IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73971

CITY OF RENO,

Appellant,

v.

JODY YTURBIDE,

Respondent.

Appeal From Order Denying Petition for Judicial Review
District Court Case No. CV17-00065
Second Judicial District Court of Nevada

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

The City of Reno is a governmental party; therefore, no disclosure is necessary.

The law firm of McDonald Carano LLP appeared on behalf of the City of Reno in the underlying administrative proceedings and in the district court.

Dated this 24th day of April, 2018.

McDONALD CARANO LLP

By: /s/ *Lisa Wiltshire Alstead*

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JURISDICTIONAL STATEMENT

This is an appeal of an administrative agency decision issued by an Appeals Officer for the Nevada Department of Administration on December 16, 2016. The City of Reno ("City") filed a petition for judicial review with the Second Judicial District Court for the State of Nevada on January 13, 2017. (I JA 001-013.) The district court denied the City's petition in an order dated August 8, 2017. (IV JA 390-398.) Notice of entry of that order was filed on September 7, 2017. (IV JA 399-415.) The City timely filed its notice of appeal with the Supreme Court on September 7, 2017. (IV JA 403-415.) Because the order denying petition for judicial review was a final judgment, appellate jurisdiction exists under NRAP 3A(b)(1) and NRS 233B.150.

I. ROUTING STATEMENT

As an administrative agency case that does not involve tax, water or public utilities, this appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(10).

II. STATEMENT OF ISSUES

1. Did the district court incorrectly construe the 25% cap on lump sum permanent partial disability ("PPD") payments set forth in NRS 616C.495(1)(d) and NAC 616C.498 (collectively, the "Statute") as being limited to a specific claim when the workers' compensation statutory framework looks at whole person impairment?

2. When applying the 25% cap on lump sum PPD payments set forth in the Statute, did the City correctly deduct prior lump sum PPD awards paid to injured employee/claimant Jody Yturbide ("Ms. Yturbide") in other claims?

III. STATEMENT OF THE CASE

This matter arises out of a workers' compensation claim. The primary dispute concerns the 25% statutory cap on lump sum PPD awards set forth in the Statute. The specific question presented is whether Ms. Yturbide's prior PPD awards for different claims or disabilities must be subtracted from Ms. Yturbide's 33% PPD award to comply with the 25% statutory cap on lump sum payments.

Ms. Yturbide worked as a Public Safety Dispatcher in the Reno Emergency Communications Division for the City. (II JA 137.) On May 23, 2014, she filed a claim for injuries to her right shoulder, forearm, elbow, wrist, and fingers with a date of injury of May 22, 2014. (*Id.*) On June 19, 2016, Dr. Katharina Welborn conducted a PPD evaluation and thereby rated Ms. Yturbide with a 33% whole person impairment related to her cervical spine. (II JA 172-173.)

On July 1, 2016, the City's third-party administrator, Cannon Cochran Management Services, Inc. ("TPA"), issued a determination letter offering a 33% PPD award. (II JA 174.) The letter also indicated that because Ms. Yturbide has prior PPDs resulting in a total whole person impairment of 7%, she is only entitled

to an 18% lump sum payment on the claim, with the remaining 15% to be paid in installments. (*Id.*) Ms. Yturbide appealed this determination. (*See* III JA 270-272.)

On August 11, 2016, the Hearing Officer reversed and remanded, determining that Ms. Yturbide is entitled to a one-time lump sum offering of 25% with the remaining 8% to be paid in monthly installments irrespective of the prior lump sum PPD awards she received. (*Id.*)

The City appealed the Hearing Officer Decision to a Department of Administration Appeals Officer. (III JA 268.) On December 16, 2016, the Appeals Officer affirmed the Hearing Officer Decision, finding that Ms. Yturbide should be offered 25% of her 33% PPD award as a lump sum, with the remaining 8% to be paid in installments in accordance with the Statute. (I JA 010.)

As both the Hearing Officer's and Appeals Officer's decisions misread and misapplied the Statute, the City filed a petition for judicial review in the Second Judicial District Court on January 13, 2017. (I JA 001-13.) The district court denied the petition. (IV JA 390-400.) The City now appeals.

