

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case Nos. 73971

CITY OF RENO,

Appellant.

vs.

JODY YTURBIDE,

Respondent.

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JOINT APPENDIX, VOLUME IV of IV

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **JOINT APPENDIX VOLUME IV** filed in **Case No. 73971** does not contain the social security number of any person.

Date: April 24, 2018.

/s/ Lisa Wiltshire Alstead

Lisa Wiltshire Alstead

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano, LLP and that on April 24, 2018, JOINT APPENDIX VOLUME IV was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Pursuant to NRAP 30(f)(2), all Participants in the case will be served and provided an electronic copy via U.S. mail as follows:

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7 *****

8 CITY OF RENO,
9 Petitioner,
10 vs.
11 JODY YTURBIDE, et al
12 Respondents.
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Case No.: CV15 02173

Dept.: 9

**RESPONDENT, JODY YTURBIDE'S
ANSWERING BRIEF**



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1 **III. JURISDICTION**

2 This Court has jurisdiction to review the findings of fact and conclusions law of the
3 Appeals Officer. See NRS 617.405; NRS 233B.130. In this regard, NRS 233B.130
4 provides that:

5 1. Any party who is:

- 6 (a) Identified as a party of record by an agency in an administrative
7 proceeding; and
8 (b) Aggrieved by a final decision in a contested case,
9 is entitled to judicial review of the decision. Where appeal is provided within
10 an agency, only the decision at the highest level is reviewable unless a
11 decision made at a lower level in the agency is made final by statute. Any
12 preliminary, procedural or intermediate act or ruling by an agency in a
13 contested case is reviewable if review of the final decision of the agency
14 would not provide an adequate remedy.

11 6. The provisions of this chapter are the exclusive means of judicial review of,
12 or judicial action concerning, a final decision in a contested case involving an
13 agency to which this chapter applies.

13 The Petitioner, City of Reno, was a party of record to the administrative proceeding
14 under review herein and claims to be "aggrieved" by the final decision of the Appeals
15 Officer. Based on the January 13, 2017, filing date, it appears that the Petitioner has timely
16 filed their Petition for Judicial Review and Opening Brief in accordance with NRS
17 233B.130(2)(c) and NRS 233B.133(1).

18 Respondent, Jody Yturbide, timely filed her notice of intent to participate on January
19 31, 2017, in accordance with NRS 233B.130(3) and now submits her Answering Brief in
20 opposition to Petitioner's Petition for Judicial review as required by NRS 233B.133(2).

21 **IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

22 A. Whether the Appeals Officer's Findings of Fact and Conclusions of Law
23 reversing CCMSI's July 1, 2016, determination offering 18% of her 33% permanent partial
24 disability rating in lump sum and the remaining 15% in monthly installments is supported by
25 substantial evidence.



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1 B. Whether the Appeals Officer's Findings of Fact and Conclusions of Law ordering
2 CCMSI to offer Mrs. Yturbide 25% of her 33% permanent partial disability rating in lump
3 sum and the remaining 8% in installments in accordance with NRS 616C.495(d) and NAC
4 616C.498 is supported by substantial evidence.

5 **V. SUMMARY OF ARGUMENT**

6 Mrs. Yturbide asks that the Court deny the City of Reno's Petition for Judicial
7 Review. The Appeals Officer's Findings of Fact and Conclusions of Law in this matter are
8 supported by both the quantity and quality of factual evidence that a reasonable man could
9 accept as adequate proof of what the governing law requires. The Appeals Officer correctly
10 concluded that CCMSI's July 1, 2016, determination to limit Mrs. Yturbide's right to
11 receive a lump sum of her 33% permanent partial disability ("PPD") award to 18% was not
12 supported by the evidence or Nevada law. Additionally, the Appeals Officer analyzed the
13 requirements of the governing law and correctly concluded that Mrs. Yturbide should have
14 been offered 25% lump sum of her 33% PPD under NRS 616C.495(d) and NAC 616C.498.

15 **VI. STATEMENT OF THE CASE**

16 **A. PROCEDURAL HISTORY**

17 **1. Hearing No. 1700074-JL**

18 On July 1, 2016, CCMSI rendered a determination offering Mrs. Yturbide 18% of
19 her 33% whole person impairment.

20 On July 8, 2016, Mrs. Yturbide filed a Request for Hearing with the Hearings
21 Division.

22 On July 13, 2016, the Hearing Officer set the hearing in this matter for Wednesday,
23 August 3, 2016 at 9:00 a.m., in Carson City, Nevada.

24 On August 11, 2016, the Hearing Officer rendered his Decision and Order,
25 specifically stating, "*On July 1, 2016, the Insurer offered the Claimant a 33% PPD award.*"



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1 The claimant was further advised that he was entitled to a one time lump sum payment of
2 18%, and the remaining 15% in monthly installments, the instant appeal. Having reviewed
3 the submitted evidence and in consideration of the representations made at today's hearing,
4 the Hearing Officer finds the Insurer errored in its 18% one time lump sum offering. As
5 such, the Hearing Officer finds the Claimant is entitled to a one time lump sum offering of
6 25%, with the remaining 8% to be paid in monthly installments, pursuant to NAC 616C.498.
7 Therefore, the Insurer shall recalculate the 33% PPD award based on a lump sum offering
8 of 25%, and upon completion, render a new determination with appeal rights accordingly."
9 **ROA at 246-248.**

10 **2. Appeal No. 1700698-LLW**

11 On September 8, 2016, the Petitioner Appealed the Decision and Order of the
12 Hearing Officer to the Appeals Officer.

13 The administrative hearing before the Appeals Officer was conducted November 21,
14 2016, pursuant to Nevada's Administrative Procedure Act under Chapter 233B of the
15 Nevada Revised Statutes ("NRS"); the Nevada Industrial Insurance Act ("NIIA") NRS
16 Chapters 616CA through 616D, and related regulations.

17 On December 16, 2016, the Appeals Officer issued her Findings of Fact and
18 Conclusions of Law which are now subject to the Petition for Judicial Review now before
19 this Court. **ROA at 72-79.**

20 **B. STATEMENT OF FACTS**

21 While employed by the Petitioner, Mrs. Yturbide has sustained injuries to three
22 separate body parts which have resulted in the award of a permanent partial disability rating
23 for each body part.

24 On or about September 17, 2009, Mrs. Yturbide had received a 5% PPD rating for
25 carpal tunnel syndrome in her **right wrist** under Claim No. 08853A368316. **ROA at 166.**



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1 Thereafter, on or about April 15, 2013, Mrs. Yturbide had received a 2% PPD rating
2 for injuries to her **left elbow** under Claim No. 11853C036358. Exhibit 1 at 67. **ROA at 178.**

3 On May 16, 2016, CCMSI issued a determination informing Mrs. Yturbide that she
4 had been scheduled for a Permanent Partial Disability evaluation with Katharina C.
5 Welborn, D.C. **ROA at 28-30.**

6 Chiropractor Welborn completed her evaluation and then issued her findings on June
7 19, 2016, wherein she concluded that Mrs. Yturbide had sustained a 33% whole person
8 impairment for injuries to her **cervical spine**. **ROA at 32-38.**

9 On July 1, 2016, CCMSI issued a determination offering 18% of Mrs. Yturbide's
10 33% permanent partial disability rating in lump sum and the remaining 15% in monthly
11 installments. In this regard, Mrs. Yturbide was informed that she was only entitled to 18%
12 in a lump sum due to the fact that she had received prior impairment ratings of 2% and 5%.
13 **ROA at 39-53.**

14 Mrs. Yturbide disagreed and contended that she should have been offered 25% of her
15 33% permanent partial disability rating in lump sum and the remaining 8% in installments in
16 accordance with NRS 616C.495(d) and NAC 616C.498.

17 **VII. ARGUMENT**

18 **A. Standard of Review**

19 The parameters of judicial review of an administrative tribunal are established by
20 statute. In this regard, NRS 233B.135 specifically provides:

- 21 1. Judicial review of a final decision of an agency must be:
22 (a) Conducted by the court without a jury; and
23 (b) Confined to the record.

24 In cases concerning alleged irregularities in procedure before an agency that are not
25 shown in the record, the court may receive evidence concerning the irregularities.

26 2. The final decision of the agency shall be deemed reasonable and lawful until
27 reversed or set aside in whole or in part by the court. **The burden of proof is on the**
28 **party attacking or resisting the decision to show that the final decision is invalid**
29 **pursuant to subsection 3.**



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1 3. The court shall not substitute its judgment for that of the agency as to the
2 weight of evidence on a question of fact. The court may remand or affirm the final
3 decision or set it aside in whole or in part if substantial rights of the petitioner have
4 been prejudiced because the final decision of the agency is:
5 (a) In violation of constitutional or statutory provisions;
6 (b) In excess of the statutory authority of the agency;
7 (c) Made upon unlawful procedure;
8 (d) Affected by other error of law;
9 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on
10 the whole record; or
11 (f) Arbitrary or capricious or characterized by abuse of discretion.

12 (emphasis added.)

13 In accordance with the foregoing standard of review, our Nevada Supreme Court has
14 explained that, when reviewing an administrative tribunal's actions, the district court is
15 limited to the record below and to whether the board acted arbitrarily or capriciously.
16 McCracken v. Fancy, 98 Nev. 30, 31, 639 P.2d 552 (1982). The question the district court
17 must resolve when reviewing the administrative tribunal's decision is whether the tribunal's
18 decision was based on substantial evidence. Leeson v. Basic Refractories, 101 Nev. 384,
19 705 P.2d 137, 138 (1985). If based on substantial evidence the district court may not
20 substitute its judgment for the administrative tribunal's determination. Id.

21 In this regard, there are two (2) steps in the long-established methodology for
22 applying the substantial evidence standard set forth in the NRS 233B.135(3)(e)-(f). First,
23 the district court must identify the law that governs the contested issue, as such law
24 establishes what facts had to be proven, and how such facts had to be proven. Second, the
25 district court must review the record on appeal and determine whether the record contains
26 both that quantity and quality of factual evidence that a reasonable man could accept as
27 adequate proof of what the governing law requires. See State Emp. Security v. Hilton
28 Hotels, 102 Nev. 606, 608 n. 1, 729 P.2d 497, 498 n. 1 (1986) (citing Richardson v. Perales,
29 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) and quoting Robertson Transp. Co. v.
30 P.S.C., 39 Wis.2d 653, 159 N.W.2d 636, 638 (1968)).



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1 The findings of the appeals officer will not be set aside absent a showing that they
2 are against the manifest weight of the evidence in light of what the governing law requires.
3 Southwest Gas v. Woods, 108 Nev. 11, 15, 823 P.2d 288, 290 (1992). Thus, if the record on
4 appeal contains both that quantity and quality of factual evidence which a reasonable man
5 could accept as adequate proof of what the governing law requires, then the decision of the
6 appeals officer must be deemed reasonable and lawful. See NRS 233B.135(2).

7 B. The Appeals Officer's Findings Of Fact And Conclusions Of Law Are
8 Supported By Both The Quantity And Quality Of Factual Evidence That
9 A Reasonable Man Could Accept As Adequate Proof Of What The
10 Governing Law Requires.

11 NRS 616C.495(1)(d) provides:

12 Any claimant injured on or after July 1, 1995, **may elect to receive his or her**
13 **compensation in a lump sum in accordance with regulations adopted by the**
14 **Administrator and approved by the Governor.** The Administrator shall adopt
15 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. Notwithstanding the provisions of NRS 233B.070, any
regulation adopted pursuant to this paragraph does not become effective unless it is
first approved by the Governor.

16 (Emphasis supplied).

17 NAC 616C.498 is the regulation adopted by the Administrator and approved by the
18 Governor. This regulation provides:

19 An employee injured on or after July 1, 1995, who incurs a permanent partial
20 disability that:

- 21 1. Does not exceed 25 percent may elect to receive compensation in a lump
22 sum.
- 23 2. Exceeds 25 percent may elect to receive compensation in a lump sum
24 equal to the present value of an award for a disability of 25 percent. If the
25 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.



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1 (emphasis supplied).

2 The Appeals Officer considered and analyzed the foregoing requirements of the
3 governing law, evaluated the evidence presented, including all the medical evidence, and
4 received the legal arguments proffered by the parties at the hearing before issuing her Order.
5 In this regard, the Appeals Officer correctly concluded that CCMST's July 1, 2016,
6 determination to limit and reduce Mrs. Yturbide's right to receive a lump sum of her 33%
7 permanent partial disability ("PPD") award to 18% is not supported by the evidence or
8 Nevada law. Further, the Appeals Officer ordered that Mrs. Yturbide should have been
9 offered 25% lump sum of her 33% PPD under NRS 616C.495(d) and NAC 616C.498.

