IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI),

Appellants,

v.

JARED SPANGLER,

Respondent.

SUPREME COURT NO: 76295

DISTRICT COURT NO: A-17-759871-J

APPELLANTS' APPENDIX VOLUME 2

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INDEX TO APPELLANTS' APPENDIX[1]

PLEADING, MOTION, ORDER, TRANSCRIPT, EXHIBIT	VOLUME	PAGE NUMBER
TRANSMITTAL OF RECORD ON APPEAL	1	1
RECORD ON APPEAL IN ACCORDANCE WITH THE NEVADA ADMINISTRATIVE PROCEDURE ACT	1	2
DECISION AND ORDER OF APPEALS OFFICER BRADLEY FILED JULY 20, 2017	1	3-11
CORRESPONDENCE (**DECISION LETTER**) FROM DANIEL SCHWARTZ, ESQ TO APPEALS OFFICER BRADLEY FILED JUNE 21, 2017	1	12
CLAIMANT'S APPEAL MEMORANDUM FILED APRIL 20, 2017	1	13-20
NOTICE OF RESETTING FILED FEBRUARY 22, 2017	1	21-22
CLAIMANT'S SUPPLEMENTAL EVIDENCE PACKAGE (**MARKED CLAIMANT'S EXHIBIT 2**) FILED DECEMEBER 29, 2016	1	23-29
ORDER SETTING HEARING READINESS STATUS REPORT FILED OCTOBER 13, 2016	1	30-31
EMPLOYER'S INDEX OF DOCUMENTS (**MARKED EMPLOYER'S EXHIBIT A**) FILED JUNE 15, 2016	1	32-80

[1] Note: This Appendix contains the Record on Appeal exactly as it appeared in District Court. District Court documents are included after the formal Record on Appeal at Volume 2

EMPLOYER'S APPEAL MEMORANDUM FILED JUNE 15, 2016	1	81-90
CLAIMANT'S EVIDENCE PACKAGE (**MARKED CLAIMANT'S EXHIBIT 1**) FILED JUNE 13, 2016	1	91-138
NOTICE OF APPEAL AND ORDER TO APPEAR FILED MAY 10, 2016	1	139-146
PETITION FOR JUDICIAL REVIEW FILED ON AUGUST 14, 2017	2	147-158
PETITIONER'S OPENING BRIEF FILES ON OCTOBER 20, 2017	2	159-176
RESPONDENT'S ANSWERING BRIEF	2	177-193
COURT MINUTES FROM MAY 7, 2018	2	194
COURT MINUTES FROM MAY 16, 2018	2	195-196
ORDER GRANTING PETITION FOR JUDICIAL REVIEW FILED ON JUNE 18, 2018	2	197-200
NOTICE OF ENTRY OF ORDER FILED ON JUNE 19, 2018	2	201-207
NOTICE OF APPEAL FILED ON JULY 2, 2018	2	208-219
RESPONDENTS' MOTION FOR STAY PENDING SUPREME COURT APPEAL AND MOTION FOR ORDER SHORTENING TIME FILED ON JULY 10, 2018	2	220-237
OPPOSITION TO MOTION FOR STAY PENDING SUPREME COURT APPEAL FILED ON JULY 13, 2018	2	238-253
COURT MINUTES FROM JULY 16, 2018	2	254
ORDER GRANTING MOTION FOR STAY FILED ON AUGUST 20, 2018	2	255-256
NOTICE OF ENTRY OF ORDER FILED ON AUGUST 21, 2018	2	257-261

CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 12 day of March 2019, service of the attached **APPELLANTS' APPENDIX VOLUME 2** was made this date by depositing a true copy of the same for mailing, first class mail, and/or electronic service as follows:

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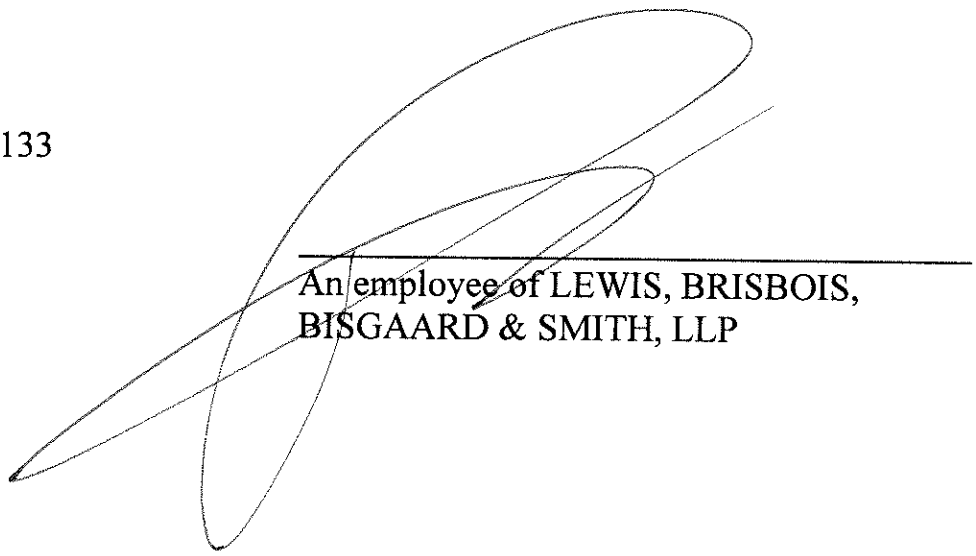

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DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER, Petitioner, vs. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, Respondents.	CASE NO.: A-17-759871-J DEPT. NO.: Department 18

PETITION FOR JUDICIAL REVIEW
ARBITRATION EXEMPTION CLAIMED
REVIEW OF ADMINISTRATIVE DECISION

Date: N/A
Time: N/A

COMES NOW, Petitioner, JARED SPANGLER, by and through his attorney, Lisa M. Anderson, Esq. of the law firm of Greenman, Goldberg, Raby & Martinez and prays for this Court to judicially review the decision of the Appeals Officer, dated July 20, 2017 attached hereto as Exhibit "1" and made a part hereof. This Petition for Judicial Review is made pursuant to the provisions of NRS 233B.130.

Petitioner claims his substantial rights have been prejudiced because the administration findings, inferences, conclusions or decisions are:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

WHEREFORE, Petitioner prays that this Court allow briefs to be filed, oral argument be heard, and following a review of the record, that this Court enters its Order reversing the above decision of the Appeals Officer.

DATED this 14th day of August, 2017.

GREENMAN, GOLDBERG, RABY & MARTINEZ

LISA M. ANDERSON, ESQ.
Nevada Bar #4907
601 South Ninth Street
Las Vegas, NV 89101
Attorneys for Petitioner

EXHIBIT 1

16-2077Y

FILED

JUL 20 2017

APPEALS OFFICE

NEVADA DEPARTMENT OF ADMINISTRATION

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim of JARED SPANGLER 3550 TUNDRA SWAN ST. LAS VEGAS, NV 89122, Claimant.	Claim No.: 16C52G555847 Hearing No.: 1523393-MT Appeal No. : 1524756-GB Employer: CITY OF HENDERSON ATTN: SALLY IHMELS P.O. BOX 95050 MSC 127 HENDERSON, NV 89009-5050

DECISION AND ORDER

The above-captioned appeal came on for hearing before Appeals Officer GEORGANNE W. BRADLEY, ESQ. The claimant, JARED SPANGLER (hereinafter referred to as "claimant"), was represented by his counsel, LISA M. ANDERSON, ESQ., of GREENMAN GOLDBERG RABY & MARTINEZ. The Employer, CITY OF HENDERSON (hereinafter referred to as "Employer"), was represented by DANIEL L. SCHWARTZ, ESQ., of LEWIS BRISBOIS BISGAARD & SMITH LLP.

On March 15, 2016, the claimant was informed that his industrial insurance claim was denied. Claimant appealed that determination and the parties agreed to bypass the Hearing Officer and proceed before this Court, generating the instant hearing.

After considering the documentary evidence and the argument of counsel, the Appeals Officer finds and decides as follows:

FINDINGS OF FACT

1. On February 9, 2016, the claimant, JARED SPANGLER, alleges that has hearing loss and ringing in the ears which he attributes to job related exposure to loud noises. The claimant was seen by Dr. Blake at Anderson Audiology where hearing loss was noted. The claimant

appears to have failed to have revealed his earlier 2005 denied hearing loss claim or that the claimant apparently has been working a desk job for the last 5-6 years. (Exhibit A at 1)

2. The Employer's Report of Industrial Injury or Occupational Disease notes a nearly one month delay in reporting the hearing loss. (Exhibit A at 2)

3. The Employer's First Notice of Injury or Occupational Disease notes that the claimant alleges exposure to excessive loud noises and that he has had tinnitus for several years. (Exhibit A at 3)

4. The claimant has previously filed a hearing loss claim in November of 2005. On February 22, 2006, Dr. Manthei noted that the claimant's family had a positive history of hearing loss. He noted that MRI testing revealed that the claimant had revealed "a contrast enhancement of the left internal auditory canal suggesting extrinsic compression from a neoplastic process of the brain." It was concluded that the claimant's symptomatology was most likely due to a nonindustrial component, and that the claimant's hearing loss should not be considered to be industrial in nature. A claim denial determination for the November 1, 2005, hearing loss claim was issued on March 7, 2006. (Exhibit A at 4-21)

5. Hearing testing has been performed throughout the claimant's employment with the City of Henderson. (Exhibit A at 22-34)

6. As a result of hearing testing in October of 2015, the claimant was seen by Dr. Blake at Anderson Audiology. A hearing loss was found which was found to be suggestive loss due to noise exposure. (Exhibit A at 35-38)

7. A medical release was signed by the claimant on February 9, 2016. (Exhibit A at 39)

8. On March 2, 2016, the claimant was seen by Dr. Theobald. The claimant complained of difficulty in hearing conversational speech, particularly women and children's voices, especially in the presence of background noise. It was noted that the claimant has a "possible tumor located in the area of the left cochlear nerve." It was recommended that the claimant be seen by a neuro-otologist to assess the potential likelihood of left sided cochlear pathology. (Exhibit A at 40-43)

9. On March 15, 2016, a claim denial determination was issued. However, it was noted that bills related to Dr. Theobold's evaluation would be paid. (Exhibit A at 44)

10. On March 28, 2016, the claimant appealed the claim denial determination. (Exhibit A at 45) This appeal was transferred directly to the Appeals Officer. (Exhibit A at 46)

11. Claimant provided fifty-one (51) pages of evidence which was reviewed and duly considered. (Exhibits 1-2)

12. These Findings of Fact are based upon substantial evidence within the record.

13. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa.

CONCLUSIONS OF LAW

1. It is the claimant, not the Employer, who has the burden of proving his case, and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

2. In attempting to prove his case, the claimant has the burden of going beyond speculation and conjecture. That means that the claimant must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, §80.33(a).

3. NRS 616A.010 makes it clear that:

> A claim for compensation filed pursuant to the provisions of this chapter or chapter 617 of NRS must be decided on its merits and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

4. Claimant was unable to meet his burden of proof in this case. He was unable to demonstrate that his hearing loss is a compensable industrial injury.

5. Under NRS 616C.150 and NRS 617.358, the claimant has the burden of proof to show that the injury arose out of and in the course of employment. The claimant must satisfy this burden by a preponderance of the evidence. Further, NRS 616B.612 mandates that an employee is only entitled to compensation if he is injured in the course and scope of his employment.

6. The Nevada Supreme Court has held that:

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work ... the injured employee must establish a link between the workplace conditions and how those conditions caused the injury ... a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment.

Rio Suite Hotel v. Gorsky, 113 Nev. 600 (1997).

7. Some courts have found a distinction between "the course of employment" and "arising out of employment." In addition to occurring while at work, the injury must result from a hazard connect with the employment. See, Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996).

8. In Nevada, the Supreme Court has defined the term "arose out of," as contained in NRS 616C.150, to mean that there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, the claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. The claimant has failed to meet his burden in this regard, especially given the prior 2006 claim denial and the intervening primarily desk job assignment of the claimant.

9. NRS 616A.030 defines an accident as "... an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." As explained above, there is no known acute trauma or specific mechanism of injury, therefore, no statutory accident has been established.

