or hidden, heart disease. EICON argues more weight should have
14 been given instead to the opinions of Drs. Ali and Lagstein that
15 Mr. DeMaranville died of complications from the gallbladder
16 surgery.

17 Any physician giving testimony to the appeals officer
18 as to the cause of death must state his or her opinion to a
19 degree of reasonable medical probability. See United Exposition
20 Service Co. v. State Indus. Ins. Sys., 109 Nev. 421, 424-425, 851
21 P.2d 423 (1993). A speculative doctor's opinion regarding
22 causation will not support an appeals officer's determination.
23 Horne v. State Indus. Ins. Sys., 113 Nev. 532, 538, 936 P.2d 839
24 (1997). Dr. Ali did state to a reasonable medical probability
25 "there is documentation of atherosclerotic heart disease" before
26 the date of death, but she was unable to find in the records she
27 reviewed any documentation to support the diagnosis contained in
28 the death certificate. ROA 375. Dr. Ali then concluded "it
appears most likely that the cardiac arrest was a post-operative

1 complication." ROA 375:\

2 Similarly, Dr. Lagstein stated "there was no clear
3 evidence of heart disease" prior to the date of death. ROA 415.
4 He agreed with Dr. Ali by opining that without a postoperative
5 EKG or cardiac enzymes test to determine the cause of death, the
6 cause must be "due to a postoperative complication of unclear
7 etiology." ROA 416. Both Dr. Ali and Dr. Lagstein offer an
8 alternative theory of causation: undetermined complications from
9 the gallbladder surgery.

10 Once Laura DeMaranville presented the opinion of Dr.
11 Ruggeroli on causation, she met her prima facie burden as a
12 claimant and EICON had three ways to traverse Dr. Ruggeroli's
13 opinion on causation: (1) cross-examine Dr. Ruggeroli, which
14 EICON did not do; (2) contradict Dr. Ruggeroli's testimony with
15 its own expert, which EICON attempted with Dr. Ali and Dr.
16 Lagstein but it appears from their opinions that neither reviewed
17 a complete record from the PACU; or, (3) propose an independent
18 alternative causation theory. See Williams v. Eighth Judicial
19 Dist. Ct., 127 Nev. Adv. Rep. 45, 262 P.3d 360, 368 (2011) (in
20 cases where medical experts testify on causation, defense experts
21 may either contradict the plaintiff's expert or furnish a
22 reasonable alternative cause).

23 If offered as alternative causation theories, then Dr.
24 Ali's opinion on "post-operative complication" and Dr. Lagstein's
25 opinion on "postoperative complication of unclear etiology" may
26 not need to be stated with a reasonable degree of medical
27 probability, but the theories are still subject to certain
28 threshold requirements. The experts giving opinion evidence must

1 still avoid speculation. Willams at 369. EICON's experts fail
2 that test. They simply declare by default some cause other than
3 that shown on the death certificate. There appears in neither
4 opinion reliable evidence as to what went wrong in surgery that
5 lead to Mr. DeMaranville's death. Neither doctor addresses the
6 patient's reported "good" condition leaving surgery and his death
7 six hours later while under the watchful eyes of the PACU staff,
8 and Dr. Gomez and Dr. Ellis. Neither doctor cites to the medical
9 record for reliable and relevant facts which might support their
10 opinions.

11 Pursuant to NRS 617.430 and NRS 616C.505 Laura
12 DeMaranville is entitled to survivor's benefits if pursuant to
13 NRS 617.457 she could prove to the appeals officer by a
14 preponderance of the evidence that her husband died of heart
15 disease. EICON challenges the appeals officer's conclusion that
16 the veteran policeman died of heart disease by offering an
17 alternative cause vaguely referred to as complications from the
18 surgery. EICON proffers no evidence of sufficient weight to
19 contravene the opinions of Dr. Gomez and Dr. Ruggeroli as to
20 causation. The the opinions of Dr. Gomez and Ruggeroli
21 constitute substantial evidence on which the appeals officer
22 could find that Daniel DeMaranville died of heart disease. A
23 reasonable person could find that evidence adequate to support
24 the conclusion that Laura DeMaranville is entitled to death
25 benefits. See Elizondo at 482 (the court will not reweigh the
26 evidence if a reasonable person could find the evidence presented
27 adequate to support the conclusions).
28

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VII.


CONCLUSION

The Nevada Administrative Procedure Act, as interpreted by the Nevada Supreme Court, mandates the district court show deference to the administrative law judge's findings of fact. Here, the administrative law judge found the opinion of Dr. Ruggeroli persuasive and credible. Dr. Ruggeroli's expert opinion supported the cause of death determined by Dr. Gomez: Daniel DeMaranville's death was a consequence of heart disease. Dr. Ruggeroli was presented with a complete medical record and the appeals officer could use that same record to check the bases for that expert opinion. Dr. Ruggeroli's opinion was supported by substantial evidence. The alternative causation theories proffered by EICON's expert witnesses were not so substantial as to render the appeals officer's conclusions arbitrary or capricious, or an abuse of discretion.

The cross-petition filed by Employers Insurance Company of Nevada seeking to reverse the Decision of the Appeals Officer filed March 18, 2015, must be dismissed.

RESPECTFULLY SUBMITTED this 28th day of August, 2015.

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CERTIFICATE OF COMPLIANCE
(NRAP 28.2 (a))

1
2
3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
5 32(a)(5) and the type style requirements of NRAP 32(a)(6)
6 because:

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

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

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17 points or more and contains ___ words; or

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19 inch, and contains ___ words or ___ lines of text;
20 or

21 X Does not exceed 30 pages.

22 3. Finally, I hereby certify that I have read this brief, and to
23 the best of my knowledge, information, and belief, it is not
24 frivolous or interposed for any improper purpose. I further
25 certify that this brief complies with all applicable Nevada Rules
26 of Appellate Procedure, in particular NRAP 28(e)(1), which
27 requires every assertion in the brief regarding matters in the
28 record to be supported by a reference to the page and volume
number, if any, of the transcript or appendix where the matter

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relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of August, 2015.

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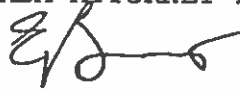
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CERTIFICATE OF COMPLIANCE
(NRAP 32(8))

I hereby certify that I have read this Respondent's Answering Brief to Opening Brief of Cross-Petitioner Employers Insurance Company of Nevada, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 28th day of August, 2015.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the
preceding RESPONDENT'S ANSWERING BRIEF TO OPENING BRIEF OF CROSS-
PETITIONER EMPLOYERS INSURANCE COMPANY OF NEVADA pertaining to
Case No. _15 OC 00092 1B:

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

-OR-

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

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

-OR-

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



Signature

08/28/2015

Date

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on this date I deposited for mailing at Carson City, Nevada, a true and correct copy of the within and foregoing RESPONDENT'S ANSWERING BRIEF TO OPENING BRIEF OF CROSS-PETITIONER EMPLOYERS INSURANCE COMPANY OF NEVADA to:

LAURA DEMARANVILLE
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and that on this date, an electronic copy was sent via email to the following parties listed below:

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DATED: August 28, 2015

SIGNED: Laura Demaranville

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8
9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR CARSON CITY

12 CITY OF RENO,

13 Petitioner,

14 vs.

CASE NO. 15 OC 00092 1B

15 DANIEL DEMARANVILLE [DECEASED];
16 EMPLOYERS INSURANCE COMPANY OF
17 NEVADA; and APPEALS OFFICE of the
18 DEPARTMENT OF ADMINISTRATION,

DEPT. NO. II

19 Respondents.
20 _____/

21 RESPONDENT'S ANSWERING BRIEF
22 TO
23 OPENING BRIEF OF PETITIONER
24 CITY OF RENO

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DISCLOSURE STATEMENT
(NRAP 26.1)

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Respondent's parent corporations: None

Firms having appeared: Nevada Attorney for Injured Workers

Respondent's pseudonyms: None

Submitted this 28th day of August, 2015.

NEVADA ATTORNEY FOR INJURED WORKERS

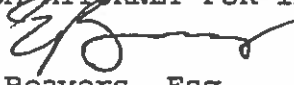

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I.

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<u>Elizondo v. Hood Machine, Inc.,</u>	
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<u>Employers Ins. Co. of Nevada v. Daniels,</u>	
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<u>Grover C. Dils Med. Ctr. v. Menditto,</u>	
121 Nev. 278, 112 P.3d 1093 (2005)	15
<u>Howard v. City of Las Vegas,</u>	
121 Nev. 691, 120 P.3d 412 (2005)	18
<u>Las Vegas Housing Auth. v. Root,</u>	
116 Nev. 864, 8 P.3d 143 (2000)	15
<u>Mikohn Gaming v. Espinosa,</u>	
122 Nev. 593, 137 P.3d 1150 (2006)	15
<u>Mirage v. Nevada Dep't of Admin.,</u>	
110 Nev. 257, 871 P.2d 317 (1994)	17, 18
<u>Nassiri v. Chiropractic Physicians' Bd. of Nev.,</u>	
130 Nev. Adv. Op. 27, 327 P.3d 487(2014)	9, 13
<u>Nellis Motors v. State,</u>	
124 Nev. 1263, 197 P.3d 1061 (2008)	10
<u>Nev. Dept. of Corrections v. York Claims Services, Inc.,</u>	
131 Nev. Adv. Op. 25 (2015)	9
<u>Private Investigator's Licensing Bd. v. Tatalovich,</u>	
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<u>Riverboat Hotel Casino v. Harold's Club,</u>	
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<u>State Indus. Ins. Sys. v. Bokelman,</u>	
113 Nev. 1116, 946 P.2d 179 (1997)	10
<u>State Indus. Ins. Sys. v. Jesch,</u>	
101 Nev. 690, 709 P.2d 172 (1985)	15
<u>State Indus. Ins. Sys. v. Khweiss,</u>	
108 Nev. 123, 825 P.2d 218 (1992)	10, 19

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1	<u>State Indus. Ins. Sys. v. Swinney,</u>	
2	103 Nev. 17, 731 P.2d 359 (1987)	14
3	<u>State Indus. Ins. Sys. v. Vernon,</u>	
4	106 Nev. 128, 787 P.2d 792 (1990)	15
5	<u>State Indus. Ins. Sys. v. Weaver,</u>	
6	103 Nev. 196, 734 P.2d 740 (1987)	11
7	<u>Verendenburg v. Sedgwick CMS,</u>	
8	124 Nev. 553, 188 P.3d 1084 (2008)	10
9	<u>Warpinski v. State Indus. Ins. Sys.,</u>	
10	103 Nev. 567, 747 P.2d 227 (1987)	15
11	STATUTES	
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22	NRS 617.457	18
23	OTHER AUTHORITIES	
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25	NRAP 28 (b) (4)	1

1 II.

2 JURISDICTIONAL STATEMENT

3 Pursuant to NRAP 28(b)(1), the respondent adopts the
4 petitioner's jurisdictional statement.

5 III.

6 STATEMENT OF THE ISSUES

7 1. Whether the appropriate standard for review
8 requires deference to the appeals officer's findings of fact and
9 de novo review of her conclusions of law.