10 To support her decision, the Appeals Officer explained that NAC 616C.498
11 explicitly allows an injured worker who receives a PPD rating in up to and in excess of 25%
12 to elect to receive compensation in a lump sum equal to the present value of an award for a
13 disability of 25% and installments payments for that portion of the injured employee's
14 disability in excess of 25%. Elaborating on the application of the regulation, the Appeals
15 Officer went on to conclude that an injured worker's right to receive up to 25% of their PPD
16 rating in lump sum applies to each and every permanent partial disability an injured worker
17 incurs as clearly specified by the plain language of the regulation which attaches the injured
18 workers right to "a" permanent partial disability that meets the criteria of section (1) and (2)
19 of the regulation.

20 When construing a statute or regulation, our Nevada Supreme Court has said that
21 courts must first inquire whether an ambiguity exists in the language of the statute. State v.
22 Quinn, 117 Nev. 709, 30 P.3d 1117, 1120 (2001). If the words of the statute have a definite
23 and ordinary meaning, Nevada courts will not look beyond the plain language of the statute,
24 unless it is clear that this meaning was not intended. Id. The Nevada Supreme Court has
25 consistently held that when there is no ambiguity in a statute or regulation, there is no



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1 opportunity for judicial construction, and the law must be followed unless it yields an absurd
2 result. Diamond v. Swick, 117 Nev 671, 674, 28 P.3d 1087, 1089 (2001). In construing a
3 statute or regulation, courts must give effect to the literal meaning of its words. Id. In
4 respect of the foregoing, when determining how to give effect to a statute or regulation,
5 Courts are to first look to the plain language of the statute or regulation. Smith v. Crown
6 Financial Services, 111 Nev. 277, 284, 890 P.2d 769 (1995). Accordingly, if the language
7 of the statute or regulation is plain, its intention must be deduced from that language.
8 Hedlund v. Hedlund, 111 Nev. 325, 328, 890 P.2d 790 (1995); State Dep't of Mtr. Vehicles
9 v. McGuire, 108 Nev. 182, 184, 827 P.2d 821, 822 (1992); State, Div. of Ins. v. State Farm
10 Mut. Auto. Ins. Co., 116 Nev. Adv. Op. 27, 995 P.2d 482 (March 9, 2000); Madera v. State
11 Indus. Ins. Sys., 114 Nev. 253, 257, 956 P.2d 117 (1998); Maxwell v. State Indus. Ins. Sys.,
12 109 Nev. 327, 849 P.2d 267 (1993); State Indus. Ins. Sys. v. Bokelman, 113 Nev. 1116, 946
13 P.2d 179 (1997).

14 In this case, there is nothing ambiguous about the term "a" in NAC 616C.498 with
15 respect to an injured worker's right to receive up to 25% of their PPD rating in lump sum for
16 each and every permanent partial disability an injured worker incurs. The plain meaning of
17 "a" in this context is "one single; any" and a "unit of measurement to mean one such unit."¹
18 Hence, when the regulation states, "An employee injured on or after July 1, 1995, who
19 incurs a permanent partial disability . . ." the plain meaning of "a" in conjunction with
20 "permanent partial disability" means one permanent partial disability that meets the criteria
21 of section (1) and (2) of the regulation.

22 Accordingly, the Appeals Officer correctly concluded that NAC 616C.498 and NRS
23 616C.495(1)(d) do not in any way limit or otherwise require a reduction of the lump sum



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25 ¹ Oxford English On-line Dictionary, <https://en.oxforddictionaries.com/definition/a>, 2017 Oxford University Press (last accessed April 24, 2017).

1 award an injured worker is entitled to receive where an injured worker has multiple claims
2 with injuries to separate body parts.

3 Contrary to CCMSI and the City of Reno's assertions, the Nevada Supreme Court
4 has never held nor inferred that an injured worker is limited to a 25% lump sum PPD in
5 situations involving more than one claim and distinct injuries resulting in disabilities to
6 separate body parts. In Eads v. State Indus. Ins. Sys., 109 Nev. 733, 736, 857 P.2d 13, 15
7 (1993), Eads' PPD award increased from nineteen percent to thirty-five percent "for the
8 same disability;" therefore, the Court held that the lump sum payment available to Eads
9 may not exceed the twenty-five percent limit specified in the statute at that time. In this
10 regard, the Court concluded that when "an injured worker's case is reopened for further
11 treatment and evaluation of the original disability . . . " the statute, ". . . applies to the
12 combined disability allowance and limits any lump sum payments to a total of twenty-five
13 percent." The Eads case does not apply to the Petitioner's case presented to this Court for
14 review because it is silent concerning cases involving multiple permanent partial disability
15 awards for separate body parts.

16 In accordance with the foregoing, the Appeals Officer correctly concluded that
17 CCMSI's July 1, 2016, determination to limit Mrs. Yturbide's right to receive a lump sum of
18 her 33% permanent partial disability ("PPD") award to 18% was not supported by the
19 evidence or Nevada law. Further, the Appeals Officer did not abuse her discretion, act
20 arbitrarily or otherwise misapply the law when she ordered Petitioner to offer Mrs. Yturbide
21 25% of her 33% permanent partial disability rating in lump sum and the remaining 8% in
22 installments in accordance with NRS 616C.495(d) and NAC 616C.498.

23 **VIII. CONCLUSION**

24 In accordance with the foregoing, Petitioners have failed to establish that the Appeal
25 Officer committed any errors of law in rendering her decision or that her Findings of Fact




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1 and Conclusions of Law are not supported by substantial evidence. Therefore, Respondent,
2 Jody Yturbide, respectfully requests that the Petition for Judicial Review be DENIED.

3 **AFFIRMATION**

4 The undersigned does hereby affirm that the foregoing document filed in this matter
5 does not contain the social security number of any person.

6 DATED this 25th day of April, 2017.

7 
8 Jason D. Guinasso, Esq.
9 Nevada Bar No. 8478
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12 Reno, NV 89511
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1 **IX. ATTORNEY'S CERTIFICATE OF COMPLIANCE**

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

10 Dated this 25th day of April, 2017.

11
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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 190 W. Huffaker Lane, Suite 402, Reno, Nevada, 89511.


On April 25th, 2017, I served the following:

ANSWERING BRIEF

on the following in said cause as indicated below:

JODY YTURBIDE 9732 PYRAMID WAY, NO. 368 SPARKS, NV 89441 (VIA U.S. MAIL)	CCMSI P.O. BOX 20068 RENO, NV 89515-0068 (VIA U.S. MAIL)
LISA WILTSHIRE ALSTEAD, ESQ. MCDONALD CARANO WILSON 100 W LIBERTY ST., 10 TH FLOOR RENO, NV 89505 (VIA E-FLEX)	CITY OF RENO ATTN: KELLY LEERMAN PO BOX 1900 RENO, NV 89505 (VIA U.S. MAIL)
NEVADA DEPARTMENT OF ADMIN. APPEALS DIVISION 1050 E WILLIAM ST, STE 450 CARSON CITY, NEVADA 89701 (VIA U.S. MAIL)	OFFICE OF THE ATTORNEY GENERAL 100 N CARSON ST. CARSON CITY, NV 89701 (VIA U.S. MAIL)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 25th, 2017, at Reno, Nevada.


KATRINA TORRES



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13 CITY OF RENO

14
15 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
16
17 **IN AND FOR THE COUNTY OF WASHOE**

18 CITY OF RENO,

19 Petitioner,

20 vs.

21 JODY YTURBIDE, and the NEVADA
22 DEPARTMENT OF ADMINISTRATION
23 APPEALS OFFICER

24 Respondents.

Case No.: CV17-00065

Dept. No.: 7

25 **PETITIONER'S REPLY BRIEF**

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Clerk of the Court
Transaction # 6119725 : yviloria

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Others Cited:

<i>Guides to the Evaluation of Permanent Impairment</i>	8
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INTRODUCTION

Claimant's Answering Brief suggests that there is no ambiguity in the applicable statutes that cap lump-sum payment of permanent disabilities at 25% because of the use of the word "a" in NAC 616C.498. Claimant further argues that the *Eads* case is inapplicable here. Claimant presents inconsistent arguments to avoid application of the legal holding in *Eads*.

In *Eads*, the Court found the predecessor statute to NAC 616C.498 to be facially clear with respect to "a disability." If the statute is clear, as argued by Claimant, then the holding of *Eads* must apply "to the combined disability allowance and limits any lump sum payments to a total of twenty-five percent." This would hold true for multiple claims and multiple disabilities with a "combined disability allowance" for whole person impairment that exceeds twenty-five percent. The Legislature has not codified *Eads* or otherwise amended the applicable statutes to be limited to one claim or disability and therefore no such limitation exists under Nevada's workers' compensation statutes.

Nor would such an amendment make any logical sense as it would be contrary to the general principle in workers' compensation laws that permanent partial disability ("PPD") awards evaluate whole person impairment, as directed by the American Medical Association's ("AMA") Guides, and combine all prior PPD awards with the current award to determine impairment on a whole person basis. To look to each disability of a person separately, as suggested by Claimant, ignores the mandate that all disabilities must be considered, combined, and converted to a calculation based on whole person impairment. Impairment ratings were designed to reflect functional limitations and not disability and therefore the AMA Guides estimate overall ability to perform activities of daily living.

Alternatively, if the statutes are ambiguous or silent as to multiple claims and multiple disabilities, then as a matter of statutory construction the statutes must be considered as a whole and no interpretation should render any part of a statute meaningless. Claimant's Answering Brief wholly ignores application of statutory construction and the neighboring provisions in NRS 616C.495(1)(e) and NRS 616C.409(9) as well as the AMA Guides which all instruct that permanent disability is looked at from a whole person impairment perspective, and not by

individual injury as suggested by Claimant. The calculation of permanent disability percentages must account for, and deduct therefrom, previous disabilities. Claimant's failure to address the errors of law as to statutory construction in the Appeals Officer's Decision confirms that Claimant cannot and does not oppose that purpose of Nevada's workers' compensation statutes is to look at disabilities from a whole person impairment perspective and not claim by claim. That is, that a claimant is fairly compensated, does not receive a windfall for total combined injuries exceeding 100%, and that after 25% whole person impairment the claimant will receive benefits in installments to ensure compensation over time for serious injuries.

ARGUMENT

I. If the Statutes are Unambiguous as Argued by Claimant, then the Broad Holding of Eads Applies Here and is not Limited to the Facts of Eads.

The Nevada Supreme Court in *Eads* held 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 v. State Indus. Ins. Sys.*, 109 Nev. 733, 736, 857 P.2d 13, 15 (1993) (emphasis added). The Court further clarified that the State Industrial Insurance System "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.*

In the Answering Brief, the Claimant rests her hat on the argument that NAC 616C.498 addresses "a" permanent partial disability and therefore PPD awards for different disabilities cannot be combined. (Answering Br. at 10-13.) However, that argument ignores that the *Eads* court applied "a" to multiple (two) PPD awards. Albeit this was the same disability, two separate PPD awards were issued to Claimant and the PPD ratings were combined for purposes of calculating the lump-sum 25% cap. *See Eads*, 109 Nev. at 736, 857 P.2d at 15. As such, *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. That is exactly what the insurer did here. The insurer combined multiple PPD awards to calculate the lump sum cap.

Notwithstanding, Claimant argues that *Eads* does not apply here because the fact pattern is different. (Answering Br. at 13:13-15.) However, if the Nevada Supreme Court wanted to reconsider its interpretation of NAC 616C.498 as stated in *Eads*, which has a broad application to “all entitlements” and the “combined disability allowance,” it would do so. *See i.e. Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 49, 38 P.3d 872, 874-75 (2002) (reconsidering the decision in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 93 Nev. 270, 563 P.2d 582 (1977) which interprets NRS 80.210). However, the Nevada Supreme Court has not sought to reconsider *Eads* interpretation of this statute. Nor has the legislature sought to codify *Eads* or otherwise limit its broad holding to the same claim or disability which are the specific facts of the *Eads* case. *See i.e., In Re Christensen*, 122 Nev. 1309, 1320, 149 P.3d 40, 47 (2006).

Instead, *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. Therefore, it was an error of law for the Appeals Officer to apply the facts of *Eads* (*i.e.* same claim and same disability) to create a limitation that does not exist under the plain language of NRS 616C.495(1)(d) and NAC 616C.498 and contrary to the broad holding of *Eads*.

II. If the Statutes are Silent as to Multiple Claims and Multiple Disabilities, Claimant Does not Dispute the Statutory Construction as Identified in the Opening Brief.

When a statute is “susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application.” *Beazer Homes Nevada, Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 575, 580, 97 P.3d 1132, 1135 (2004) (internal citation omitted). In *Beazer*, the court looked outside the plain language of NRS 78.585 because the statute expressly addressed pre-dissolution claims only and was silent as to post-dissolution claims. *See id.* As such, the rules of statutory construction applied. *See id.*, 120 Nev. at 581, 97 P.3d at 1136.