10. Furthermore, NRS 616A.265 defines an injury as ". . . a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence . . ." Here, there is no statutory injury for the reasons set forth above.

11. The Nevada Supreme Court has held that:

> An award of compensation cannot be based solely upon possibilities and speculative testimony. A testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury...

United Exposition Services Co. v. SIIS, 109 Nev. 421, 851 P.2d 423 (1993).

12. This holding has been affirmed and bolstered in the Horne v. SIIS, 113 Nev. 532, 936 P.2d 839 (1997) case, which held that "mere speculation and belief does not rise to the level of reasonable medical certainty." Given the lack of any fully informed medical opinion making an industrial causal connection to a reasonable degree of medical probability, claim denial was legal and proper.

13. Further, the Nevada Supreme Court held in Mitchell v. Clark County School District, 121 Nev. 179, 111 P.3d 1104 (2005):

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. However, if an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of the claimant's employment. Finally, resolving whether an injury arose out of employment is examined by a totality of the circumstances.

14. The Court in Rio Suite Hotel & Casino v. Gorsky, 113 Nev. 600, 605 939 P2d. 1043 (1997) held that the "Nevada Industrial Insurance Act is not a mechanism which makes employers absolutely liable for injuries suffered by employees who are on the job." The Court concluded by stating, "The requirements of 'arising out of and in the course of employment' make it clear that a claimant must establish more than being at work and suffering an injury in order to recover."

15. The Court in Rio All Suite Hotel and Casino v. Phillips, 126 Nev. Ad. Opn. 34 (2010) clarified Mitchell. It indicated that:

> "The appeals officer found that Phillips' case was 'distinguishable' from Mitchell because Phillips' injury did not result from an 'unexplained fall.' Without elaborating, the appeals officer also stated that '[t]he Mitchell [c]ourt mentions the inherent dangerousness of stairways.' . . . [The Court in Rio further discussed Mitchell: "The employee argued that because she did not have a health affliction that caused her to fall and 'because staircases are inherently dangerous,' her injury "arose out of her employment." . . . The appeals officer determined that the employee's fall did not arise out of her employment, and the district court denied her petition for judicial review.". . . [Our finding in Mitchell was that] "[T]he employee must show that 'the origin of the injury is related to some risk involved within the scope of employment . . . thus, because the [Mitchell] employee could not explain how the conditions of her employment caused her to fall . . . we determined that the appeals officer correctly concluded that she failed to demonstrate the requisite 'causal connection.

16. The claimant has failed to establish that the origin of his injury, is related to some risk in the course of employment, given the claimant's past denied hearing loss claim and subsequent apparent assignment to a desk job, and given the lack of any acute trauma or specific mechanism of injury.

17. Furthermore, the claimant has not met the requirements of NRS 617.440 to establish a compensable occupational disease. That statute states:

> NRS 617.440 Requirements for occupational disease to be deemed to arise out of and in course of employment; applicability.
>
> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
>
> (a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
>
> (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (c) It can be fairly traced to the employment as the proximate cause; and
>
> (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.
>
> 2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.

3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.

4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.

5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

18. Therefore, since the claimant has failed to establish both an injury by accident or an occupational disease, the Appeals Officer finds that claimant has failed to establish a compensable industrial claim and same was properly denied.

DECISION AND ORDER

The claimant, JARED SPANGLER, has failed to establish a compensable industrial injury claim.

IT IS HEREBY ORDERED that the March 15, 2016 determination denying the claim is AFFIRMED.

IT IS SO ORDERED.

DATED this 20th day of July, 2017.

Georganne W. Bradley

GEORGANNE W. BRADLEY, ESQ.
APPEALS OFFICER

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final decision of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within thirty (30) days after service by mail of this decision.

Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

DANIEL L. SCHWARTZ, ESQ.
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Attorney for the Employer

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the appropriate addressee file maintained by the Division, 2200 South Rancho Drive, Second Floor, Las Vegas, Nevada, to the following:

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DATED this 20th day of July, 2017.

Patricia C. Fox
An employee of the State of Nevada

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DISTRICT COURT

CLARK COUNTY, NEVADA

JERED SPANGLER, Petitioner, vs. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC., THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, Respondents.	CASE NO. : DEPT. NO. :	A-17-759871-J XXVIII

PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND REGULATIONS

I

STATEMENT OF ISSUE

The issue raised by Petitioner is whether substantial evidence supports the Appeals Officer's Decision and Order dated July 20, 2017 affirming Respondents' determination denying liability for Petitioner's February 9, 2016 industrial injury claim.

II

STATEMENT OF CASE

This is the petition of JERED SPANGLER (hereinafter "Petitioner") of the Decision and Order of the Appeals Officer below, wherein the Appeals Officer affirmed the determination of the Employer, City of Henderson, and its workers' compensation administrator, CCMSI, (hereinafter and collectively "Respondent") denying liability for Petitioner's February 9, 2016 claim for workers' compensation benefits related to occupationally hearing loss.

The prior history in the instant appeal is summarized as follows:

On July 20, 2017, the Appeals Officer, by and through her Decision and Order, affirmed Respondent's March 15, 2016 determination denying liability for Petitioner's February 9, 2016 industrial injury claim. Petitioner filed an appeal, arguing that the Appeals Officer improperly ruled in Respondent's favor, alleging that the Appeals Officer's Decision and Order lack substantial evidence, and that the Appeals Officer committed legal error.

Petitioner filed the instant appeal on August 14, 2017. The Record on Appeal was filed on September 12, 2017.

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III

STATEMENT OF FACTS

On or about February 9, 2016, Petitioner reported the development of occupationally related hearing loss and tinnitus that was sustained and accelerated while in the course and scope of his employment as a police officer for the City of Henderson. On that date, Petitioner reported extensive exposure to unprotected loud noises during his career as a police officer. Liability for the claim was erroneously denied. Claim denial is the subject of this appeal.

Petitioner participated in annual physicals, including hearing tests, as part of his employment as a police office. (ROA pages 93-104) Petitioner demonstrated minor hearing deficits when he was hired as a police officer in 2003. However, Petitioner's hearing progressively worsened to a moderate to severe level by the time he filed his claim for workers' compensation benefits.

On February 9, 2016, Petitioner presented to Amanda Blake, Au.D for an audiology evaluation. At that time, Ms. Blake noted Petitioner's employment history as a police officer began in 2003, with eleven (11) years on active patrol. During Petitioner's employment as a police officer, Ms. Blake opined that Petitioner's hearing progressively worsened as a result of being "exposed to sirens, gunfire during range qualifications, and a radio piece in his left ear, and then a lapel microphone on his left side." Ms. Blake was provided with copies of the annual hearing examinations dating back to Petitioner's 2003 hire date, and she confirmed that Petitioner sustained additional bilateral hearing loss since his hire date, left worse than right. Ms. Blake concluded that Petitioner's "standard pure tone testing revealed borderline normal hearing, 0.25-2k Hz, sloping to a moderate high frequency sensorineural hearing loss in the right ear" and a "mild sloping to severe sensorineural hearing loss in the left ear with a notch present

at 6k Hz." Ms. Blake confirmed that it was her opinion that his hearing loss was "not a consequence of the normal aging process for either ear and is suggestive of noise exposure." Ms. Blake completed a C-4 form and opined that Petitioner's hearing loss was directly related to his employment as a police office. Ms. Blake recommended binaural amplification. (ROA pages 105-109)

On March 1, 2016, Petitioner was evaluated by Roger Theobald, Au.D, who confirmed that he reviewed the prior medical records pertaining to Petitioner's annual hearing tests, reporting from Dr. Scott Manthei in 2005, and reporting from Ms. Blake. Mr. Theobald also reported that Petitioner's job as a police officer exposed him to loud noises while on the job with the Henderson Police Department. Mr. Theobald verified that Petitioner had mild to moderate hearing loss in the left ear and normal to mild high frequency hearing loss in the right ear at the time of his 2003 hiring. In the years following Petitioner's 2003 hire date, Mr. Theobald opined that Petitioner's "hearing has significantly decreased bilaterally. Hearing decrease is considered significant if a change of 10dB or more occur at three or more hearing thresholds." Mr. Theobald verified that there is a likelihood of a pre-existing underlying condition contributing to Petitioner's hearing loss in the left ear, "however, there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." Testing performed by Mr. Theobald revealed "pure tone hearing threshold show a mild to moderately severe sensorineural hearing loss in the right ear and a moderate to moderately severe sensorineural hearing loss in the left." Mr. Theobald recommended that Petitioner be provided with hearing aids and be scheduled to see a neuro-otologist to evaluate for a left sided cochlear pathology. (ROA pages 110-113)

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On March 15, 2016, the Insurer denied liability for Petitioner's claim for bilateral hearing loss. (ROA pages 132) Petitioner appealed that determination to the Hearing Officer. Prior to the hearing, the parties agreed to transfer the matter to the Appeals Officer.

On November 23, 2016, Petitioner sent a letter to Dr. Steven Becker asking him whether Petitioner's hearing loss was work related and, if not, whether Petitioner's exposure to work related noise contributed to the hearing loss and tinnitus. On December 23, 2016, Dr. Becker opined that Petitioner's hearing loss was not entirely work related, however, Dr. Becker confirmed that it was his opinion that Petitioner's work related noise exposure "contributed" to the extent of the present hearing loss and tinnitus. Dr. Becker based his opinion on the "original hearing test (performed in) 2003 revealed losses bilaterally, worse in the left and hearing has steadily worsened" since that time." (ROA pages 25-29)

On July 20, 2017, the Appeals Officer affirmed Respondent's March 15, 2017 claim denial determination. The Appeals Officer concluded that Petitioner failed to establish that his occupational hearing loss qualified for benefits as an industrial injury or occupational disease. The Appeals Officer ruled that the origin of Petitioner's hearing loss was not related to an employment related risk. Respondent also argued that Claimant was assigned to a desk job during his career as a police officer. (ROA pages 3-11)

It is from the Appeals Officer's Decision and Order dated July 20, 2015 that Petitioner now appeals.

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IV

LEGAL ARGUMENT

A. The Appropriate Standard for Judicial Review in Contested Workers' Compensation Claims

In contested workers compensation claims, judicial review first requires an identification of whether the issue to be resolved is a factual or legal issue. While questions of law may be reviewed de novo by this Court, a more deferential standard must be employed when reviewing the factual findings of an administrative adjudicator.

NRS 233B.135, which governs judicial review of a final decision of an administrative agency, provides, in pertinent part, the following:

> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
>
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

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Relating to the standard of review of administrative decisions, our Supreme Court has consistently held that the factual findings made by administrative adjudicators may not be disturbed on appeal unless they lack the support of substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); SIIS v. Thomas, 101 Nev. 293, 701 P.2d 1012 (1985); SIIS v. Swinney, 103 Nev. 17, 731 P.2d 359 (1987); SIIS v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990).

Thus, "the central inquiry is whether substantial evidence in the record supports the agency decision." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 583, 854 P.2d 862, 865 (1993). Substantial evidence is "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." State Employment Sec. Dep't v. Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986). Therefore, if the agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary and capricious. Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 547, 2 P.3d 850, 854 (2000). The Court must defer to an agency's findings of fact only as long as they are supported by substantial evidence. Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).

On the other hand, purely legal questions may be determined by the District Court without deference to an agency determination, upon de novo review. SIIS v. Khweiss, 108 Nev. at 126, 825 P.2d at 220 (1992). Furthermore, the construction of a statute is a question of law, subject to de novo review. See State, Dep't of Motor Vehicles v. Lovett, 110 Nev. 473, 476, 874 P.2d 1274, 1249 (1994).

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The matter at issue in this appeal clearly involves a factual issue regarding whether Petitioner has met his burden in establishing compensability for the extent of hearing loss detected at the time of the filing of the February 9, 2016 workers' compensation claim.

B. <u>The Appeals Officer's Decision And Order Dated July 20, 2017 is Not Supported by Substantial Evidence and Contains Legal Error</u>

It is the Petitioner's position that his employment as a police officer directly contributed to the extent of hearing loss and tinnitus present when the February 9, 2016 claim for workers' compensation was filed. Petitioner maintains that his particular profession, that of a law enforcement officer, exposes his to various noise hazards that the average citizen does not experience.