10 2. Whether the finding that Daniel DeMaranville died
11 of heart disease is supported by substantial evidence.

12 3. Whether the conclusion that the City of Reno is
13 liable to Laura DeMaranville for death benefits was an error of
14 law.

15 IV.

16 STATEMENT OF THE CASE

17 Pursuant to NRAP 28(b)(4), the respondent adopts the
18 appellant's statement of the case.

19 V.

20 STATEMENT OF THE FACTS

21 Daniel DeMaranville was a Reno police officer in a
22 full-time, continuous, uninterrupted and salaried position from
23 1969 until his retirement in 1990. ROA 053-054. He was a contract
24 security officer serving in the federal courthouse in Reno in
25 August of 2012. ROA 054.

26 On August 5, 2012, Mr. DeMaranville was admitted to
27 Renown Regional Medical Center in Reno for an elective
28 laparoscopic cholecystectomy (removal of the gallbladder). ROA

1 570. The surgeon was Myron Gomez, M.D. ROA 570. The
2 anesthesiologist was Terry A. Ellis, M.D. ROA 570. Dr. Gomez
3 dictated at 1:32 p.m., at the conclusion of the surgery, that his
4 patient had tolerated the procedure well and was transferred to
5 recovery in stable condition. ROA 571. Various specimens for
6 laboratory testing were taken during the afternoon while Mr.
7 DeMaranville was in PACU. ROA 577-580. Included in the lab
8 reports was Dr. Gomez' order for troponin I levels at 3:45 p.m.
9 and the results reported at 4:11 p.m. ROA 579.

10 Laura DeMaranville confirmed the surgery began about
11 noon (ROA 058) and took a little over an hour (ROA 059). She
12 testified that Dr. Gomez personally confirmed shortly after
13 surgery that everything went fine. ROA 059. She testified she
14 waited nearly six hours after that before she was allowed to
15 visit her husband. ROA 060. During that visit in the recovery
16 room Mr. DeMaranville spoke to his wife and asked questions about
17 her conversation with Dr. Gomez. ROA 060. He then tried to sit
18 up and complained he felt sick. ROA 060-061. A nurse stated the
19 patient was having a massive myocardial infarction, and Ms.
20 DeMaranville was promptly escorted out of the PACU. ROA 061.

21 According to the notes of the anesthesiologist, Dr.
22 Ellis, he was called to the patient's bedside and determined Mr.
23 DeMaranville was in full cardiac arrest. ROA 551. According to
24 the Code Blue Record, chest compressions began at 7:08 p.m., but
25 resuscitation ended at 7:18 p.m. with the death of the patient.
26 ROA 547.

27 Frank Carrea, M.D., the attending cardiologist that
28 day, was summoned to the PACU. ROA 575-576. CPR was being

1 performed. ROA 576. Dr. Carrea recommended aggressive doses of
2 medications. ROA 576. Dr. Carrea noted in his report that an
3 echo machine had been ordered and a brief echo was done which
4 demonstrated no motion in the left ventricular wall. ROA 576.
5 Shortly after that, the decision was made to cease efforts at
6 resuscitation. ROA 576.

7 Dr. Gomez counseled Ms. DeMaranville, who was still
8 waiting outside the PACU. ROA 061-062. He explained that Mr.
9 DeMaranville had passed away. ROA 062. He explained that she
10 could request an autopsy. ROA 062; 573. She declined and began
11 the grieving process. ROA 062; 573. Two days later, on August
12 7, 2012, Dr. Gomez completed the death certificate identifying
13 the cause of death as cardiac arrest due to, or as a consequence
14 of, atherosclerotic heart disease. ROA 552.

15 Laura DeMaranville initiated her claim for benefits
16 arising from her husband's death by completing form C-4 September
17 5, 2012, and submitting it to CCMSI, the claims administrator for
18 the City of Reno. ROA 067. In the C-4 form, Ms. DeMaranville
19 recited the cause of death Dr. Gomez identified in the death
20 certificate-cardiac arrest and atherosclerotic heart disease.
21 Dr. Gomez, who completed the C-4 form, noted myocardial
22 infarction in the diagnosis. ROA 553.

23 After sourcing medical records on the decedent, CCMSI
24 submitted records to Jay E. Betz, M.D., to opine on the cause of
25 death. ROA 177-178. By letter dated May 13, 2013, Dr. Betz
26 stated he could not determine the cause of death based on the
27 limited medical records submitted to him. ROA 179-181. By
28 letter dated May 23, 2013, CCMSI notified Ms. DeMaranville of its

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1 determination to deny her claim for benefits due to lack of
2 information establishing the cause of death and no medical
3 records establishing heart disease. ROA 182-184. Ms.
4 DeMaranville appealed that determination to the Hearings
5 Division. Representatives for the City and Ms. DeMaranville
6 stipulated to by-pass the hearing officer and proceed, instead,
7 directly to hearing before an appeals officer. ROA 689-691.
8 After CCMSI denied her claim, Ms. DeMaranville
9 submitted the C-4 form to EICON as the insurer for the City of
10 Reno at the time Mr. DeMaranville retired in 1990. ROA 381.
11 EICON submitted medical records to Prium, a record review
12 service, and by informal review dated September 3, 2013, Sankar
13 Pemmaraju, D.O., opined the patient had risk factors that would
14 have led to atherosclerotic heart disease and that the myocardial
15 infarction would most likely not have been due to postoperative
16 complication. ROA 376-381.
17 Next EICON asked another physician with Prium to
18 conduct a record review. By informal review dated September 16,
19 2013, Yasmine S. Ali, M.D., opined that the records she reviewed
20 showed evidence of cardiovascular disease and atherosclerotic
21 heart disease prior to the time of Mr. DeMaranville's gallbladder
22 surgery. ROA 372-375. However, Dr. Ali did not find in the
23 records she reviewed sufficient documentation to support
24 atherosclerotic heart disease as the cause of death as stated in
25 the death certificate. ROA 375. Dr. Ali concluded there was no
26 evidence of myocardial infarction, "particularly since cardiac
27 enzymes were not drawn," and there was no ECG and no autopsy.
28 According to Dr. Ali, "[i]t appears most likely that the cardiac

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1 arrest was a post-operative complication." ROA 375.

2 After receiving Dr. Ali's opinion, EICON, by
3 determination letter to Laura DeMaranville dated September 19,
4 2013, denied liability for the claim on the basis that there was
5 no medical reporting to support the diagnosis of atherosclerotic
6 heart disease and myocardial infarction. ROA 368-370. That
7 determination was appealed by the claimant to the hearing officer
8 who ruled in favor of the claimant. ROA 361-363. That decision
9 was appealed by EICON. ROA 668-674. The City also appealed
10 EICON's determination letter to the claimant, and that appeal
11 proceeded directly to the appeals officer by stipulation. ROA
12 646-650. Eventually, all appeals were consolidated for
13 presentation to the appeals officer. ROA 642-643; 654-655.

14 In preparation for hearing before the appeals officer,
15 the claimant submitted medical records to Charles E. Ruggeroli,
16 M.D., a Las Vegas cardiologist, with a request for his opinion as
17 to the cause of death and the accuracy of the findings in the
18 death certificate. ROA 420-554; 555-561. Dr. Ruggeroli opined
19 that the cause of Dan DeMaranville's death was "a catastrophic
20 cardiovascular event secondary to occult occlusive
21 atherosclerosis of the coronary arteries." ROA 557. While Dr.
22 Ruggeroli acknowledged there was no documented history of
23 coronary artery disease, multiple risk factors for
24 atherosclerotic vascular disease were remarkable. ROA 556. Dr.
25 Ruggeroli confirmed he reviewed the records provided; confirmed
26 Daniel DeMaranville died of heart disease; and confirmed his
27 opinions were stated to a reasonable degree of medical
28 probability. ROA 559-560.

1 EICON then delivered Dr. Ruggeroli's opinion to Zev
2 Lagstein, M.D., also a Las Vegas cardiologist, along with some
3 medical records, for his review and opinion. ROA 409-410. Dr.
4 Lagstein, in his letter of August 31, 2014, disagreed with Dr.
5 Ruggeroli. ROA 411-416. Dr. Lagstein concluded there was not
6 enough evidence in the records he reviewed to support a diagnosis
7 of arteriosclerotic heart disease as noted in the death
8 certificate.¹ ROA 415. Apparently on the belief there was no
9 postoperative EKG and cardiac enzymes were not drawn (ROA 415),
10 Dr. Lagastein concluded "the death is due to a postoperative
11 complication of unclear etiology." ROA 416. He closed his
12 opinion by stating there was "no evidence to support a diagnosis
13 of myocardial infarction in the absence of abnormal postoperative
14 EKG and postoperative cardiac enzymes, especially troponin I
15 level." ROA 416.