IV. STATEMENT OF FACTS

A. Ms. Yturbide's Workers' Compensation Claim.

Ms. Yturbide worked as a Public Safety Dispatcher in the Reno Emergency Communications Division for the City. (II JA 137.) On May 22, 2014, Ms. Yturbide reported suffering injuries to her right shoulder, forearm, elbow, wrist, and fingers,

including severe pain and numbness and loss of sensation in two-to-three fingers, related to her job duties. (II JA 136.) On May 23, 2014, Ms. Yturbide filed a claim for compensation with the City's TPA. (*Id*.)

The claim was accepted for right wrist/elbow strain and was later modified to include Ms. Yturbide's cervical conditions. (II JA 150.) After treatment, which included physical therapy and two surgeries, Ms. Yturbide was found to be at maximum medical improvement by her treating physician, who recommended a PPD evaluation. (II JA 162.)

B. Ms. Yturbide's Third Permanent Partial Disability Award.

On June 19, 2016, Ms. Yturbide's PPD evaluation was conducted by Dr. Katharina Welborn. (II JA 167-173). Dr. Welborn recommended claim closure with a 33% whole person impairment related to the cervical spine. (II JA 172-173).

On July 1, 2016, TPA issued a determination letter awarding a 33% whole person impairment. (II JA 174.) This determination also indicated that because Ms. Yturbide has prior PPDs resulting in a total whole person impairment of 7%, she was only entitled to an 18% lump sum payment because of the 25% cap on lump sum PPD awards under NAC 616C.498.[1] TPA concluded that the remaining 15%

[1] The version of NAC 616C.498 in place as of the date of injury, May 22, 2014, capped the amount an injured employee can receive in lump sum form at 25%. NRS 616C.425; *see also State Ind. Ins. Sys v. Conner*, 102 Nev. 335, 337, 721 P.2d 384, 385 (1986) (stating, "entitlement to benefits is determined as of the date of injury"). Although a more recent version of NAC 616C.498 was adopted and went into effect

was to be paid in installments. (*Id*.) The calculation in TPA's letter allocating the 33% PPD award into lump sum and installments is summarized as follows:

PPD Awards:

PPD Awards	Date of Injury	Percentage Whole Person Impairment	Lump Sum Payment Received	Installments Payments Received	Body Part
1st	1/23/08	5%	X		Right Wrist
2nd	11/17/11	2%	X		Left Elbow
3rd	5/22/14	33%	X	X	Cervical
Total PPD Awards	n/a	**40%**	n/a	n/a	n/a

Lump Sum Calculation:

25% WPI[2]	**Award Allowed Under NAC 616C.498**
-7 % WPI	**Prior PPD Awards Accepted in Lump Sum**
18% WPI	**Lump Sum Balance Available for Third PPD Award**

Balance of Third PPD Award to be Paid in Installments:

15% WPI	Calculated by taking WPI for third PPD (33%) minus portion of Third PPD Award paid in lump sum (18%)

on December 21, 2016 that increases the lump sum payment cap from 25% to 30%, that provision applies only to employees injured on or after January 1, 2016. *See* NAC 616C.498(2).

[2] "WPI" stands for "whole person impairment" in these charts.

C. Appeals Before the Department of Administration.

Ms. Yturbide appealed this determination to the Department of Administration, Hearings Division, on July 8, 2016, and a Hearings Officer heard the appeal on August 3, 2016. (III JA 270-272.) On August 11, 2016, the Hearing Officer issued his decision reversing and remanding TPA's July 1, 2016 determination. (*Id.*) The Hearing Officer found TPA erred "in its 18% one-time lump sum offering... [and] finds the Claimant is entitled to a one-time lump sum offering of 25%, with the remaining 8% to be paid in monthly installments, pursuant to NAC 616C.498." The Hearing Officer instructed TPA to recalculate the PPD award accordingly. (*Id*.)

On September 8, 2016, the City appealed the Hearing Officer Decision to the Department of Administration, Appeals Division, Appeals Office. (III JA 268.) The matter was heard before an Appeals Officer on November 21, 2016. (II JA 104.) The Appeals Officer affirmed the Hearing Officer Decision, concluding that the Statute "do[es] not in any way limit or otherwise require a reduction of the lump sum award an injured worker is entitled to receive where an injured worker has multiple claims . . . ." (I JA 010.)

D. The District Court Denied the City's Petition for Judicial Review.

On January 13, 2017, the City timely filed a petition for judicial review in the Second Judicial District Court. (I JA 1-4.) The matter was fully briefed and oral

arguments conducted on July 21, 2017. (IV JA 359.) On August 8, 2017, the district court denied the City's petition for judicial review, concluding that the Appeals Officer Decision was unaffected by error of law and was supported by substantial evidence. (IV JA 390-415.)