NRS 617.440 states:

> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
> (a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
> (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
> (c) It can be fairly traced to the employment as the proximate cause; and
> (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.
> 2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.
> 3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.
> 4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X-rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.

5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

[Part 26:44:1947; A 1949, 365; 1953, 297] — (NRS A 1961, 589; 1963, 874; 1967, 685; 1983, 458; 2007, 3366)

The medical reporting from the audiologists, who examined, tested and reviewed all prior hearing studies, verifies that the extent of Petitioner's hearing loss and tinnitus is directly related to occupational exposures. These exposures consist of, but are not limited to, fire arm use, sirens, radio and various tactical maneuvers. Police officers are trained to be prepared to be in loud, chaotic environments. Ms. Blake and Mr. Theobald note Petitioner's prior hearing exposure but directly relate the ensuring severity of the hearing loss to employment related exposures. Further, Dr. Becker verified that Petitioner's hearing loss did not originate with his employment, but opined that the work related exposures contributed to the steady decline in hearing capabilities. Thus the totality of the reporting establishes a "direct causal connection" between the extent of Petitioner's hearing loss and tinnitus and his job as a police officer. Petitioner is not placed in this type of situation outside of his employment. Since there was not a singular moment when Petitioner sustained hearing damage, the reporting clearly establishes that his occupational exposures contributed to Petitioner's level of hearing damage, which is a natural incident of his employment and qualifies for coverage as an occupational disease. It is clear that ~~Mr. Davis~~ Petitioner's work conditions and work environment directly contributed to the February 9, 2016 claim for occupational hearing loss.

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Although Petitioner started his career as a police officer with a minor hearing deficit, it was Petitioner's job in law enforcement that significantly accelerated his hearing loss and produced the tinnitus. NRS 616C.175 addresses the issue of when industrial factors aggravate or accelerate a pre-existing condition.

NRS 616C.175 states:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> Ê shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.
> 2. The resulting condition of an employee who:
> (a) Sustains an injury by accident arising out of and in the course of his or her employment; and
> (b) Subsequently aggravates, precipitates or accelerates the injury in a manner that does not arise out of and in the course of his or her employment,
> Ê shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the injury described in paragraph (a) is not a substantial contributing cause of the resulting condition.
> (Added to NRS by 1993, 663; A 1995, 2147; 1999, 1777)

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Respondent denied liability for Petitioner's bilateral hearing loss and tinnitus. Respondent based its denial on the fact that Claimant had some hearing deficit at the time of his 2003 hire date. Respondent has acknowledged the hearing deficit from 2003, however, he maintains that the ensuing hearing loss and tinnitus is associated with employment related noise exposure. Thus it was Petitioner's occupational exposures that accelerated his future hearing losses.

The reporting from the audiologists, Ms. Blake and Mr. Theobald, establishes that Petitioner had some hearing loss at the time of his 2003 hire as a police officer. However, these audiologists verified that Petitioner's hearing loss progressively worsened due to employment related noise exposure.

Ms. Blake confirmed that it was her opinion that Petitioner's hearing loss was "not a consequence of the normal aging process for either ear and is suggestive of noise exposure." Ms. Blake noted that during his eleven (11) years on active patrol, Petitioner's hearing has progressively worsened as a result of being "exposed to sirens, gunfire during range qualifications, and a radio piece in his left ear, and then a lapel microphone on his left side."

Mr. Theobald verified that there is a likelihood of a pre-existing underlying condition contributing to Petitioner's hearing loss in the left ear, "however, there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." In the years following Petitioner's 2003 hire date, Mr. Theobald opined that Petitioner's "hearing has significantly decreased bilaterally. Hearing decrease is considered significant if a change of 10dB or more occur at three or more hearing thresholds."

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Furthermore, Dr. Becker confirmed that, while Petitioner's job did not cause the hearing loss, his job was absolutely a "contributing factor" in the loss that developed after his 2003 hire date as a police officer.

NRS 616C.175 addresses the issue of when an industrial injury "aggravates, precipitates or accelerates" a pre-existing condition. This statute mandates that an Insurer is responsible for treatment related to a pre-existing condition if the industrial injury "aggravates, precipitates or accelerates" the pre-existing condition. Moreover, if the Insurer denies responsibility for treatment related to a pre-existing condition, this statute requires the Insurer to "prove by a preponderance of the evidence that the subsequent (industrial) injury is not a substantial contributing cause of the resulting condition."

In this case, Respondent has completely failed to meet its statutory obligation of proving by "a preponderance of the evidence" that Petitioner's occupationally related noise exposure is "not a substantial contributing cause of the resulting condition." Petitioner began experiencing increased hearing loss and the development of tinnitus symptoms after his 2003 hire date as a police officer. This fact was documented in Ms. Blake, Mr. Theobald and Dr. Becker's reporting. Petitioner's job as a police officer regularly exposed him to extremely loud sirens, unprotected sounds of gunfire, a radio piece in the left ear and a lapel radio in close proximity to this left ear. It was during these activities that resulted in the acceleration of hearing loss following his 2003 hire date.

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Petitioner experienced minimal hearing deficit at the time of his 2003 hire date. During the subsequent years of active patrol duty, Petitioner was exposed to wide-ranging sources of loud noise without protection. In fact, the reporting verified that Petitioner's increased hearing loss in the left ear compared to the right ear was related to the use of the ear piece in the left ear and the lapel radio on the left side. These exposures were a "contributing factor" in Petitioner's accelerated hearing loss and the development of tinnitus. The current level of hearing loss has been directly related to his occupation as a police officer.

Therefore, Petitioner's job as a police officer is clearly the primary contributing cause of the current level of hearing loss and the development of tinnitus. The reporting from Ms. Blake, Mr. Theobald and Dr. Becker confirms that Petitioner's occupation noise exposure was the primary contributing cause of the current hearing loss and tinnitus. Although there was a pre-employment finding of mild hearing loss at the time of his 2003 hiring as a police officer, the subsequent deterioration of his hearing abilities and current need for hearing aids is directly related to his employment as a police officer. Therefore, based upon the extensive nature of the industrial noise exposures, Petitioner's worsening hearing loss and tinnitus is industrially related.

Thus, the Appeals Officer incorrectly applied the NRS 616C.150 and NRS 617.440 when finding that Petitioner's hearing loss condition did not qualify for benefits as an industrial injury or occupational disease. Petitioner's hearing loss absolutely qualifies for benefits under NRS 616C.440. Moreover, the available reporting demonstrates that Claimant's mild pre-existing hearing loss at the tire of his hire as a police officer was aggravated and accelerated by the ensuring years of occupational noise exposures.

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Based upon the totality of the evidence, this Court should reverse the Appeals Officer's July 20, 2017 Decision and Order, as the decision of the administrative agency on questions of fact if the decision is supported by substantial evidence in the record. SIIS v. Thomas, 101 Nev. 293, 701 P.2d 1012 (1985). Therefore, the Appeals Officer's decision, is not supported by the evidence, and should be reversed on appeal.

V

CONCLUSION

Since the Appeals Officer's Decision and Order lacks substantial evidentiary support and contains legal error as outlined above, Petitioner respectfully requests entry of this Honorable Court's order REVERSING the Appeals Officer Decision and Order as outlined above. This matter should be returned to Respondent for the acceptance of the February 9, 2016 claim for occupational hearing loss.

DATED this 20th day of October, 2017.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petitioner's Opening 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 reply 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 the Nevada Rules of Appellate Procedure.

DATED this 20th day of October, 2017.

GREENMAN, GOLDBERG, RABY & MARTINEZ

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CERTIFICATE OF MAILING

I hereby certify that on the 20th day of October, 2017, I deposited a true and correct copy of the OPENING BRIEF in the U.S. Mails, postage fully prepaid, enclosed in envelopes addressed as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner,

v.

CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE,

Respondents.

CASE NO.: A-17-759871-J

DEPT NO.: II

RESPONDENTS' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — **Page No(s).**

STATUTES

OTHER

I.

STATEMENT OF THE CASE

This is a worker's compensation case. Prior to the subject claim, in 2005, Petitioner JARED SPANGLER (hereinafter "Petitioner") filed a claim for workers' compensation benefits alleging that he had a hearing loss that was job incurred. This claim was denied as there was evidence that Petitioner had hearing loss prior to his employment. Petitioner did not contest this denial.

In the instant claim, on February 9, 2016, Petitioner filed a second claim alleging that his non-industrial hearing loss was made worse over time by his employment. This claim was denied. Petitioner appealed.

On July 20, 2017, the Appeals Officer affirmed claim denial given that there was no conclusive evidence that his hearing loss was related to his employment. Petitioner filed the instant Petition for Judicial Review contesting this July 20, 2017 Decision.

Petitioner argues to this Court that the aggravation over time of his non-industrial condition should be compensable. However, as will be explained below, the Nevada workers' compensation system does not allow for such a claim. The Appeals Officer's Decision was proper.

II.

STATEMENT OF THE ISSUES

1. Whether substantial rights of Petitioner have been prejudiced as set forth in NRS 233B.135(3) because the Appeals Officer's Decision and Order filed on July 20, 2017 was:

(a) in violation of constitutional or statutory provisions;

(b) in excess of statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion; and

2. Whether the Appeals Officer's Decision and Order was based upon substantial evidence as required by NRS 233B.125.

III.

STATEMENT OF FACTS

On February 9, 2016, the Petitioner, JARED SPANGLER (hereinafter referred to as "Petitioner"), alleges that has hearing loss and ringing in the ears which he attributes to job related exposure to loud noises. The Petitioner was seen by Dr. Blake at Anderson Audiology where hearing loss was noted. The Petitioner appears to have failed to have reveal his earlier 2005 denied hearing loss claim or that the Petitioner apparently has been working a desk job for the last 5-6 years. Further, Petitioner also failed to reveal that Employer modified his position after 2005 to avoid loud noises. (Record on Appeal p. 35)(hereinafter "ROA p. __")

The Employer's Report of Industrial Injury or Occupational Disease notes a nearly one month delay in reporting the hearing loss. (ROA p. 36)

The Employer's First Notice of Injury or Occupational Disease notes that the Petitioner alleges exposure to excessive loud noises and that he has had tinnitus for several years. (ROA p. 37)

The Petitioner has previously filed a hearing loss claim in November of 2005. On February 22, 2006, Dr. Manthei noted that the Petitioner's family had a positive history of hearing loss. He noted that MRI testing revealed that the Petitioner had revealed "a contrast enhancement of the left internal auditory canal suggesting extrinsic compression from a neoplastic process of the brain." It was concluded that the Petitioner's symptomatology was most likely due to a nonindustrial component, and that the Petitioner's hearing loss should not be considered to be industrial in nature. A claim denial determination for the November 1, 2005, hearing loss claim was issued on March 7, 2006. (ROA pp. 38-55) Petitioner did not contest this claim denial.

Hearing testing has been performed throughout the Petitioner's employment with the City of Henderson. (ROA pp. 56-68)

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As a result of hearing testing in October of 2015, on February 9, 2016, the Petitioner was seen by Dr. Blake at Anderson Audiology. A hearing loss was found which was deemed to be suggestive of loss due to noise exposure. Again, it must be noted that there is no indication that Petitioner informed Dr. Blake that he had been working a desk job for 5-6 years prior to this exam and prior to that had a modified job to avoid loud noises. Furthermore, it does not appear that Dr. Blake had access to Petitioner's entire file. (ROA pp. 69-72)

A medical release was signed by the Petitioner on February 9, 2016. (ROA p. 73)

On March 2, 2016, the Petitioner was seen by Dr. Theobald who noted that, prior to his employment Petitioner had hearing loss in both ears, but that his left was worse than his right, prior to employment with Employer. It was noted that "there is a high likelihood that there is an underlying condition that may be contributing to Mr. Spangler's hearing loss in his left ear" and that the Petitioner has a "possible tumor located in the area of the left cochlear nerve." Job noise exposure was also a potential cause of the hearing loss. It was recommended that the Petitioner be seen by a neuro-otologist to assess the potential likelihood of left sided cochlear pathology. (ROA pp. 74-76)

On March 15, 2016, a claim denial determination was issued. However, it was noted that bills related to Dr. Theobold's evaluation would be paid. (ROA p. 77)

On March 28, 2016, the Petitioner appealed the claim denial determination. (ROA p. 78) This appeal was transferred directly to the Appeals Officer. (ROA p. 79)

On July 20, 2017, the Appeals Officer affirmed claim denial given that there was no conclusive evidence that his hearing loss was related to his employment. (ROA pp. 3-11)

Petitioner filed the instant Petition seeking review of the Appeals Officer's July 20, 2017 Decision and Order.

