CASE NO. 73971

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

CITY OF RENO, Appellant

v.

JODY YTURBIDE, Respondent

APPEAL FROM THE
SECOND JUDICIAL DISTRICT COURT, RENO, NEVADA

BRIEF OF AMICUS CURIAE NEVADA JUSTICE ASSOCIATION

In Support of Respondent JODY YTURBIDE
In Support of AFFIRMANCE

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Docket 73971 Document 2018-33017

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Amicus Curiae, NEVADA JUSTICE ASSOCIATION (not a pseudonym) is a non-profit educational organization;

2. The undersigned counsel of record for NEVADA JUSTICE ASSOCIATION are the only attorneys who have appeared on its behalf in this matter. It did not appear in the District Court, nor before the Appeals Officer in the administrative proceeding.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 27th day of July 2018.

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CONCISE STATEMENT OFAMICUS CURIAE

The Nevada Justice Association (NJA) is an organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system. NJA is a non-profit educational organization whose charter strives towards three primary goals:

- To continually provide its membership with up-to-date knowledge and information through continuing legal education programs and Nevada specific publications.
- To monitor the legislative session in order to ensure that Nevadans' access to the courts is not diminished.
- To educate the public regarding their individual rights and responsibilities as citizens.

Additionally, the NJA has a keen interest in the development of Nevada law in the areas in which its members practice. One of these important areas is workers' compensation law. The NJA has an interest in this case because its outcome will have a profound effect on the practice of law in the workers' compensation area and will, especially, impact upon the workers' compensation benefits that are due to the clients represented by NJA members and those clients' families.

NJA has authority to file this brief under NRAP 29(a) upon the condition precedent of this Court granting its motion for leave to file the brief under NRAP 29(c).

SUMMARY OF ARGUMENT

There is a very good reason that the Hearing Officer, the Appeals Officer, and the District Court all ruled against the argument that the City of Reno continues to advance before this Court: there is no law that supports the argument. Period. The statute in question, NRS 616C.495, and the regulation, NAC 616C.498, by their plain language apply to "a disability." Throughout the statute the words "a disability" are used when applying the caps on lump sum permanent partial disability (PPD) awards. This makes clear that the caps are to be applied on a particular disability caused by an industrial injury and NOT all disabilities regardless of what body part or condition and regardless of whether or not it was on the same claim.

The case of *Eads v. SIIS*, 109 Nev. 733, 857 P.2d 13 (1993) is cited by Appellant as being controlling law in this matter. This is incorrect. In *Eads* the injured employee had a subsequent PPD award on a ***reopened*** claim. The Court in Eads makes clear that "where, as here, ***an injured worker's case is reopened*** for further treatment and evaluation of the original disability, NRS 616.607(1)(c) applies to the combined disability allowance and limits any lump sum payments to a total of twenty-five percent." 109 Nev. at 736. (emphasis added) Thus, by its own facts and language, *Eads* applies only to reopened claims and is not controlling here. Nor is it even persuasive. It makes sense to apply the caps on reopening

because that is "a disability" (singular) as it arises out of one accident and injury, NOT multiple claims for injuries on different dates and to different body parts or conditions.

The Appellant is asking this court to legislate from the bench, which it cannot and must not do. The approach taken by the City of Reno in this case is NOT how workers' compensation lump sum PPD awards have ever worked. If the Legislature saw fit to make lump sum PPD award limitations cumulative as to all claims, body parts, or conditions, then it would expressly do so. It could, but it has not. The plain language of NRS 616C.495(1)(d) controls and there is no occasion for the Court to rewrite the words "a disability" into "all disabilities."

There are many public policy considerations that would be at play in limiting lump sum PPD awards to 25% for a lifetime on all claims for all body parts and conditions. The Court is ill-suited to perform, and likely not eager to perform, the Legislature's function in sorting out all of the competing interests of all of the stakeholders in the workers' compensation realm to come up with the best and most sound public policy on the matter. The Court customarily and most emphatically refuses to do the Legislature's job for it. The Court should follow that tradition in this case and point the City of Reno to Carson City in 2019 if it feels that a 25% lifetime cap on lump sum PPD awards would be good public policy.