16 Dr. Lagstein's opinion letter was shared with Dr.
17 Ruggeroli for a follow-up opinion, along with additional reports
18 and notes from Renown records covering the period of the surgery
19 and the time in the PACU. ROA 565-565; 569-580. Dr. Ruggeroli
20 responded in his report dated October 13, 2014, by restating his
21 findings of multiple cardiovascular risk factors for coronary
22 artery disease and then referred to specific details in the
23 medical record focusing on the events from the conclusion of the
24 surgery to the time of death. ROA 566. Dr. Ruggeroli noted the
25 patient arrived in the PACU with normal vital signs, but after

26
27 ¹Dr. Gomez, in the death certificate, referred to
28 atherosclerotic heart disease, the most common form of
arteriosclerotic heart disease. See Stedman's Medical Dictionary
162 (27th ed. 2000).

1 becoming hypotensive and tachycardic (low blood pressure and
2 rapid heart beat) laboratory evaluation was obtained at 3:35
3 p.m., which proved remarkable for elevated troponin levels
4 consistent with heart damage. ROA 566. Dr. Ruggeroli then
5 confirmed his opinion that the patient had underlying occult
6 occlusive coronary artery disease. ROA 566. Dr. Ruggeroli
7 concluded his opinion by pointing out that cardiac enzymes
8 (troponin I level) drawn approximately four hours prior to Daniel
9 DeMaranville's death were elevated and consistent with a
10 cardiovascular cause of the patient's death. ROA 566.

11 The appeals officer found Dr. Ruggeroli's opinion
12 persuasive and credible. ROA 022. In particular, the appeals
13 officer found, "Dr. Ali and Dr. Lagstein were apparently unaware
14 of the troponin I level prior to Mr. DeMaranville's death and
15 therefore those opinions are of little weight except to affirm
16 the importance of the levels to determine the cause of death.
17 Daniel DeMaranville died of heart disease." ROA 022.

18 VI.

19 SUMMARY OF THE ARGUMENT

20 The evidence presented to the appeals officer
21 supporting a finding of heart disease as the cause of Daniel
22 DeMaranville's death was substantial. The appeals officer's
23 reliance on Dr. Ruggeroli's opinion was not arbitrary or
24 capricious. The City's reliance on the last injurious exposure
25 rule to shift liability for death benefits to EICON, the City's
26 previous insurer, is misplaced. The rule is used to determine
27 liability between successive employers, not to determine the
28 liability between an employer and its own insurer.

1 A. The appropriate standard of review for this case is
2 deference to the appeals officer's findings of facts and de novo
3 review of the conclusions of law.

4 The standard for the district court to review the
5 decision of the administrative law judge is found in NRS
6 233B.135. The review must be confined to the record. NRS
7 233B.135(1)(b). The final decision of the agency shall be deemed
8 reasonable and lawful until reversed and the burden of proof is
9 on the party attacking or resisting the decision. NRS
10 233B.135(2). The court shall not substitute its judgment for
11 that of the agency as to weight of evidence on a question of
12 fact. NRS 233B.135(3). The court may remand or set aside the
13 final decision if the decision is clearly erroneous in view of
14 the reliable, probative and substantial evidence on the whole
15 record (NRS 233B.135(3)(e)) or arbitrary or capricious or
16 characterized by abuse of discretion (NRS 233B.135(3)(f)).

17 The City of Reno argues there is no evidence in the
18 record that Dan DeMaranville had atherosclerotic heart disease
19 that would have led to a catastrophic cardiac event. It is the
20 City's argument that the appeals officer must be reversed
21 because, without an autopsy, it was not possible to conclude with
22 conviction or certainty that a cardiac event caused Mr.
23 DeMaranville's death. According to the City, the decision of the
24 appeals officer is arbitrary and not supported by substantial
25 evidence.

26 Dr. Gomez stated in the death certificate that the
27 cause of death was cardiac arrest as a consequence of
28 atherosclerotic heart disease. The City denied the claim for
death benefits because Dr. Betz could not find evidence to

1 support that conclusion in the records he was provided. Dr.
2 Ruggeroli's opinion that Daniel DeMaranville's death was caused
3 by a catastrophic cardiac event secondary to atherosclerosis
4 supports the findings of Dr. Gomez. Appeals Officer Ward made
5 the specific determination that Dr. Ruggeroli's opinion was
6 persuasive and credible. The appeals officer made the factual
7 finding that Daniel DeMaranville died of heart disease. Given
8 the City's challenge to the appeals officer's finding of this
9 critical fact, the district court must look for substantial
10 evidence which would support the finding. NRS 233B.135(3)(e).
11 The court must inquire whether the appeals officer's factual
12 determinations are reasonably supported by evidence of sufficient
13 quality and quantity. See, Nassiri v. Chiropractic Physicians'
14 Bd. of Nev., 130 Nev. Adv. Op. 27, 327 P.3d 487, 489
15 (2014) (citing Elizondo v. Hood Machine, Inc., 129 Nev. Adv. Op.
16 84, 312 P.3d 479 (2013)).

17 The substantial evidence standard "contemplates
18 deference to those determinations on review, asking only whether
19 the facts found by the administrative factfinder are reasonably
20 supported by sufficient, worthy evidence in the record." Nassiri
21 at 490. The appeals officer's factual findings should only be
22 overturned if not supported by evidence a reasonable mind could
23 accept as adequately supporting her conclusions. See Nev. Dept.
24 of Corrections v. York Claims Services, Inc., 131 Nev. Adv. Rep.
25 25, 348 P.3d 1010, 1013 (2015) quoting Nassiri. See also
26 Elizondo at 482 (the court will not reweigh the evidence or
27 revisit an appeals officer's credibility determination, quoting
28 City of Las Vegas v. Lawson, 126 Nev. __, __, 245 P.3d 1175, 1178

(2010)); Vrendenburg v. Sedgwick CMS, 124 Nev. 553, 557, 188 P.3d 1084 (2008) (the court may not substitute its judgment for that of the appeals officer as to the weight of the evidence on a question of fact); and Nellis Motors v. State, 124 Nev. 1263, 1269, 197 P.3d 1061 (2008) (the agency's decision should be affirmed unless it is shown the decision prejudiced substantial rights).

The City alternatively argues that if substantial evidence does support the appeals officer's finding of heart disease, then the City's previous insurer EICON must be held liable for the death benefit claim. The appeals officer placed liability with the City. According to the City's argument, the appeals officer failed to use the last injurious exposure rule to shift liability to EICON and therefore committed an error of law and the decision must be reversed.

A pure legal question is reviewed de novo, without deference to an agency's determination. Elizondo at 482. However, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference. See Private Investigator's Licensing Bd. v. Tatalovich, 129 Nev. Adv. Rep. 61, 309 P.3d 43, 44 (2013) (citing State Indus. Ins. Sys. v. Bokelman, 113 Nev. 1116, 1119, 946 P.2d 179 (1997)); See also State Indus. Ins. Sys. v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218 (1992) (pure legal questions may be reviewed without deference to the agency determination, but the agency's conclusions of law closely related to its view of the facts should not be disturbed if supported by substantial evidence).

///

1 B. The appeals officer's findings that Daniel
2 DeMaranville died of heart disease are supported by substantial
3 evidence.

4 The primary factual determination by the appeals
5 officer was that Dr. Ruggeroli's opinion, after review of all the
6 others, was more persuasive and credible. The City attacks this
7 ultimate finding by arguing the other physicians whose opinions
8 were considered by the appeals officer indicated it was not
9 possible to determine the cause of death without an autopsy.

10 In her decision the appeals officer shows she carefully
11 reviewed the reports of each physician who was asked to give an
12 opinion on the cause of death. ROA 019-022. The City proffered
13 the opinion of Dr. Betz who stated from the partial medical
14 record he reviewed he was unable to determine the actual cause of
15 death, but the particular records he reviewed do not accompany
16 his report. ROA 179-181. The appeals officer notes Dr. Betz did
17 say in this opinion "it is most likely he [Mr. DeMaranville]
18 suffered a significant myocardial infarction" and that it was
19 much less likely he died of pulmonary embolus or anesthesia
20 related complications. ROA 019.

21 EICON proffered the opinion of Dr. Pemmaraju, who noted
22 the presence of risk factors that could lead to atherosclerotic
23 heart disease, and noted the myocardial infarction was most
24 likely not due to postoperative complications. ROA 379. Dr.
25 Pemmaraju's report is not accompanied by the records he reviewed.
26 EICON also proffered the opinion of Dr. Ali, who did see in the
27 records evidence of cardiovascular disease but could not find in
28 the records proof of atherosclerotic heart disease as stated by

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1 Dr. Gomez on the death certificate. ROA 374-375. The particular
2 records Dr. Ali reviewed do not accompany her report. An
3 important point for the appeals officer was Dr. Ali's expressed
4 disappointment in not having cardiac enzymes testing to review.
5 ROA 020. Dr. Gomez ordered the cardiac enzyme testing hours
6 after his patient entered the PACU (ROA 579), and Dr. Ruggeroli
7 reviewed those results before forming his opinion the troponin I
8 level was indication of myocardial infarction (ROA 566).

9 EICON also proffered the opinion of Dr. Lagstein. Dr.
10 Lagstein concluded the medical records he reviewed did not
11 contain enough evidence to support a diagnosis of
12 arteriosclerotic heart disease as noted in the death certificate.
13 ROA 415-416. A compilation of the particular records Dr.
14 Lagstein reviewed was not provided with his report. The appeals
15 officer notes in her decision Dr. Lagstein's expressed
16 disappointment that there was no postoperative EKG and that
17 cardiac enzymes were not drawn. ROA 021. Dr. Carrea notes the
18 results of a postoperative EKG which that doctor reviewed in the
19 PACU. ROA 576. The cardiac enzymes, as noted above, show up in
20 the PACU records and aided Dr. Ruggeroli in forming his opinion.
21 ROA 566.