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IV.

JURISDICTION

1. Standard Of Review

Judicial review of a final decision of an agency is governed by NRS 233B.135.

> **NRS 233B.135 Judicial review: Manner of conducting; burden of; standard for review.**
>
> 1. Judicial review of a final decision of an agency must be:
>
> (a) Conducted by the court without a jury; and
>
> (b) Confined to the record.
>
> In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
>
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
>
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.

The standard of review is whether there is substantial evidence to support the underlying decision. The reviewing court should limit its review of administrative decisions to determine if they are based upon substantial evidence. North Las Vegas v. Public Service Comm'n., 83 Nev. 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). Substantial

evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993); and Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839 (1997).

When reviewing administrative court decisions, the Court has held that, on factual determinations, the findings and ultimate decisions of an appeals officer are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial Comm'n. v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977). An administrative determination regarding a question of fact will not be set aside unless it is against the manifest weight of the evidence. Nevada Indus. Comm'n. v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984). A decision by an appeals officer that is based upon the credibility of Respondent and other witnesses is "not open to appellate review." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 585, 854 P.2d 862, 867 (1993).

In determining whether an administrative decision is supported by substantial evidence, the methodology of the District Court is also well-defined. First, for each issue appealed, the pertinent rule of law is identified. Thereafter, the Record on Appeal is reviewed to determine whether the agency's decision on each issue is supported by substantial factual evidence. State Dep't of Motor Vehicles v. Torres, 105 Nev. 558, 560, 799 P.2d 959, 960-961 (1989).

If the decision of the administrative agency on the appealed issue is supported by substantial factual evidence in the Record on Appeal, the District Court must affirm the decision of the agency as to that issue. On the other hand, a decision by an administrative agency that lacks support in the form of substantial evidence is arbitrary or capricious and, thus, an abuse of discretion that warrants reversal. NRS 233B.135(3); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983).

Substantial evidence has been defined as that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion. State Emp't Sec. Dep't v. Hilton Hotels Corp., 102 Nev. 606, 608 at n.1, 729 P.2d 497 (1986). Additionally, substantial evidence is not to be considered in isolation from opposing evidence, but evidence that survives whatever in the record fairly detracts from its weight. Universal Camera Corp. v. NLRB, 340 U.S.

474, 477, 488 (1951); Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546 (9th Cir. 1991). This latter point is clearly the significance of the requirement in NRS 233B.135(3)(e) which states that the reviewing court consider the whole record.

While the Court is not required to give deference to pure legal questions determined by the agency, those conclusions of the agency which are "closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986).

V.

LEGAL ARGUMENT

A. Standard at the Appeals Officer Level.

It is the Petitioner, not the Respondents, who has the burden of proving his case, and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

In attempting to prove his case, the Petitioner has the burden of going beyond speculation and conjecture. That means that the Petitioner must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a Petitioner must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, § 80.33(a).

NRS 616A.010 makes it clear that:

> A claim for compensation filed pursuant to the provisions of this chapter or chapter 617 of NRS must be decided on its merits and not according to the principle of common law that requires statutes governing worker's compensation to be liberally construed because they are remedial in nature.

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B. **The Denial of the Claim was Legal and Proper**

Here, Petitioner argues that he has a non-occupational hearing loss that was exacerbated over time by his employment. However, workers' compensation does not recognize such a claim. To provide context for this analysis, there are essentially two types of claims that can be made under the Nevada workers' compensation system: acute injury claims which are governed by NRS 616C; and occupational disease claims which are governed by NRS 617.

Acute injury claims arise when an employee is able to establish "by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment." NRS 616C.150. To sustain that burden, the employee must prove a statutory "accident" and "injury." NRS 616A.030 defines an accident as ". . . an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Furthermore, NRS 616A.265 defines an injury as ". . . a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence . . ."

Occupational disease claims on the other hand have no requirement to establish an "accident" or "injury." Instead, making out a claim for an occupational disease is governed by NRS 617.440 as follows:

> **NRS 617.440 Requirements for occupational disease to be deemed to arise out of and in course of employment; applicability.**
>
> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
> (a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
> (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
> (c) It can be fairly traced to the employment as the proximate cause; and
> (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.
> 2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.
> 3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk

> connected with the employment, and to have flowed from that source as a natural consequence.
> 4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.
> 5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

Here, Petitioner is not alleging that he has either an acute injury claim or an occupational disease claim. Rather, Petitioner argues that he has a non-occupational disease that was made worse over time by his employment. Because an acute injury is not being alleged, the provisions of NRS 616C do not come into play. If anything, this matter would be governed exclusively by NRS 617. Therein lies the problem with Petitioner's argument.

Petitioner argues that this claim should have been analyzed under NRS 616C.175(1) which allows a Petitioner the mechanism to prove that an ***acute injury*** has aggravated a non-industrial condition. That statute provides in pertinent part as follows:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an ***injury by accident*** arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> Ê shall be deemed to be an ***injury by accident*** that is compensable pursuant to the provisions of ***chapters 616A to 616D, inclusive, of NRS***, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

(emphasis added)

As the highlighted portions of the above statute make clear, NRS 616C.175(1) only applies to acute injuries. Chapter 617 is even explicitly carved out of the statue. It would have been very simple for the statute above to reach from chapter 616A to 617. Yet it does not. This is the main problem with Petitioners argument; there is no mechanism which would allow a claim for a non-occupational disease which has allegedly gotten worse over time due to work conditions. Even if the medical evidence supported such a scenario, Petitioner's argument that the Appeals Officer committed legal error for failing to consider NRS 616.175 is demonstrably incorrect.

Without the benefit of NRS 616C.175, Petitioner concedes that he cannot prove an acute injury and is left trying to prove that he has an occupational disease under NRS 617. As the Appeals Officer properly found, Petitioner fails in carrying that burden.

To begin with, Petitioner is making a claim for hearing loss. As noted above and as Petitioner concedes, Petitioner's prior claim for hearing loss was denied. Petitioner failed to contest that claim denial. Based on that failure to appeal, it was conclusively proven that Petitioner's hearing loss was not work related. That claim denial stands and Petitioner is barred from making any new claims for the same condition. (See Reno Sparks Convention Visitors Authority v. Jackson, 112 Nev. 62, 910 P.2d 267 (1996))

The fact that Petitioner is now arguing that the same non-occupational hearing loss is now worse is of no consequence. The hearing loss is non-industrial. It does not matter how bad it gets, it will always be non-industrial per the 2005 determination.

Indeed, NRS 617.440 requires a "direct causal connection between the conditions under which the work is performed and the occupational disease." The alleged occupational disease in this case is hearing loss. However, Petitioner is not alleging that his job caused his hearing loss; Petitioner is alleging that his job made his non-industrial hearing loss worse. This type of situation is not covered by NRS 617.440.

Even if Petitioner could somehow make a showing that the worsening of a non-industrial condition over time could be deemed compensable Nevada industrial insurance, Petitioner would not be able to carry his burden before the Appeals Officer and certainly cannot carry his burden before this Court. At the Appeals Officer level, Petitioner needed to prove by a preponderance of the evidence that his claimed condition was work related. The only evidence which was presented to the Appeals Officer were the reports of Dr. Blake and Dr. Theobold.

Though Dr. Blake "checks the box" on the C-4 form that she believed Petitioner's hearing loss was industrial, her reporting is flawed as it is obviously incomplete. She did not have Petitioner's whole file and apparently did not know about Petitioner's actual work situation given that Employer modified his position after the 2005 claim so that Petitioner would not be exposed to loud noises and that he had been working a primarily desk job for the last several years.

As for Dr. Theobold, his reporting is inconclusive as he explains that Petitioner's hearing loss could be either from his employment or from some underlying neurological condition. Put simply, there was not enough evidence to prove to the Appeals Officer by a preponderance that Petitioner's non-occupational hearing loss was worsened over time by his employment.

However, the standard at this Court on questions of fact is whether the Appeals Officer's decision was afflicted by clear error. There is no clear error here. Though Respondents will concede that there is support for both sides on the question of whether Petitioner's non-industrial occupational disease was worsened over time by his job, that question is not for this Court to decide. This Court must decide whether the Appeals Officer *could* have come to the conclusion that she did. (Hilton Hotels Corp., Id.) Even if this Court would have decided this case differently, as a court of appeal, this Court is simply not permitted to substitute its judgment for the administrative officer that ultimately decided this case. (NRS 233B.135(3); Titanium Metals Corp., Id.)

In conclusion, Petitioner's entire argument rests on establishing an exacerbation claim under NRS 616C.175. However, that statute only applies to *acute* exacerbations of non-industrial conditions. Petitioner is alleging an exacerbation over time to a non-industrial condition which is simply not contemplated by NRS 616C.175 or any other statutory mechanism which Respondents are aware of. Without a legal framework to establish a claim, Petitioner's arguments must fail. The Appeals Officer's Decision was legally proper and supported by substantial evidence. This Petition must be denied and the Appeals Officer affirmed.

...

...

...

VI.

CONCLUSION

Based upon the foregoing, the Appeals Officer's Decision and Order was appropriate. The Appeals Officer's Decision and Order was based on sound legal theories and factual conclusions that are amply supported by the record.

Therefore, Respondents respectfully ask this Court to affirm the Appeals Officer's Decision and Order and deny Petitioner's Petition for Judicial Review.

Dated this 9 day of April, 2018.

Respectfully submitted,

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP

DANIEL L. SCHWARTZ, ESQ.
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Attorney for Respondents

CERTIFICATE OF COMPLIANCE

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), 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 the Nevada Rules of Appellate procedure.

Dated this 9 of April, 2018.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

DANIEL L. SCHWARTZ, ESQ. (005125)
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Attorneys for Respondents

CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 9th day of April, 2018, service of the attached **RESPONDENTS' ANSWERING BRIEF** was made this date by depositing a true copy of the same for mailing, first class mail and electronic service, as follows:

Lisa Anderson, Esq.
GREENMAN, GOLDBERG, RABY & MARTINEZ
601 South Ninth Street
Las Vegas, NV 89101

City of Henderson
Attn: Sally Ihmels
P.O. Box 95050, MSC 127
Henderson, NV 89009-5050

CCMSI
Sue Riccio
P.O. Box 35350
Las Vegas, NV 89133

An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

Worker's Compensation Appeal	COURT MINUTES	May 07, 2018

A-17-759871-J Jared Spangler, Petitioner(s)
vs.
Henderson City of, Respondent(s)

May 07, 2018 **3:00 AM** **Petition for Judicial Review**

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Haly Pannullo

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- The Court notes that it has not yet received a courtesy copy of the Transmittal of the Record on Appeal filed 9/12/2018. The Court instructs Petitioner to provide a courtesy copy of the Record on Appeal to Chambers no later than Friday, May 11, 2018, before noon.

This matter is hereby CONTINUED to the May 16, 2018 Chambers Calendar.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Haly Pannullo, to all registered parties for Odyssey File & Serve *hvp/05/09/18*

DISTRICT COURT
CLARK COUNTY, NEVADA

Worker's Compensation Appeal	COURT MINUTES	May 16, 2018

A-17-759871-J Jared Spangler, Petitioner(s)
vs.
Henderson City of, Respondent(s)

May 16, 2018 **3:00 AM** **Petition for Judicial Review**

HEARD BY: Scotti, Richard F. **COURTROOM:**

COURT CLERK: Madalyn Kearney

JOURNAL ENTRIES

- The Court GRANTS Petitioner s Petition for Judicial Review, REVERSES the Decision and Order dated July 20, 2017, and REMANDS this matter back to the Appeals Officer for further proceedings. The Appeals Officer committed clear error of law, as explained below.

