IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73971

CITY OF RENO,

Appellant,

v.

JODY YTURBIDE,

Respondent.

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

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

Dated this 8th day of August, 2018.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Rules

Other Authorities

INTRODUCTION

This appeal presents a question of law as to whether the plain and unambiguous language of NRS 616C.495(1)(d) and NAC 616C.498 (collectively, the "Statute") mandates that the 25% cap on lump sum permanent partial disability ("PPD") awards shall apply to all permanent impairment suffered by an employee under all workers' compensation claims for all injuries. In appellant City of Reno's (the "City") opening brief, the plain language of the Statute, the *Eads* case, the legislative intent, and the purpose of workers' compensation statutes limiting lump sum PPD awards cited ***all*** confirm that the answer to the question presented is "yes". The purpose and intent of lump sum caps in workers' compensation statutes is to expressly protect workers just like employee/claimant Jody Yturbide ("Ms. Yturbide"). That is, workers who have a permanent impairment preventing them from returning to their pre-injury position and therefore requiring compensation for the loss of wages over a lifetime.

In the answering brief, Ms. Yturbide ***fails to address*** the arguments presented in the opening brief regarding the purpose and underlying policy behind the cap on lump sum awards. The answering brief ***fails to address*** statutory construction of the workers' compensation statutes as a whole which confirm disability and impairment must be looked at from a whole person approach. The answering brief ***ignores*** that by definition under NRS 616C.490(1) "disability" and "impairment of the whole

person" are equivalent terms. The answering brief ***ignores*** that the *Eads* case applies the words "a disability" to two PPD awards.

Ms. Yturbide has not and cannot respond to many of the arguments in the opening brief because her position is unsupported and contrary to the law. Ms. Yturbide's interpretation of the Statute renders it meaningless, leads to an absurd result, and is contrary to the legislative intent and purpose of the Statute. For these reasons, the district court order and Appeals Officer Decision, both of which adopt Ms. Yturbide's erroneous position, should be reversed.

ARGUMENT

A. A De Novo Standard Applies to Pure Questions of Law.

Ms. Yturbide's answering brief incorrectly frames the issues in this appeal in terms of whether the Appeals Officer's conclusions are supported by substantial evidence. Although "an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence" (*State Indus. Ins. Sys. v. Khweiss*, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992)) "[t]he construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate." *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). "Because statutory construction is a question of law, [this Court's] review of an administrative ruling

concerning the application of a statute is plenary, rather than deferential. *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 174, 162 P.3d 148, 151 (2007). As conceded by Ms. Yturbide in the answering brief, there is no dispute regarding the operative facts. (Answering Br. at 5.) Thus, a de novo standard applies.

B. The Legal Analysis of *Eads* Applies to Multiple PPD Awards.

Ms. Yturbide argues that application of *Eads* should improperly be limited to factually analogous cases involving one injury and reopening of a claim. The City disagrees. With limited case law in Nevada on this issue, the *Eads* case is instructive legal precedent which should be applied to determine application of a lump sum cap when multiple PPD awards are involved.

Notably, it is not disputed that the cases are factually distinguishable. *See Eads v. State Indus. Ins. Sys.*, 109 Nev. 733, 857 P.2d 13 (1993). Unlike Ms. Yturbide, who received prior PPD awards for different injuries, the injured claimant in *Eads* reopened a prior claim and obtained a second PPD award for the same injury. *Id.*, 109 Nev. at 734-735, 857 P.2d at 14. Moreover, the district court in *Eads* found that the second PPD award was simply an upward adjustment to a previously inadequate award for the same injury. *Id.*, 109 Nev. at 736, 857 P.2d at 15. Yet, Ms. Yturbide argues that based on these ***facts*** the *Eads* case should not apply because more than one injury is at issue here. (Answering Br. at 14-15.)