V. SUMMARY OF ARGUMENT

The plain and unambiguous language of the Statute confirms that the 25% cap on lump sum PPD awards applies collectively to permanent impairment suffered by an employee under all workers' compensation claims and for all injuries. In addition to the plain meaning rule which must apply here, the holding of *Eads v. State Indus. Ins. Sys.*, 109 Nev. 733, 857 P.2d 13 (1993), is controlling and likewise confirms that the 25% lump sum cap applies to multiple PPD awards. By failing to apply the Statute in accordance with its plaining meaning and consistent with the legal holding in *Eads*, the Appeals Officer Decision contains errors of law and must be reversed.

To the extent the Appeals Officer found any ambiguity in this plain language by reading into the Statute a single claim limitation that is not expressly stated, the rules of statutory construction would govern interpretation of the Statute. Yet the Appeals Officer failed to comply with the rules of statutory construction. The Appeals Officer failed to look at the workers' compensation statutes and regulations as whole, consistent with the legislative intent, or to harmonize the statutory sections.

The Appeals Officer also failed to consider the protective purpose and policy underlying workers' compensation law. That is, disability benefits are intended to protect a disabled worker by supplying regular, periodic income to replace lost income caused by the disability. For that reason, the lump-summing of disability benefits is strongly discouraged where the disability caused by the industrial accident is sufficiently debilitating to result in a significant permanent impairment. Out of fear the lump sum will be quickly dissipated, leaving the injured worker destitute, many jurisdictions have adopted statutory caps on lump sum disability awards to further these fundamental principles. Nevada is one of these jurisdictions.

The Appeals Officer disregarded those fundamental principles in this case by allowing lump sum compensation for disability in excess of Nevada's statutory cap. The Appeals Officer Decision compels the City to pay Ms. Yturbide a 25% lump sum PPD award despite the fact she received lump sum PPD awards totaling 7% on previous claims.

Under the Appeals Officer Decision, Ms. Yturbide will receive lump sum payments for whole person impairment totaling 32%. This result conflicts with the requirements of the Statute. The Statute limits lump sum awards to whole person impairment not exceeding 25%. When whole person impairment exceeds 25%, the amount of impairment exceeding 25% must be compensated in installments.

For these reasons, the Appeals Officer Decision is affected by multiple errors of law and must be reversed. The City requests that the Court reverse the District Court Decision, enter an order limiting Ms. Yturbide's lump sum compensation for whole person impairment to a total of 18%, and remand to the District Court to grant the Petition for Judicial Review and remand to the Appeals Officer with similar instructions.

VI. ARGUMENT

A. Standard of Review

Questions of law are reviewed de novo. *SIIS v. United Exposition Services Co.,* 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Statutory construction is a question of law that warrants independent appellate review of the administrative decision. *Maxwell v. SIIS*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). With such independent review, no deference to the agency's interpretation of the statute is appropriate. *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). In this case, the City contends that the Appeals Officer Decision is affected by errors of law.

B. The Appeals Officer Decision is Affected by Error of Law by Failing to Apply the Statute Consistent With its Plain and Unambiguous Language.

The Appeals Officer Decision violates the plain meaning rule, which requires that the Statute be read according to its plain terms. Generally, when words in a statute are clear on their face, they should be given their plain meaning unless such

reading violates the spirit of the act. *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 951 P.2d 1, 6 (1997). When a statute's language is clear and unambiguous there is no room for construction, and courts are not permitted to search for its meaning beyond the statute itself. *Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994); *Nev. Power Co. v. Public Serv. Comm'n,* 102 Nev. 1, 4, 711 P.2d 867, 869 (1986).

The plain language at issue here is Nevada's statutory cap on lump sum permanent partial disability awards. In this state, an employee who suffers a work-related permanent partial disability as a result of an industrial injury is entitled to receive compensation for that disability pursuant to NRS 616C.490(1). NRS 616C.490 outlines the process for evaluating and rating the employee to determine the extent of the permanent impairment and how the employee is compensated for the impairment. Notably, for purposes of evaluating permanent impairment, the terms "disability" and "impairment of the whole person" are equivalent terms. NRS 616C.490(1).

Once the PPD evaluation is completed and the PPD award based on percent of whole person impairment is awarded, an employee may elect to receive the PPD payments in lump sum form or installments, in accordance with the Statute.