Petitioner claims that, in the course of his employment he incurred an aggravation to his pre-existing hearing loss. The Appeals Officer wrongly concluded that the injury was not compensable for several invalid reasons. First, the Appeals Officer wrongly held that this matter was governed by NRS 616B.612 which prevented Petitioner from recovering because the origin of the injury did not arise out of and in the course of employment. The Appeals officer failed to consider NRS 616.175(1) which permits compensation for certain pre-existing conditions where the origin of the injury did not arise out of and in the course of employment, but the aggravation did. Second, the Appeals Officer wrongly concluded that the aggravation of the preexisting injury did not arise by an accident, by interpreting the term accident too narrowly. The term accident is defined in NRS 616A.030 as an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The Court interprets NRS 616A.030 to mean that each incident of a loud noise, which destroys those parts of the human body responsible for hearing, is a separate accident. Such destruction each occasion is sudden and violent. Further, such accidents that destroy hearing are objective at the time in that the harm done to the ear is capable of objective, as opposed to subjective, evaluation. The term accident does not require that some person discovered the objective evidence at the time of the accident, only that such objective indicia of the injury arose at the time. Third, the Appeals Officer wrongly placed the entire burden on the Petitioner to prove by a preponderance of that the claim was compensable. NRS 616C.175 places the initial burden on the Petitioner to demonstrate, by a preponderance of the evidence, that he

had a preexisting condition, and that the preexisting condition was aggravated by an accident in the course of an in his employment, resulting in a subsequent injury. Then the burden shifts to the insurer to prove, by a preponderance of the evidence, that the subsequent injury is not a substantial contributing cause of the resulting condition. This matter is remanded back to the Appeals Officer to conduct a further hearing and applying the law as set forth herein. In this further hearing the Appeals Officer must re-evaluate the evidence, to determine whether Petitioner suffered accidents in the course of his employment which aggravated his preexisting conditions, and then to determine whether the insurer met its burden of proving, by a preponderance of the evidence, that the subsequent injury was not a substantial contributing cause of the Petitioners aggravation to a preexisting injury. The Court elects not to consider, at this time, Petitioner s other arguments of errors, and contention of lack of substantial evidence. The Petitioner shall prepare the proposed order, consistent herewith, adding appropriate context as appropriate, and correcting for any scrivener errors.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Daniel Schwartz, Esq. (Lewis Brisbois Bisgaard & Smith LLP) and Lisa Anderson, Esq. (Greenman, Goldberg, Raby & Martinez) / mk 5/17/18

ORDG
THADDEUS J. YUREK III, ESQ.
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Email: landerson@ggrmlawfirm.com
Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner

vs.

CITY OF HENDERESON, CANNON COCHRAN MANAGEMENT SERVICE, INC., and THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION,

Respondents.

PLEASE NOTE
DEPARTMENT CHANGE

CASE NO. : A-17-759871-J
DEPT. NO. : ~~XXVIII~~ 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

This matter came before this Court on the Petition for Judicial Review filed by the Petitioner, JARED SPANGLER. Petitioner was represented by LISA M. ANDERSON, ESQ. of the law firm of GREENMAN GOLDBERG RABY & MARTINEZ. Respondents, CITY OF HENDERSON and CCMSI, were represented by JOEL P. REEVES, ESQ. of the law firm LEWIS BRISBOIS BISGAARD & SMITH. No other parties were present or represented.

☐ Voluntary Dismissal	☒ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

JUN 11 2018

MH

Petitioner claims that, in the course of his employment, he incurred an aggravation to his pre-existing hearing loss. The Appeals Officer concluded that the injury was not compensable for several invalid reasons.

First, the Appeals Officer wrongly held that this matter was governed by NRS 616B.612 which prevented Petitioner from recovering because the origin of the injury did not arise out of and in the course of employment. The Appeals Officer failed to consider NRS 616C.175(1) which permits compensation for certain pre-existing conditions where the origin of the injury did not arise out of and in the course of employment, but the aggravation did.

NRS 616C.175(1) states:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> ➥ shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

Second, the Appeals Officer wrongly concluded that the aggravation of the pre-existing injury did not arise by an accident, by interpreting the term accident too narrowly. The term accident is defined in NRS 616A.030 as an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The Court interprets NRS 616A.030 to mean that each incident of a loud noise, which destroys those parts of the human body responsible for hearing, is a separate accident. Such destruction each occasion is sudden and violent. Further, such accidents that destroy hearing are objective at the time in that the harm done to the ear is capable of objective, as opposed to

subjective, evaluation. The term accident does not require that some person discovered the objective evidence at the time of the accident, only that such objective indicia of the injury arose at the time.

NRS 616A.030 defines "accident" as:

> "Accident" means an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

Third, the Appeals Officer wrongly placed the entire burden on the Petitioner to prove by a preponderance of the evidence that the claim was compensable. NRS 616C.175 placed the initial burden on the Petitioner to demonstrate, by a preponderance of the evidence, that he had a pre-existing condition, and that the pre-existing condition was aggravated by an accident in the course of his employment, resulting in a subsequent injury. Then the burden shifts to the insurer to prove, by a preponderance of the evidence, that the subsequent injury is not a substantial contributing cause of the resulting condition.

This matter is remanded back to the Appeals Officer to conduct a further hearing and applying the law as set forth herein. In this further hearing, the Appeals Officer must reevaluate the evidence, to determine whether Petitioner suffered accidents in the course of his employment which aggravated his pre-existing conditions, and then to determine the course of his employment which aggravated his pre-existing conditions, and then to determine whether the insurer met its burden of proving by a preponderance of the evidence, that the subsequent injury was not a substantial contributing cause of the Petitioners aggravation to a pre-existing injury. The Court elects not to consider, at this time, Petitioner's other arguments of errors, and contention of lack of substantial evidence.

IT IS HEREBY ORDERED that the Petition for Judicial Review is GRANTED and the Appeals Officer's Decision and Order of July 20, 2017 is REVERSED and REMANDED to the Appeals Officer for further proceedings in light of the clear error of law.

Dated this 11th day of June, 2018.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

Submitted by:

GREENMAN, GOLDBERG, RABY & MARTINEZ

LISA M. ANDERSON, ESQ.
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601 South Ninth Street
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(702) 384-1616
Attorneys for Petitioner

Approved as to form and content:

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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JERAD SPANGLER, Petitioner vs. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC., and THE DEPARTMENT OFADMINISTRATION, HEARINGS DIVISION, Respondents.	CASE NO. : DEPT. NO. :	A-17-759871-J II

NOTICE OF ENTRY OF ORDER

TO: All parties of interest.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order was

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entered in the above-entitled matter on the 18th day of June, 2018, a copy of which is attached.

DATED this 19th day of June, 2018.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By: _____

LISA M. ANDERSON, ESQ.
Nevada Bar No. 4907
GABRIEL A. MARTINEZ, ESQ.
Nevada Bar No. 326
601 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GREENMAN,GOLDBERG, RABY & MARTINEZ, and that on the 19th day of June, 2018, I caused the foregoing document entitled NOTICE OF ENTRY OF ORDER to be served upon those persons designated by parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules and depositing a true and correct copy in a sealed envelope, postage fully prepaid, addressed as follows:

Daniel L. Schwartz, Esq.
LEWIS BRISBOIS BISGAARD & SMITH
2300 West Sahara Avenue
Suite 300, Box 28
Las Vegas, Nevada 89102

An Employee of GREENMAN, GOLDBERG, RABY & MARTINEZ

ORDG
THADDEUS J. YUREK III, ESQ.
Nevada Bar No. 011332
LISA M. ANDERSON, ESQ.
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Facsimile: (702) 384-2990
Email: landerson@ggrmlawfirm.com
Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner

vs.

CITY OF HENDERESON, CANNON COCHRAN MANAGEMENT SERVICE, INC., and THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION,

Respondents.

PLEASE NOTE
DEPARTMENT CHANGE

CASE NO. : A-17-759871-J
DEPT. NO. : ~~XXVIII~~ 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

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☐ Voluntary Dismissal
☐ Involuntary Dismissal
☒ Stipulated Dismissal
☐ Motion to Dismiss by Deft(s)
☒ Summary Judgment
☐ Stipulated Judgment
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JUN 11 2018

MH

Petitioner claims that, in the course of his employment, he incurred an aggravation to his pre-existing hearing loss. The Appeals Officer concluded that the injury was not compensable for several invalid reasons.

First, the Appeals Officer wrongly held that this matter was governed by NRS 616B.612 which prevented Petitioner from recovering because the origin of the injury did not arise out of and in the course of employment. The Appeals Officer failed to consider NRS 616C.175(1) which permits compensation for certain pre-existing conditions where the origin of the injury did not arise out of and in the course of employment, but the aggravation did.

NRS 616C.175(1) states:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> ➥ shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

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Third, the Appeals Officer wrongly placed the entire burden on the Petitioner to prove by a preponderance of the evidence that the claim was compensable. NRS 616C.175 placed the initial burden on the Petitioner to demonstrate, by a preponderance of the evidence, that he had a pre-existing condition, and that the pre-existing condition was aggravated by an accident in the course of his employment, resulting in a subsequent injury. Then the burden shifts to the insurer to prove, by a preponderance of the evidence, that the subsequent injury is not a substantial contributing cause of the resulting condition.

This matter is remanded back to the Appeals Officer to conduct a further hearing and applying the law as set forth herein. In this further hearing, the Appeals Officer must reevaluate the evidence, to determine whether Petitioner suffered accidents in the course of his employment which aggravated his pre-existing conditions, and then to determine the course of his employment which aggravated his pre-existing conditions, and then to determine whether the insurer met its burden of proving by a preponderance of the evidence, that the subsequent injury was not a substantial contributing cause of the Petitioners aggravation to a pre-existing injury. The Court elects not to consider, at this time, Petitioner's other arguments of errors, and contention of lack of substantial evidence.

IT IS HEREBY ORDERED that the Petition for Judicial Review is GRANTED and the Appeals Officer's Decision and Order of July 20, 2017 is REVERSED and REMANDED to the Appeals Officer for further proceedings in light of the clear error of law.

Dated this 11th day of June, 2018.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

Submitted by:

GREENMAN, GOLDBERG, RABY & MARTINEZ

LISA M. ANDERSON, ESQ.
Nevada Bar No. 004907
GREENMAN, GOLDBERG, RABY & MARTINEZ
601 South Ninth Street
Las Vegas, Nevada 89101
(702) 384-1616
Attorneys for Petitioner

Approved as to form and content:

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2300 West Sahara Avenue
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Attorneys for Respondent

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DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
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Telephone: (702) 893-3383
Facsimile: (702) 366-9563
Email: daniel.schwartz@lewisbrisbois.com
Attorneys for Respondents,
City of Henderson and Cochran
Management Services, Inc. (CCMSI)

DISTRICT COURT
CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner,

v.

CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE,

Respondents.

CASE NO.: A-17-759871-J

DEPT NO.: II

NOTICE OF APPEAL

TO: JARED SPANGLER, Petitioner

TO: LISA M. ANDERSON, ESQ., Respondent's Attorney

NOTICE IS HEREBY GIVEN that Respondents, CITY OF HENDERSON and CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), (hereinafter referred to as "Respondents"), in the above-entitled action, hereby appeal to the Supreme Court of the State of Nevada from the attached "Order" entered in this action on or about June 18, 2018 which granted

...

...

Petitioner's Petition for Judicial Review and the "Notice of Entry of Order" filed on or about June 19, 2018.

DATED this 2 day of July, 2018.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

DANIEL L. SCHWARTZ, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
2300 West Sahara Avenue, Suite 300, Box 28
Las Vegas, Nevada 89102
Attorneys for Respondents

CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 2nd day of July, 2018, service of the foregoing **NOTICE OF APPEAL** was made this date by depositing a true copy of the same for mailing, first class mail and/or electronic service, as follows:

Lisa Anderson, Esq.
GREENMAN, GOLDBERG, RABY & MARTINEZ
601 South Ninth Street
Las Vegas, NV 89101

City of Henderson
Attn: Sally Ihmels
P.O. Box 95050, MSC 127
Henderson, NV 89009-5050

CCMSI
Sue Riccio
P.O. Box 35350
Las Vegas, NV 89133

An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, NOTICE OF APPEAL

filed in case number: A-17-759871-J

☒ Document does not contain the Social Security number of any person.

