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 and Cross-Appeal From Order Granting In Part and Denying In Part Consolidated Petitions For Judicial Review

First Judicial District Court, Case No.: 15 0C 00092 1B

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Respondent/cross-appellant City of Reno is a municipality of the State of Nevada and therefore a governmental entity that is exempt from the disclosures required by NRAP 26.1(a).

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ARGUMENT

I. There is insufficient evidence that Mr. DeMaranville died of heart disease.

Ms. DeMaranville's arguments on cross-appeal suffer from the same fatal flaws as the appeals officer's decision with respect to Mr. DeMaranville's cause of death in that both improperly rely on mischaracterized medical evidence.

The appeals officer's conclusion is based primarily on the opinion of Charles Ruggeroli, M.D., the only cardiologist to conclude that Mr. DeMaranville had a catastrophic cardiovascular event secondary to heart disease due to an elevated troponin level several hours before death. However, Dr. Ruggeroli's opinion alone is insufficient to establish that the appeals officer's decision is supported by substantial evidence given that the majority of the evidence in the record reaches the opposite conclusion—i.e., that Mr. DeMaranville's cause of death cannot be determined with any certainty because there is no evidence that he actually had heart disease of some kind that would have led to a catastrophic cardiac event. As a number of physicians have indicated, including three of the four cardiologists involved in this matter, it is simply not possible to determine what caused Mr. DeMaranville's death without an autopsy or additional testing, including ***but not limited*** to cardiac enzymes. *See* 2 JA 255 and 5 SA 434 (indicating Jay E. Betz, M.D., could not determine with certainty whether the cardiac arrest was caused by some form of heart disease and that, "[a]bsent an autopsy, a definitive conclusion

regarding Mr. DeMaranville's cause of death may not be possible"); *see also* 2 JA 238 and 5 SA 417 (Yasmine S. Ali, M.D.); 4 JA 569 and 5 SA 458 (Zev Lagstein, M.D.); 4 JA 610 and 7 SA 625 (Frank Carrea, M.D.).

In relying upon Dr. Ruggeroli's observations with respect to Mr. DeMaranville's troponin level to find that Mr. DeMaranville died of heart disease, the appeals officer improperly mischaracterized Dr. Ali and Dr. Lagstein's opinions to support her finding. *See* 1 SA 64. With these mischaracterizations, the appeals officer's decision gives the false impression that Dr. Ali and Dr. Lagstein would have agreed with Dr. Ruggeroli's opinion that Mr. DeMaranville's elevated troponin level alone was alone sufficient to determine that Mr. DeMaranville died of heart disease. *See* 4 JA 641; 1 SA 64. Ms. DeMaranville cites to these same mischaracterizations on cross-appeal to argue that the decision should be affirmed. *See* DeMaranville Answering Br. on Cross-Appeal 13. But neither Dr. Ali nor Dr. Lagstein's opinions can be read to support the appeals officer's or Dr. Ruggeroli's conclusion that Mr. DeMaranville died of heart disease.

Contrary to the appeals officer's findings, Dr. Ali and Dr. Lagstein did not simply "ascribe the cause of death to postoperative complications" based on the lack of cardiac enzymes. 4 JA 641; 1 SA 64. Rather, Dr. Ali opined that "there is no evidence of a myocardial infarction, particularly since cardiac enzymes were not drawn, a 12-lead ECG showing evidence of myocardial infarction is absent, ***and*** an

autopsy was not performed." 2 JA 238; 5 SA 417. Dr. Lagstein opined that the uncertainty surrounding the cause of death could have been clarified by "abnormal postoperative EKG ***and*** postoperative cardiac enzymes, especially troponin-I level" and requested additional records, if available, "such as postoperative EKF and notes by Dr. Frank Carrea, who participated in the resuscitation." 4 JA 569; 5 SA 458. Accordingly, neither Dr. Ali nor Dr. Lagstein opined that troponin levels alone could conclusively establish that Mr. DeMaranville died of heart disease.

But for the mischaracterizations of the opinions of Dr. Lagstein and Dr. Ali, the appeals officer's conclusion that Mr. DeMaranville died of heart disease lacks substantial evidentiary support. The appeals officer's decision is therefore "unsustainable as being arbitrary or capricious" and should be reversed. *N. Lake Tahoe Fire Prot. Dist. v. Bd. of Admin. of the Subsequent Injury Account for the Ass'ns of Self-Insured Pub. or Private Emp'rs*, 134 Nev., Adv. Op. 93 (2018).