However, the facts recited in *Eads* are not essential to the legal analysis. The court stated that the "statute is facially clear in its application to one 'who incurs *a disability* that exceeds 25'". *Id.*, 109 Nev. at 735, P.2d at 15. It then goes on to hold 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." *Id.*, 109 Nev. at 736, 857 P.2d at 15 (emphasis added). *Eads* confirms that the word "a" does not limit application of the cap on lump sum PPD awards to a single award.

Ms. Yturbide's answering brief fails to respond to *Eads* and its application to the use of the word "a". Instead, her argument simply repeats that different injuries are involved here and *Eads* only involved one injury and therefore this Court should disregard *Eads* as legal precedent. Ms. Yturbide ignores that in both cases a question of law is presented regarding application of the Statute to cap the lump sum payment where multiple PPD awards are involved. When the Statute and *Eads* are considered in conjunction, *Eads* confirms, contrary to Ms. Yturbide's position, that the plain language of the Statute contemplates application to multiple PPD awards.

C. Ms. Yturbide's Position Regarding the Plain Language is Belied by *Eads.*

In its opening brief, the City cites the plain language of NRS 616C.495(1)(d) and NAC 616C.498. There is no language in NRS 616C.495(1)(d) and NAC

616C.498 that limits the 25% cap on lump sum payments to ***impairments for the same claim or injury***.

To create a limitation not stated in the plain language, Ms. Yturbide limits her analysis of the plain language to the word "a". (Answering Br. at 16.) This one word does not change that there is no limitation in the Statute to the same claim or injury. While Ms. Yturbide argues that "a" should be read as "one single, any," she ***ignores*** that *Eads* has already found "a disability" to apply to multiple PPD awards. As discussed in the above subsection, NAC 616C.498 and the word "a" has been applied to cap combined disability allowances. *See Eads*, 109 Nev. at 736, 857 P.2d at 15. As such, *Eads* belies Ms. Yturbide's position and looks beyond the single word "a" to the entirety of the regulation language and finds it is facially clear. Thus, contrary to Ms. Yturbide's position, the plain language of "a disability" ***does*** equate to "impairment of the whole person" and applies to multiple body parts. *Id.*; *see also* NRS 616C.490(1).

D. If Deemed Ambiguous, the Statute Should Be Construed Pursuant to Rules of Statutory Construction, the Purpose and the Legislative Intent.

Notably, Ms. Yturbide's answering brief does not respond to the City's argument on statutory construction. Should the Court find the Statute's provisions to be ambiguous or *Eads* to not be instructive, then rules of statutory construction apply. To avoid absurd results, the Statute should be construed consistent with the

workers' compensation statutes as a whole which confirm whole person impairment, and not just impairment related to a specific injury or body part, must be considered when applying the statutory cap on lump sum awards. *See* NRS 616C.495(1)(e); NRS 616C.490(9).

Further, the Statute should be construed consistent with the purpose and legislative intent behind the Statute. *State Dep't of Mtr Vehicles v. Lovett,* 110 Nev. 473, 477, 874 P.2d 1247, 1249-50 (1994). Nevada's legislature has considered eliminating the statutory cap on lump sum PPD awards. The legislature ***opposed*** such elimination and explicitly stated its intent behind the statutory cap and its purpose.

In 1995, the Nevada Legislature considered eliminating the statutory cap as part of a comprehensive reform of Nevada's workers' compensation laws and elected to not do so. The legislative history of S.B. 485 contains Senator Townsend's comments in opposition to a proposed amendment that would have eliminated the statutory cap:

> "I want to quote something here which is absolutely essential to this debate. Our committee is very mindful about a specific presentation from Dr. Arthur Larsen, who is the Dean of Workers' Compensation Scholars. He is recognized as an advocate of workers' interests. I quote from this treatise on lump sums:
>
> 'In some jurisdictions, the excessive and indiscriminate use of the lump summing device has reached a point at which it threatens to undermine the real purpose of the compensation system. Since compensation is a

segment of a total income insurance system, *it ordinarily does its share of the job only if it can be depended upon to supply periodic income benefits replacing a portion of lost earnings*. If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back to where he would have been if workers' compensation had never existed. One reason for the persistence of this problem is that practically everyone associated with the system has an incentive—at least a highly visible short-term incentive—to resort to lump summing. The employer and the carrier are glad to see the case off their books once and for all. The claimant is dazzled by the vision of perhaps the largest sum of money he has ever seen in one piece. The claimant's lawyer finds it much more convenient to get his whole fee promptly out of lump sum than protractedly out of small weekly payments. The claimant's doctor, and his other creditors, and his wife and family, all typically line up on the side of encouraging a lump sum settlement. Who then is to hold the line against turning the entire income protection system into a mere mechanism for handing over cash damages as retribution for an industrial injury? It should be the administrator, but even if he is all too often relieved to get the case completely removed from his docket. With all these pressures pushing in the direction of lump summing, it is perhaps surprising that the practice has not become even more prevalent than it already has. The only solution lies in conscientious administration with unrelenting insistence that lump summing be restricted those exceptional cases in which it can be demonstrated that the purposes of the act will best be served by a lump sum award.'

That quote is from someone who is a workers' compensation specialist on the injured workers' side of the equation. Therefore, I would stand in opposition to the amendment."

Hearing Before the Senate Committee on Commerce and Labor Dep't., 68th Session, May 11, 1995, (statement of Senator Townsend).

Accordingly, the legislature has already addressed its intent on application of the Statute. The rules of statutory construction mandate interpretation consistent with this legislative intent. The legislature has voted against eliminating the lump sum cap and has reiterated that lump sum payments should be restricted. The legislature further recognizes that the policy behind the Statute is to ensure periodic payment in place of lost earnings.

This applies directly to Ms. Yturbide who at her PPD evaluation noted "[h]er injury forced early retirement." (II JA 170.) She has issues with daily activities, self-care, cannot read for long periods, "sleep is extremely problematic" due to pain, she is not as social and does not participate in recreational activities like she used to. (*Id.*) The purpose and policy behind limiting lump sum payments identified by the legislature apply to Ms. Yturbide who has a ***total permanent impairment of 40%***. The City is not asking the Court to legislate from the bench but rather to interpret the Statute consistent with this legislative intent.

Accordingly, Ms. Yturbide's failure to address the rules of statutory construction speaks volumes. The Statute when considered as a whole with the workers' compensation statutory scheme, along with the policy behind the Statute and legislative intent, all confirm that the City's application of the Statute to all multiple PPD awards is proper. Furthermore, it is in Ms. Yturbide's best interest to ensure she is provided for over time given her injury forcing an early retirement.

E. The City's Interpretation is Consistent with the AMA Guides.

NRS 616C.490 mandates the use of the AMA Guides for purposes of determining the injured claimant's percentage of disability. The AMA Guides require a whole person impairment approach to evaluating permanent partial disability. Ms. Ytrubide's answering brief mischaracterizes the AMA Guides in stating that "the AMA Guides DO NOT prescribe the combing of the ratings…" They do, at sections 1.3 through 1.4.

Whether the disability rating for an injury to the right arm should be combined with a disability rating for an injury the left arm is immaterial. It is sufficient to state that disability ratings are based on impairment of the person as a whole. The statutory cap should apply equally to persons who sustain injuries that lead to the same total level of impairment, regardless of whether the impairments resulted from multiple injuries or injuries to different areas of the body.

CONCLUSION

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

Appeals Officer. For these reasons, the City respectfully requests that the Appeals Officer Decision, and the district court order affirming that decision, be reversed with instructions that the lump sum PPD award in this case should be limited to 18%.

AFFIRMATION

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

Respectfully submitted this 8th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 3,206 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this

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

Dated this 8th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on August 8, 2018, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system.

Dated: August 8, 2018.

/s/ *Lisa Wiltshire Alstead*
Employee of McDonald Carano LLP