- OR -

☐ Document contains the Social Security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

- or -

☐ For the administration of a public program

- or -

☐ For an application for a federal or state grant

- or -

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 7/2/18

_____
(Signature)

DANIEL L. SCHWARTZ, ESQ.
(Print Name)

RESPONDENTS
(Attorney for)

LEWIS BRISBOIS BISGAARD & SMITH LLP
ATTORNEYS AT LAW

EXHIBIT I

NEOJ
LISA M. ANDERSON, ESQ.
Nevada Bar No. 4907
GABRIEL A. MARTINEZ, ESQ.
Nevada Bar No. 326
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Email: gmartinez@ggrmlawfirm.com
Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JERAD SPANGLER, Petitioner vs. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC., and THE DEPARTMENT OFADMINISTRATION, HEARINGS DIVISION, Respondents.	CASE NO. : DEPT. NO. :	A-17-759871-J II

NOTICE OF ENTRY OF ORDER

TO: All parties of interest.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order was

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///

entered in the above-entitled matter on the 18th day of June, 2018, a copy of which is attached.

DATED this 19th day of June, 2018.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By: _____
LISA M. ANDERSON, ESQ.
Nevada Bar No. 4907
GABRIEL A. MARTINEZ, ESQ.
Nevada Bar No. 326
601 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GREENMAN,GOLDBERG, RABY & MARTINEZ, and that on the 14th day of June, 2018, I caused the foregoing document entitled NOTICE OF ENTRY OF ORDER to be served upon those persons designated by parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules and depositing a true and correct copy in a sealed envelope, postage fully prepaid, addressed as follows:

Daniel L. Schwartz, Esq.
LEWIS BRISBOIS BISGAARD & SMITH
2300 West Sahara Avenue
Suite 300, Box 28
Las Vegas, Nevada 89102

An Employee of GREENMAN, GOLDBERG, RABY & MARTINEZ

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Email: landerson@ggrmlawfirm.com
Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner

vs.

CITY OF HENDERESON, CANNON COCHRAN MANAGEMENT SERVICE, INC., and THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION,

Respondents.

PLEASE NOTE
DEPARTMENT CHANGE

CASE NO. : A-17-759871-J
DEPT. NO. : ~~XXVIII~~ 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

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☐ Voluntary Dismissal
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JUN 11 2018

MH

Petitioner claims that, in the course of his employment, he incurred an aggravation to his pre-existing hearing loss. The Appeals Officer concluded that the injury was not compensable for several invalid reasons.

First, the Appeals Officer wrongly held that this matter was governed by NRS 616B.612 which prevented Petitioner from recovering because the origin of the injury did not arise out of and in the course of employment. The Appeals Officer failed to consider NRS 616C.175(1) which permits compensation for certain pre-existing conditions where the origin of the injury did not arise out of and in the course of employment, but the aggravation did.

NRS 616C.175(1) states:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> ➥ shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

Second, the Appeals Officer wrongly concluded that the aggravation of the pre-existing injury did not arise by an accident, by interpreting the term accident too narrowly. The term accident is defined in NRS 616A.030 as an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The Court interprets NRS 616A.030 to mean that each incident of a loud noise, which destroys those parts of the human body responsible for hearing, is a separate accident. Such destruction each occasion is sudden and violent. Further, such accidents that destroy hearing are objective at the time in that the harm done to the ear is capable of objective, as opposed to

subjective, evaluation. The term accident does not require that some person discovered the objective evidence at the time of the accident, only that such objective indicia of the injury arose at the time.

NRS 616A.030 defines "accident" as:

> "Accident" means an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

Third, the Appeals Officer wrongly placed the entire burden on the Petitioner to prove by a preponderance of the evidence that the claim was compensable. NRS 616C.175 placed the initial burden on the Petitioner to demonstrate, by a preponderance of the evidence, that he had a pre-existing condition, and that the pre-existing condition was aggravated by an accident in the course of his employment, resulting in a subsequent injury. Then the burden shifts to the insurer to prove, by a preponderance of the evidence, that the subsequent injury is not a substantial contributing cause of the resulting condition.

This matter is remanded back to the Appeals Officer to conduct a further hearing and applying the law as set forth herein. In this further hearing, the Appeals Officer must reevaluate the evidence, to determine whether Petitioner suffered accidents in the course of his employment which aggravated his pre-existing conditions, and then to determine the course of his employment which aggravated his pre-existing conditions, and then to determine whether the insurer met its burden of proving by a preponderance of the evidence, that the subsequent injury was not a substantial contributing cause of the Petitioners aggravation to a pre-existing injury. The Court elects not to consider, at this time, Petitioner's other arguments of errors, and contention of lack of substantial evidence.

IT IS HEREBY ORDERED that the Petition for Judicial Review is GRANTED and the Appeals Officer's Decision and Order of July 20, 2017 is REVERSED and REMANDED to the Appeals Officer for further proceedings in light of the clear error of law.

Dated this 11th day of June, 2018.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

Submitted by:

GREENMAN, GOLDBERG, RABY & MARTINEZ

LISA M. ANDERSON, ESQ.
Nevada Bar No. 004907
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(702) 384-1616
Attorneys for Petitioner

Approved as to form and content:

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Attorneys for Respondent

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Attorneys for Respondents,
City of Henderson and Cochran Management Services, Inc. (CCMSI)

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER, Petitioner, v. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE, Respondents.	CASE NO.: A-17-759871-J DEPT NO.: II HEARING REQUIRED DATE: 7/16/18 TIME: Chambers

RESPONDENTS' MOTION FOR STAY PENDING SUPREME COURT APPEAL AND MOTION FOR ORDER SHORTENING TIME

COMES NOW the Respondents, CITY OF HENDERSON and CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), (hereinafter referred to as "Respondents"), by and through their attorneys, DANIEL L. SCHWARTZ, ESQ., and LEWIS, BRISBOIS, BISGAARD & SMITH, LLP, and move this Court for a Motion for Stay pending Supreme Court appeal and an Order Shortening Time for this Motion to be heard before or shortly after the deadline for obtaining a stay.

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This Motion is made and based upon the papers and pleadings on file herein, and the attached Points and Authorities and any arguments of counsel on this matter.

DATED this 3 day of July, 2018.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, NV 89102-4375
Attorneys for the Respondents

AFFIDAVIT IN SUPPORT OF ORDER SHORTENING TIME AND TEMPORARY STAY

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, JOEL P. REEVES, ESQ., do herby swear under penalty of perjury that the assertion of this affidavit are true, that:

1. Affiant is an attorney authorized and duly licensed to practice law in the State of Nevada and is one of the attorneys of record for Respondents.

2. This affidavit is made in support of an ex-parte order shortening time for this Motion for Stay to be heard.

3. Affiant has personal knowledge of all matters set forth herein, except those matters stated on information and belief, and is competent to testify thereto.

4. That NRAP Rule 8(a)(1) requires that Appellants move first in the District Court for a Stay of the underlying Order Granting Petition for Judicial Review, filed on June 18, 2018.

5. The above-named Affiant has good cause to request this Court for an Order Shortening time. NRS 616C.375 mandates that an Appeals Officer's Decision and Order shall not be stayed unless the District Court issues an Order of Stay within thirty (30) days from the date of the Decision and Order. Further, NRAP 4(a)(1) requires that the subject Order be appealed within thirty (30) days from the date of the Order. Therefore, this Motion cannot be heard in the normal course.

6. The time for appeal in this matter expires on or about July 23, 2018.

7. In the absence of a stay, the Respondents will be required to comply with this Court's Order and a new hearing will commence before the Appeals Officer which may adversely impact the Respondents and cause duplicative litigation.

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8. This Motion and request for Order Shortening Time is made in good faith and not for the purpose of undue advantage.

Further Affiant sayeth naught.

DATED this 3 day of July, 2018.

JOEL P. REEVES, ESQ.

SUBSCRIBED AND SWORN to before me this 3rd day of July, 2018.

NOTARY PUBLIC in and for said County and State

JENNIFER BRYAN
Notary Public, State of Nevada
Appointment No. 98-42284-1
My Appt. Expires Nov 1, 2019

ORDER SHORTENING TIME

GOOD CAUSE APPEARING THEREFOR,

IT IS HEREBY ORDERED that the time of hearing of the above-entitled matter be, and the same will be heard, on the 16th day of July 2018, at Chambers ~~A.M./P.M.~~ in Dept. No. II., Courtroom 3B

DATED this 16th day of July, 2018.

DISTRICT COURT JUDGE

MH

Respectfully submitted by:

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
LEWIS BRISBOIS BISGAARD & SMITH
2300 W. Sahara Ave., Ste. 300, Box 28
Las Vegas, NV 89102
Attorneys for the Respondents

ORDER GRANTING TEMPORARY STAY

Having reviewed the attached Affidavit in support of Order Granting Temporary Stay, and finding that good cause exists therefore, it is hereby ORDERED ADJUDGED AND DECREED that a temporary stay shall be entered in this matter on this 10th day of July, 2018, and continuing through the date of the hearing on Respondents' Motion for Stay Pending Supreme Court Appeal.

DATED this 11th day of July, 2018.

DISTRICT COURT JUDGE

MH

Respectfully submitted by:

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
LEWIS BRISBOIS BISGAARD & SMITH
2300 W. Sahara Ave., Ste. 300, Box 28
Las Vegas, NV 89102
Attorneys for the Respondents

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Respondents' Motion for Stay Pending Supreme Court Appeal, a copy of which is attached hereto, has been set for hearing by this Court on the _____ day of _____, 2018, in the aforementioned Department at _____ __.m., or as soon thereafter as counsel can be heard.

DATED this 3 day of July, 2018.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Tel. 702.893.3383
Attorneys for the Respondents

I.

STATEMENT OF THE FACTS

On February 9, 2016, the Petitioner, JARED SPANGLER (hereinafter referred to as "Petitioner"), alleges that has hearing loss and ringing in the ears which he attributes to job related exposure to loud noises. The Petitioner was seen by Dr. Blake at Anderson Audiology where hearing loss was noted. The Petitioner appears to have failed to have reveal his earlier 2005 denied hearing loss claim or that the Petitioner apparently has been working a desk job for the last 5-6 years. Further, Petitioner also failed to reveal that Employer modified his position after 2005 to avoid loud noises. (Record on Appeal p. 35)(hereinafter "ROA p. __")

The Employer's Report of Industrial Injury or Occupational Disease notes a nearly one month delay in reporting the hearing loss. (ROA p. 36)

The Employer's First Notice of Injury or Occupational Disease notes that the Petitioner alleges exposure to excessive loud noises and that he has had tinnitus for several years. (ROA p. 37)

The Petitioner has previously filed a hearing loss claim in November of 2005. On February 22, 2006, Dr. Manthei noted that the Petitioner's family had a positive history of hearing loss. He noted that MRI testing revealed that the Petitioner had revealed "a contrast enhancement of the left internal auditory canal suggesting extrinsic compression from a neoplastic process of the brain." It was concluded that the Petitioner's symptomatology was most likely due to a nonindustrial component, and that the Petitioner's hearing loss should not be considered to be industrial in nature. A claim denial determination for the November 1, 2005, hearing loss claim was issued on March 7, 2006. (ROA pp. 38-55) Petitioner did not contest this claim denial.