1 Here, similar to *Beazer*, NAC 616C.498 does not expressly address multiple and different
 2 claims and disabilities and therefore is arguably silent on application of the 25% lump-sum
 3 payment cap to multiple claims and multiple disabilities because of the use of the word “a.”
 4 Therefore, to the extent the statute is silent or ambiguous, the Appeals Officer should have looked
 5 to the statutes as a whole, the purpose of the statutes, and the AMA Guides as argued in detail in
 6 Petitioner’s Opening Brief. (Opening Br. at 10-13.) Notably, Claimant’s failure to respond or
 7 address Petitioner’s arguments regarding statutory construction in the Answering Brief
 8 “constitutes a clear concession . . . that there is merit in [appellants’] position.” *See Colton v.*
 9 *Murphy*, 71 Nev. 71, 72, 279 P.2d 1036 (1955); *see also Arcenas v. Mortgageit, Inc.*, 2016 WL
 10 3943341 at *2 (July 13, 2016) (the failure to present any argument or legal authority to rebut an
 11 argument “which appears to have merit and was supported by salient authority” is concession to
 12 the issue).

13 Thus, as Claimant does not dispute, it was an error of law for the Appeals Officer to fail to
 14 read NRS 616C.695(d) and NAC 616C.498 in a way that gives meaning to all parts of the
 15 workers’ compensation statutes. The Appeals Officer’s Decision renders the applicable statutes
 16 meaningless. It was further an error of law to not include Claimant’s prior 7% of PPD awards in
 17 the calculation of determining how much in lump sum form the Claimant is entitled to.

18 **III. The Substantial Evidence Demonstrates Claimant is Only Entitled to 18% in Lump**
 19 **Sum Form.**

20 Claimant’s Answering Brief suggests that the Opening Brief is requesting that this Court
 21 substitute its judgment for that of the Appeals Officer as to the weight of evidence on a question
 22 of fact. (*See* Answering Br. at 9.) That is not true. Rather, Petitioner acknowledges that the
 23 evidence is undisputed as to Claimant having two prior claims totaling 7% which were paid out in
 24 lump sum form. (Opening Br. at 13.) Because the Appeals Officer Decision ignores this
 25 evidence, it is clearly erroneous in view of the reliable, probative, and substantial evidence on the
 26 whole record. In order to properly calculate the lump-sum award as a matter of law, the prior
 27 PPD awards should have been considered as demonstrated by the substantial evidence.
 28

1 IV. Claimant's Position Ignores the General Principle in Workers' Compensation Laws
2 that Permanent Partial Disability is Calculated on a Whole Person Impairment Basis
3 and Not by Individual Disability.

4 Finally, Claimant's argument is flawed based on general workers' compensation
5 principles. NRS 616C.490 is the statute that covers compensation for permanent partial
6 disability. Pursuant to NRS 616C.490(2)(a), a rating physician is selected to "determine the
7 percentage of disability in accordance with the American Medical Association's *Guides to the*
8 *Evaluation of Permanent Impairment* as adopted and supplemented by the Division pursuant to
9 NRS 616C.110." NRS 616C.110 instructs the Division to adopt regulations that
10 incorporate the AMA Guides and specifically, *inter alia*, identifies that the regulations "[m]ust
11 not consider any factors other than the degree of physical impairment of the whole person in
12 calculating the entitlement to compensation." NRS 616C.110(2)(c) (emphasis added).

13 Attached as Exhibit 1 to the Opening Brief are Sections 1.3 and 1.4 of the AMA *Guides to*
14 *Evaluation of Permanent Impairment*, Fifth Edition. (Opening Br. at Exhibit 1.) Section 1.3
15 recognizes that impairment ratings reflect functional limitations. (*Id.*) As such, the weight for
16 impairments for regional parts of the body are converted to whole person impairment. (*Id.*)
17 Section 1.4 instructs that a physician must look at the Combined Values Chart designed to
18 account for the effects of multiple impairments with a summary value. (*Id.*) "A standard formula
19 was used to ensure that *regardless of the number of impairments, the summary value would not*
20 *exceed 100% of the whole person.*" (*Id.*) As identified in Section 2.5b of the AMA Guides, "[i]n
21 the case of two significant yet unrelated conditions, each impairment rating is calculated
22 separately, converted or expressed as a whole person impairment, *then combined using the*
23 *Combined Values Chart.*" (See Exhibit 2 hereto, AMA Guides § 2.5b) (emphasis added).

24 Thus, as demonstrated by the above statutes and AMA Guide sections, a PPD award must
25 take into consideration and combine all disabilities or impairments. The reasoning is to ensure
26 impairment is evaluated on a whole person basis and does not exceed 100%. Thus, as mandated
27 by Nevada's workers' compensation statutes as a whole and the AMA Guides, compensation for
28 a permanent partial disability must account for prior PPD awards. This would include accounting
for and calculating the lump-sum cap of 25% based on whole person impairment and deducting

1 prior PPD awards paid in lump sum form. To hold otherwise, as suggested by Claimant, is
2 contrary to general principles in the workers' compensation scheme.

3 **CONCLUSION**

4 For the above-stated reasons and as detailed in the Opening Brief, the City submits that
5 the Appeals Officer Decision is affected by multiple errors of law and unsupported by the
6 substantial evidence. The proper lump sum amount that can be paid by statute, in light of the
7 substantial evidence of prior awards, is 18% and not 25% as ordered by the Appeals Officer. For
8 these reasons, the City respectfully requests that the Appeals Officer Decision be reversed by this
9 Court.

10 **Affirmation**

11 The undersigned does hereby affirm that the preceding does not contain the social
12 security number of any person.

13 Dated this 25th day of May, 2017.

14 By: /s/ Lisa Wiltshire Alstead

15 Timothy E. Rowe
16 Lisa Wiltshire Alstead
17 100 W. Liberty Street, 10th Floor
18 P.O. Box 2670
19 Reno, NV 89505-2670

20 Attorneys for Petitioner
21 CITY OF RENO
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **PETITIONER'S REPLY 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 in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 25th day of May 2017.

/s/ Lisa Wiltshire Alstead
LISA WILTSHIRE ALSTEAD

McDONALD  CARANO

100 WEST US350N STREET, RENO, NV 89501
TEL: (775) 783-2000 FAX: (775) 783-2022

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO and that on the 25th day of May, 2017, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which serviced the following parties electronically:

JASON D. GUINASSO, ESQ.
Reese Kintz Guinasso, LLC
190 W. Huffaker Lane, Suite 402
Reno, NV 89511

and on the same date I deposited a copy of the foregoing for mailing with the U.S. Postal Service at Reno, Nevada, with postage prepaid thereon, addressed as follows:

Appcals Officer Lorna L. Ward
Department of Administration
1050 E. William St., Suite 450
Carson City, NV 89701

/s/ Kathleen Morris
KATHLEEN MORRIS

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1	
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MCDONALD & CARANO
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EXHIBIT 2

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Clerk of the Court
Transaction # 6119725 : yvitoria

EXHIBIT 2

2.4 When Are Impairment Ratings Performed?

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living.

Impairments often involve more than one body system or organ system; the same condition may be discussed in more than one chapter. Generally, the organ system where the problems originate or where the dysfunction is greatest is the chapter to be used for evaluating the impairment. Thus, consult the vision chapter for visual problems due to optic nerve dysfunction. Refer to the extremity chapters for neurological and musculoskeletal extremity impairment from an injury. However, if the impairment is due to a stroke, the neurology chapter is most appropriate. Whenever the same impairment is discussed in different chapters, the *Guides* tries to use consistent impairment ratings across the different organ systems.

2.5 Rules for Evaluation

2.5a Confidentiality

Prior to performing an impairment evaluation, the physician obtains the individual's consent to share the medical information with other parties that will be reviewing the evaluation. If the evaluating physician is also that person's treating physician, the physician needs to indicate to the individual which information from his or her medical record will be shared.

2.5b Combining Impairment Ratings

To determine whole person impairment, the physician should begin with an estimate of the individual's most significant (primary) impairment and evaluate other impairments in relation to it. It may be necessary for the physician to refer to the criteria and estimates in several chapters if the impairing condition involves several organ systems. Related but separate conditions are rated separately and impairment ratings are combined unless criteria for the second impairment are included in the primary impairment. For example, an individual with an injury causing neurologic and muscular impairment to his upper extremity would be evaluated under the upper extremity criteria in Chapter 16. Any skin impairment due to significant scarring would be rated separately in the skin chapter and combined with the impairment from the upper extremity chapter. Loss of nerve function would be rated within either the musculoskeletal chapters or neurology chapter.

In the case of two significant yet unrelated conditions, each impairment rating is calculated separately, converted or expressed as a whole person impairment, then combined using the Combined Values Chart (p. 604). The general philosophy of the Combined Values Chart is discussed in Chapter 1.

2.5c Consistency

Consistency tests are designed to ensure reproducibility and greater accuracy. These measurements, such as one that checks the individual's lumbosacral spine range of motion (Section 15.9) are good but imperfect indicators of people's efforts. The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing.

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 CITY OF RENO,

Case No.: CV17-00065

10 Plaintiff,

Dept. No.: 7

11 vs.

12 JODY YTURBIDE, et al.

13 Defendants.
14

15 **ORDER**

16 On May 26, 2017, Plaintiff, CITY OF RENO (hereafter Plaintiff), filed a
17 *Request for Oral Argument*. No Response was filed thereto from Defendants, JODY
18 YTURBIDE, et al.

19 Having fully reviewed the briefing and pleadings, this Court finds that oral
20 argument is necessary for a full and fair determination and adjudication of the
21 *Petition for Judicial Review*.

22 Accordingly, the parties to this matter are hereby **ORDERED** to contact the
23 Judicial Assistant in Department 7 within ten (10) days of this *Order* to set oral
24 argument in this matter.

25 DATED this 15 day of June, 2017.

26
27 
28 PATRICK FLANAGAN
District Judge

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second
3 Judicial District Court of the State of Nevada, County of Washoe; that on this
4 15 day of June, 2017, I electronically filed the following with the Clerk of the
5 Court by using the ECF system which will send a notice of electronic filing to the
6 following:

7 Lisa Wiltshire, Esq. for City of Reno, and

8 Jason Guinasso, Esq. for Jody Yturbide

9 I deposited in the Washoe County mailing system for postage and mailing
10 with the United States Postal Service in Reno, Nevada, a true copy of the attached
11 document addressed to:

12 
13 Judicial Assistant
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1 4185
2 STEPHANIE KOETTING
3 CCR #207
4 75 COURT STREET
5 RENO, NEVADA
6

7 IN THE SECOND JUDICIAL DISTRICT COURT
8 IN AND FOR THE COUNTY OF WASHOE
9 THE HONORABLE PATRICK FLANAGAN DISTRICT JUDGE

10 --oOo--

11 CITY OF RENO,	}	
12 Plaintiffs,	}	
13 vs.	}	Case No. CV17-00065
14 JODY YTURBIDE, et al.,	}	Department 7
15 Defendants.	}	

16
17
18 TRANSCRIPT OF PROCEEDINGS
19 ORAL ARGUMENTS
20 July 21, 2017
21 9:00 a.m.
22 Reno, Nevada
23

24 Reported by: STEPHANIE KOETTING, CCR #207,
Computer-Aided Transcription

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RENO, NEVADA, July 21, 2017, 9:00 a.m.

--oOo--

THE CLERK: Case number CV17-00065, City of Reno
versus Jody Yturbide. Matter set for oral arguments.
Counsel, please state your appearance.

MS. ALSTEAD: Lisa Alstead for the employer, City
of Reno.

MR. GUINASSO: Jason Guinasso on behalf of the
claimant, Jody Yturbide.

THE COURT: Thank you, counsel. Good Friday
morning to both of you. Currently before us is the
petitioner's, City of Reno's petition for judicial review
filed on January 13th of this year seeking a review of the
decision rendered by the Department of Administrative Appeals
on December 16th of 2016. So let's start with your argument
here.

MS. ALSTEAD: Thank you, your Honor. The employer
has filed a petition for judicial review of the December 16th
decision entered by the appeals officer. The dispute on
appeal is the calculation of the payment of Ms. Yturbide's
permanent partial disability award. I'll refer to permanent
partial disability as PPD throughout my argument.

The dispute is with regards to the limitation

1 under Nevada law which limits lump sum payments to
2 25 percent. Here Ms. Yturbide received a 33 percent PPD
3 award, so she exceeded 25 percent lump sum cap under Nevada
4 law.