22 The records provided to Dr. Ruggeroli were admitted
23 into evidence just as they were reviewed by the claimant's chief
24 witness. Evidence Exhibit #6 (ROA 420-554) and Evidence Exhibit
25 #9 (ROA 555-561) contain a compilation of pertinent medical
26 records on Daniel DeMaranville from 1999 until his death in the
27 PACU. As early as 2004 Mr. DeMaranville was noted to have
28 abnormal electrocardiogram (EKG or ECG) results on examination or

1 unusual heartbeats and was diagnosed with right branch bundle
2 block, although his condition was such that he continued to be
3 cleared for work. ROA 426; 448-451; 456; 470-473; 478; 521-523;
4 543. While the City attempts to impeach Dr. Ruggeroli's
5 conclusions by arguing the other physicians reviewing the record
6 could not determine the cause of death from the records they
7 reviewed, that argument lacks weight given that there is no proof
8 that the experts were all reviewing the same complete record.

9 In the opinion of Dr. Ruggeroli, the cardiac enzymes
10 identified as troponins drawn four hours prior to Mr.
11 DeMaranville's death were elevated and consistent with a
12 cardiovascular cause of death. ROA 566. Compare this with the
13 findings of Dr. Ali and Dr. Lagstein who both opined that
14 elevated troponin levels would have been conclusive (ROA 375;
15 416) but neither doctor saw the cardiac enzyme testing in the
16 record. Also, note that none of the physicians giving evidence
17 refute Dr. Ruggeroli's finding that Mr. DeMaranville's medical
18 history was remarkable for multiple cardiac risk factors.
19 Clearly, there was sufficient and worthy evidence presented to
20 the appeals officer to find Dr. Ruggeroli's opinion more
21 persuasive and more credible than the opinions of the other
22 physicians. See Nassiri at 490 (deference given to findings of
23 fact supported by sufficient, worthy evidence in the record).

24 C. The conclusion that the City of Reno is liable to
25 Laura DeMaranville for death benefits is not an error of law.

26 After she heard the evidence and took the case under
27 submission, the appeals officer asked for additional briefing on
28 the issue of which insurer is liable for the claim. ROA 585. The

1 City responded with argument that the last injurious exposure
2 rule should apply to shift liability to EICON, who insured the
3 City at the time of Daniel DeMaranville's retirement. ROA 039-
4 042. The appeals officer rejected that argument. In her final
5 decision she concluded that Mr. DeMaranville was not entitled to
6 compensation for occupational disease until he became disabled by
7 disease. ROA 023. She made the finding that he was not disabled
8 until the date of his death. ROA 022. At that point in time,
9 the appeals officer concluded, the City was self-insured and
10 therefore liable for the death benefits claim. ROA 024.

11 The City renews its argument to the district court,
12 asking that the last injurious exposure rule be applied in such a
13 way as to shift liability from the City to its one-time insurer,
14 EICON. However, a review of the Nevada Supreme Court's
15 application of the last injurious exposure rule shows no support
16 for the City's position that the appeals officer committed legal
17 error by failing to apply the rule.

18 The Nevada Supreme Court has applied the last injurious
19 exposure rule in two types of cases. In cases where the employee
20 had successive injuries and successive employers the Court has
21 applied the rule to place full liability upon the employer or
22 insurer covering the risk at the time of the most recent injury
23 bearing a causal relation to the disability. See State Indus.
24 Ins. Sys. v. Swinney, 103 Nev. 17, 731 P.2d 359 (1987) (successive
25 injuries, successive employers; must determine whether subsequent
26 condition was a new injury, aggravation of prior injury, or
27 recurrence of prior injury before applying the rule); Warpinski
28 v. State Indus. Ins. Sys., 103 Nev. 567, 747 P.2d 227 (1987)

1 (successive injuries, successive employers; rule has no
2 application where subsequent injury is non-industrial); State
3 Indus. Ins. Sys. v. Vernon, 106 Nev. 128, 787 P.2d 792
4 (1990) (successive injuries, successive employers; three-step test
5 for applying rule to out-of-state employment); Collett Elec. v.
6 Dubovik, 112 Nev. 193, 911 P.2d 1192 (1996) (successive injuries,
7 successive employers; if second injury is mere recurrence of
8 first, insurer/employer covering risk at time of first injury
9 remains liable); Riverboat Hotel Casino v. Harold's Club, 113
10 Nev. 1025, 944 P.2d 819 (1997) (successive injuries, but employers
11 concurrent, not successive, therefore rule does not apply); Las
12 Vegas Housing Auth. v. Root, 116 Nev. 864, 8 P.3d 143 (2000)
13 (successive injuries, successive employers; rule applies where
14 later injury is aggravation of earlier injury); Grover C. Dils
15 Med. Ctr. v. Menditto, 121 Nev. 278, 112 P.3d 1093 (2005)
16 (successive injuries, successive employers; rule applies if
17 aggravation of previous injury properly established); Mikohn
18 Gaming v. Espinosa, 122 Nev. 593, 137 P.3d 1150 (2006) (successive
19 injuries, successive employers; rule applies unless subsequent
20 condition was mere recurrence of earlier injury).

21 The other type of cases in which the Court has applied
22 the last injurious exposure rule is where the employee is
23 disabled by an occupational disease and has successive employers.
24 The Court has used the rule to assign liability to the employer
25 closest in temporal proximity to the disabling event. See State
26 Indus. Ins. Sys. v. Jesch, 101 Nev. 690, 709 P.2d 172 (1985)
27 (industrial disease, successive employers; rule applies to last
28 employer who bore a causal relationship to the disease);

1 Employers Ins. Co. of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d
2 1024(2006) (industrial disease, successive employers; where causal
3 relationship between employment and disease conclusively
4 presumed, rule places liability on employer closest in temporal
5 proximity to the disabling event).

6 The Daniels case is the only case cited by the City
7 where our State Supreme Court applied the last injurious rule to
8 the conclusive presumption statute by which Laura DeMaranville
9 seeks compensation. In Daniels the employee had worked as a
10 fireman for five or more years for two different employers. He
11 was diagnosed with heart disease on two separate occasions. The
12 first occasion was when he was employed by the City of North Las
13 Vegas and the second occasion was when he was employed by Bechtel
14 Nevada Corporation. The Court determined the last injurious
15 exposure rule should apply to place responsibility on the
16 employer in closest temporal proximity to the disabling event.
17 Id. at 1013. To determine which employer bore responsibility
18 turned on the date the employee became disabled. The Court
19 stated NRS 617.060 defines disablement for the purposes of
20 occupational diseases as 'the event of becoming physically
21 incapacitated' and NRS 617.420 states the employee is not
22 entitled to compensation unless he has become incapacitated for
23 at least a period of five days in a 20-day period. The Court
24 reasoned the employee is not disabled until the day the employee
25 can no longer work. In the case of fireman Daniels, he became
26 disabled when his doctor found him permanently disabled and
27 unable to work as a firefighter. Id. at 1015. The Court
28 concluded the employee became incapacitated, pursuant to NRS

1 617.420, while he was employed by the subsequent employer. Id.

2 According to the analysis the Court used in Daniels,
3 there is no use for the last injurious exposure rule in the
4 DeMaranville appeals. The appeals officer was not presented with
5 two employers both of which, during different periods, employed
6 the same employee diagnosed with an occupational disease. In
7 DeMaranville, there is but one employer and there was no need for
8 the appeals officer to choose among multiple employers to
9 determine which was in closest temporal proximity to the
10 disabling event. The last injurious exposure rule has no
11 application in the DeMaranville appeals and the appeals officer
12 did not commit legal error by refusing to apply the rule.

13 The City argues that the appeals officer committed
14 legal error by using the date of disability to determine
15 liability, that date being when the City was self-insured,
16 instead of using the last injurious exposure rule to shift
17 liability to EICON. Petitioner's Opening Brief, p.17, l. 16.
18 Given one occupational disease, that is, heart disease, and one
19 employer, the City of Reno, the appeals officer relied on the
20 correct law and analysis to reach the right result. In Mirage v.
21 Nevada Dep't of Admin., 110 Nev. 257, 260, 871 P.2d 317 (1994),
22 our State Supreme Court declared that an employee does not
23 qualify for compensation under Chapter 617 until physically
24 incapacitated by occupational disease. It is not sufficient that
25 the employee merely contracted an occupational disease; the
26 employee must be disabled by the disease. Daniels at 1014. A
27 qualifying claimant seeking benefits for heart disease under NRS
28 617.457 is disabled on the date of his heart attack, and not

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1 until then. See Howard v. City of Las Vegas, 121 Nev. 691, 694,
2 120 P.3d 412 (2005) (fireman suffered heart attack eight years
3 after retiring, the date of disability under Mirage is the date
4 of the heart attack when he was earning no wages therefore he was
5 entitled to no substitute wage). Thus, the appeals officer's
6 refusal to follow the law of the other jurisdictions cited by the
7 City in its brief when the law in Nevada is clear cannot be
8 construed as legal error.

9 As more fully set out above, the opinions of Dr. Gomez
10 and Dr. Ruggeroli, along with the medical records supporting
11 those opinions, constitute substantial evidence on which the
12 appeals officer could find Daniel DeMarnville died of
13 occupational heart disease. Substantial evidence also supports
14 her findings that he was not disabled, as defined by Nevada law,
15 until August 5, 2012, when he suffered massive heart failure.
16 The conclusive presumption found in NRS 616C.457 does not require
17 nor even contemplate proof of when a police officer is "exposed"
18 to heart disease, yet the City requires such a finding in its
19 effort to shift liability to EICON. In the City's analysis,
20 "[i]t is the date of exposure, not the date of disability that .
21 . . is determinative." Petitioner's Opening Brief, p. 13, 1.1.
22 11-12. That is contrary to the statute under which this case is
23 presented, and contrary to the decisions of our State Supreme
24 Court interpreting NRS 616C.457.