Hearing testing has been performed throughout the Petitioner's employment with the City of Henderson. (ROA pp. 56-68)

As a result of hearing testing in October of 2015, on February 9, 2016, the Petitioner was seen by Dr. Blake at Anderson Audiology. A hearing loss was found which was deemed to be suggestive of loss due to noise exposure. Again, it must be noted that there is no indication that Petitioner informed Dr. Blake that he had been working a desk job for 5-6 years prior to this exam

and prior to that had a modified job to avoid loud noises. Furthermore, it does not appear that Dr. Blake had access to Petitioner's entire file. (ROA pp. 69-72)

A medical release was signed by the Petitioner on February 9, 2016. (ROA p. 73)

On March 2, 2016, the Petitioner was seen by Dr. Theobald who noted that, prior to his employment Petitioner had hearing loss in both ears, but that his left was worse than his right, prior to employment with Employer. It was noted that "there is a high likelihood that there is an underlying condition that may be contributing to Mr. Spangler's hearing loss in his left ear" and that the Petitioner has a "possible tumor located in the area of the left cochlear nerve." Job noise exposure was also a potential cause of the hearing loss. It was recommended that the Petitioner be seen by a neuro-otologist to assess the potential likelihood of left sided cochlear pathology. (ROA pp. 74-76)

On March 15, 2016, a claim denial determination was issued. However, it was noted that bills related to Dr. Theobold's evaluation would be paid. (ROA p. 77)

On March 28, 2016, the Petitioner appealed the claim denial determination. (ROA p. 78) This appeal was transferred directly to the Appeals Officer. (ROA p. 79)

On July 20, 2017, the Appeals Officer affirmed claim denial given that there was no conclusive evidence that his hearing loss was related to his employment. (ROA pp. 3-11) Petitioner filed the instant Petition seeking review of the Appeals Officer's July 20, 2017 Decision and Order.

On June 18, 2018, this Court reversed the Appeals Officer, finding that the Appeals Officer failed to consider NRS 616C.175(1), that the Appeals Officer interpreted the term "accident" too narrowly, and that the Appeals Officer incorrectly placed the entire burden on Petitioner to prove that the claim was compensable.

Respondents filed an Appeal with the Nevada Supreme Court to contest this Court's June 18, 2018 Decision. Respondents now seek a stay of that Decision pending the Supreme Court appeal.

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POINTS & AUTHORITIES

II.

JURISDICTION

NRAP 8(a)(1) provides this Court with authority to hear the instant Motion for Stay:

> A party must ordinarily move first in the district court for the following relief:
>
> (A) a stay of the judgment or order of, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ;
>
> (B) approval of a supersedeas bond; or
>
> (C) an order suspending, modifying, restoring or granting an injunction while an appeal or original writ petition is pending

NRS 233B.140 further provides that:

> 1. A petitioner who applies for a stay of the final decision in a contested case shall file and serve a written motion for the stay on the agency and all parties of record to the proceeding at the time of filing the petition for judicial review.
>
> 2. In determining whether to grant a stay, the court shall consider the same factors as are considered for a preliminary injunction under Rule 65 of the Nevada Rules of Civil Procedure.
>
> 3. In making a ruling, the court shall:
>
> (a) Give deference to the trier of fact; and
>
> (b) Consider the risk to the public, if any, of staying the administrative decision.
>
> The petitioner must provide security before the court may issue a stay.

For reference, **NRCP Rule 65** provides in pertinent part as follows:

> (a) Preliminary injunction.
>
> (1) Notice. No preliminary injunction shall be issued without notice to the adverse party.
>
> (2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision

(a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(d) Form and scope of injunction or restraining order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

III.

LEGAL ARGUMENT

A.

Standard of Review

The standard for granting a stay was enunciated in the case of Kress v. Corey, 65 Nev. 1, 16-17, 189 P.2d 352, 360 (1948) as follows:

> an order for a supersedeas or stay will only be granted on good cause shown and where a proper case for exercise of the court's discretion is made out. As a rule a supersedeas or stay should be granted, if the court has the power to grant it, [1] whenever it appears that without it the object of the appeal or writ of error may be defeated, or [2] that it is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in the case of reversal, and [3] it does not appear that appellee or defendant in error will sustain irreparable or disproportionate injury, in case of affirmance on the other hand, as a rule, a supersedeas or stay will not be granted unless it appears to be necessary to prevent irreparable injury or a miscarriage of justice. (citations removed)(numeration added)

A party requesting a stay must also prove a reasonable likelihood of success on the merits. Success on the merits for Petitions for Judicial review of a final decision of an agency is governed by NRS 233B.135 as follows:

> **NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.**
> 1. Judicial review of a final decision of an agency must be: (a) Conducted by the court without a jury; and (b) Confined to the record. In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

The standard of review is whether there is substantial evidence to support the underlying decision. The reviewing court should limit its review of administrative decisions to determine if they are based upon substantial evidence. North Las Vegas v. Public Service Common, 83 Nev. 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993); and Horne v. State Indus. Ins. Sys., 113 Nev. 532, 537, 936 P.2d 839 (1997).

When reviewing administrative decisions, this Court has held that, on factual determinations, the findings and ultimate decisions of an agency are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial Common v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977).

An administrative determination regarding a question of fact will not be set aside unless it is against the manifest weight of the evidence. Nevada Indus. Common v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984).

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B.

An Order Granting Stay is Appropriate Until this Appeal is Heard and Decided on its Merits

The Nevada Supreme Court has consistently held that a stay is appropriate under circumstances such as those that exist in the instant case. Kress, Id. In DIR v. Circus Circus, 101 Nev. 405, 411-12, 705 P.2d 645, 649 (1985), the Nevada Supreme Court stated that an insurer's proper procedure when aggrieved by a decision is to seek a stay. The Nevada Supreme Court has also recognized that a stay should be granted where it can be shown that the Appellant would suffer irreparable injury during the pendency of the appeal, if the stay is not granted. White Pine Power v. Public Service Commission, 76 Nev. 263, 252 P.2d 256 (1960).

The Nevada Supreme Court held, in Ransier v. SIIS, 104 Nev. 742, 766 P.2d 274 (1988), that an insurer may not seek recoupment of benefits paid to a claimant that were later found to be unwarranted on appeal. However, it must be noted that NRS 616C.138 was recently modified to allow insurers to recover amounts paid during the pendency of an appeal "from a health or casualty insurer" if the insurer is found to be entitled to the same. However, if there is no health or casualty insurer, Ransier applies and insurers cannot recover anything at all. Here, just as in most cases, there is nothing to indicate whether Petitioner has health or casualty insurance. Furthermore, under no circumstances could an insurer recover any wage replacement benefits such as temporary partial disability or temporary total disability benefits.

In the instant case, an order granting a Stay of this Court's decision is appropriate for the reasons set forth herein. As will be discussed in great detail below, this Court's Decision was, respectfully, issued under color of a legal error. Furthermore, the only party that will be harmed by the subject order will be the Respondents. Instead of attempting to relitigate this claim, this matter should be put to the Supreme Court to avoid any duplicate proceedings. Indeed, if the Supreme Court can resolve this matter, there is no need to send this case back down to the Appeals Officer. It would be patently unfair to force Respondents into duplicative litigation. Such litigation represents irreparable harm to Respondents.

This case is precisely the scenario in which a stay is appropriate. Respondents have shown a substantial likelihood of prevailing on the instant appeal and Respondents will be irreparably harmed if the instant motion is not granted. Accordingly, Respondents contend that they have made the requisite showing for the granting of a stay of the Appeals Officer's decision until such time as a hearing can be conducted on the merits of its appeal.

C.

Petitioner Will Not Be Harmed By the Granting of a Stay

In the instant case, Petitioner will not be harmed by the granting of this stay. There are no pending emergency medical procedures which a Stay would prevent. Indeed, Petitioner's claim was already denied and this Decision remands for further determination. Petitioner would not be harmed at all by a stay.

The only potential for harm is to Respondents as the subject Order provides improper instructions to the Appeals Officer regarding the burdens associates with each party and contains incorrect assertions about the scope of workers' compensation in general. The only party which stands to be harmed by a failure to grant a stay is Respondents. Accordingly, Respondents have again made the requisite showing for the granting of a stay of this Court's decision until such time as a hearing can be conducted on the merits of Respondents' appeal.

D.

Standard Regarding Merits of Underlying Appeal

As for the merits of the underlying appeal, it was the Petitioner, not Respondents, who had the burden of proving his entitlement to any benefits under any accepted industrial insurance claim by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Johnson v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

In attempting to prove his case, the Petitioner has the burden of going beyond speculation and conjecture. That means that the Petitioner must establish all facets of the claim by a preponderance of all the evidence. To prevail, a Petitioner must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v.

SIIS, 109 Nev. 327, 849 P.2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, the Law of Workmen's Compensation, § 80.33(a).

E.

The Subject Order Makes Several Improper Conclusions Regarding Workers' Compensation

This case is about a claimant who has a pre-existing, non-industrial hearing loss which all parties agree is not compensable. However, Petitioner is alleging that his employment, over time, caused his pre-existing hearing loss to worsen. Administrator denied this claim as the state of Nevada does not recognize a claim that a pre-existing non-industrial condition was worsened over time by industrial causes. Further, Petitioner failed to establish that any one specific noise caused his hearing loss, especially considering that he has been working a desk job for 5-6 years prior to filing his claim. Without an allegation that his hearing loss was caused by a specific event, there is simply no way to render Petitioner's claim compensable. The Appeals Officer recognized this when she affirmed claim denial.

However, this Court reversed the Appeals Officer and remanded for an analysis of NRS 616C.175(1) with an expanded definition of "accident" to include the consideration that each loud noise which causes damage to the hearing as a separate accident. However, this holding does not match up with what Petitioner is asking for and does not provide Petitioner with a mechanism to prove that his *cumulative* alleged hearing loss is industrial. Indeed, Petitioner has not alleged any one single event that caused his hearing loss. He has alleged that over time his hearing has worsened.

Considering this Court's instructions, even if Petitioner could create a timeline of all the loud noises from the time of his hire through the time that he filed the claim (notwithstanding the fact that he did attempt to file a claim in 2005, was denied, and never contested the denial), if after each noise occurred a potential claim arose, Petitioner waived any right to have such claims considered as industrial by not filing a claim. Per NRS 616C.015, injured employees **must** provide written notice of an injury within seven (7) days. Per NRS 616C.020, injured employees **must** file

a claim within ninety (90) days after an accident. If written notice is not timely provided and a claim is not timely filed, the injured employee is foreclosed from claiming the injury/accident under industrial insurance.

The Nevada Supreme Court, in Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 2 P.3d 850 (2000), held that *mandatory* compliance with both NRS 616C.015 and NRS 616C.020 is a prerequisite for a compensable industrial insurance claim. The Court specifically held:

> After a careful review of NRS Chapter 616C, we conclude that the legislature established a comprehensive statutory scheme for workers' compensation claims that begins with a two-step process. First, **under NRS 616C.015, an injured employee must provide written notice of a work related injury to the employer within seven days of the injury.** Second, under NRS 616C.020(1), the employee must file a claim for compensation for the injury within ninety days of the accident. In accordance with NRS 616C.015(l) and NRS 616C.020(1), NRS 616C.025(1) expressly provides that an injured employee is barred from receiving compensation if the employee fails to file a notice of injury or fails to file a claim for compensation. Id., at 545. (emphasis added)

Therefore, even if the parties were to conduct the analysis requested by the Court, every time a loud noise occurred and allegedly caused a hearing loss, Petitioner conceded that such alleged hearing loss was non-industrial by failing to file a claim. Appeal rights cannot be regenerated. (See Reno Sparks Convention Visitors Auth. v. Jackson, 112 Nev. 62, 910 P.2d 267, (1996)). In other words, Petitioner could not make out a claim for all of the cumulative hearing loss which occurred prior to the most recent loud noise. He would only be able to claim the loss from the singular loud noise. And again, that is not even what Petitioner is asking for. He is asking for this claim to be accepted for his *cumulative* hearing loss, not the hearing loss from a specific accident.

As pointed out in Respondents' briefing before this Court, this case simply does not fit into the acute accident constructs of NRS 616C. It was error for this Court to remand for further consideration of this case under NRS 616C and a stay is needed to prevent unnecessary litigation.

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IV.

CONCLUSION

Based upon all of the above, it is the belief of Respondents, CITY OF HENDERSON and CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), that a stay of this Court's Order dated June 18, 2018, is necessary to prevent irreparable harm to Respondents.

WHEREFORE, Respondents, CITY OF HENDERSON and CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), respectfully requests that this Court grant its Motion For Stay Pending Supreme Court Appeal.

DATED this 3 day of July, 2018.