5 THE COURT: Didn't they modify that, allowing her
6 to have the 25 percent, and I think Mr. Guinasso, you have to
7 concede that that's the cap as far as lump sum is concerned.
8 And I don't mean to interrupt, but if I could just focus the
9 argument a little bit and it's on this seven percent, the
10 previous PPD. She had a two percent PPD back in 2008, a five
11 percent in 2011, and then this 33 percent.

12 The dispute as I tried to glean from the pleadings
13 here is whether or not that seven percent should have been
14 deducted from the 33 percent pursuant to I think it's --
15 Ms. Clerk, is it 490? Let's look at it. Number two.

16 Except as otherwise provided, this is 616C.490,
17 subsection nine, if there's a previous disability such as the
18 percentage of disability for a subsequent injury must be
19 determined by computing the percentage of the entire
20 disability and deducting therefrom the percentage of the
21 previous disability as it existed at the time of the
22 subsequent injury. I believe that this, this statute
23 controls our discussion, does it not, counsel?

24 MS. ALSTEAD: Your Honor, if I may just clarify.

1 I definitely believe that statute plays in and provides
2 guidance as to how the calculation should be determined here.
3 There was a 33 percent PPD award. No one disputes that's the
4 appropriate award. So really the dispute comes down to how
5 much can she get in a lump sum and how much has to go in
6 installments. And under NAC 616C.49A, that's the regulation
7 that has been adopted, that says a --

8 THE COURT: That's number one, Ms. Clerk. Go
9 ahead, counsel.

10 MS. ALSTEAD: An employee may elect to take up to
11 25 percent in a lump sum amount. So really the dispute here
12 is whether because she has prior awards totaling seven
13 percent, can she take the entire 25 percent in lump sum with
14 the remainder in installments, or does she have to deduct
15 from the 25 percent cap under Nevada law the prior seven
16 percent.

17 So the employer's position is because she has two
18 prior awards, which is consistent with the 490 statute you
19 had up earlier, you had to consider all prior disabilities
20 and awards, and so therefore the determination letter took
21 the 33 percent award and said, you've got 25 percent, you
22 need to deduct the seven percent for prior awards, which
23 gives you 18 percent you're entitled to in a lump sum form.

24 The remainder you're still entitled to, you just

1 have to receive that in installment payments.

2 THE COURT: Why can't she elect to take the seven
3 percent out of the remainder and get a 25 percent lump sum
4 award and then a one percent installment?

5 MS. ALSTEAD: Your Honor, if I may, I printed out
6 a visual aid and I think that will help at least with my
7 argument. This is located at pages 4 to 5 of our opening
8 brief. If I may approach?

9 THE COURT: I read it, but go ahead.

10 MS. ALSTEAD: And I've given opposing counsel a
11 copy. This will help explain.

12 THE COURT: I saw that chart.

13 MS. ALSTEAD: So it's our position that under the
14 two statutes here that you have NRS 616C.495 and that tells
15 you that the administrator may establish regulations limiting
16 lump sum amounts. So that directs to NAC 616C.498, which
17 says the employee may not exceed receiving a lump sum of more
18 than 25 percent and the remainder should be in installments.

19 So it's our position that the way the statute is
20 worded, based on the plain language, you cannot receive ever
21 in your lifetime more than 25 percent of a lump sum.

22 So when you look at the chart we have here, in
23 2008, she received five percent for her right wrist and she
24 elected a lump sum at that point. So you would take that

1 five percent from the total in her lifetime she can receive
2 for lump sum payments. In 2011, she received another two
3 percent. So you would need to take that away from the lump
4 sum 25 percent total she's allowed over her lifetime. Then
5 the current injury was a 33 percent.

6 So as you can see in the lump sum calculation,
7 it's our position that you have to deduct those prior awards
8 in just considering how much lump sum payment she's entitled
9 to. Again, she gets the whole 33 percent. It's just really
10 an issue of how much can be in lump sum and how much in
11 installment.

12 THE COURT: Under your analysis, wouldn't that
13 lead to a point in a claimant's life in which he or she is
14 ineligible for any lump sum?

15 MS. ALSTEAD: Your Honor, that's a great question.
16 That really goes to kind of the alternative argument we've
17 made in our briefing. First, if you don't think the statutes
18 are clear based upon the plain language, then you need to
19 look at the purpose of the statutes and the AMA guides and
20 that answers your question.

21 The AMA guides are adopted in NRS Chapter 616C and
22 those take what's called a whole person impairment approach.
23 So it requires you to look at all disabilities and then to do
24 a calculation and to combine prior disabilities to end into a

1 whole person approach calculation. And the reason being
2 is --

3 THE COURT: You don't want somebody with a
4 200 percent PPD.

5 MS. ALSTEAD: Exactly. You're correct. At some
6 point, if they had enough disabilities, it could total
7 100 percent. But the worker comp statutes and the purpose
8 behind those and the guides is to prevent somebody exceeding
9 an award of more than 100 percent impairment, because your
10 total body is 100 percent.

11 So you really have to look at the purpose behind
12 the statutes and the guides that are adopted and they all
13 tell you, you don't look at one specific claim or one body
14 part, but you have to consider those prior claims and
15 disabilities and calculate them into your current disability
16 and then come up with a whole person impairment number.

17 THE COURT: No question about that. However,
18 isn't it the claimant's decision to -- well, if you look at
19 498, an employee injured, B, may, one, elect, so the
20 decision, at least as written in the statute by the
21 legislature leaves the decision up to the employee -- well,
22 let me put it this way. Doesn't this language vest in the
23 employee who is injured the power to elect to have that
24 previous percentage, which must be deducted, taken from

1 either the overage or the 25 percent?

2 MS. ALSTEAD: I have two responses to that. The
3 way I read it is when they're doing their election form,
4 which here she had a form that said, you have a 33 percent
5 award, how do you want to receive it, lump sum or
6 installments or both? When she's looking at that award, she
7 can elect how she wants to receive it. Yes, this says she
8 has the choice to say, I want it all in installments or I
9 want a portion up to 25 percent.

10 But that's where, I think, to give some more
11 insight on how this applies, you need to look to the Eads
12 case. There's very limited caselaw in Nevada on how this
13 statute applies.

14 THE COURT: Welcome to Nevada.

15 MS. ALSTEAD: Right. Exactly. And there's just
16 very limited circumstances where someone exceeds the
17 25 percent where you get into this dispute.

18 THE COURT: I don't know if Eads really helps us.

19 MS. ALSTEAD: So our position is that Eads is
20 factually distinguishable, but the legal analysis and the
21 calculation analysis does provide guidance. The facts are
22 different than our case and we do not think that those facts
23 should limit application here.

24 But in Eads, the ultimate holding under the prior

1 version of NAC 616C.498, which was then 616.617, in the
2 holding on the last page of the case, the Court --

3 THE COURT: All entitlements in excess of the
4 25 percent must be paid in installments.

5 MS. ALSTEAD: Correct, your Honor. And in this
6 case, the claimant had received originally a 19 percent PPD
7 award. The claim was closed and it was later reopened for
8 additional conditions that needed to be treated and then an
9 additional 16 percent award was given. So this claimant had
10 a total of 35 percent.

11 THE COURT: But for the same injuries.

12 MS. ALSTEAD: For the same injuries.

13 THE COURT: And this is something I'm confused
14 from the record. Were these the same injuries? I'm looking
15 at your chart here, Ms. Wiltshire, and the previous PPD
16 awards were for a wrist and a left elbow, a right wrist.
17 Now, I was unclear in looking through the file here as to
18 which wrist was the -- was involved in this case in the
19 subsequent application. If it's the right wrist, then Eads
20 would apply. If not, I guess Eads doesn't apply.

21 The fundamental finding is correct. Of course
22 it's correct. The Supreme Court is functionally infallible.
23 Which is that all entitlements in excess of the 25 percent
24 must be paid in installments. I don't think there's any

1 question about that.

2 My question is, and I understand the total PPD and
3 the philosophy behind it, which is you want to limit a final
4 PPD to no more than 100 percent. But in looking at the
5 language of the statute, it seems to me in this particular
6 case that it is the employee's call as to whether or not that
7 deduction comes from the 25 percent or from the overage. Am
8 I missing something?

9 MS. ALSTEAD: Your Honor, so that was the position
10 and that was the way the argument in Eads went. The State
11 Industrial Insurance System says, okay, this employee has
12 elected to take all 25 percent and we're not disagreeing that
13 the employee is entitled to the full percentage amount, but
14 we don't believe Nevada law allows the employee to elect the
15 full 25 percent given prior awards.

16 THE COURT: For the second award.

17 MS. ALSTEAD: For the second one.

18 THE COURT: For the same injury.

19 MS. ALSTEAD: For the same injury. And you're
20 correct, your Honor, the prior injuries here were different
21 body parts. But it's our position that nowhere in the
22 statute is there a limitation to the same claim or same body
23 part.

24 So the error of law that we see is that the

1 appeals officer is taking the facts of Eads, which are one
2 claim, one body part, and taking those and reading in a
3 limitation into NAC 616.498 that's not there. When you look
4 at the plain language, yes, it says the employee may elect
5 25 percent, but then it says only up to -- 25 percent and any
6 excess of 25 percent must be received in installments.
7 Nowhere does it say that it, you know, that you can ignore
8 prior awards or prior claims or prior body parts.

9 THE COURT: That's 490.

10 MS. ALSTEAD: Exactly. I think when you look to
11 490, that's instructive when you're looking at the statute as
12 a whole. To the extent that the plain language of 498 is not
13 clear and you look at Chapter NRS 616C as a whole, 490 that
14 you cited is directly on point that says you must look to
15 prior injuries and disabilities in your calculation.

16 Similarly, NRS 616C.495, 1, E, has similar
17 language. You need to combine previous PPD awards in doing
18 your calculation of benefits and again reminds you that your
19 total cannot exceed more than 100 percent.

20 So that's really the error of law is what you're
21 hitting at is, yes, the statute says they can elect the
22 25 percent, but there's no limitation to one claim and one
23 body part. So it's our position that it applies to all
24 claims and all body parts.

1 Eads helps based on the calculation analysis, but
2 to the extent it appears silent or ambiguous as to whether
3 this applies to multiple claims and multiple body parts,
4 which is what we have in our case, then you have to look at
5 statutory construction and that says look at the statute as a
6 whole. You have these other sections that are saying you
7 have to combine prior awards. You have to include those in
8 your calculation. You cannot exceed 100 percent. So that
9 sheds light on how this statute section is supposed to be
10 read.

11 THE COURT: What about the judicial philosophy
12 behind this statutory scheme, which says if there's any
13 ambiguity it's resolved in favor of the employee?

14 MS. ALSTEAD: Again, I would say that the Eads
15 case touches on that. And it says you're not seeking to take
16 any benefit from the claimant, so there's no harm that is
17 coming to the claimant in construing the statutes this way.
18 You're simply ensuring they're being paid correctly.

19 Let me give you an example. This really goes to
20 someone who is severely injured. Say someone loses both of
21 their arms and they receive a 50 percent PPD award. If they
22 were to get that lump sum, the entire amount, they go buy a
23 Ferrari, a brand-new car, and then a year down the road they
24 have no money and they're not able to work in the capacity

1 they were in before and that's really the purpose of this
2 statute.

3 If there's someone that has more than 25 percent
4 impairment, again, looking at their total body, you don't
5 want them receiving all of that money in a lump sum, because
6 they're going to need that help down the road.

7 And so if you were to construe it in favor of the
8 claimant, that's really what you're looking at. You want to
9 ensure that this person is receiving installments throughout
10 their lifetime for their benefit. You don't want them buying
11 a Ferrari, a new computer, take a trip to Hawaii, those types
12 of things. You want to ensure that they're provided for
13 throughout their lifetime.

14 THE COURT: You're saying that the State knows
15 best?

16 MS. ALSTEAD: Correct. That's our reading of it.
17 If you can't find the answer in the plain language, you have
18 to look at all those other outside parts that are really the
19 purpose of these worker's comp statutes. And the AMA guides
20 are adopted by Nevada statute and they look at those items
21 and whole person impairment to ensure that people with high
22 permanent percentage disabilities are cared for.

23 So we submit that is one of the reasons the
24 decision should be reversed is the error of law which is for

1 three reasons. One, it reads into the statute of limitation
2 not in the plain language. To the extent that the plain
3 language does not give us an answer and it's silent, you have
4 to look at the statutes as a whole. And, third, you have to
5 look at the purpose of the statutes and the AMA guides, which
6 all look at whole person impairment combined prior
7 disability. So you need to look at the whole picture of the
8 person when making these calculations.

9 Secondly, we sought to reverse the decision,
10 because it was not supported by substantial evidence. It was
11 undisputed that the claimant has two prior PPD awards. The
12 first was the five percent award in 2009 for the wrist
13 injury, which is located on the record on appeal at page 166.
14 There was a subsequent two percent PPD award for a left elbow
15 injury in April of 2013. That's located in the record on
16 appeal at page 178. And then the instant claim that's before
17 the Court is an additional 33 percent PPD award and that is
18 located at pages 32 to 38 of the record on appeal.