NRS 616C.495(1)(d) specifies the circumstances in which a claimant may elect a lump sum award:

> 1. Except as otherwise provided in NRS 616C.380, ***an award for a permanent partial disability may be paid in a lump sum under the following conditions***:
>
> * * *
>
> (d) Any claimant injured on or after July 1, 1995, may elect to receive his or her compensation in a lump sum in accordance with regulations adopted by the Administrator and approved by the Governor. The Administrator shall adopt regulations for determining the eligibility of such a claimant to receive all or any portion of his or her compensation in a lump sum. Such regulations may include the manner in which an award for a permanent partial disability may be paid to such a claimant in installments (emphasis added).

The version of NAC 616C.498 in force at the time of the Appeals Officer Decision, which is the regulation adopted by the Nevada Division of Industrial Relations ("DIR") pursuant to NRS 616C.495(1)(d), provides:

> An employee injured on or after July 1, 1995, who incurs a permanent partial disability that:
>
> 1. Does not exceed 25 percent may elect to receive his compensation in a lump sum.
>
> 2. Exceeds 25 percent may elect to receive his compensation in a lump sum equal to the present value of an award for a disability of 25 percent. ***If the injured employee elects to receive compensation in a lump sum pursuant to this subsection, the insurer shall pay in installments to the injured employee that portion of the injured employee's disability in excess of 25 percent*** (emphasis added).

The phrase "disability" in this provision equates to "whole person impairment." NRS 616C.490(1).

There is no language in NRS 616C.495(1)(d) and NAC 616C.498 that limits the 25% cap on lump sum payments to ***impairments for the same claim or injury***. *See* NRS 616C.495(1)(d) and NAC 616C.498. As such, the plain and unambiguous

language makes clear that all permanent impairment of an employee, and not just impairment resulting from the current injury, must be considered when applying the statutory cap. *See* NRS 616C.490(1).

The Appeals Officer Decision goes beyond the plain and unambiguous language by reading into the Statute a limitation (*i.e.*, that the 25% cap on lump sum payments applies separately to each injury of a person) that does not exist. (I JA 096-103.) Because the word "disability" must be read to mean "whole person impairment," the language of NAC 616C.498 requires that the lump sum payment be paid in installments where whole person impairment exceeds 25%. The Appeals Officer Decision is contrary to the statutory language.

Here, Ms. Yturbide has received a total of 40% in PPD awards for whole person impairment as a result of three separate work-related injuries. (I JA 098.) With 7% having been paid in lump sum for prior awards, the Statute is clear that the prior PPD awards must be subtracted from this third PPD award for the instant injury for purposes of paying the lump sum portion. NRS 616C.495(1)(d); NRS 616C.490(1); NAC 616C.498. Taking the 25% cap less the 7% in PPD lump sum awards previously received, Ms. Yturbide is only entitled to receive 18% of the current 33% PPD award in lump sum. NRS 616C.495(1)(d); NRS 616C.490(1); NAC 616C.498. The remainder (15%) must be paid in installments.

By awarding 25% in lump sum rather than 18%, the Appeals Officer Decision

violated the plain meaning rule where the Statute's language is clear and unambiguous. Here there was no room for construction; the Appeals Officer could not read a limitation into the statutory language that does not appear in Statute itself. Had the Legislature intended for such a limitation, it would have done so. *State, Dep't of Motor Vehicles & Public Safety v. Brown,* 104 Nev. 524, 526, 762 P.2d 882, 883 (1988) (where the Legislature could easily have inserted exception language into a statute but chose not to, the court could not judicially create one).

C. The Holding of *Eads* Supports the City's Determination.

1. *The Legal Analysis of Eads Applies to this Case.*

The holding in *Eads* is controlling and is instructive on application of the plain language of the Statute. In *Eads*, an injured employee received a 19% PPD award following an injury resulting from a fall. *Eads v. State Indus. Ins. Sys.*, 109 Nev. at 734-35, 857 P.2d at 14-15. Later, after his claim was closed, the employee sought to reopen his workers' compensation claim because additional treatment was required for his same injury. *Id.* After additional treatment was received, the employee was reevaluated for permanent partial disability and awarded another 16% PPD award over and above the 19% PPD award originally accepted. *Id.* at 735, 857 P.2d at 14. The parties disagreed as to whether the employee could receive the additional award of 16% for this same claim and injury in lump sum form, where the

original PPD award of 19% had been accepted in lump sum, as it would exceed the 25% cap on lump sum payments. *Id.*