ARGUMENT

I. BY THEIR PLAIN LANGUAGE NRS 616C.495 AND NAC 616C.498 ONLY CAP LUMP SUM PAYMENTS FOR THE SAME DISABILITY OR PERMANENT IMPAIRMENT TO THE SAME BODY PART.

The Appeals Officer correctly held that NRS 616C.495(1)(d) and NAC 616C.498 do not limit or require a reduction of the lump sum payment an injured worker is entitled to receive when an injured worker has multiple claims with injuries to separate body parts. Appellant's argument is flawed as it not only fails to acknowledge the clear and unambiguous language of the statute and the regulation, it in fact turns the plain language on its head and attempts to delete the critical language which is "a disability" and replace it with "all disabilities" instead. NRS 616C.495(1)(d)[1] as it existed at the time period involved in this case specifically and clearly states that

> (d) Any claimant injured on or after July 1, 1995 may elect to receive his or her compensation in a lump sum in accordance with regulations adopted by the Administrator and approved by the Governor. The Administrator shall adopt regulations for determining the eligibility of such a claimant to receive all or any portion of his or her compensation in a lump sum. Such regulations may include the manner in which an award for a permanent partial disability may be paid to such a claimant in installments. Notwithstanding the provisions of NRS 233B.070, any regulation adopted pursuant to this

[1] NRS 616C.495 has been modified to increase the percentage of a lump sum for a disability to 30% as of July 1, 2017 pursuant to the passage of AB 458 in the 2017 legislative session. Further, the Legislature rendered NAC 616C.498 moot by putting the lump sum caps all back into NRS 616C.495 rather than continuing to delegate the policy determination to the Division of Industrial Relations.

> paragraph does not become effective unless it is first approved by the Governor

NAC 616C.498 as adopted by the Division of Industrial Relations (DIR) pursuant to the statute states as follows:

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

Both of these laws clearly and unequivocally state that it is "a disability" (NRS 616C.495) or "a permanent impairment" [NAC 616C.498] that is capped at 25%. The holding by the Supreme Court in *Eads v. SIIS*, 109 Nev. 733, 857 P.2d 13 (1993) is consistent with the statute and the regulation.

In *Eads,* the Court held that where "an injured worker's case is ***reopened*** for further treatment and evaluation of the **original disability**, NRS 616.607(1)(c)[2] applies to the combined disability allowance and limits any lump sum payments to a total of twenty-five percent." [Emphasis added,] The Court also made the distinction of the legislative use of the word "a." The Court stated

> that the statute is facially clear in its application to one "who incurs *a*

[2] Re-codified as NRS 616C.495(1)(d).

disability that exceeds 25 percent." (Emphasis added.)
(*Id*.)

There is language in the *Eads* decision which confirms the Court's interpretation that the Legislature intended to limit the 25% lump sum cap to "a disability." The Court noted that Mr. Eads did not contend that the additional award of sixteen percent represented compensation for a new or aggravated injury. The Court determined that

> Since Eads' PPD award increased from nineteen percent to thirty-five percent for the same disability, the lump sum payment available to Eads may not exceed the twenty-five percent limit specified in [NRS 616C.495].

This ruling makes it clear that the Court's interpretation of NRS 616C.495 is based upon the clear and unambiguous language of the statute which only imposed the lump sum cap to "a disability" NOT "all disabilities." Had the insurer in *Eads* limited the lump sum amount for two different disabilities to different body parts in two different claims, it is clear that the *Eads* Court would have held that the award could be paid in lump sum up to the cap to for ***each separate disability***. The facts before the Court here in Ms. Yturbide's case are completely and materially distinguishable from those in *Eads*. Whereas in *Eads* the injured employee had a ***reopened*** claim that resulted in an increase in the percentage of permanent disability or impairment to the ***same body part***, Ms. Yturbide has **NEVER** had a prior injury, disability, or rating on her cervical spine. Ms. Yturbide's prior two

percent (2%) and seven percent (7%) ratings were to completely different body parts, NOT her cervical spine which is what her 33% disability in this case pertains to. Contrary to Appellant's bold claim, the *Eads* case is not on point, is not controlling, and is not precedent for this case. This case turns on the plain language of NRS 616C.495(d) and NAC 616C.498. Incidentally, NAC 616C.498 was not promulgated by DIR until May 10, 1996, about three years after *Eads* and the DIR certainly did NOT incorporate the rationale of *Eads* into the regulation with respect to different disabilities for different body parts or conditions on different claims.