19 So in the appeals officer's decision, she finds
20 the claimant had two prior awards with the five and
21 two percent. The decision finds that there was a current
22 33 percent award. Both of these are located on page three of
23 the decision. So the Court acknowledges the substantial
24 evidence, but then ignores it in the calculation that is

1 performed.

2 The appeals officer on the last page of the
3 decision at page seven ignores those two prior PPD awards and
4 concludes that the claimant is entitled to the full
5 25 percent in lump sum and then the remainder in installment.
6 And we would submit by ignoring the substantial evidence,
7 which is the prior PPD awards, the conclusion and the
8 calculation used was improper.

9 In conclusion, it's our position that the decision
10 is affected by both an error of law and is clearly erroneous
11 based on the substantial evidence. Again, at pages 5 to 6 of
12 the decision, the decision contains an error of law by
13 failing to reduce prior awards from the total lump sum and
14 reading into NAC 616C.498 a limitation that just doesn't
15 exist.

16 If the legislature wanted to adopt that limitation
17 after Eads, they would have done that. That hasn't happened.
18 Eads was decided in 1993. So there is no limitation as it
19 currently stands.

20 And, secondly, the decision contains -- is
21 unsupported by the substantial evidence based on the two
22 prior awards. And with that, I'm happy to answer any other
23 questions you have.

24 THE COURT: Thank you, counsel. Mr. Guinasso.

1 MR. GUINASSO: Yes, thank you, your Honor. As was
2 mentioned, there really is no factual dispute. We
3 understand, number one, that there were two prior injuries
4 resulting in a permanent disability award of five percent for
5 the right wrist and two percent for the left elbow. The PPD
6 at issue in this case involved the cervical spine and the
7 33 percent award related thereto.

8 The real issue, as we see it, your Honor, is
9 really did the appeal officer abuse her discretion when she
10 concluded that Ms. Yturbide could receive up to 25 percent of
11 her 33 percent PPD award for the disability that was caused
12 by her work related injury to her cervical spine, which is a
13 separate and distinct injury from her prior injuries that
14 received PPD awards.

15 And really more specifically when the appeal
16 officer analyzed and applied NAC -- I'm sorry -- NRS 616.495,
17 1, sub D, and NAC 616C.498, did the appeal officer abuse her
18 authority by construing that regulation and statute to find
19 that the injured worker is entitled to receive the 25 percent
20 of the PPD award and lump sum for each and every PPD an
21 injured worker receives for each injury and claim an injured
22 worker sustains and subsequently files during their lifetime.

23 Our answer to that question is emphatically, no,
24 she didn't abuse her discretion or authority in construing

1 this statute and this regulation. As you take a close look
2 at NAC 616C.498, the regulation says, an employee injured on
3 or after July 1st, 1995, who incurs a permanent partial
4 disability, that -- and then it gives two criteria and the
5 one criteria that applies here is exceeds the 25 percent.

6 Notice that when the department adopted this
7 language in accordance with the authority that the
8 legislature gave it and NRS 616C.495 when it said that the --
9 any claimant injured on or after July 1st, 1995 may elect to
10 receive his or her compensation in a lump sum in accordance
11 with the regulations adopted by the administrator and
12 approved by the governor.

13 This regulation that we're dealing with was
14 created as a direct result of the authority given to the
15 department by the legislature. And the operative term here,
16 I think this case really turns on the purpose and application
17 of a, the article in that sentence. An employee injured on
18 or after July 1, 1995, who incurs a, we have to figure out
19 what that means in the context of the regulation.

20 And the appeal officer concluded that a as applied
21 here explicitly allows an injured worker who receives a PPD
22 rating and up to and in excess of 25 percent to elect to
23 receive compensation in the lump sum equal to the present
24 value of the award for the disability of 25 percent and

1 installment payments for that portion of the employee
2 disability in excess of 25 percent.

3 The Eads case does not apply to this case as your
4 Honor pointed out and really what the city is attempting to
5 do is to extend its holding, that is, it's inviting this
6 Court to try to extend this Court. And it did the same thing
7 with the appeal officer below and the appeal officer was not
8 obliged to accept that invitation.

9 Because in the Eads case, as was noted earlier,
10 we're dealing with a reopening case relative to a particular
11 industrial injury that was subsequently rated again and that
12 exceeded the 25 percent limit on that injury for that claim.

13 And I think it's important to contemplate how
14 these PPD awards come into fruition, that is, there is an
15 injury or a group of injuries as a result of a discrete
16 accident at the workplace. That injury is treated. They're
17 subsequently determined to be a disability and then that
18 disability is rated. Then the injured worker is, not the
19 State, the injured worker is given the discretion to
20 determine how best to receive that award either in lump sum
21 or installments. That's why there's the permissive language
22 may.

23 So in this case where you have three separate,
24 distinct industrial injuries, you have three separate

1 transactions and occurrences. And that's why the reference
2 to 616C.490 is really addressing apportionment, which is not
3 at issue in this case. That is, the only time you can
4 apportion an industrial injury is when it's the same injury.

5 So if she had -- if the two prior disability
6 awards, the two percent and the five percent, were for the
7 cervical spine, then we would expect an apportionment to take
8 place. We would expect two percent to be deducted and
9 another five percent to be deducted. Or if in the same
10 discrete accident or injury, the wrist was injured, the elbow
11 was injured, and the cervical spine was injured and there was
12 one rating for that particular claim, then as was pointed
13 out, the AMA guides prescribe that you have to rate all of
14 those body parts that come from that discrete accident injury
15 together contemplating the disability to the whole person.

16 But here we don't have that. Here we have a
17 distinct accident and injury that results in discrete
18 disability ratings. And when that occurs, the regulation
19 provides that the injured worker can take up to 25 percent of
20 that particular award in lump sum. And that there's no
21 apportionment that is required, especially when you're
22 dealing with other discrete injuries. And, further, you
23 don't just willy-nilly look for past, you know, PPD awards
24 and then deduct them in total from the 25 percent total lump

1 sum.

2 THE COURT: If I can go back, is this 25 -- let's
3 just say -- strike that. In this particular case, we have a
4 finding by the chiropractor and by the division -- by the
5 chiropractor rates the cervical spine at 33 percent of PPD.

6 Now, is that 33 percent of the cervical spine's
7 functionality or 33 percent of the whole body? Because under
8 one route, we follow either branches, if it's of the cervical
9 spine, and then shortly thereafter, there's an injury to the
10 lumbar spine and there's another 33 percent, and then one of
11 the thoracic area and another 33 percent. You see where
12 we're going here? And then somebody gets an elbow and that's
13 another 33 percent. Pretty soon without being totally
14 incapacitated, an individual could receive in excess of
15 100 percent of a PPD. Address that concern.

16 MR. GUINASSO: Yes, your Honor, and a valid
17 concern, but I think they're two different issues. One is an
18 evaluation of a permanent partial disability of the whole
19 person and how that is calculated over the course of an
20 individual's lifetime. So when we're talking about the
21 33 percent, we would concede that 33 percent isn't just
22 relative to the cervical spine, but it's relative to the
23 entire person. And that if you had subsequent --

24 THE COURT: That makes sense.

1 MR. GUINASSO: If you had subsequent disabilities
2 throughout that individual's life, ultimately an individual
3 cannot be more than 100 percent disabled. We concede that
4 point.

5 But the real question here with regard to each
6 discrete accident and injury that results in a disability,
7 how much can the claimant take in a lump sum for each one of
8 those disabilities throughout their lifetime? If you have a
9 two percent, a five percent, a 33 percent. Let's say in ten
10 years from now, there's some other injury that results in a
11 27 percent, you know, impairment. For each of those discrete
12 accidents and injuries, our position is that the statute and
13 the regulation when read on its face allow the injured worker
14 the discretion to take that particular PPD in a lump sum up
15 to 25 percent.

16 THE COURT: And then any previous award would be
17 deducted from the installment?

18 MR. GUINASSO: It could be deducted from the
19 installment, but I don't know that it's entirely clear that's
20 the right result, necessarily, in this case. What we would
21 submit to you, based on the way we understand the language of
22 the regulation and the way the appeal officer applied it
23 would be that each discrete disability rating really needs to
24 be dealt with on its own merit.

1 And if you were to deduct that seven percent from
2 the total, even on the installment, what you would
3 essentially be doing is apportioning that rating and that
4 would be inappropriate under the statutes and regs, which
5 provides that apportionment only occurs when you're dealing
6 with the same specific injury.

7 We argued in the alternative in that and the
8 appeal officer specifically rejected that argument, and when
9 preparing the findings of facts and conclusions of law, says
10 apportionment is not an issue in this case, do not apply the
11 apportionment statutes or regulations.

12 So this is a different issue than apportionment.
13 This is really an issue of whether with regard to separate
14 incidents that involve separate accidents and injuries,
15 whether those specific ratings can be taken in lump sum up to
16 25 percent.

17 Again, the Eads case doesn't address that. The
18 Eads case deals with the same injury. And, really, what I
19 believe the city is trying to do is extend that holding to
20 include multiple injuries over the lifetime of an individual.
21 And while that may be something that the Supreme Court may
22 want to do at some time in the future, that doesn't mean that
23 the appeal officer in applying this regulation and this
24 statute abused her discretion based on the law as it is today

1 in determining that my client could accept the 25 percent in
2 lump sum for this discrete accident injury that resulted in
3 disability and not have to have the seven percent for the
4 other two injuries deducted from her award.

5 THE COURT: Either the excess or the lump sum?

6 MR. GUINASSO: In either case, right. Because if
7 you do that, it would really be to impose an apportionment
8 and apportionment really is not at issue here, because we're
9 dealing with injuries to distinct body parts. And when
10 you're dealing with 490, 616C.490 that you cited earlier,
11 what you're really dealing with is making sure that when
12 there are prior injuries to the same body parts, that we're
13 not, you know, getting -- that we're not forgetting to
14 apportion those prior -- the disability ratings for those
15 prior injuries.

16 And then dealing with ratings as they pertain to
17 multiple injuries in one distinct transaction or occurrence,
18 what you would have is you would have a rating of the whole
19 person in that situation that would only allow -- so let's
20 say the facts were a little bit different in this case. We
21 had a wrist injury, an elbow injury and a cervical injury all
22 arising out of the same transaction and occurrence. Then in
23 that situation, the claimant would only be able to take the
24 25 percent of that total award after the whole person

1 impairment rating was reached.

2 And, typically, they do a -- there's a thing at
3 the back of the guides, a little chart that's called the
4 combined values chart. So in that situation, what would
5 happen is you take the 33 percent, plus the two percent, plus
6 the five percent, you go to the combined values chart and it
7 would actually reduce the disability rating a bit, because
8 the combined value of that disability as it pertains to that
9 transaction and occurrence by that particular formula results
10 in usually a percent or two reduction as those three injuries
11 are contemplated against the whole person for a specific
12 transaction and occurrence.

13 But with regard to discrete transactions and
14 occurrences, the guides don't prescribe combining of the
15 whole person and neither do the statutes or regs at issue
16 before you today.

17 And even if your Honor thought, well, there has to
18 be some deduction, you know, that seven percent, that may be
19 a reasonable interpretation of the statute from another
20 perspective. But really the question is, did the appeal
21 officer abuse her discretion and authority in applying the
22 regulation and the statute the way she did, and we would
23 submit to you that she did not.

24 THE COURT: Okay. Thank you, Mr. Guinasso.

1 Ms. Wiltshire.

2 MS. ALSTEAD: Thank you, your Honor. To respond
3 briefly, I agree with claimant's counsel's argument on two
4 issues. He answered your question regarding the 33 percent
5 calculation and whether you can take the seven percent off
6 the back end, off the installments. And I agree, because
7 this is not an apportionment case. You can't take that.
8 They get the full 33 percent. Really the dispute is how much
9 can be in a lump sum and how much in installment?

10 And, again, I agree with his argument that you're
11 looking at the whole person impairment. And really the
12 reason behind that is you're evaluating functional
13 limitations. Can a person with a cervical spine injury, what
14 are their functional limitations in the workplace and in
15 their daily life? What can they go out and do?

16 As he indicated, you're looking at the whole
17 person impairment, because you're looking at functionally
18 that body part is hurt, but what is her whole person? What
19 are they able to do?

20 To respond to the position regarding the statute's
21 language, NAC 616C.498 references the word a and Ms. Yturbide
22 has taken the position that that word a tells us the statute
23 only applies to one claim or one injury and that's not the
24 case. Because the Eads case addresses that specific

1 language, both the word a, and it doesn't limit to a PPD
2 award, and in fact it combines two PPD awards to determine
3 that the lump sum cap of 25 percent applies to two PPD
4 awards.