The Supreme Court applied the same statutory provisions at issue here to allow no more than 25% whole person impairment to be paid in a lump sum PPD award. *See id.* at 733, 857 P.2d at 13. The Supreme Court concluded that the agency must combine disability awards and limit lump sum payments to a total of 25%. *Id.* at 736, 857 P.2d at 15. Meaning, the appeals officer in *Eads* was required to combine the 19% original PPD award with the later 16% PPD award for a total whole person impairment of 35%. The Supreme Court then applied the lump sum cap and limited Eads' lump sum award to 25%. *Id.* Because the original 19% had been paid in lump sum form, at the time the 16% PPD award was offered following the claim reopening, only 6% remained within the cap; the balance of 10% needed to be paid in installments. *Id.*

In other words, *Eads* ***holds*** that the 25% cap on lump sum payments "applies to the ***combined*** disability allowance and limits any lump sum payments to a total of twenty-five percent. ***All entitlements*** in excess of the twenty-five percent must be paid in installments as provided by the statute." *Eads*, 109 Nev. at 736, 857 P.2d at 15 (emphasis added). The Supreme Court further clarified that the State Industrial Insurance System ("SIIS") "is not attempting to deprive Eads of his duly awarded benefits. SIIS is simply complying with the law which allows Eads to accept up to

twenty-five percent of his PPD award in a lump sum payment and the remainder in installments." *Id.*

The legal holding of *Eads* supports the City's position regarding the Statute's cap on lump sum payments for Ms. Yturbide. At the appeal hearing, the City asserted that the legal analysis in *Eads* is directly applicable here such that Ms. Yturbide's prior 7% in PPD awards must be subtracted from the cap amount, as done in *Eads*. (II JA 114-116.)

However, the Appeals Officer Decision misinterpreted *Eads* as limiting the application of the Statute to cases involving the same claim and disability. (I JA 10-11.) In so doing, the Appeals Officer Decision improperly applied the facts of *Eads* to the Statute to create a limitation that does not exist. (I JA 10-11). The Appeals Officer Decision contravenes the legal holding of *Eads*.

2. *Eads Confirms the Use of the Word "a" Does Not Limit Application of the Cap on Lump Sum PPD Awards to a Single Award.*

The legal analysis in *Eads* also instructs that the plain language of the Statute contemplates application to multiple PPD awards despite the use of the word "a" in reference to the word "disability" in the Statute. At the hearing, Ms. Yturbide argued that NAC 616C.498 addresses "a" permanent partial disability and therefore PPD awards for different disabilities cannot be combined. (II JA 336-339.) The Appeals Officer incorrectly accepted this argument, even though the *Eads* court construed the word "a" to apply to more than one PPD award.

Although *Eads* involved the same body part, it addressed two separate PPD awards issued to Eads. *See Eads*, 109 Nev. at 736, 857 P.2d at 15. The PPD ratings were combined for purposes of calculating the lump sum 25% cap. *Id.* By combining the PPD awards, *Eads* interprets NAC 616C.498's use of the term "a permanent partial disability" to look to the combined percentage awarded in two separate PPD awards. The *Eads* legal analysis is sound and is legal precedent that establishes that the reference to the word "a" in NAC 616C.498 does not preclude combining PPD awards for purposes of calculating a lump sum payment.

Here, as in *Eads*, TPA combined Ms. Yturbide's multiple PPD awards to calculate the lump sum cap. (II JA 142.) By reversing the TPA's determination, and concluding that prior PPD awards do not have to be considered when awarding the current PPD award (which is the third award for Ms. Yturbide), the Appeals Officer Decision contains an error of law. *Eads* confirmed that the plain language of the Statute and reference to the word "a" does not limit application to multiple claims or awards.

D. If the Statute is Ambiguous, it Should Have Been Interpreted Consistent with the Statutory Scheme According to the Rules of Statutory Construction.