Thus, the Appeals Officer correctly applied the law in the administrative Decision and Order. As stated by the Honorable Patrick Flanagan:

> There is nothing in the language of the Nevada Revised Statutes or the Nevada Administrative Code that would lead to a different result than the one reached in *Eads*. The *Eads* case reaffirmed the appropriate application of the 25% cap on a PPD determination that exceeds 25% when it is based on a single injury. Therefore, the Court does not find the Appeals Officer Decision was affected by an error of law due to the reliance on *Eads*.

JA394.

The Hearing Officer, the Appeals Officer, and the District Court Judge understood perfectly what was happening here and correctly applied the law in this case. The argument advanced by the Appellant in this matter turns decades of workers' compensation claims administration on its head. To the knowledge of the

authors of this Brief's, based on combined workers' compensation law practice experience of nearly 50 years, no other insurer or TPA follows the practice argued for in this appeal. Everyone else understands the plain language of both the statute and the regulation to support the decisions of the administrative law judges and the District Court Judge in this case.

The findings and conclusions are legal determinations that are closely related to the facts and, therefore, under the well-settled authority of the Supreme Court of Nevada, the Appeals Officer's Decision and Order is entitled to deference. *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 600, 137 P.3d 1150 (2006). The decision is fully supported by substantial evidence on the record taken as a whole. The District Court's order denying the Petition for Judicial Review should be affirmed.

II. THE APPELLANT'S ATTEMPT TO COMPARE A LUMP SUM PAYMENT WITH THE WHOLE PERSON STANDARD LEADS TO ABSURD RESULTS AND WAS PROPERLY REJECTED BY THE HEARING OFFICER, THE APPEALS OFFICER AND THE DISTRICT COURT JUDGE.

As a matter of introduction it must first be pointed out that the Appellant misleadingly construes some of the language used in the statutes and creates a semantic argument that risks an erroneous result based on confusion and misunderstanding. The *American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides) was incorporated by

reference into the law by the legislature in NRS 616C.110. The AMA Guides must be used in determining percentages of disability for PPD awards. Despite that fact that Nevada and other states use it that way, it is a book that, by its own admonition, was never intended to be used to determine how much of a "disability" a person has for purposes of legal or monetary determinations. AMA Guides Ch. 1 Accordingly it never uses the terms "disabled" or "disability" in its text. Instead it uses the term "impairment of the whole person." Because of this mismatch in language the legislature clarified that "disability" and "impairment of the whole person" are interchangeable and equivalent terms:

> **NRS 616C.490 Permanent partial disability: Compensation.**
>
> 1. Except as otherwise provided in NRS 616C.175, every employee, in the employ of an employer within the provisions of chapters 616A to 616D, inclusive, of NRS, who is injured by an accident arising out of and in the course of employment is entitled to receive the compensation provided for permanent partial disability. As used in this section, "disability" and "impairment of the whole person" are equivalent terms. …

The Appellant twists this convenient explanatory device into an argument that the Legislature intended the use of "a disability" in NRS 616C.495 to mean that the 25% cap on lump sum PPD awards for "a disability" means a *cumulative* cap of 25% lump sum awards on ALL disabilities because "disability" is equivalent to "impairment of the whole person." This argument is actually a request that this Court legislate from the bench and read an unorthodox and unintended meaning

into the plain and unambiguous language of NRS 616C.495 which would produce an absurd result and an unnecessary and complex change to decades of workers' compensation claims administration. If the Legislature wanted what is argued for by Appellant, it surely would have clearly stated so.

Latching onto the "impairment of the whole person" is equivalent to "disability" language contained in NRS 616C.490(1) the Appellant argues that the "impairment of the whole person" must be considered when applying the statutory cap on lump sum awards. Fundamentally the Appellant is confusing and misapplying exactly what a lump sum is. First it is not an award, rather it is the election of one of two methods by which the PPD award may be received by an injured worker. The first method is to accept periodic "installment" payments (usually monthly) until the injured worker reaches the age of 70 as provided for in NRS 616C.490. The second method is to accept a lump sum under NRS 616C.495.