II. Liability for paying workers' compensation stemming from a retired police officer's presumptively occupational heart disease under NRS 617.457 is appropriately placed on the responsible employer's insurer at the time of retirement.

A. EICON is responsible because it insured the City during the entirety of Mr. DeMaranville's sole qualifying employment as a police officer.

Assuming substantial evidence exists to support the finding that Mr. DeMaranville died of heart disease on August 5, 2012, Mr. DeMaranville's heart disease is conclusively presumed to have arisen out of and in the course of his

employment as a police officer with the City pursuant to NRS 617.457 (2011). During the entirety of Mr. DeMaranville's employment as a police officer with the City from 1969 to 1990, EICON was the City's insurer for purposes of workers' compensation claims. Thus, EICON can be the only insurer responsible for paying compensation for the death of an employee who died from an occupational disease that is conclusively presumed to have arisen out of and in the course of that employment.

EICON incorrectly contends the City's position has been inconsistent throughout the case. To the contrary, the City has consistently argued that it cannot be held responsible for Ms. DeMaranville's claim because at no time has Mr. DeMaranville been employed by the City since it became self-insured in 2002. The City did not become self-insured until 12 years after Mr. DeMaranville retired and ***has never insured the risk of Mr. DeMaranville contracting an occupational disease arising out of and in the course of his employment with the City***. *See* City Opening Br. 27 n.3. Particularly in the context of the last injurious exposure rule ("LIER"), the City has consistently argued that EICON is responsible for Ms. DeMaranville's claim because EICON is the last and *only* insurer to have ever covered the risk of Mr. DeMaranville's exposure to heart disease during his employment as a police officer. *See* 4 JA 616 (arguing in the administrative proceedings that the City "cannot be the responsible Insurer on this claim because

the Claimant was never employed with the City at a time which it was self-insured"); 5 JA 778-79 (arguing in the administrative proceedings that the LIER, as adopted and applied in Nevada, revealed that liability is properly assigned to EICON); 5 JA 833-42 (arguing in the district court proceedings that the LIER, as adopted and applied elsewhere, revealed that liability is properly assigned to EICON).

Despite EICON's assertions to the contrary, the City does not argue "that some exposure from the employment must cause or contribute to the heart disease." EICON's RAB 22. Instead, NRS 617.457 conclusively presumes that some exposure from Mr. DeMaranville's employment as a police officer caused his heart disease so long as the two statutory criteria are met: (1) five years of employment as a police officer prior to disablement and (2) heart disease. *See, e.g.*, *Manwill v. Clark Cty.*, 123 Nev. 238, 243, 162 P.3d 876, 880 (2007). The City uses the term "exposure" in reference to the requisite period of qualifying employment for purposes of demonstrating that NRS 617.457's presumption can only apply to EICON in accordance with the last injurious *exposure* rule. Because Mr. DeMaranville had accumulated the requisite five years of qualifying employment as a police officer at the time of his retirement when EICON was the City's insurer, and Mr. DeMaranville did not work for the City at any point thereafter, EICON's liability for any future disablement or death as a result of heart disease was fixed at that time.

B. EICON's reliance on the date of disablement is misplaced because at no point did Mr. DeMaranville work for the City since it became self-insured.

In relying on distinguishable caselaw and the timing of the disabling event, EICON overlooks the significance of the date of Mr. DeMaranville's last exposure to the employment which is conclusively presumed to have caused his heart disease. Once NRS 617.457's presumption applies, the timing of the disabling event is significant primarily for purposes of determining when the employee or the employee's dependent becomes entitled to receive occupational disease compensation. *See Manwill*, 123 Nev. at 244, 162 P.3d at 880 (citing *Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1014, 145 P.3d 1024, 1027-28 (2006)). Likewise, in the context of the LIER, the timing of the disabling event might be significant for purposes of determining which of two employers to whom NRS 617.457's presumption applies "bears the burden of paying disability compensation." *Daniels*, 122 Nev. at 1017, 145 P.3d at 1029. But where, as here, the claimant is retired from the single employment to which NRS 617.457's presumption applies on the date of disablement, it is irrelevant who insures the employer at that time. Rather, the LIER would assign liability to the responsible employer's insurer at the time of the employee's retirement—i.e., the date of the employee's last exposure to the employment which is conclusively presumed to have

caused his heart disease. *See* City Opening Br. 28-29 & n.4 (citing supporting authorities).