25 To rule in favor of the City and reverse the appeals
26 officer on this point of law would require adopting the City's
27 substitution of "employment" with the word "exposure." "The date
28 of DeMaranville's last exposure to the disease-causing agent

1 determines which insurer is liable." Petitioner's Opening Brief,
2 p. 15, 1.1. 15-16. The City cites to no evidence proving the
3 date of exposure. All the City cites to in its argument is the
4 dates of employment for Mr. DeMaranville and proclaims that EICON
5 is liable as the party insuring the employee when he was last
6 employed, 1990. There is no evidence of when the decedent was
7 "exposed" to heart disease, only when he succumbed to the
8 disease. NRS 616C.457 may presume the heart disease arose out of
9 employment but NRS 617.060 defines disablement as the event of
10 becoming incapacitated, and the evidence shows Daniel
11 DeMaranville was not incapacitated until August 5, 2012, when the
12 City was self-insured. The appeals officer's legal conclusion as
13 to the date of disablement being the date of incapacitation is so
14 closely related to her view of the facts as presented in the
15 reporting of Dr. Gomez and Dr. Ruggeroli as to be entitled to
16 great deference by the reviewing court. See State Indus. Ins.
17 Sys v. Khweiss, at 126.

18 VII.

19 CONCLUSION

20 The finding by the appeals officer that Daniel
21 DeMaranville died of heart disease is based upon substantial
22 evidence. The opinions of Dr. Gomez and Dr. Ruggeroli provided
23 the appeals officer with evidence of sufficient quality and
24 quantity as to reasonably support the findings. The challenges
25 the City of Reno raises in its petition for judicial review as to
26 the appeals officer's legal conclusions are insufficient for
27 reversal. The date of disability was, in the case of Daniel
28 DeMaranville, the date of his death. On that date his employer,

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1 the City of Reno, was self-insured and the appeals officer
2 properly placed liability on the City. The last injurious
3 exposure rule has no application to the facts presented to the
4 appeals officer. Laura DeMaranville is entitled to death
5 benefits under the Nevada Occupational Diseases Act and the
6 Nevada Industrial Insurance Act. The City's petition for
7 judicial review should be denied.

8 RESPECTFULLY SUBMITTED this 28th dy of August, 2015.

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CERTIFICATE OF COMPLIANCE
(NRAP 28.2 (a))

1
2
3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
5 32(a)(5) and the type style requirements of NRAP 32(a)(6)
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22 3. Finally, I hereby certify that I have read this brief, and to
23 the best of my knowledge, information, and belief, it is not
24 frivolous or interposed for any improper purpose. I further
25 certify that this brief complies with all applicable Nevada Rules
26 of Appellate Procedure, in particular NRAP 28(e)(1), which
27 requires every assertion in the brief regarding matters in the
28 record to be supported by a reference to the page and volume
number, if any, of the transcript or appendix where the matter

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1 relied on is to be found. I understand that I may be subject to
2 sanctions in the event that the accompanying brief is not in
3 conformity with the requirements of the Nevada Rules of Appellate
4 Procedure.

5 DATED this 28th day of August, 2015.

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CERTIFICATE OF COMPLIANCE
(NRAP 32(8))

I hereby certify that I have read this Respondent's Answering Brief to Opening Brief of Petitioner City of Reno, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 28th day of August, 2015.

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the
preceding RESPONDENT'S ANSWERING BRIEF TO OPENING BRIEF OF
PETITIONER CITY OF RENO pertaining to Case No. 15 OC 00092 1B:

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

-OR-

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

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

-or-

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


Signature

08/28/201
Date

Evan Beavers, Esq.
Nevada Attorney for Injured Workers
Attorney for Respondent
Laura DeMaranville, Surviving Spouse

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Nevada Attorney for Injured Workers, and that on this date I deposited for mailing at Carson City, Nevada, a true and correct copy of the within and foregoing RESPONDENT'S ANSWERING BRIEF TO OPENING BRIEF OF PETITIONER CITY OF RENO addressed to:

LAURA DEMARANVILLE
PO BOX 261
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and that on this date, an electronic copy was sent via email to the following parties listed below:

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SUSAN MERRIWETHER
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BY VS DEPUTY

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

CITY OF RENO,

Petitioner,

Case No. 15 0C 00092 1B

vs.

Department No: 2

DANIEL DEMARANVILLE [Deceased],
EMPLOYER'S INSURANCE COMPANY
OF NEVADA, and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Respondents.

EMPLOYERS INSURANCE COMPANY
OF NEVADA

Cross-Petitioner,

vs.

CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Cross-Respondents,

RESPONDENT EMPLOYERS
INSURANCE COMPANY OF NEVADA'S ANSWERING BRIEF TO THE
OPENING BRIEF OF THE CITY OF RENO

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1 **I. ISSUES PRESENTED FOR REVIEW**

2 The issue on appeal as between Employers Insurance Company of Nevada and the City of
3 Reno is which entity is responsible for the claim arising from Mr. DeMaranville's death. The
4 Appeals Officer found that as between Employers Insurance Company of Nevada and the City of
5 Reno as a self-insured employer, all liability for the claim should lie with the City of Reno under its
6 self-insurance plan and not with Employers Insurance Company of Nevada. Both Employers
7 Insurance Company of Nevada and the City of Reno contest the Appeals Officer's finding that there
8 is a valid claim under NRS 617.457. Employers Insurance Company of Nevada addressed that issue
9 in its opening brief as the Cross-Petitioner. This brief will be limited to responding to the argument
10 by the City of Reno that the Appeals Officer was wrong in assigning full liability to the City of Reno.

11
12 **II. STATEMENT OF FACTS**

13 For purposes of the issue of which insurer is liable for the claim, the relevant facts are as
14 follows:

15 Mr. DeMaranville worked as a police officer for the City of Reno, retiring in 1990. See
16 Record on Appeal at page 128, (Hereinafter, "ROA ____"). On August 5, 2012 Mr. DeMaranville
17 died while in the recovery room after undergoing gall bladder surgery. ROA 551.

18 Employers Insurance Company of Nevada, (hereinafter, "Employers"), was the workers'
19 compensation insurer for the City of Reno, (hereinafter, "City"), until 1992 when the City became
20 self-insured. ROA 51, lines 15-21.¹

21 The Claimant, (Mr. DeMaranville's widow, Laura DeMaranville), filed claims against both
22 the City and Employers. The City denied the Claimant's claim on May 23, 2013. ROA 182-183.
23 Employers denied the Claimant's claim on September 19, 2013. ROA 368-370.

24 The Claimant appealed both denials and on March 18, 2015 the Appeals Officer issued her
25 Decision in which she found that Mr. DeMaranville died as the result of heart disease, that his heart
26 disease was a compensable occupational disease pursuant to NRS 617.457, and that full liability for

27

28 ¹ In its Opening Brief the City states that Employers was the insurer until 2002 when the City
 became self-insured. See, e.g. the City's Opening Brief at page 6, lines 13-14. The City provides no
 citation to the Record on Appeal for that assertion, and it appears that it is a typographical error.

1 the claim rests with the City of Reno under its self-insurance plan. ROA 16- 26.

2 III. SUMMARY OF ARGUMENT

3 The determination by the Appeals Officer to assign full liability for the claim to the City of
4 Reno under its plan of self-insurance was appropriate. Under the applicable law a claim for benefits
5 under the police officers' heart disease statute, NRS 617.457, does not arise until the claimant
6 becomes disabled. In this case that occurred in 2012 when Mr. DeMaranville died. At that time the
7 City of Reno was self-insured and is therefore responsible for the claim.

8 IV. ARGUMENT

9 A. STANDARD OF REVIEW

10 NRS 223B.135 provides that a reviewing court may set aside a decision of an administrative
11 agency if the decision is:

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

18 In reviewing a decision of an administrative agency, the Court "is limited to the record
19 developed in agency proceedings and a determination of whether substantial evidence exists in the
20 record to support the agency's ruling." SIIS v. Christensen, 106 Nev. 85, 88, 787 P.2d 408, 409-410
(1990).

21 "While it is true that the district court is free to decide pure legal questions without deference
22 to an agency determination, the agency's conclusions of law, which will necessarily be closely
23 related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they
24 are supported by substantial evidence." Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806
25 (1986).

26 The correct standard of review in this case is therefore one of deference to the Appeals
27 Officer's conclusions of law which established that the City of Reno is liable for the claim, and a
28 determination of whether the Appeals Officer's Decision is supported by substantial evidence in the

1 record. Substantial evidence has been defined as “that quantity and quality of evidence which a
2 reasonable [person] could accept as adequate to support a conclusion.” Jourdan v. SIIS, 109 Nev.
3 497, 499, 853 P.2d 99, 101 (1993), citing State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608,
4 n.1, 729 P.2d 497, 498, n.1 (1986) (quoting Robertson Transp. Co. v. P.S.C., 159 N.W.2d 636, 368
5 (Wis. 1968)). The Decision of the Appeals Officer that full liability for the claim should rest with
6 the City of Reno is supported by substantial evidence, is in accord with applicable law and should be
7 affirmed.

8 B. THE APPEALS OFFICER PROPERLY ASSIGNED
9 FULL LIABILITY FOR THE CLAIM TO THE CITY OF RENO

10 This claim was brought under the police officer’s heart disease statute, NRS 617.457. That
11 statute provides a conclusive presumption that heart disease is a compensable occupational disease
12 for anyone who worked as a police officer for five consecutive years. It is undisputed that Mr.
13 DeMaranville did work as a police officer for the City of Reno for more than five years and retired
14 in 1990. ROA 72, lines 4-7. It is also undisputed that Mr. Demaranville did not become disabled, as
15 defined in the statutes, until his death on August 5, 2012. ROA 22, lines 22-23.