The Appellant confuses the issue by discussing the AMA Guides and how it instructs on how to combine certain impairments for determining a "whole person" rateable impairment. The AMA Guides has charts on how to combine certain impairments and also on how to convert impairments to "whole person." For example if an injured worker has injured his or her right arm, the AMA Guides will first calculate a percentage of impairment for the "right upper extremity" body

part. The Guides' methodology then calls for that "right upper extremity" percentage to be converted using a chart to arrive at the "whole person impairment" percentage. To illustrate based on Appellant's "extreme example" of a person who has their arm amputated in an accident, the "upper extremity impairment" would be 100% because the arm is gone; however, the "whole person impairment" would only be 60% because the person is still alive and still has another arm to use.

The methodology in the AMA Guides is not the issue when it comes to application of the lump sum cap in NRS 616C.495. The issue before the Court does not center on the underlying disability/impairment rating and whether it was calculated correctly. There is no issue between the parties as to the final determination of the Respondent's rating which is 33%. The issue is the manner of *paying* the award. Because there is no case law, statute, or regulation to support the Appellant's position, it pivots to the rating process to craft an argument that the method for rating impairments set out in the AMA Guides also has a bearing on the statute that allows for a lump sum payment of the award. It doesn't. The creation of the PPD award in NRS 616C.490 and the lump sum alternative method and its limitation of 25% for "a disability" under NRS 616C.495 is the Legislature's policy determination, not the AMA Guides. Which comes full circle to the requirement that the Court merely apply the plain language of the statute and the

regulation which states clearly that the 25% cap on lump sum award elections is for "a disability" in the claim at issue and NOT "all disabilities" for all claims for the entire life of the injured worker.

The Appellant then states that the lump sum payments cannot exceed 100% PPD. Opening Brief, page 21. That is a correct observation based upon the provisions of NRS 616C.495(1)(g) which was added by SB 232 in the 2015 legislative session, after Ms. Yturbide's date of injury.[3] The argument confirms that the Appellant completely misunderstands NRS 616C.495 and is misapplying the actual rating process of combining impairments. Simply put, the relevant rule is that you cannot receive more than 25% of "**a disability**" in a lump sum. The Appellant argues at length about its "extreme example" that it contends illustrates its argument. What it actually illustrates is the absurdity of the argument. If an injured worker actually first had one arm amputated and was rated at 60% PPD, he or she (for the time period applicable to this case) would be able to accept 25% of that award in a lump sum and would receive installment payments until age 70 on the remaining 35% of the PPD. This is fine so far. But then in the "extreme example" the Appellant has the same injured worker losing his or her other arm in a second industrial accident. At that point there would be no further PPD award

[3] NRS 616C.495(1)(g) also illustrates that the Legislature is fully capable of expressing if and when it wants multiple disabilities to be combined for some purpose. It did so in subsection 1(g), it DOES NOT do so in subsection 1(d). The language is clear and plain. That is the end of it.

because under NRS 616C.435(1)(c) the hypothetical injured worker would be declared permanently and totally disabled (PTD) and would receive 66.66% of his or her average monthly wage for life (the earlier 25% lump sum PPD already paid would be recovered pursuant to the methodology in NRS 616C.440(4)). Thus, the "extreme example" set forth by Appellant in its opening brief is so extreme that it is actually an impossible scenario. It is, in fact, absurd.

III. APPELLANT'S PUBLIC POLICY ARGUMENTS DO NOT JUSTIFY LEGISLATING FROM THE BENCH AND THERE ARE MANY OTHER PUBLIC POLICY CONSIDERATIONS THAT WOULD BE BEST LEFT TO THE LEGISLATURE.

The Appellant attempts to justify the Court's rewriting of NRS 616C.495 by engaging in some public policy arguments. The Appellant refers to testimony when the cap was being discussed during the 1987 legislature. AB 757 that year attempted to fix an issue regarding the language in the lump sum statute which prevented certain injured workers from being able to elect lump sum payments of their PPD awards or even accept less than what they were entitled to receive in order to get a lump sum if their award was over 25%. The Appellant does not fairly represent the testimony. It is clear from reading the entire testimony, along with the other stakeholders, that the lump sum payment of the PPD award needed to be fairly available to all injured workers. Larry Zimmerman[4] testified that

[4] Mr. Zimmerman represented CDS and advocated for the self-insured employers in the State of Nevada.