To the extent the Appeals Officer deemed the Statute ambiguous or silent as to whether the 25% cap on lump sum PPD awards applied to multiple claims or

multiple injuries, then as a matter of statutory construction, the Appeals Officer should have considered the Statute as a whole without rendering any statutory provision meaningless or producing an unreasonable result.[3] *See Leven v. Frey,* 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("in interpreting a statute, this court considers the statute's multiple legislative provisions as a whole. Additionally, statutory interpretation should not render any part of a statute meaningless, and a statute's language 'should not be read to produce absurd or unreasonable results.'") (internal citation omitted); *see also Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dept.,* 124 Nev. 138, 147, 179 P.3d 542, 548 (2008); *see also McCrackin v. Elko County School Dist*., 103 Nev. 655, 658, 747 P.2d 1373 (1987). Meaning should be given to all of the statute's parts. *See Edgington v. Edgington,* 119 Nev. 577, 583, 80 P.3d 1282, 1287 (2003).

Here, the neighboring statutory provisions confirm that whole person impairment, not just impairment related to a specific claim or injury or body part, must be considered when applying the statutory cap on lump sum awards. Specifically, neighboring provision NRS 616C.495(1)(e) states:

> (e) If the permanent partial disability rating of a claimant seeking compensation pursuant to this section would, ***when combined with any previous permanent partial disability rating of the claimant that***

[3] Rules of statutory construction equally apply to both this statute (NAC 616C.495(1)(d)) and administrative regulation (NAC 616C.498). *See Meridian Gold Co. v. State ex rel. Department of Taxation,* 119 Nev. 630, 633, 81 P.3d 516, 518 (2003).

> ***resulted in an award of benefits to the claimant***, result in the claimant having a total permanent partial disability rating in excess of 100 percent, ***the claimant's disability rating upon which compensation is calculated must be reduced by such percentage as required to limit the total permanent partial disability rating of the claimant for all injuries to not more than 100 percent*** *(emphasis added).*

This provision makes clear that when calculating compensation previous PPD ratings that resulted in an award of benefits to the injured employee must be considered.

Similarly, NRS 616C.490(9) provides:

> 9. Where there is a previous disability, as the loss of one eye, one hand, one foot, or any other previous permanent disability, ***the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury*** *(emphasis added).*

This provision demonstrates that, for apportionment purposes, the percentage of disability for a current claim is calculated by first deducting the percentage disability for previous disabilities. Again, this confirms that a rating physician must consider prior permanent disability awards and deduct them in order to calculate the permanent disability for a subsequent injury.

To the extent the Statute could be deemed ambiguous as to whether the 25% cap requires consideration of prior PPD ratings, NRS 616C.495(1)(e) and NRS 616C.490(9) answer this question in the affirmative. By ignoring the workers'

compensation statutes as a whole, failing to give meaning to all parts and rendering an unreasonable result the Appeals Officer committed an error of law.

E. NRS 616C.490 and the AMA Guides Mandate a Whole Person Approach to Permanent Partial Disability.

The Appeals Officer Decision was also contrary to the requirement in NRS 616C.490 that the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides") be used in evaluating an employee's permanent partial disability. The AMA Guides require a whole person impairment approach to evaluating permanent partial disability, just as set forth in NRS 616C.490(1). (III JA 324-326.)

Specifically, the AMA Guides require that all impairments, including impairments from different regions of the musculoskeletal system, be combined to determine total impairment at any given time. This concept is discussed in the AMA Guides at sections 1.3 through 1.4. (III JA 324-326.)

Section 1.4 states in part:

> In general, impairment ratings within the same region are combined before combining the regional impairment rating with that from another region. For example, when there are multiple impairments involving abnormal motion, neurologic loss, and amputation of an extremity part, these impairments first should be combined for a regional extremity impairment. The regional extremity impairment then is combined with an impairment from another region, such as from the respiratory system.

(III JA 325-326.)

If this whole person approach to determining impairment is not taken into account in applying Nevada's statutory cap for lump sum PPD awards, the purpose of the cap and the principles that underlie the adoption of the cap are completely undermined.

The whole person impairment approach is best demonstrated by an extreme example. If an employee lost his whole left arm he would be determined to have a 60% whole person impairment. (Addendum 020.) If in a second work related injury, the employee lost his right arm, he would again have a 60% impairment. Adding these two impairments would result in a 120% impairment, an amount that exceeds the 100% maximum allowed under the AMA Guides. As such, the AMA Guides mandate that permanent partial disability be evaluated and determined using the Combined Values Chart. (Addendum 021.)

Taking the above example, a doctor performing a PPD evaluation after the employee's second injury (*i.e.*, the loss of the right arm following prior loss of the left arm) would have to look at total impairment (*i.e*., the loss of both arms). The doctor would then use the Combined Value Charts to determine the total impairment for the loss of two arms. Under the Combined Value Chart the total impairment would be 80% whole person impairment. (*Id.*) This adjustment on a whole person basis is necessary and must include all impairments, so that total impairment does not exceed 100%.