5 So they're taking inconsistent positions. They're
6 saying the statute is clear, it gives you the word a, it only
7 applies to one PPD award and Eads doesn't apply, but the Eads
8 case says the statute on its face is clear and it applies to
9 two PPD awards. So you have to pick or choose. It's
10 inconsistent to argue the statute is clear and Eads doesn't
11 apply, because Eads says on its face it can apply to two PPD
12 awards.

13 With respect to the standard of review, it's our
14 position you're not necessarily looking at abuse of
15 discretion, but the focus really is whether there's an error
16 of law and whether the decision fails to consider the
17 substantial evidence.

18 Lastly, there's been discussion about the word
19 may, and the may elect, and what the employee is entitled to
20 do. Again, I'd submit in Eads, the employee exercised his
21 may elect, but the State Industrial Insurance System says, we
22 see your election, but we have to follow the law. So we
23 understand that you have elected it, but we're a check and
24 balance system and we need to make sure, even though you've

1 elected to get 25 percent, that you're really entitled to it
2 under the law.

3 So to the extent that the statute says may, in our
4 case, the employer and insurer still has the duty to be a
5 check and balance and say, no, the law does not apply. And,
6 really, that's all we're doing here. We're not disputing
7 she's entitled to 33 percent. We're acting as a check and
8 balance as to how much of that can be lump sum form and how
9 much can be installments.

10 And if you were to read that, they can elect
11 whatever they want. I'm sure the employee would elect many
12 things. So it's up to the insurer to make sure that conforms
13 with what Nevada law tells us to do.

14 So for those reasons, we submit again that the
15 decision contains an error of law. It reads into the plain
16 language of NAC 616C.498 is an indication that's simply not
17 there. Claimant's counsel is arguing that we're seeking to
18 extend the holding in Eads. We are saying that that analysis
19 applies here, but it's not necessarily extending the holding,
20 because the statute does not contain any limitations. So
21 we're saying, read the statute as to what the plain language
22 is with no limitations to multiple claims and multiple
23 disabilities. That language is simply not there.

24 Again, using that analysis and the error of law,

1 likewise, the decision fails to look at the substantial
2 evidence by not considering the prior awards in the
3 calculation. And with that, I'm happy to answer any
4 questions you may have.

5 THE COURT: Mr. Guinasso.

6 MR. GUINASSO: Yes, your Honor.

7 THE COURT: Any further comments?

8 MR. GUINASSO: No. We'll stand on what we argued
9 previously. I don't think, though, that we're taking
10 inconsistent positions relative to the Eads case. Again,
11 Eads was dealing with one body part arising out of one
12 transaction and occurrence and arriving at the holding that
13 you can't take more than 25 percent for the disability
14 related to that particular body part. It was a reopening
15 case. It doesn't apply here.

16 THE COURT: Ms. Wiltshire, this is your case, I'll
17 let you take the last cut.

18 MS. ALSTEAD: Thank you, your Honor. I'll rest on
19 the argument made.

20 THE COURT: All right. Very interesting. I'm
21 going to take this under submission and we'll try to get an
22 order out shortly. This is interesting case, interesting
23 arguments. Counsel did a good job on both sides. It doesn't
24 make it any easier on the judge, but I appreciate your

1 advocacy. Ms. Wiltshire, anything further?
2 MS. ALSTEAD: Nothing further, your Honor.
3 THE COURT: Mr. Guinasso.
4 MR. GUINASSO: Nothing further. Thank you, your
5 Honor.
6 THE COURT: Court's in recess.
7 --oOo--
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1 STATE OF NEVADA }
2 County of Washoe } ss.

3 I, STEPHANIE KOETTING, a Certified Court Reporter of the
4 Second Judicial District Court of the State of Nevada, in and
5 for the County of Washoe, do hereby certify;

6 That I was present in Department No. 7 of the
7 above-entitled Court on July 21, 2017, at the hour of 9:00
8 a.m., and took verbatim stenotype notes of the proceedings
9 had upon the oral arguments in the matter of CITY OF RENO,
10 Plaintiff, vs. JODY YTURBIDE, et al., Defendant, Case
11 No. CV17-00065, and thereafter, by means of computer-aided
12 transcription, transcribed them into typewriting as herein
13 appears;

14 That the foregoing transcript, consisting of pages 1
15 through 31, both inclusive, contains a full, true and
16 complete transcript of my said stenotype notes, and is a
17 full, true and correct record of the proceedings had at said
18 time and place.

19
20 DATED: At Reno, Nevada, this 20th day of February 2018.

21
22 S/s Stephanie Koetting
23 STEPHANIE KOETTING, CCR #207
24

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 CITY OF RENO, Case No.: CV17-00065
10 Petitioner, Dept. No.: 7
11 vs.
12 JODY YTURBIDE,
13 Respondent.
14

15 **ORDER**

16 Currently before the Court is Petitioner CITY OF RENO's (hereinafter
17 "Petitioner") *Petition for Judicial Review*, filed on January 13, 2017. Petitioner seeks
18 review of the Decision rendered by the Department of Administration Appeals Officer
19 on December 16, 2016. Petitioner's *Opening Brief* was filed on March 27, 2017. On
20 April 25, 2017, Respondent JODY YTURBIDE (hereinafter "Respondent") filed her
21 *Answering Brief*. On May 25, 2017, Petitioner filed their *Reply Brief*, and requested
22 oral argument on May 26, 2017. Oral argument was heard on the matter on July 21,
23 2017.

24 **Factual Background**

25 Respondent was employed by Petitioner as a Public Safety Dispatcher in the
26 Reno Emergency Communications Division. On May 23, 2014, Petitioner filed a claim
27 for injuries to her right shoulder, forearm, elbow, wrist, and fingers related to severe
28 pain and numbness and loss of sensation in two to three fingers. The date of the injury

1 was May 22, 2014. The cause of the injury was attributed to non-stop typing and
2 answering of phones. Respondent sought treatment for her injuries and thereafter,
3 she was rated for her conditions. On June 19, 2016, Respondent's Permanent Partial
4 Disability (PPD) evaluation was performed by Dr. Katharine Welborn. Dr. Welborn
5 recommended claim closure with a 33% whole person impairment related to the body
6 part of the cervical spine. Respondent had previously received a 5% PPD rating in
7 September 2009 for carpal tunnel syndrome and a 2% PPD in April 2013 for injuries
8 to her elbow.

9 On July 1, 2016, the insurer issued a determination offering 18% of the
10 Respondent's 33% PPD rating in lump sum and the remaining 15% in monthly
11 installments. This was based on Respondent having received prior PPD ratings of 2%
12 and 5%. On July 8, 2016, Respondent sought review of the insurer's July 1, 2016
13 determination letter. A hearing was held on August 3, 2016, before the Hearing
14 Officer. On August 11, 2016, the Hearing Officer reversed and remanded the insurer's
15 July 1, 2016 determination, finding that the Respondent is entitled to a one time
16 lump sum offering of 25% with the remaining 8% to be paid in monthly installments.
17 The Appeals Officer affirmed the Hearing Officer's decision on December 16, 2016
18 (hereinafter "Appeals Officer Decision").

19 Issues Presented

20 1. Does the Appeals Officer Decision contain errors of law by: (a) failing to
21 subtract Claimant's prior PPD awards from the 25% cap on the amount of a PPD
22 award that can be paid in lump sum form for the instant claim; and (b) by limiting
23 the 25% cap on lump sum payments to the same claim or body part?

24 2. Is the Appeals Officer Decision concluding that the Respondent is entitled
25 to have 25% of the 33% PPD award paid in a lump sum amount supported by the
26 substantial evidence where the record contains evidence that Respondent has
27 received two prior PPD awards totaling 7%?
28

1 Standard of Review

2 In reviewing an administrative agency decision, the court is to review the
3 evidence presented to the agency in order to determine whether the agency's decision
4 was arbitrary or capricious and was thus an abuse of the agency's discretion.¹ A
5 district court may not substitute its judgment in the place of an administrative
6 agency's judgment when reviewing findings of fact and must limit their review to
7 whether or not the findings of fact are supported by substantial evidence.² Pure
8 questions of law are reviewed de novo, however "an agency's conclusions of law that
9 are closely related to the agency's view of the facts are entitled to deference and
10 should not be disturbed if they are supported by substantial evidence."³ Substantial
11 evidence is defined as "that quantity and quality of evidence which a reasonable
12 [person] could accept as adequate to support a conclusion."⁴

13 Discussion

14 This matter essentially rests on the determination of whether Respondent's
15 two prior PPD determinations have an effect on the application of the 25% cap on the
16 lump sum payments for a current PPD determination. Petitioner argues that because
17 Respondent has already received a 7% lump sum payment based on the two prior
18 PPDs, that the 7% should be subtracted from the 25% cap. Therefore, Petitioner
19 argues that the Appeals Officer Decision finding that the lump sum payment of 25%
20 was appropriate with the remaining payments to be paid in installments, was an
21 error of law. Further, Petitioner argues that the Appeals Officer Decision was not
22 supported by substantial evidence because it failed to take into consideration the
23 prior PPD lump sum payments when determining payments for the current PPD
24 determination. Thus, Petitioner argues that Respondent should only receive an 18%
25 lump sum payment and the remaining 15% in installments.

26 ¹ *Clements v. Airport Auth. of Washoe Cty.*, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995)

27 ² *Id.* at 721.

28 ³ *Id.* at 722 (citing *SIIS v. Swinney*, 103 Nev. 17, 20 (1987))

⁴ *Id.* (quoting *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1 (1986) (alteration original)).

1 Respondent argues that the Appeals Officer Decision was not affected by an
2 error of law and was supported by substantial evidence. Respondent argues that the
3 25% cap is not a cumulative determination, meaning that for each and every PPD
4 determination that exceeds 25%, the person should be entitled to collect 25% in a
5 lump sum payment.

6 I. Application of the Relevant Statutes on the 25% Cap on Lump Sum
7 Payments

8 Under NRS 616C.495(1)(d), an award for a permanent partial disability may
9 be paid in a lump sum under the following conditions:

10 (d) Any claimant injured on or after July 1, 1995, and before January 1,
11 2016, who incurs a disability that:

12 ...
13 (2) Exceeds 25 percent may elect to receive his or her compensation in a
14 lump sum equal to the present value of an award for a disability of 25
15 percent. If the claimant elects to receive compensation pursuant to this
16 sub-subparagraph, the insurer shall pay in installments to the claimant
17 that portion of the claimant's disability in excess of 25 percent.

18 Additionally, under NAC 616C.498:

19 1. An employee injured on or after July 1, 1995, but before January 1,
20 2016, who incurs a permanent partial disability that:

21 ...

22 (b) Exceeds 25 percent may:

23 (1) Elect to receive compensation in a lump sum equal to the
24 present value of an award for a disability of 25 percent. If the injured
25 employee elects to receive compensation in a lump sum pursuant to this
26 subparagraph, the insurer shall pay in installments to the injured
27 employee that portion of the injured employee's disability in excess of 25
28 percent.

As stated by the parties, the Nevada Revised Statutes and Nevada Administration
Code are silent as to the application of the 25% cap on lump sum payments when
there has been multiple PPD determinations stemming from multiple injuries. In
Eads v. State Indus. Ins. Sys., 109 Nev. 733, 857 P.2d 13 (1993), the Nevada Supreme
Court addressed the application of the 25% cap on lump sum payments when there
were multiple PPD determinations. There, the plaintiff suffered a single injury with

1 an initial PPD rating of 19%.⁵ However, subsequent to the first rating, the plaintiff
2 received an additional 16% rating, which brought his total PPD rating to 35%.⁶ The
3 Nevada Supreme Court held that the 25% cap applied to the lump sum payment even
4 when there were multiple PPD determinations due the PPD determinations being
5 made on the same injury.⁷ The present action is distinguishable from *Eads v. State*
6 *Indus. Ins. Sys.*, due to Respondent's PPD ratings being the result of multiple injuries.
7 If there is a literal reading of the holding in *Eads*, it would appear the 25% cap on the
8 lump sum payment would only apply to individual injuries, not a combination of
9 multiple injuries.