16 The conclusion by the Appeals Officer that the City of Reno is responsible for the claim is
17 both an appropriate conclusion of law and is mandated by the controlling statutes and Nevada
18 Supreme Court decisions. The argument put forth by the City is both misplaced and contrary to
19 Nevada law.
20

21 While there is no specific definition of “claim” in NRS Chapter 617, a review of the statutes
22 and case law show that a claim for an occupational disease does not arise until the claimant both
23 acquires the occupational disease and is disabled as a result of it. In this case that occurred in 2012
24 when the City was self-insured.
25

26 NRS 617.344(1) provides in part: “an employee who has incurred an occupational disease, or
27 a person acting on behalf of the employee, shall file a claim for compensation with the insurer within
28

1 90 days after the employee has knowledge of the disability and its relationship to his or her
2 employment” (Emphasis added).²

3 NRS 617.060 defines “disablement” as: “the event of becoming physically incapacitated by
4 reason of an occupational disease”

5 NRS 617.430 provides: “Every employee who is disabled or dies because of an occupational
6 disease. . .” is entitled to compensation. (Emphasis added).
7

8 In the present case the Claimant was not disabled, and therefore no claim for compensation
9 arose, until August 2012 when the City was self-insured. The fact that the conclusive presumption
10 set forth in NRS 617.457, (that the Claimant’s heart disease arose out of and in the course of his
11 employment), attached at the end of his first five years of employment which would have been when
12 the City was insured by EICON, is not determinative of the issue since a valid claim does not exist
13 until there is both an occupational disease and a disablement. Nevada Supreme Court case law
14 makes this clear.
15

16 In Mirage Casino-Hotel v. Nevada Dept. of Administration, 110 Nev. 257, 871 P.2d 317
17 (1994) the Nevada Supreme Court held that the provisions of NRS Chapter 617 provide “sufficient
18 guidance for determining the date of eligibility for such benefits,” which it went on to show is the
19 date the claimant becomes disabled and not when the claimant first contracts the occupational
20 disease. 871 P.2d at 319.
21

22 The case of Manwill v. Clark County, 123 Nev. 28, 162 P.3d 876 (2007) is quite instructive
23 with respect to this issue. In that case a firefighter suffered from a congenital heart condition which
24 was first diagnosed before he completed five years of employment. Subsequently, after the five year
25 period had run, he filed a claim. The claim was denied. In remanding the matter, the Nevada
26

27
28 ² Subsection 2 of that statute expands the time for filing a claim for compensation to one year from
the date of the death of an employee.

1 Supreme Court held that a claimant seeking benefits under NRS 617.457 must show two things: (1)
2 heart disease; and, (2) five years' qualifying employment before disablement.³ 162 P.3d at 879.

3 Again, in the present case both of those conditions were not satisfied until 2012.

4 The Court also held, quoting the Daniels case discussed more fully below, that:

5 [T]o receive occupational disease compensation, a firefighter must be disabled by the heart
6 disease: "[a]n employee is not entitled to compensation 'from the mere contraction of an
7 occupational disease. Instead, compensation . . . flows from a disablement resulting from such a
8 disease.'" [Citations omitted]. 162 P.3d at 880.

9
10 Thus, the Claimant in the present case was not entitled to compensation merely from his five
11 years of employment which triggered the presumption of NRS 617.457; rather, his entitlement to
12 benefits, and the corresponding liability of the insurer, did not arise until 2012 when he was
13 disabled. There could be no claim until that date. The responsible insurer at that time was the City
14 under its self-insurance program. As is more fully discussed below, the City's entire argument is
15 based upon a misapprehension of the statutes and case law and an erroneous assumption that liability
16 flows from some exposure to a harmful agent or condition.

17
18 Howard v. City of Las Vegas, 121 Nev. 691, 120 P.3d 410 (2005) is in accord. In that case a
19 firefighter suffered a heart attack eight years after he retired. The Court held:

20
21 Here, Howard's heart disease first manifested itself in the form of a heart attack eight
22 years after he retired from his employment as a firefighter. While under NRS
23 617.457(1)'s presumption, Howard's heart attack was an occupational disease arising
24 out of and in the course of his employment entitling him to occupational disease
25 benefits, the date of disability under Mirage is the date of the heart attack. 120 P.3d at
26 412.

27 The case of Employers Insurance Company of Nevada v. Daniels, 122 Nev. 1009, 145 P.3d

28

3 The Court remanded the matter for a determination as to whether, and if so when, the claimant was disabled.

1 1024 (2006) is not directly on point since it involves the application of the last injurious exposure
2 rule between two different employers involving two different manifestations of heart disease. In the
3 present case there is but one employer and, more importantly, only one manifestation of heart
4 disease. Nevertheless, that case shows that the Appeal Officer in this case correctly assigned liability
5 to the City.
6

7 In Daniels, the appeals officer assigned liability to the claimant's first employer based upon
8 his first manifestation of heart disease. However, Mr. Daniels did not suffer a disablement at that
9 time but only became disabled while working for the second employer at the time of his second
10 manifestation of heart disease. In reversing, the Supreme Court described the issue as:

11 Which of Daniels' two firefighting employers bears responsibility for his disability
12 necessarily turns on the date that he became disabled. 145 P.3d at 1027.

13
14 The Court found that while Daniels may have manifested a heart condition while the first
15 employer was still responsible for his condition, he suffered no disablement at that time and was not
16 disabled until during his employment with the second employer when he suffered a heart attack. The
17 Court therefore held that liability could not attach to the first employer. As set forth above, the Court
18 held "An employee is not entitled to compensation from the mere contraction of an occupational
19 disease. Instead, compensation ... flows from a disablement resulting from such a disease." [Citations
20 and internal quotations omitted]. 145 P.3d at 1027.
21

22 The Court then undertook an analysis under the last injurious exposure rule that is not
23 directly applicable here since in the present case the Claimant only worked for one employer and
24 became eligible for the presumption of NRS 617.457 while employed by that single employer, which
25 was the City. Nevertheless, if the last injurious exposure rule is applicable, it is clear that liability
26 would attach to the City's self-insurance. The Court in Daniels, in determining which employer was
27 liable, stated:
28

1 Consequently, the last injurious exposure rule applies in such circumstances and
2 places responsibility for disability compensation on the employer in closest temporal
3 proximity to the disabling event. 145 P.2d at 1027. (Emphasis added).

4 This holding directly contradicts the City's argument that under the last injurious exposure
5 rule liability would shift back to Employers. The only disabling event occurred in August 2012 when
6 the City was self-insured and that is when liability attaches. The Daniels' Court reversed the Appeals
7 Officer for doing exactly what the City is requesting this Court do: assign liability to Employers as
8 the first insurer even though the Claimant did not become disabled until the City was self-insured.

9 Thus, pursuant to the applicable statutes and Nevada case law the Appeals Officer correctly
10 concluded that liability for the claim did not attach until Mr. DeMaranville was disabled, which did
11 not occur until August 2012 when the City was self-insured.

12 C. THE CITY'S ARGUMENT IS WITHOUT MERIT

13 First, it is rather disingenuous for the City to attack the Appeals Officer for her "failure to
14 even address the last injurious exposure rule, which is determinative of this case." See, City's
15 Opening Brief at page 9, lines 18-19. This is so because in the City's Points and
16 Authorities/Argument on Insurer Liability submitted to the Appeals Officer on this very issue the
17 City argued that the last injurious exposure rule did not apply to this case.⁴ Indeed, its argument
18 heading in that brief is entitled: "1. Daniels and the LIER do not apply to this case." The first
19 sentence under this heading reads: "This is not a successive employer/carrier case." ROA 40. Having
20 argued below that the last injurious exposure rule does not apply, the City cannot now raise this
21 argument on appeal. Edgington v. Edgington, 119 Nev. 577, note 28, 80 P.3d 1282 (2003); Lubin v.
22 Kunin, 117 Nev. 107, note 3, 7 P.3d 422 (2001).

23
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25
26
27 ⁴ After the hearing the Appeals Officer issued an Order requesting briefing on the issue of which
28 insurer would be liable for the claim. ROA 585-586. The City's Points and Authorities/Argument on
Insurer Liability was filed in response to that Order.

1 Second, the City's argument concerning the applicability of the last injurious exposure rule
2 is, on the merits, erroneous. The City's entire premise is that the statute is based upon a police
3 officer's exposure to some "heart disease-causing agents that can result in heart disease that is
4 occupational, much like working with asbestos exposes a worker to disease causing agents...." See
5 City's Opening Brief at page 11, lines 20-22. This is incorrect. NRS 617.457(1) has nothing to do
6 with any such exposure to harmful agents and makes no mention of any such exposure. The statute
7 simply creates a conclusive presumption that a police officer's heart disease is an occupational
8 disease providing he worked for five continuous years as a police officer. The legislature certainly
9 knows how to address liability based on exposure to harmful agents as it specifically did so in NRS
10 617.455 regarding lung diseases. That statute specifically requires exposure to "heat, smoke, fumes,
11 tear gas or any other noxious gases..." for a lung disease to be considered an occupational disease
12 for police officers or firefighters employed for at least two years. (NRS 617.455(5) provides a
13 conclusive presumption for those employed at least five years). See also, NRS 617.481 (exposure to
14 contagious diseases). The statute at issue here, NRS 617.457, does not involve any exposure issue
15 whatsoever.

16
17
18 The City then relies on this erroneous assertion to argue that the last date of some fictitious
19 "exposure" to some unknown harmful agent establishes the date for determining which insurer is
20 liable. The cases cited by the City all involve exposure to some type of harmful agent; e.g. asbestos,
21 noise, dust and hepatitis C. Contrast that with the clear holding from the Nevada Supreme Court
22 which states that in order to claim benefits under NRS 617.457 a police officer must show only two
23 things: (1) heart disease; and, (2) five years' qualifying employment before disablement. Manwill v.
24 Clark County, 123 Nev. 28, 162 P.3d 876, 879 (2007). There is no requirement of, or reference to,
25 any exposure to any harmful agent or condition. These two requirements were not met until Mr.
26
27
28


1 DeMaranville died in August 2012 when the City was self-insured and the Appeals Officer properly
2 assigned liability of the claim to the City.