Applying the statutory cap in the extreme example as required by the Statute would require the insurer to take into account prior lump sum awards. At the time the first PPD award was offered for employee's whole person impairment (60% for loss of one arm), the employee would have received 25% in lump sum with the 35% balance paid in installments. Because 25% in lump sum was previously paid to the employee for the first injury, zero percent could be paid in lump sum on the second PPD award. The entire additional amount (20%) would need to be paid in installments because the employee has exceeded the 25% cap.

Under the approach advocated by Ms. Yturbide and adopted by the Appeals Officer, an injured employee would be entitled to a lump sum PPD payment in an amount up to 25% on any claim as long as the total of the lump sum payments do not exceed 100%. Theoretically, an employee could have multiple separate claims, each resulting in substantial impairment yet nevertheless receive lump sum PPD awards for total impairment far exceeding the 25% cap. Under our extreme example, that would mean that, upon loss of the first arm the employee would receive 25% in lump sum form and then, upon the loss of the second arm, would receive another 25% lump sum award. A total of 50% would be paid in lump sum for the two awards.

If prior lump sum awards for whole person impairment are not deducted when applying the statutory cap, the cap becomes meaningless. As illustrated in this extreme example, an employee would take 50% in lump sum form (25% for each

injury) which nullifies the 25% cap on total disability or impairment. Thus, the rationale adopted by the Appeals Officer renders the cap meaningless and completely undermines the fundamental principles behind the adoption of the cap.

F. The Appeals Officer Decision Contravenes the Underlying Purpose in the Workers' Compensation Statutory Scheme Behind Capping Lump Sum Payments.

The Appeals Officer Decision is contrary to the Statute's purpose and underlying policy. If a statute is susceptible to more than one interpretation, it should be construed to be consistent with the legislative intent and policy behind the statute. *State Dep't of Mtr Vehicles v. Lovett,* 110 Nev. 473, 477, 874 P.2d 1247, 1249-50 (1994). "Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *Edgington*, 119 Nev. at 583, 80 P.3d at 1286 -1287.

The rationale of statutes that cap lump sum payments is to ensure that the most seriously injured employees are compensated over time and not left destitute after lump sum payments are exhausted. *See* Larson's Workers' Compensation Law, *Agreements and Settlements*, §132.07[1] (2015). When Nevada's cap of 25% on lump sum payments was proposed to the Legislature in 1987 as part of Assembly Bill 757, Raymond Badger, the Chairman of the Nevada Trial Lawyers Workman's Compensation Committee stated that the purpose was to protect those individuals with severe injuries by limiting lump sum awards and requiring installment

payments "so as not to dissipate their entire compensation". (Addendum 003-004); *see also* Amount, Payment and Period of Compensation, 0060 Surveys 28 (Dec. 2015) (surveying the 50 states' limitations on lump sum payments and stating that "Workers' Compensation statutes are enacted to guarantee that employees who are injured or disabled during work will be compensated and assured an income during their recovery, and if they are unable to return to work as a result of their injury that they will receive an income to replace their lost wages").

This concern is not just limited to Nevada. While states across the country take different approaches to regulating lump sum payments of PPD awards, the concerns surrounding lump sum payments are consistent among jurisdictions nationwide:

> In some jurisdictions, the excessive and indiscriminate use of the lump-summing device has reached a point at which it threatens to undermine the real purposes of the system. Since compensation is a segment of a total income insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. ***If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the worker is right back where or she would have been if workers' compensation had never existed.***

Larson's Workers' Compensation Law, *Agreements and Settlements*, §132.07[1] (2015) (emphasis added.)

In fact, these concerns with lump sum awards are ubiquitous internationally:

> In normal compensation theory, since benefits are designed to forestall destitution by supplying regular periodic income, lump-summing is strongly discouraged. Theory is confirmed by experience, since it is a truism of compensation administrations in all countries that often the lump sum is soon gone and the community is right back where it would have been if there had been no compensation system at all – confronted with a helpless family that has no resources to draw upon.

Id. at § 80.05[5].