10 However, Petitioner argues that the Appeals Officer Decision's reliance on
11 *Eads* in determining that the 25% cap only applies to a single injury was an error of
12 law. Specifically, Petitioner asserts that if the Nevada Legislature's intent was to
13 limit the application of the 25% cap on PPD determinations to those involving a single
14 injury, it would have done so by codifying *Eads*.⁸ The Court does not agree. In reading
15 NRS 616C.495 and NAC 616C.498, there is nothing in the text that would result in
16 an application that is inconsistent with the holding in *Eads*. Under both NRS
17 616C.495 and NAC 616C.498, if a claimant received a PPD rating in excess of 25%,
18 the claimant "may elect to receive his or her compensation in a lump sum equal to
19 the present of an award for a disability of 25 percent." There is nothing in the
20 language of the Nevada Revised Statutes or the Nevada Administrative Code that
21 would lead to a different result than the one reached in *Eads*. The *Eads* case
22 reaffirmed the appropriate application of the 25% cap on a PPD determination that
23 exceeds 25% when it is based on a single injury. Therefore, the Court does not find
24 the Appeals Officer Decision was affected by an error of law due to the reliance on
25 *Eads*.

26 ⁵ *Eads v. State Indus. Ins. Sys.*, 109 Nev. 733, 857 P.2d 13, (1993).

27 ⁶ *Id.* at 15.

28 ⁷ *Id.* (emphasis added).

⁸ *See, In re Christensen*, 122 Nev. 1309, 1320, 149 P.3d 40, 47 (2006).

1 ///

2 **II. Workers' Compensation Statutes**

3 Next, Petitioner argues that the failure of the Appeals Officer Decision to
4 consider the workers' compensation statutes as a whole, specifically NRS
5 616C.495(1)(g) and NRS 616C.490(9), resulted in a decision that was affected by an
6 error of law. Under NRS 616C.495(1)(g):

7 If the permanent partial disability rating of a claimant seeking
8 compensation pursuant to this section would, when combined with any
9 previous permanent partial disability rating of the claimant that
10 resulted in an award of benefits to the claimant, result in the claimant
11 having a total permanent partial disability rating in excess of 100
12 percent, the claimant's disability rating upon which compensation is
13 calculated must be reduced by such percentage as required to limit the
14 total permanent partial disability rating of the claimant for all injuries
15 to not more than 100 percent.

16 Petitioner argues that this reaffirms their position that when calculating
17 compensation for a PPD rating, the prior PPD ratings must be factored in.
18 Furthermore, under NRS 616C.490(9):

19 [i]f there is a previous disability, as the loss of one eye, one hand, one
20 foot, or any other previous permanent disability, the percentage of
21 disability for a subsequent injury must be determined by computing the
22 percentage of the entire disability and deducting therefrom the
23 percentage of the previous disability as it existed at the time of the
24 subsequent injury.

25 Again, Petitioner argues that the requirement that the rating physician factor in the
26 prior PPD ratings for the purposes of apportionment, reaffirms their position that the
27 calculation of payments must also consider the prior PPD ratings.

28 After review, the Court does not find Petitioner's arguments persuasive. Again,
there is nothing in the text of the statutes that support their argument that the prior
PPD ratings must be subtracted from the 25% cap on lump sum payment and instead
be paid in installments. Both statutes referenced above apply only to the application
of prior PPD ratings as it relates to a PPD rating of a claimant as a whole. It is an
extraordinary leap to apply the reduction of the prior PPD ratings as it relates to a

1 whole person PPD rating, to a reduction of prior PPD ratings as it relates to right to
2 a lump sum payment. Although the Court agrees that the workers' compensation
3 statutes should be considered as a whole, the Court does not find that either of the
4 statutes proffered by Petitioner support a finding that the Appeals Officer Decision
5 was affected by an error of law for failing to consider those statutes.

6 III. AMA Guides

7 Petitioner's next argument is similar to the one addressed above. Petitioner
8 argues that the Appeals Officer Decision was affected by an error of law for failing to
9 consider the AMA *Guides* approach to whole person impairment. Specifically, the
10 requirement that impairment from different regions be combined to determine whole
11 person impairment. After review, the Court does not find that the AMA *Guides*
12 dictate that a prior PPD rating must be subtracted from the 25% cap on the lump
13 sum payment under NRS 616C.495 and NAC 616C.489. Rather, the AMA *Guides*
14 focus on the appropriate method in which to ensure that a claimant's PPD rating does
15 not exceed 100%. This is analogous to the statutes referenced above. In an attempt to
16 prevent a PPD rating exceeding 100%, AMA *Guides* and the statutes referenced
17 above attempt to reduce the current PPD rating by taking into account any prior PPD
18 ratings. For example, if a claimant has two prior PPD ratings of 2% and 5% and
19 subsequently receives a 33% PPD rating, the 7% should theoretically be subtracted
20 from the current 33% PPD rating leaving the claimant with a current PPD rating of
21 26% for the purposes of disability payments. Therefore, leaving the claimant with a
22 25% lump sum payment and 1% of installment payments. Under this logic, it would
23 appear that the AMA *Guides* and applicable Nevada Revised Statutes are designed
24 to address the concern of exceeding a 100% PPD rating, not the reduction of the 25%
25 cap on lump sum payments.

26 Again, the Court does not find that the Appeals Officer Decision was affected
27 by an error of law for failing to consider the AMA *Guides* approach to whole person
28 impairment. The approach to whole person impairment relates solely to the

1 determination of a whole person PPD rating, not a calculation of the payments for
2 the purposes of the 25% cap on lump sum payments under NRS 616C.495(1)(d) and
3 NAC 616C.498.

4 **IV. Appeals Officer Decision Was Not Supported by Substantial Evidence**

5 Lastly, Petitioner argues that the Appeals Officer Decision was not supported
6 by substantial evidence because the decision ignores the prior PPD ratings and fails
7 to subtract those prior ratings from the 25% cap on lump sum payments. It is
8 undisputed that Respondent received two prior PPD ratings. Further, it is
9 undisputed that Respondent received payments pursuant to those ratings via lump
10 sum. However, there is nothing in the Nevada Revised Statutes or the Nevada
11 Administrative Code that requires the reduction of the 25% cap on lump sum
12 payments based on prior PPD ratings. Furthermore, the limited case law on the issue
13 stands for the proposition that the cap on a lump sum payment applies only in the
14 context of a single injury. Thus, the Court finds that the Appeals Officer Decision was
15 supported by substantial evidence because it was not required to subtract the prior
16 PPD ratings from the 25% cap on the current PPD rating.

17 **Conclusion**

18 Having fully reviewing the briefing submitted and considering the arguments
19 of counsel, the Court finds that the Appeals Officer Decision was not affected by an
20 error of law and was supported by substantial evidence. Accordingly, and good cause
21 appearing, the December 16, 2016, *Decision and Order of the Appeals Officer* is
22 **AFFIRMED.**

23 **IT IS SO ORDERED.**

24 **DATED** this 8th day of August, 2017.

25 
26 PATRICK FLANAGAN
27 District Judge
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 8th day of August, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Jason D. Guinasso, Esq., attorney for Respondent; and
Lisa Wiltshire Alstead, Esq., attorney for Petitioner.


Judicial Assistant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDONALD CARANO LLP and that on September 7, 2017, I caused to be electronically filed the NOTICE OF ENTRY OF ORDER with the Clerk of the Court using the ECF system, which will automatically e-serve the same on the attorney of record set forth below:

Jason Guinasso, Esq.
Reese Kintz Guinasso
190 W. Huffaker Lane, Suite 402
Reno, NV 89511

Additionally, I served the below parties by placing a true copy of the NOTICE OF ENTRY OF ORDER enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office mail at 100 West Liberty Street, 10th Floor, Reno, Nevada 89501 addressed as follows:

Jason Guinasso, Esq.
Reese Kintz Guinasso
190 W. Huffaker Lane, Suite 402
Reno, NV 89511

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

I am familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. The envelopes addressed to the above parties were sealed and placed for collection by the firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 7, 2017 at Reno, Nevada.


An Employee of McDonald Carano LLP

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Index of Exhibits

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2017-09-07 02:20:44 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6288062

EXHIBIT 1

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PHONE: 775.786.2000 • FAX: 775.786.2000

EXHIBIT 1

1 CODE: \$2515
2 Timothy E. Rowe
3 Nevada State Bar No. 1000
4 Lisa Wiltshire Alstead
5 Nevada State Bar No. 10470
6 McDonald Carano LLP
7 P.O. Box 2670
8 Reno, NV 89505-1670
9 775-788-2000
10 Attorneys for City of Reno

11
12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
13 **IN AND FOR THE COUNTY OF WASHOE**

14 CITY OF RENO,

15
16 Petitioner,

Case No. CV17-00065

Dept. No. 7

17 vs.

18 JODY YTURBIDE, and the NEVADA
19 DEPARTMENT OF ADMINISTRATION
20 APPEALS OFFICER,

21 Respondents.

22 **NOTICE OF APPEAL**

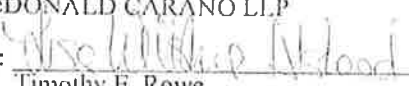
23 Notice is hereby given that the CITY OF RENO, by and through its attorneys of record,
24 Timothy E. Rowe, Esq. and Lisa Wiltshire Alstead, Esq. of McDonald Carano LLP, hereby appeals
25 to the Supreme Court of Nevada from the Order entered by the above-entitled Court on August 8,
26 2017. A copy of said Order is attached hereto as **Exhibit 1**.

27 AFFIRMATION: The undersigned hereby affirms that this document does not contain the
28 social security number of any person.

DATED this 7th day of September, 2017.

McDONALD CARANO LLP

By:


Timothy E. Rowe
Lisa Wiltshire Alstead
P.O. Box 2670
Reno, NV 89505-2670
Attorneys for City of Reno

McDONALD CARANO

CERTIFICATE OF SERVICE

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Rachleen K. Mann
An Employee of McDonald Carano LLP

MCDONALD  **CARANO**
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EXHIBIT 1

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Jacqueline Bryant
Clerk of the Court
Transaction # 6288154 : yvlorla

EXHIBIT 1

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Petitioner,

Dept. No.: 7

vs.

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17 Respondent has already received a 7% lump sum payment based on the two prior
18 PPDs, that the 7% should be subtracted from the 25% cap. Therefore, Petitioner
19 argues that the Appeals Officer Decision finding that the lump sum payment of 25%
20 was appropriate with the remaining payments to be paid in installments, was an
21 error of law. Further, Petitioner argues that the Appeals Officer Decision was not
22 supported by substantial evidence because it failed to take into consideration the
23 prior PPD lump sum payments when determining payments for the current PPD
24 determination. Thus, Petitioner argues that Respondent should only receive an 18%
25 lump sum payment and the remaining 15% in installments.

26

¹ *Clements v. Airport Auth. of Washoe Cty.*, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995)

27 ² *Id.* at 721.

28 ³ *Id.* at 722 (citing *SIIS v. Swinney*, 103 Nev. 17, 20 (1987))

⁴ *Id.* (quoting *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1 (1986) (alteration original)).

1 Respondent argues that the Appeals Officer Decision was not affected by an
2 error of law and was supported by substantial evidence. Respondent argues that the
3 25% cap is not a cumulative determination, meaning that for each and every PPD
4 determination that exceeds 25%, the person should be entitled to collect 25% in a
5 lump sum payment.

6 I. Application of the Relevant Statutes on the 25% Cap on Lump Sum
7 Payments

8 Under NRS 616C.495(1)(d), an award for a permanent partial disability may
9 be paid in a lump sum under the following conditions:

10 (d) Any claimant injured on or after July 1, 1995, and before January 1,
11 2016, who incurs a disability that:

12 ...
13 (2) Exceeds 25 percent may elect to receive his or her compensation in a
14 lump sum equal to the present value of an award for a disability of 25
15 percent. If the claimant elects to receive compensation pursuant to this
16 sub-subparagraph, the insurer shall pay in installments to the claimant
17 that portion of the claimant's disability in excess of 25 percent.

18 Additionally, under NAC 616C.498:

19 1. An employee injured on or after July 1, 1995, but before January 1,
20 2016, who incurs a permanent partial disability that:

21 ...

22 (b) Exceeds 25 percent may:

23 (1) Elect to receive compensation in a lump sum equal to the
24 present value of an award for a disability of 25 percent. If the injured
25 employee elects to receive compensation in a lump sum pursuant to this
26 subparagraph, the insurer shall pay in installments to the injured
27 employee that portion of the injured employee's disability in excess of 25
28 percent.

As stated by the parties, the Nevada Revised Statutes and Nevada Administration
Code are silent as to the application of the 25% cap on lump sum payments when
there has been multiple PPD determinations stemming from multiple injuries. In
Eads v. State Indus. Ins. Sys., 109 Nev. 733, 857 P.2d 13 (1993), the Nevada Supreme
Court addressed the application of the 25% cap on lump sum payments when there
were multiple PPD determinations. There, the plaintiff suffered a single injury with

1 an initial PPD rating of 19%.⁵ However, subsequent to the first rating, the plaintiff
2 received an additional 16% rating, which brought his total PPD rating to 35%.⁶ The
3 Nevada Supreme Court held that the 25% cap applied to the lump sum payment even
4 when there were multiple PPD determinations due the PPD determinations being
5 made on the same injury.⁷ The present action is distinguishable from *Eads v. State*
6 *Indus. Ins. Sys.*, due to Respondent's PPD ratings being the result of multiple injuries.
7 If there is a literal reading of the holding in *Eads*, it would appear the 25% cap on the
8 lump sum payment would only apply to individual injuries, not a combination of
9 multiple injuries.