> if a claimant had a disability over 25 percent that have probably been out of work for a considerable amount of time and would need a lump sum settlement to get their affairs together.
> Addendum 4-5.

As Mr. Badger testified

> Most of the people with a permanent injury have been out of work for a long time and are financially devastated. Addendum 4.

It is clear that the concern was that the lump sum was a necessary mechanism for the injured worker to cover the financial loss they experienced. Consider the effect on an injured firefighter, for example. If the firefighter earned $120,000 per year ($10,000 per month) his or her average monthly wage under workers' compensation law is still capped at a current (FY 2019) maximum of $5,856.54 and therefore his or her temporary total disability (TTD) benefits, two-thirds of the maximum, for his or her time off of work due to the injury is artificially limited to $3,904.36 per month.

http://dir.nv.gov/uploadedFiles/dirnvgov/content/WCS/ImportantDocs/Max%20Comp%20FY19%20Memo%20and%20Calc.pdf. It is not difficult to see how a person accustomed to earning $10,000 per month could quickly fall behind on financial obligations if he or she has to be off of work for several months and only receiving limited TTD benefits. The lump sum PPD award is often used by injured workers to "catch up" after falling behind while injured. If that ability were limited or eliminated many injured workers would be bankrupted by their on the

job injuries. Moreover, desperate injured workers could turn to the myriad of companies that offer cash for future periodic payments at a steep discount (e.g. www.jgwentworth.com) This would exacerbate the very social policy problem that Appellant is arguing about. The injured worker may as well get the legitimate present value lump sum at a fair statutory rate directly from the workers' compensation insurer, rather than be fleeced when in desperation he or she turns to companies that offer a pittance of cash for the future payments.[4]

In Ms. Yturbide's case, there is nothing in the record to indicate that she will end up destitute if she receives 25% of her 33% PPD in lump sum. She may qualify for vocational retraining to do something else. It is suggested that this public servant has "retired" and may be receiving a good pension. Appellant's argument that she will be destitute is somewhat hollow.

As to the other public policy arguments advanced by Appellant, the Court should consider all of the very good reasons that the Court should not legislate from the bench. For example, without the benefit that the Legislature gets of holding public hearings and getting input from all of the stakeholders on the issue, how does the Court know that all the other workers' compensation insurers agree

[4] While it is true that NRS 616C.205 does not permit assignment of workers' compensation benefits prior to issuance of the check, that does not mean that unsophisticated injured workers and unscrupulous operators would not attempt to do so by, for example, simply changing the address that the checks go to the address of the company paying the discounted lump sum and providing it with a power of attorney to cash the checks.

with the Appellant here and want the aggregation of all disabilities for purposes of the 25% lump sum cap?

Some insurers may prefer to pay the lump sum and get the case off of their books without the administrative burden of decades of having to send small monthly checks to a multitude of injured workers. Maybe some or all of the other insurers do want this because their "bean counters" figure they can make more money off of keeping the money that would otherwise be paid in lump sum and investing it for themselves while making the periodic payments, perhaps through purchasing annuities. Maybe some or all of the insurers would like the windfall that they would receive when some injured workers die before age 70 and the remaining periodic payments no longer have to be made.

Many insurers undoubtedly like the provisions of NRS 616C.495(2) which states as follows:

> 2. If the claimant elects to receive his or her payment for a permanent partial disability in a lump sum pursuant to subsection 1, all of the claimant's benefits for compensation terminate. The claimant's acceptance of that payment constitutes a final settlement of all factual and legal issues in the case. By so accepting the claimant waives all of his or her rights regarding the claim, including the right to appeal from the closure of the case or the percentage of his or her disability…[with some limited exceptions]

If, in subsequent claims, the injured worker is barred from accepting a lump sum PPD award because of an aggregation of prior awards in different claims to

different body parts totaling over 25%, the insurers will lose the certainty and finality that comes from the above statutory provision. Some insurers may not like that very much. The Legislative process could balance and account for any such concerns, this Court is not equipped to "make sausage" to account for the concerns of the interested parties. This illustrates the wisdom of the Court's repeated refusal to try to do the Legislature's job. The Court should reaffirm that wisdom in this case.