3
4 **V. CONCLUSION**

5 The determination by the Appeals Officer assigning full liability for the claim to the City of
6 Reno under its plan of self-insurance was correct. While Employers maintains that the Appeals
7 Officer erred in finding that Mr. DeMaranville died as a result of heart disease, in the event that
8 determination is upheld, the Decision of the Appeals Officer assigning full liability to the City of
9 Reno should also be affirmed.

10
11 Dated this 27th day of August, 2015.

12
13 SERTIC LAW LTD.

14
15
16 By: 
17 Mark S. Sertic
18 Attorneys for Cross-Petitioner/Respondent
19 Employers Insurance Company
20 of Nevada
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ATTORNEY'S CERTIFICATE

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

☐ This brief has been prepared in a proportionally spaced typeface using [state name and version of word-processing program] in [state font size and name of type style]; or

☒ This brief has been prepared in a monospaced typeface using Times New Roman typeface and Microsoft Word with 10.5 characters per inch.

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

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/ / /


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///

///

1 DATED this 27th day of August, 2015.

SERTIC LAW LTD.


4 By: 
5 Mark S. Sertic
6 Attorneys for Cross-Petitioner/Respondent
7 Employers Insurance Company
8 of Nevada
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of Sertic Law Ltd., Attorneys at Law, over the age of eighteen years, not a party to the within matter, and that on the 27th day of August, 2015, I deposited for mailing at Reno, Nevada, with postage fully prepaid, a true copy of the foregoing or attached document, addressed to:

Tim E. Rowe, Esq.
McDonald Carano Wilson LLP
P.O. Box 2670
Reno, Nevada 89505


NAIW
Evan Beavers, Esq.
1000 E William Street #208
Carson City, Nevada 89701


Gina L. Walsh

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm to the best of his knowledge that the foregoing document does not contain the social security number of any person.

Dated on this 27th day of August, 2015.


Mark S. Sertic

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

9 *****

10 CITY OF RENO,

11 Petitioner,

Case No. 150C000921B

12 vs.

Department No: II

13 DANIEL DEMARANVILLE [Deceased],
14 EMPLOYER'S INSURANCE COMPANY
15 OF NEVADA, and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

16 Respondents.
17 _____/

18 EMPLOYERS INSURANCE COMPANY
19 OF NEVADA

20 Cross-Petitioner,

21 vs.

22 CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

23 Cross-Respondents.
24 _____/

25 **ORDER GRANTING PETITIONS FOR JUDICIAL REVIEW**
26
27
28

Petitioner Employers Insurance Company of Nevada, (“EICON”), has filed a Cross-Petition for Judicial Review seeking the reversal of that part of the Appeals Officer’s Decision which found that the claim qualified for compensation under the police officer’s heart disease statute, NRS 617.457. Petitioner the City of Reno, (“CITY”), has filed a Petition for Judicial Review seeking the reversal of the Appeals Officer’s Decision finding the claim to be compensable and also finding that the CITY is the responsible insurer for the claim, and that EICON is not responsible for the claim.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the Cross-Petition for Judicial review filed by EICON is granted and the Decision of the Appeals Officer finding that the claim is compensable under NRS 617.457 is reversed.

IT IS HEREBY ORDERED that the Petition for Judicial review filed by the CITY is granted with respect to the Appeals Officer's Decision finding that the claim is compensable under NRS 617.457. That part of the Appeals Officer's Decision is reversed. The finding by the Appeals Officer that the CITY is the responsible insurer for the claim, and that EICON is not responsible for the claim, is thus moot. Therefore, to the extent the CITY's Petition for Judicial review seeks to reverse that part of the Appeals Officer's Decision, it is denied.

Dated: _____, 2015.

DISTRICT COURT JUDGE

Submitted by:
Mark S. Sertic
Nevada Bar No. 403
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Reno, Nevada 89502
(775) 327-6300
Attorneys for Cross-Petitioner/Respondent
Employers Insurance Company of Nevada

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NEVADA DEPARTMENT OF ADMINISTRATION

STATE OF NEVADA
DEPT OF ADMINISTRATION
HEARINGS DIVISION
APPEALS OFFICE

BEFORE THE APPEALS OFFICER

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AND
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In the matter of the Industrial
Insurance Claim

Claim No.: 12853C301824

of

Hearing No.: 52796-KD

Daniel Demaranville, Deceased,
Claimant.

Appeal No.: 53387-LLW

MOTION TO INTERVENE AND/OR FOR JOINDER

Employers Insurance Company of Nevada hereby moves for an
Order allowing it to intervene in this matter or alternatively
joining it in this matter. This motion is made and based on the
pleadings and papers on file herein and the following Points and
Authorities.

DATED this 31st day of August, 2015.

SERTIC LAW LTD.

By: Mark S. Sertic
MARK S. SERTIC, ESQ.
5975 Home Gardens Drive
Reno, Nevada 89502
(775) 327-6300
Attorneys for
Employers Insurance Company
of Nevada

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1 since: (1) There is at least a possibility that the determination
2 assigning liability for the claim to the City could be overturned
3 on appeal; and, (2) In that event an argument might be raised that
4 the amount of the benefits as determined in this proceeding is
5 binding upon Employers.

6 NRCP 24(b) provides:

7
8 Upon timely application anyone may be permitted to
9 intervene in an action: (1) when a statute confers a
10 conditional right to intervene; or (2) when an applicant's
11 claim or defense and the main action have a question of law or
12 fact in common. In exercising its discretion the court shall
13 consider whether the intervention will unduly delay or
14 prejudice the adjudication of the rights of the original
15 parties.

16
17 There are common questions of law and fact involved here with
18 respect to the appropriate amount of any benefits to which the
19 Claimant may be entitled. Therefore, Employers should be allowed to
20 intervene in this matter.

21 NRCP 19(a) provides in part:

22
23 A person who is subject to service of process and whose
24 joinder will not deprive the court of jurisdiction over the
25 subject matter of the action shall be joined as a party in the
26 action if (1) in the person's absence complete relief cannot
27 be accorded among those already parties, or (2) the person
28 claims an interest relating to the subject of the action and
is so situated that the disposition of the action in the
person's absence may (i) as a practical matter impair or
impede the person's ability to protect that interest or (ii)
leave any of the persons already parties subject to a
substantial risk of incurring double, multiple, or otherwise
inconsistent obligations by reason of the claimed interest.

29 Joinder of Employers into this action is appropriate as there
30 are common questions of law or fact relating to the appropriate

1 amount of any benefit to which the Claimant might be entitled and
2 EICON's participation in this action is necessary in order to
3 protect its interests.

4 Therefore, Employers respectfully requests that it be allowed
5 to intervene in this action, or alternatively that it be joined
6 into this action.

7 DATED this 31st day of August, 2015.

9 SERTIC LAW LTD.

10 By: Mark S. Sertic
11 MARK S. SERTIC, ESQ.
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15 Attorneys for
16 Employers Insurance Company
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of Sertic Law Ltd., Attorneys at Law, over the age of eighteen years, not a party to the within matter, and that on the 1st day of ~~August~~^{September}, 2015, I served by U.S. mail, a true copy of the foregoing or attached document, addressed to:

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1000 E William Street #208
Carson City, Nevada 89701

Timothy Rowe, Esq.
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Reno, NV 89505


Gina L. Walsh

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm to the best of his knowledge that the attached document does not contain the social security number of any person.

Dated on this 31st day of August, 2015.


Mark S. Sertic

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1 NEVADA DEPARTMENT OF ADMINISTRATION
2 BEFORE THE APPEALS OFFICER

3 1050 E. WILLIAM, SUITE 450
4 CARSON CITY, NV 89701

FILED

SEP 2 2015

DEPT. OF ADMINISTRATION
APPEALS OFFICER

6 In the Matter of the Contested
7 Industrial Insurance Claim of:

} Claim No: 12853C301824

} Hearing No: 52796-KD

} Appeal No: 53387-LLW

9 DANIEL DEMARANVILLE, DECEASED,
10

11 Claimant.
12

ORDER

13 The Employers Insurance Company of Nevada (EICN) is hereby
14 joined as an indispensable party to this action. The parties shall serve EICN with
15 all pleadings and evidence within ten days of the date of this Order.

16 **IT IS SO ORDERED.**
17


18 

19 _____
20 LORNA L WARD
21 APPEALS OFFICER
22
23
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28

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ORIGINAL

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*Attorneys for Cross-Petitioner/Respondent
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CLERK
BY  DEPUTY

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

CITY OF RENO,

Petitioner,

Case No. 15 OC 00092 1B

vs.

Department No: 2

DANIEL DEMARANVILLE [Deceased],
EMPLOYER'S INSURANCE COMPANY
OF NEVADA, and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Respondents.

EMPLOYERS INSURANCE COMPANY
OF NEVADA

Cross-Petitioner,

vs.

CITY OF RENO, DANIEL DEMARANVILLE
[Deceased], and NEVADA DEPARTMENT
OF ADMINISTRATION APPEALS OFFICER

Cross-Respondents.

**CROSS-PETITIONER EMPLOYERS
INSURANCE COMPANY OF NEVADA'S REPLY BRIEF**

NRAP 26.1 DISCLOSURE STATEMENT

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

1. There are no corporations that must be disclosed pursuant to this Rule.

2. Employers Insurance Company of Nevada was represented in all of the administrative proceedings below, and is represented before this Court, by Mark S. Sertic of Sertic Law Ltd.

Dated this 25th day of September, 2015.

SERTIC LAW LTD.


By: 
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(775) 327-6300
Attorneys for Cross-Petitioner/Respondent
Employers Insurance Company
of Nevada

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TABLE OF AUTHORITIES

Statutes:

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NRS 617.457	7

I. ARGUMENT

As set forth in detail in the opening brief of Employer Insurance Company of Nevada, (“EICON”), the Appeals Officer’s decision is arbitrary and capricious in that it is conclusory, without support in the evidence and based upon a mischaracterization of Dr. Lagstein’s reporting.