10 However, Petitioner argues that the Appeals Officer Decision's reliance on
11 *Eads* in determining that the 25% cap only applies to a single injury was an error of
12 law. Specifically, Petitioner asserts that if the Nevada Legislature's intent was to
13 limit the application of the 25% cap on PPD determinations to those involving a single
14 injury, it would have done so by codifying *Eads*.⁸ The Court does not agree. In reading
15 NRS 616C.495 and NAC 616C.498, there is nothing in the text that would result in
16 an application that is inconsistent with the holding in *Eads*. Under both NRS
17 616C.495 and NAC 616C.498, if a claimant received a PPD rating in excess of 25%,
18 the claimant "may elect to receive his or her compensation in a lump sum equal to
19 the present of an award for a disability of 25 percent." There is nothing in the
20 language of the Nevada Revised Statutes or the Nevada Administrative Code that
21 would lead to a different result than the one reached in *Eads*. The *Eads* case
22 reaffirmed the appropriate application of the 25% cap on a PPD determination that
23 exceeds 25% when it is based on a single injury. Therefore, the Court does not find
24 the Appeals Officer Decision was affected by an error of law due to the reliance on
25 *Eads*.

26 ⁵ *Eads v. State Indus. Ins. Sys.*, 109 Nev. 733, 857 P.2d 13, (1993).

27 ⁶ *Id.* at 15.

28 ⁷ *Id.*(emphasis added).

⁸ *See, In re Christensen*, 122 Nev. 1309, 1320, 149 P.3d 40, 47 (2006).

1 ///

2 **II. Workers' Compensation Statutes**

3 Next, Petitioner argues that the failure of the Appeals Officer Decision to
4 consider the workers' compensation statutes as a whole, specifically NRS
5 616C.495(1)(g) and NRS 616C.490(9), resulted in a decision that was affected by an
6 error of law. Under NRS 616C.495(1)(g):

7 If the permanent partial disability rating of a claimant seeking
8 compensation pursuant to this section would, when combined with any
9 previous permanent partial disability rating of the claimant that
10 resulted in an award of benefits to the claimant, result in the claimant
11 having a total permanent partial disability rating in excess of 100
12 percent, the claimant's disability rating upon which compensation is
13 calculated must be reduced by such percentage as required to limit the
14 total permanent partial disability rating of the claimant for all injuries
15 to not more than 100 percent.

16 Petitioner argues that this reaffirms their position that when calculating
17 compensation for a PPD rating, the prior PPD ratings must be factored in.

18 Furthermore, under NRS 616C.490(9):

19 [i]f there is a previous disability, as the loss of one eye, one hand, one
20 foot, or any other previous permanent disability, the percentage of
21 disability for a subsequent injury must be determined by computing the
22 percentage of the entire disability and deducting therefrom the
23 percentage of the previous disability as it existed at the time of the
24 subsequent injury.

25 Again, Petitioner argues that the requirement that the rating physician factor in the
26 prior PPD ratings for the purposes of apportionment, reaffirms their position that the
27 calculation of payments must also consider the prior PPD ratings.

28 After review, the Court does not find Petitioner's arguments persuasive. Again,
there is nothing in the text of the statutes that support their argument that the prior
PPD ratings must be subtracted from the 25% cap on lump sum payment and instead
be paid in installments. Both statutes referenced above apply only to the application
of prior PPD ratings as it relates to a PPD rating of a claimant as a whole. It is an
extraordinary leap to apply the reduction of the prior PPD ratings as it relates to a

1 whole person PPD rating, to a reduction of prior PPD ratings as it relates to right to
2 a lump sum payment. Although the Court agrees that the workers' compensation
3 statutes should be considered as a whole, the Court does not find that either of the
4 statutes proffered by Petitioner support a finding that the Appeals Officer Decision
5 was affected by an error of law for failing to consider those statutes.

6 III. AMA Guides

7 Petitioner's next argument is similar to the one addressed above. Petitioner
8 argues that the Appeals Officer Decision was affected by an error of law for failing to
9 consider the *AMA Guides* approach to whole person impairment. Specifically, the
10 requirement that impairment from different regions be combined to determine whole
11 person impairment. After review, the Court does not find that the *AMA Guides*
12 dictate that a prior PPD rating must be subtracted from the 25% cap on the lump
13 sum payment under NRS 616C.495 and NAC 616C.489. Rather, the *AMA Guides*
14 focus on the appropriate method in which to ensure that a claimant's PPD rating does
15 not exceed 100%. This is analogous to the statutes referenced above. In an attempt to
16 prevent a PPD rating exceeding 100%, *AMA Guides* and the statutes referenced
17 above attempt to reduce the current PPD rating by taking into account any prior PPD
18 ratings. For example, if a claimant has two prior PPD ratings of 2% and 5% and
19 subsequently receives a 33% PPD rating, the 7% should theoretically be subtracted
20 from the current 33% PPD rating leaving the claimant with a current PPD rating of
21 26% for the purposes of disability payments. Therefore, leaving the claimant with a
22 25% lump sum payment and 1% of installment payments. Under this logic, it would
23 appear that the *AMA Guides* and applicable Nevada Revised Statutes are designed
24 to address the concern of exceeding a 100% PPD rating, not the reduction of the 25%
25 cap on lump sum payments.

26 Again, the Court does not find that the Appeals Officer Decision was affected
27 by an error of law for failing to consider the *AMA Guides* approach to whole person
28 impairment. The approach to whole person impairment relates solely to the

1 determination of a whole person PPD rating, not a calculation of the payments for
2 the purposes of the 25% cap on lump sum payments under NRS 616C.495(1)(d) and
3 NAC 616C.498.

4 **IV. Appeals Officer Decision Was Not Supported by Substantial Evidence**

5 Lastly, Petitioner argues that the Appeals Officer Decision was not supported
6 by substantial evidence because the decision ignores the prior PPD ratings and fails
7 to subtract those prior ratings from the 25% cap on lump sum payments. It is
8 undisputed that Respondent received two prior PPD ratings. Further, it is
9 undisputed that Respondent received payments pursuant to those ratings via lump
10 sum. However, there is nothing in the Nevada Revised Statutes or the Nevada
11 Administrative Code that requires the reduction of the 25% cap on lump sum
12 payments based on prior PPD ratings. Furthermore, the limited case law on the issue
13 stands for the proposition that the cap on a lump sum payment applies only in the
14 context of a single injury. Thus, the Court finds that the Appeals Officer Decision was
15 supported by substantial evidence because it was not required to subtract the prior
16 PPD ratings from the 25% cap on the current PPD rating.

17 **Conclusion**

18 Having fully reviewing the briefing submitted and considering the arguments
19 of counsel, the Court finds that the Appeals Officer Decision was not affected by an
20 error of law and was supported by substantial evidence. Accordingly, and good cause
21 appearing, the December 16, 2016, *Decision and Order of the Appeals Officer* is
22 **AFFIRMED.**

23 **IT IS SO ORDERED.**

24 **DATED** this 8th day of August, 2017.

25 
26 PATRICK FLANAGAN
27 District Judge
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCp 5(b), I hereby certify that I am an employee of the Second
3 Judicial District Court of the State of Nevada, County of Washoe; that on this
4 8TH day of August, 2017, I electronically filed the following with the Clerk of the
5 Court by using the ECF system which will send a notice of electronic filing to the
6 following:

7 Jason D. Guinasso, Esq., attorney for Respondent; and
8 Lisa Wiltshire Alstead, Esq., attorney for Petitioner.

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11 Judicial Assistant
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1 CODE: 1310
2 Timothy E. Rowe, Esq.,
3 Nevada State Bar No. 1000
4 Lisa Wiltshire Alstead
5 Nevada State Bar No. 10470
6 McDonald Carano LLP
7 P.O. Box 2670
8 Reno, NV 89505-1670
9 775-788-2000
10 Attorneys for City of Reno

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR THE COUNTY OF WASHOE**

13 CITY OF RENO,

14 Petitioner,

Case No. CV17-00065

Dept. No. 7

15 vs.

16 JODY YTURBIDE, and the NEVADA
17 DEPARTMENT OF ADMINISTRATION
18 APPEALS OFFICER,

19 Respondents.
20

21 **CASE APPEAL STATEMENT**

22 The CITY OF RENO submits the following Case Appeal Statement pursuant to Nevada
23 Rules of Appellate Procedure 3(f):

24 **1. Name of Appellant filing this Case Appeal Statement:**

25 City of Reno

26 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

27 The Honorable Patrick Flanagan, District Judge, Department 7 of the Second Judicial
28 District Court of the State of Nevada in and for the County of Washoe.

**3. Identify each appellant and the name and address of counsel for each
appellant:**

1 *City of Reno*
2 Timothy E. Rowe
3 Lisa Wiltshire Alstead
4 McDonald Carano LLP
100 West Liberty St., 10th Floor
Reno, NV 89501

5 **4. Identify each respondent and the name and address of appellate counsel, if known,**
6 **for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as**
7 **much and provide the name and address of that respondent's trial counsel):**

8 *Jody Yturvide*
9 Jason Guinasso, Esq.
10 Reese Kintz Guinasso, LLC
190 West Huffaker, Suite 402
Reno, NV 89511

11 **5. Indicate whether any attorney identified above in response to question 3 or 4 is not**
12 **licensed to practice law in Nevada, and if so, whether the district court granted that attorney**
13 **permission to appear under SCR 42 (attach a copy of any district court order granting such**
14 **permission):**

15 All counsel are licensed in the State of Nevada.

16 **6. Indicate whether appellant was represented by appointed or retained counsel in the**
17 **district court:**

18 Retained counsel.

19 **7. Indicate whether appellant is represented by appointed or retained counsel on**
20 **appeal:**

21 Retained counsel.

22 **8. Indicate whether appellant was granted leave to proceed in forma pauperis, and**
23 **the date of entry of the district court order granting such leave:**

24 No.

25 **9. Indicate the date the proceedings commenced in the district court (e.g., date**
26 **complaint, indictment, information, or petition was filed):**

1 The Petition for Judicial Review of the December 16, 2016 Department of Administration
2 Appeals Officer's decision was filed in the Second Judicial District Court, Case No. CV17-00065,
3 on January 13, 2017.

4 **10. Provide a brief description of the nature of the action and result in the district**
5 **court, including the type of judgment or order being appealed and the relief granted by the**
6 **district court:**

7 This is an appeal of a District Court Order denying Appellant's Petition for Judicial Review
8 in a contested workers' compensation claim.

9 **11. Indicate whether the case has previously been the subject of an appeal to or**
10 **original writ proceeding in the Supreme Court, and if so, the caption and Supreme Court**
11 **Docket number of the prior proceeding:**

12 This case has not previously been subject of an appeal or writ.

13 **12. Indicate whether this appeal involves child custody or visitation:**

14 This appeal does not involve child custody or visitation.

15 **13. If this is a civil case, indicate whether this appeal involves the possibility of**
16 **settlement:**

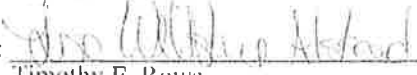
17 This is a civil case. Settlement may be possible.

18 **AFFIRMATION**

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

21 DATED this 7th day of September, 2017.

22 McDONALD CARANO LLP

23 By: 
24 Timothy E. Rowe
25 Lisa Wiltshire Alstead
26 P.O. Box 2670
27 Reno, NV 89505-2670
28 Attorneys for City of Reno

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDONALD CARANO LLP and that on September 7, 2017, I caused to be electronically filed the CASE APPEAL STATEMENT with the Clerk of the Court using the ECF system, which will automatically e-serve the same on the attorney of record set forth below:

Jason Guinasso, Esq.
Reese Kintz Guinasso
190 W. Huffaker Lane, Suite 402
Reno, NV 89511

Additionally, I served the below parties by placing a true copy of the CASE APPEAL STATEMENT enclosed in a sealed envelope with postage prepaid thereon in the United States Post Office mail at 100 West Liberty Street, 10th Floor, Reno, Nevada 89501 addressed as follows:

Jason Guinasso, Esq.
Reese Kintz Guinasso
190 W. Huffaker Lane, Suite 402
Reno, NV 89511

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

I am familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. The envelopes addressed to the above parties were sealed and placed for collection by the firm's messengers and will be deposited today with the United States Postal Service in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 7, 2017 at Reno, Nevada.


An Employee of McDonald Carano LLP