And candidly, the Nevada Justice Association's members have an interest here as well. It is no secret that most injured workers cannot afford to hire attorneys and pay them hourly like insurance companies can. Workers' compensation is a highly specialized area of the law requiring application of complex legal rules that are, in some instances, finely nuanced. The business model of attorneys practicing workers' compensation law universally relies in part on a contingent fee on lump sum PPD awards. The ruling argued for by Appellant in this case could make it more difficult for the most disadvantaged and needy injured workers to hire counsel to help them navigate complex legal waters. Attorneys who know that the injured worker has prior claims with 25% or more in prior PPD awards are more likely to pass on taking on representation of those injured workers, even if the new claim is for a completely different body part or condition. This, in turn, will further strain the limited state resources of the

Nevada Attorney for Injured Workers (NAIW) which is required to represent any injured workers who do not have private counsel at the Appeals Officer level administrative hearings.

As the Court can see, there are many public policy ramifications to reading "all disabilities" into NRS 616C.495 instead of applying the plain language of "a disability." If the Appellant wants this rule, it needs to take it up with the legislature because it is not currently the law in Nevada.

Simply put, if the Nevada Legislature had intended to put a lifetime cap of 25% on an injured worker's right to elect lump sum PPD awards, the statute would clearly state just that. It would state something like this:

> Any claimant injured on or after July 1, 1981, and before July 1, 1995, may only elect a total of 25% in a lump sum in their lifetime for all industrial claim ratings. Once the injured worker has elected a total of 25% in a lump sum, all future PPD awards for any and all claims shall only be paid in installments.

NRS 616C.495 doesn't say that.

The position of the Appellant expressly requests that this Court legislate from the bench. It literally asks this Court to rewrite NRS 616C.495 and NAC 616C.498 and disregard the clear and unambiguous language that the cap applies to "a disability." This, as the Court knows is impermissible. The Court must follow its rules of statutory construction and apply the plain language of the statute and the regulation. There is simply no ambiguity in NRS 616C.495. Therefore, under

well-settled principles of statutory construction, there is no occasion for the Court to do anything other than apply the statute as written as did the Court in *Eads***.** It is well settled that

> Where the language of the statute is plain and unambiguous, such that the legislative intent is clear, a court should not 'add to or alter [the language] to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.' *Maxwell v. SIIS*, 109 Nev. at 330, 849 P.2d at 269 (citations omitted). [This court] will not construe a statute to produce an unreasonable result when another interpretation will produce a reasonable result.

Breen v. Caesars Palace, 102 Nev. 79, 82, 715 P.2d 1070, 1072 (1986).

For the reasons set forth above Amicus Curiae NJA supports the Respondent, JODY YTURBIDE's's arguments and supports AFFIRMING the District Court's August 8, 2017 Order Denying Judicial Review. The Decision and Order of the Appeals Officer dated December 16, 2016, was correct under the facts and the law. The Court should AFFIRM the Order of the District Court which AFFIRMS the Appeals Officer's December 16, 2016 Decision and Order.

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CONCLUSION.

In accordance with the above, the Amicus Curiae Nevada Justice Association supports the Respondent in this matter. The Appeals Officer's December 16, 2016 Decision and Order in this matter was correct and the District Court's denial of the Appellant Petition for Judicial Review was also correct.

RESPECTFULLY SUBMITTED this 27th day of July 2018

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ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF THE NEVADA RULES OF APPELLATE PROCEDURE

James P. Kemp, Attorney for Amicus Curiae Nevada Justice Association, by signing below herby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

1. 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 2010 in Times New Roman size 14 font;

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

Proportionately spaced, has a typeface of 14 points or more, and contains 4,657 words;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of July 2018

/s/ James P. Kemp
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 27, 2018, I filed the foregoing Brief of Amicus Curiae through the Supreme Court of Nevada's electronic filing system along with the Motion seeking leave to file the brief. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

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