The Court need not overrule or modify existing precedent to reach the same conclusion here, as the Nevada Supreme Court's decisions applying the LIER are consistent with the City's position. *See, e.g.*, *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 112 P.3d 1093 (2005) (applying the LIER to a case involving successive injuries and employers); *State Indus. Ins. Sys. v. Jesch*, 101 Nev. 690, 709 P.2d 172 (1985) (applying the LIER to a case involving occupational diseases and successive employers). Indeed, none of the Nevada Supreme Court decisions addressing the LIER (or any other decision of which the City is aware) have placed liability for a claimant's industrial injury or occupational disease on an insurer who has never insured the risk for that claimant during his or her tenure of employment with the covered employer.[1]

[1]For example, in successive injury and employer cases, the employer and insurer covering the risk at the time of the original injury remain liable for the claimant's second injury "if the second injury is merely a recurrence of the first, and does not contribute even slightly to the causation of the disabling condition." *State Indus. Ins. Sys. v. Swinney*, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987). This is the case notwithstanding that, at the time the second claim is filed, (1) the claimant is no longer employed by the liable employer and (2) the liable employer is no longer insured by the liable insurer. Unless the liable employer has the same insurer when both the original and second claims are filed, liability would not be placed with the liable employer's insurer at the time the second claim is filed because that insurer never covered the risk during the claimant's covered employment. Similarly, liability cannot properly be placed on the self-insured City here.

For instance, the *Daniels* decision upon which EICON relies provides for the application of the LIER in successive employer/insurer cases only where the criteria necessary to invoke NRS 617.457's presumption have been met with respect to both employers or insurers involved. *Daniels*, 122 Nev. at 1017, 145 P.3d at 1029. Unlike in *Daniels*, where there were two qualifying employments to which the presumption could apply, there is but one qualifying employment here—i.e., Mr. DeMaranville's employment with the EICON-insured City from 1969 to 1990. As such, there is but one insurer that could be charged with responsibility for Mr. DeMaranville's claim. Thus, notwithstanding that it is distinguishable, the *Daniels* decision demonstrates that liability is properly assigned to EICON given that the last and only qualifying employment in closest proximity to Mr. DeMaranville's disabling event is his employment with the EICON-insured City.

In sum, because the City was insured by EICON during the entirety of Mr. DeMaranville's single qualifying employment, EICON is the last and only insurer to have covered the risk that Mr. DeMaranville would at some point in the future develop heart disease and become disabled or die, thereby entitling him or his dependents to occupational disease benefits in accordance with NRS 617.457. Indeed, because Mr. DeMaranville had accumulated the requisite five years of full-time, continuous work as a police officer by the time of his retirement, and because he did not work for the City or any other employer to whom NRS 617.457's

presumption applies thereafter, EICON's liability was fixed as of the date of Mr. DeMaranville's retirement. The appeals officer and district court erred as a matter of law in concluding otherwise. Thus, reversal is warranted in this regard.

C. EICON's due process argument lacks merit.

EICON contends that, as a matter of due process, it cannot be held liable for Ms. DeMaranville's claim because the Court determined EICON lacked standing to assert a cross-appeal under NRAP 3A(a), among other authorities. EICON's argument appears speculative and premature to the extent EICON is suggesting that its present status as a non-aggrieved party would somehow deprive EICON of due process by precluding it from challenging any adverse order that might be entered against it in the future. Otherwise, EICON's conclusory argument is difficult to discern and need not be addressed. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (recognizing the Court need not consider claims on appeal that are neither cogently argued nor supported by relevant legal authority).

CONCLUSION

The record lacks substantial evidence supporting a finding that Mr. DeMaranville died from heart disease and, even if it did, the City cannot be liable under NRS 617.457's statutory presumption because at no point did Mr. DeMaranville work for the City while it was self-insured. Therefore, the City

respectfully requests that the Court reverse the portion of the district court's order denying the consolidated petitions for judicial review and affirming the appeals officer's March 18, 2015 decision.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 19th day of December, 2018.

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I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitations of NRAP 28.1(e)(2) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2350 words.

I hereby certify that I have read this 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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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 19th day of December, 2018, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system as listed below:

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