One of the foremost authorities on workers' compensation law offers the following explanation for the lump-summing the problem:

> . . . practically everyone associated with the system has an incentive – at least a highly visible short-term incentive – to resort to lump-summing. The employer and the carrier are glad to get the case off their books once and for all. The claimant is dazzled by the vision of perhaps the largest sum of money the claimant has ever seen in one piece. The claimant's lawyer finds it much more convenient to get his or her fee promptly out of a lump sum than protractedly out of small weekly payments. The claimant's doctor, and other creditors as well as the claimant's spouse and family, all typically line up on the side of encouraging a lump-sum settlement.

Id.

Larson's warns that the only solution to these concerns with lump sum awards "lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purpose of the Act will be best served by a lump sum award." *Id.*

The City, through the TPA, has done just that by conscientiously considering prior lump sum payments to Ms. Yturbide and restricting the total lump sum payments to 25%. By applying the Statute consistent with its plain language and

legislative purpose, the City effectuated the protective nature of limiting the lump sum cap where Ms. Yturbide is "no longer able to perform her job duties as a dispatcher, even at a decreased duty." (II JA 170.)

In evaluating Ms. Yturbide's significant permanent disability, Dr. Welborn noted, ***"Her injury forced early retirement."*** (*Id.*) (emphasis added). Ms. Yturbide "continues to have difficulties with her daily activities as well as self care." (*Id.*) Dr. Welborn provided examples of such difficulties, noting that Ms. Yturbide is fatigued and pained when lifting her arms or trying to curl her hair or button her shirt. (*Id.*) Ms. Yturbide cannot read for longer periods due to difficultly in looking down and has a pins-and-needles sensation in her shoulder blades when writing. (*Id.*) Ms. Yturbide cannot carry, lift or pull without pain and especially items over 30 pounds. (II JA 171.) She has difficulty holding a fork to eat, swallowing, and traveling for over 25 minutes. (*Id.*) "Sleep is extremely problematic" due to pain, and Ms. Yturbide "has not been as social or participating in recreational activities as she used to due to pain." (*Id.*) She suffers severe headaches almost daily. (*Id.*) At the time of the evaluation, the City was attempting to find a vocational rehabilitation program that could accommodate Ms. Yturbide's restrictions. (II JA 170.) As these examples demonstrate, Ms. Yturbide is a textbook example of an injured employee that will have difficulty finding a job that can accommodate her disability in the future given her high whole person impairment rating. A lump sum payment that

exceeds the 25% cap (with the associated lower installment payments into the future) runs the risk that Ms. Yturbide will be left destitute, in contravention of the Statute's protective purpose.

Ultimately, where an employee is unable to work and has significant restrictions, the general principle behind workers' compensation statutes supports the interpretation that Mr. Yturbide should be compensated in installments—not a lump sum payment—for whole person impairment exceeding 25% to ensure she has regular periodic income. Otherwise, with multiple permanent impairments to different body parts compensated in lump sum, Ms. Yturbide could be left with no resources to draw upon in the future.

G. The District Court Adopted the Errors in the Appeals Officer Decision.

The District Court Decision affirmed the Appeals Officer Decision. (IV JA 390-415.) The district court concluded that the Appeals Officer Decision was unaffected by error of law and was supported by substantial evidence. (IV JA 390-415.) It further concluded that the Appeals Officer did not fail to construe the statutes as a whole. (*Id.*) It also concluded that the workers' compensation statutes and AMA Guides do not limit lump sum awards to 25% for total whole person impairment. (*Id.*) According to the district court, application of *Eads* to multiple claims and multiple injuries is not consistent with the Statute. (*Id.*) For these

reasons, the District Court Decision, like the Appeals Officer Decision, is affected by errors of law.

CONCLUSION

The Appeals Officer Decision renders the Statute meaningless and leads to an absurd result. It is undisputed that Ms. Yturbide has received two prior lump sum awards totaling 7%. Because PPD awards are paid for whole person impairment, the 25% cap on lump sum payments for whole person impairment should have been reduced by 7% due to the prior PPD awards. The proper lump sum amount that can be paid in this case under the statutory cap is 18% and ***not*** 25% as ordered by the Appeals Officer. For these reasons, the City respectfully requests that the Appeals Officer Decision, and the district court order affirming that decision, be reversed with instructions that the lump sum PPD award in this case should be limited to 18%.

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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 24th day of April, 2018.

McDONALD CARANO LLP

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 7,586 words.

Pursuant to NRAP 28.2, 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), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number 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 this

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on April 24, 2018, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

Dated: April 24, 2018.

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Employee of McDonald Carano LLP