The Claimant’s response to the fact that the Appeals Officer specifically misstated the opinion of Dr. Lagstein is rather telling. As set forth in EICON’s opening brief the Appeals Officer incorrectly asserted that Dr. Lagstein opined that the troponin I “test with or without autopsy would have clarified this issue beyond any doubts.” ROA 7, lines 7-9. As set forth in EICON’s opening brief, this is completely wrong. Dr. Lagstein clearly stated that: “There is no evidence to support diagnosis [sic] of myocardial infarction in the absence of abnormal postoperative EKG and postoperative cardiac enzymes, especially troponin-I level. There was no evidence of underlying arteriosclerotic heart disease. Therefore, the death is due to a postoperative complication of unclear etiology. Clearly, the aforementioned diagnostic test with or without autopsy would have clarified this issue beyond any doubts.” (Emphasis added). ROA 416. Thus, Dr. Lagstein wanted to see both a postoperative EKG and cardiac enzyme test. Both tests are important because even as Dr. Ruggeroli acknowledges, what the elevated troponin level shows is “myocardial necrosis or heart damage,” and is consistent with a “cardiovascular cause of the patient’s death.” ROA 566. While we know that Mr. DeMaranville died as the result of the stoppage of his heart that is not the issue; the issue is whether the stoppage of the heart was the result of heart disease. The evidence simply does not support this.¹

1 As set forth in EICON’s opening brief, increased troponin levels can be caused by many things other than heart disease, including tachycardia, trauma or even strenuous exercise. See University of Maryland Medical Center Website: <http://umm.edu/health/medical/ency/articles/troponin-test>. Thus, all this test established is that Mr. DeMaranville had some damage to his heart, the cause of which is likely the tachycardia. It does not establish that he had underlying heart disease. That is why the non-existent EKG would have been so important.

1 This mischaracterization of the evidence was essential and material to the Appeals Officer's
2 rejection of Dr. Lagstein's opinion and her reliance upon the opinion of Dr. Ruggeroli. The
3 Claimant's response to the Appeals Officer's material reliance upon this mischaracterization of the
4 record is, amazingly, to assert that both tests were performed! The Claimant states in her reply brief
5 that "the notes of Dr. Gomez and Dr. Carrea ... show that both tests were conducted and the results
6 reported." See Claimant's reply brief at page 13, line 27 to page 14, line 1. The Claimant offers no
7 citation to the record to support this. However, it is clear that no postoperative EKG was performed
8 and this critical evidence does not exist.² Even the Appeals Officer does not assert that an EKG was
9 performed; rather, she simply ignored Dr. Lagstein's reference to the non-existent EKG test. The
10 Appeals Officer's reliance on this misstatement of the evidence is arbitrary and capricious, and by
11 itself is sufficient grounds to reverse her decision.
12

13 The Claimant then compounds her error by asserting that Dr. Ali and Dr. Lagstein "both
14 opined that elevated troponin levels would have been conclusive...." See Claimant's brief at page
15 13, line 13-14. This is incorrect. Neither of these doctors so opined. The Claimant cites to ROA 375
16 and 416 for this assertion. Dr. Lagstein's specific opinion at ROA 416 is discussed above. Dr. Ali, at
17 ROA 375, actually states "there is no evidence of a myocardial infarction, particularly since cardiac
18 enzymes were not drawn, a 12-lead ECG [another name for EKG] showing evidence of myocardial
19 infarction is absent and an autopsy was not performed." ROA 375. The Claimant's effort to support
20 the Appeals Officer's Decision is based upon a mischaracterization of the evidence.
21
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26 ² While an echocardiogram was performed, no EKG (electrocardiogram) was performed. ROA 140,
27 141. Those two tests are not remotely the same. An EKG records the electrical signals that cause the
28 heart to beat as they travel through the heart. <http://www.mayoclinic.org/tests-procedures/electrocardiogram/basics/definition/prc-20014152>. An echocardiogram uses sound waves to produce images of the heart. <http://www.mayoclinic.org/tests-procedures/echocardiogram/basics/definition/prc-20013918>.

1 The Claimant argues that since, (in her belief at least), Mr. DeMaranville did not begin to
2 experience any post-operative difficulties until relatively shortly before his death, this shows his
3 death could not have been due to any post-operative issues. The problem with this, however, is two-
4 fold. First, there is no medical opinion that states that the amount of time between the surgery and
5 his death, (approximately six hours), rules out a post-operative cause. Second, the Claimant is
6 incorrect in her assertion. The record is clear that Mr. DeMaranville began to experience difficulties
7 shortly after leaving surgery. "Shortly after arriving in the PACU the recovery room nurse reported
8 that the patient became hypotensive and tachycardic." ROA 551. The enzyme test was taken
9 approximately two hours after surgery which indicates the problems were severe by then. ROA 137.

11 The Claimant's contention that the Petitioners must establish that Mr. DeMaranville died by
12 some other cause than heart disease is a red herring. The burden to establish the claim, i.e. that Mr.
13 DeMaranville suffered from, and died as the result of, heart disease is on the Claimant. See NRS
14 617.358 and NRS 617.457. The evidence in this case does not support such a finding.

16 The Appeals Officer ignored the three cardiologists who opined that there was insufficient
17 evidence to conclude that the death was the result of heart disease. Dr. Carrea, stated "I don't think it
18 is possible to state with conviction or certainty that his death resulted from a cardiac event." ROA
19 583. Dr. Ali, indicated that there was no documentation in the records that would support a diagnosis
20 of atherosclerotic heart disease as noted on the death certificate. ROA 372-375. Dr. Lagstein found
21 that there was insufficient evidence to diagnose Mr. DeMaranville as having any underlying
22 coronary artery disease and there was insufficient evidence to support the diagnosis of
23 arteriosclerotic heart disease as stated on the death certificate. ROA 415. The Appeals Officer
24 ignored those three opinions and instead relied upon the opinion of Dr. Ruggeroli. But in order to do
25 so, as set forth above, she had to mischaracterize the evidence.
26
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1 The evidence simply does not support a finding that Mr. DeMaranville died as a result of
2 heart disease. The only evidence pointing in that direction is the elevated enzyme test, which is fully
3 explained by the tachycardia that Mr. DeMaranville suffered after the operation. The key finding by
4 the Appeals Officer that Dr. Lagstein stated the enzyme test would be conclusive is incorrect and
5 based upon a mischaracterization of his report. Thus, the Appeals Officer's finding that Mr.
6 DeMaranville died as the result of heart disease is conclusory, without support in the evidence and
7 arbitrary and capricious.
8

9 The fact that the Appeals Officer relied upon a mischaracterization of the evidence shows
10 that the Decision was arbitrary and capricious. The fact that the Claimant must resort to citing non-
11 existent evidence to support her argument shows that the Decision is not based upon substantial
12 evidence and is therefore arbitrary and capricious.
13

14 II. CONCLUSION

15
16 Employers Insurance Company of Nevada respectfully requests that its Cross-Petition for
17 Judicial Review be granted and the Appeals Officer's Decision that Mr. DeMaranville died as a
18 result of heart disease be reversed.
19

20 Dated this 25th day of September, 2015.

21
22 SERTIC LAW LTD.

23
24
25 By: Mark S. Sertic
26 Mark S. Sertic
27 Attorneys for Cross-Petitioner/Respondent
28 Employers Insurance Company
of Nevada

ATTORNEY'S CERTIFICATE

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//

1 DATED this 25th day of September, 2015.

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3 SERTIC LAW LTD.


4 By: Mark S. Sertic
5 Mark S. Sertic
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Tim E. Rowe, Esq.
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P.O. Box 2670
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Evan Beavers, Esq.
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Carson City, Nevada 89701


Gina L. Walsh

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm to the best of his knowledge that the foregoing document does not contain the social security number of any person.

Dated on this 25th day of September, 2015.


Mark S. Sertic

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DEPUTY

8 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9
10 IN AND FOR THE COUNTY OF CARSON CITY

11 CITY OF RENO,

12 Petitioner,

Case No: 15 0C 00092 1B

13 vs.

Department No: II

14 DANIEL DEMARANVILLE [Deceased],
15 EMPLOYER'S INSURANCE COMPANY
16 OF NEVADA, and NEVADA DEPARTMENT
17 OF ADMINISTRATION APPEALS OFFICER,

18 Respondents.

19 JOINDER IN BRIEF OF CROSS-PETITIONER
20 EMPLOYERS INSURANCE COMPANY OF NEVADA

21 Petitioner, City of Reno ("City"), hereby joins in the Brief of Cross-
22 Petitioner, Employers Insurance Company (EICN), with respect to the arguments
23 presented by EICN on the issue of the compensability of Mr. Demaranville's claim under
24 NRS 617.457. The City adopts by reference the arguments presented by EICN.

25 Dated this 27th day of September, 2015.

26 McDONALD CARANO WILSON LLP

27 By: T. E. Rowe
28 TIMOTHY E. ROWE, ESQ.
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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Joinder In Brief of Cross-Petitioner Employers Insurance Company of Nevada filed in the First Judicial District Court of the State of Nevada, does not contain the social security number of any person.

T.E. Rowe
Timothy E. Rowe, Esq.
Attorney for Petitioner
CITY OF RENO

9-28-15
Date

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP, and that on the on the 29th day of September, 2015, I served the preceding Joinder In Brief of Cross-Petitioner Employers Insurance Company of Nevada by placing a true and correct copy thereof in a sealed envelope and requesting Reno-Carson Messenger Service hand-deliver said document to the following party at the address listed below:

Appeals Officer
Department of Administration
1050 E. William Street, Suite 450
Carson City, Nevada 89701

Evan Beavers, Esq.
Nevada Attorney for Injured Workers
1000 E. William Street, Suite 208
Carson City, NV 89701

A true and correct copy of the within document was also served via U.S. Mail at Reno, Nevada, on the parties/address referenced below:

Mark Sertic, Esq.
5975 Home Gardens Drive
Reno, NV 89502

City of Reno
Risk Management
P.O. Box 1900
Reno, Nevada 89505

Lisa Jones
CCMSI
P.O. Box 20068
Reno, NV 89515-0068


Carole Davis

#429526

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