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
2300 West Sahara Avenue, Suite 300
Las Vegas, Nevada 89102
Attorneys for the Respondents

CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 10th day of July, 2018, service of the attached **RESPONDENTS' MOTION FOR STAY PENDING SUPREME COURT APPEAL AND MOTION FOR ORDER SHORTENING TIME** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

Lisa Anderson, Esq.
GREENMAN, GOLDBERG, RABY & MARTINEZ
601 South Ninth Street
Las Vegas, NV 89101

City of Henderson
Attn: Sally Ihmels
P.O. Box 95050, MSC 127
Henderson, NV 89009-5050

CCMSI
Sue Riccio
P.O. Box 35350
Las Vegas, NV 89133

An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

OPPS
LISA M. ANDERSON, ESQ.
Nevada Bar No. 004907
THADDEUS J. YUREK III, ESQ.
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Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER, Petitioner vs. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICE, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, Respondents.	CASE NO. : DEPT. NO. :	A-17-759871-J II

OPPOSITION TO MOTION FOR STAY PENDING SUPREME COURT APPEAL

COMES NOW, Petitioner, JARED SPANGLER (hereinafter "Petitioner"), by and through his attorneys, LISA M. ANDERSON, ESQ, and THADDEUS J. YUREK III, ESQ., of the law firm of GREENMAN, GOLDBERG, RABY & MARTINEZ, and files this Opposition to Motion for Stay Pending Supreme Court Appeal filed by the CITY OF HENDERSON and

CCMSI (hereinafter "Respondents"), by and through its attorney of record, DANIEL L. SCHWARTZ, ESQ., of the law firm of LEWIS BRISBOIS BISGAARD & SMITH.

This Opposition is made and based upon the Points and Authorities attached hereto as well as all other pleadings and papers on file in this action.

Dated this 13th day of July, 2018.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By _____
LISA M. ANDERSON, ESQ.
Nevada Bar No. 004907
THADDEUS J. YUREK III, ESQ.
Nevada Bar No. 011332
601 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Petitioner

POINTS AND AUTHORITIES

STATEMENT OF FACTS

On or about February 9, 2016, Petitioner reported the development of occupationally related hearing loss and tinnitus that was sustained and accelerated while in the course and scope of his employment as a police officer for the City of Henderson. On that date, Petitioner reported extensive exposure to unprotected loud noises during his career as a police officer. Liability for the claim was erroneously denied. Claim denial is the subject of this appeal.

Petitioner participated in annual physicals, including hearing tests, as part of his employment as a police office. (ROA pages 93-104) Petitioner demonstrated minor hearing deficits when he was hired as a police officer in 2003. However, Petitioner's hearing progressively worsened to a moderate to severe level by the time he filed his claim for workers' compensation benefits.

On February 9, 2016, Petitioner presented to Amanda Blake, Au.D for an audiology evaluation. At that time, Ms. Blake noted Petitioner's employment history as a police officer began in 2003, with eleven (11) years on active patrol. During Petitioner's employment as a police officer, Ms. Blake opined that Petitioner's hearing progressively worsened as a result of being "exposed to sirens, gunfire during range qualifications, and a radio piece in his left ear, and then a lapel microphone on his left side." Ms. Blake was provided with copies of the annual hearing examinations dating back to Petitioner's 2003 hire date, and she confirmed that Petitioner sustained additional bilateral hearing loss since his hire date, left worse than right. Ms. Blake concluded that Petitioner's "standard pure tone testing revealed borderline normal hearing, 0.25-2k Hz, sloping to a moderate high frequency sensorineural hearing loss in the right ear" and a "mild sloping to severe sensorineural hearing loss in the left ear with a notch present

at 6k Hz." Ms. Blake confirmed that it was her opinion that his hearing loss was "not a consequence of the normal aging process for either ear and is suggestive of noise exposure." Ms. Blake completed a C-4 form and opined that Petitioner's hearing loss was directly related to his employment as a police office. Ms. Blake recommended binaural amplification. (ROA pages 105-109)

On March 1, 2016, Petitioner was evaluated by Roger Theobald, Au.D, who confirmed that he reviewed the prior medical records pertaining to Petitioner's annual hearing tests, reporting from Dr. Scott Manthei in 2005, and reporting from Ms. Blake. Mr. Theobald also reported that Petitioner's job as a police officer exposed him to loud noises while on the job with the Henderson Police Department. Mr. Theobald verified that Petitioner had mild to moderate hearing loss in the left ear and normal to mild high frequency hearing loss in the right ear at the time of his 2003 hiring. In the years following Petitioner's 2003 hire date, Mr. Theobald opined that Petitioner's "hearing has significantly decreased bilaterally. Hearing decrease is considered significant if a change of 10dB or more occur at three or more hearing thresholds." Mr. Theobald verified that there is a likelihood of a pre-existing underlying condition contributing to Petitioner's hearing loss in the left ear, "however, there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." Testing performed by Mr. Theobald revealed "pure tone hearing threshold show a mild to moderately severe sensorineural hearing loss in the right ear and a moderate to moderately severe sensorineural hearing loss in the left." Mr. Theobald recommended that Petitioner be provided with hearing aids and be scheduled to see a neuro-otologist to evaluate for a left sided cochlear pathology. (ROA pages 110-113)

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On March 15, 2016, the Insurer denied liability for Petitioner's claim for bilateral hearing loss. (ROA pages 132) Petitioner appealed that determination to the Hearing Officer. Prior to the hearing, the parties agreed to transfer the matter to the Appeals Officer.

On November 23, 2016, Petitioner sent a letter to Dr. Steven Becker asking him whether Petitioner's hearing loss was work related and, if not, whether Petitioner's exposure to work related noise contributed to the hearing loss and tinnitus. On December 23, 2016, Dr. Becker opined that Petitioner's hearing loss was not entirely work related, however, Dr. Becker confirmed that it was his opinion that Petitioner's work related noise exposure "contributed" to the extent of the present hearing loss and tinnitus. Dr. Becker based his opinion on the "original hearing test (performed in) 2003 revealed losses bilaterally, worse in the left and hearing has steadily worsened" since that time." (ROA pages 25-29)

On July 20, 2017, the Appeals Officer affirmed Respondent's March 15, 2017 claim denial determination. The Appeals Officer concluded that Petitioner failed to establish that his occupational hearing loss qualified for benefits as an industrial injury or occupational disease. The Appeals Officer ruled that the origin of Petitioner's hearing loss was not related to an employment related risk. Respondent also argued that Claimant was assigned to a desk job during his career as a police officer. (ROA pages 3-11)

It is from the Appeals Officer's Decision and Order dated July 20, 2015 that Petitioner appealed. Upon reviewing the briefs submitted by the parties, the District Court Granted Petitioner's Petition for Judicial Review. The District Court found that the Appeals Officer erred as a matter of law when it applied NRS 616B.612 in affirming claim denial instead of applying NRS 616C.175(1) which permits compensation for certain pre-existing conditions where the origin of the injury did not arise out of and in the course of employment, but the

aggravation did. Additionally, the District Court found that the Appeals Officer "wrongly concluded that the aggravation of the pre-existing injury did not arise by an accident, by interpreting the term accident too narrowly." The District Court found that "each incident of a loud noise, which destroys those parts of the human body responsible for hearing, is a separate accident. Such destruction each occasion is sudden and violent." For this reason, the District Court concluded that "such accidents that destroy hearing are objective at the time in that the harm done to the ear is capable of objective, as opposed to subjective, evaluation. The term accident does not require that some person discovered the objective evidence at the time of the accident, only that such objective indicia of the injury arose at the time." For these reason, the District Court remanded the matter "back to the Appeals Officer to conduct a further hearing and apply the law as set for herein."

Respondent filed a Notice of Appeal to the Nevada Supreme Court on or about July 2, 2018 and filed a Motion for Stay on or about July 3, 2018. An "in chambers" hearing is set for July 16, 2018.

LEGAL DISCUSSION

I. THE APPLICATION FOR STAY PENDING APPEAL IS UNWARRANTED

An order for stay is not a right to be exercised, but a matter of judicial discretion to be used by the Court, when appropriate, upon application of a party. NRS 233B.140(3) provides that in making a ruling, the Court shall give deference to the trier of fact and consider the risk to the public, if any, of staying the administrative decision.

When considering an application for a stay order pending appeal, there are four factors which must be addressed:

1) Whether the petitioner for the stay order has made a *strong* showing that it is likely to prevail on the merits of the appeal;

2) Whether or not the petitioner has shown it would sustain irreparable injury absent the stay order;

3) Whether or not the issuance of a stay order would substantially harm the other interested parties; and

4) Where the public interest lies.

Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d 1371, 1374 (Nev. 1975); American Horse Protection Assoc. v. Frizzel, 403 F.Supp. 1206, 1215 (Nev. 1975). In this matter, a stay is unwarranted as Respondent has failed to meet the burden of making a strong showing that it is likely to prevail on the merits or that it will sustain irreparable injury absent the stay order. Moreover, a stay is unwarranted because the issuance of a stay order will substantially harm one of the other interested parties and the public interest favors Petitioner. The administrative determination that is the subject of this appeal is tantamount to an attempt by Respondent to deny liability for the occupationally related and aggravated hearing loss.

A. RESPONDENT HAS NOT MADE A STRONG SHOWING THAT IT WILL PREVAIL ON THE MERITS.

In order to show that it will prevail on the merits, Respondent has the burden of demonstrating that the District Court's decision was factually or legally incorrect and that the District Court acted arbitrarily or capriciously. NRS 233B.135(2); Campbell v. Nevada Tax Com'n, 853 P.2d 717 (Nev. 1993). In determining the appropriateness of the District Court's decision, this Court may not substitute its judgment for that of the District Court as to the weight of the evidence. N.R.S. 233B.135; SIIS v. Campbell, 862 P.2d 1184 (Nev. 1993); Campbell v. Nev. Tax Com'n, 853 P.2d 717 (Nev. 1993). On questions of fact, this Court is limited to

determining whether *substantial evidence* exists in the record to support the District Court's decision. Desert Inn Casino & Hotel v. Moran, 106 Nev. 334, 792 P.2d 400, 401 (1990); SIIS v. Swinney, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987). Substantial evidence is "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." State of Nevada Emplmt. Sec. Dept. v. Hilton Hotels Corp., 102 Nev. 606, 607-08, 729 P.2d 497, 498 (1986), quoting Robertson Transp. Co. v. P.S.C., 39 Wis.2d 653, 159 N.W.2d. 636, 638 (1968). In the instant case, Respondent has failed to meet its burden of demonstrating that the District Court's decision was factually or legally incorrect. Respondent has also failed to show that the District Court acted arbitrarily or capriciously.

LEGAL ARGUMENT

I. The Evidence Clearly Supports the District Court's Order Granting Petition for Judicial Review When Concluding That The Appeals Officer's July 20, 2017 Decision and Order Contained Legal Errors

In its Motion for Stay, Respondent argues that it will prevail upon the merits of the appeal because the District Court's decision "was, respectfully, issued under color of legal error..." and "represents irreparable harm to Respondents." Respondent's arguments lack merit and are a clear attempt to reweigh the evidence and reconsider the arguments previously submitted in their briefs.

It is the Petitioner's position that his employment as a police officer directly contributed to the extent of hearing loss and tinnitus present when the February 9, 2016 claim for workers' compensation was filed. Petitioner maintains that his particular profession, that of a law enforcement officer, exposes his to various noise hazards that the average citizen does not experience.

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NRS 617.440 states:

> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
>
> (a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
>
> (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (c) It can be fairly traced to the employment as the proximate cause; and
>
> (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.
>
> 2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.
>
> 3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.
>
> 4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X-rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.
>
> 5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.
>
> [Part 26:44:1947; A 1949, 365; 1953, 297] — (NRS A 1961, 589; 1963, 874; 1967, 685; 1983, 458; 2007, 3366)

The medical reporting from the audiologists, who examined, tested and reviewed all prior hearing studies, verifies that the extent of Petitioner's hearing loss and tinnitus is directly related to occupational exposures. These exposures consist of, but are not limited to, fire arm use, sirens, radio and various tactical maneuvers. Police officers are trained to be prepared to be in loud, chaotic environments. Ms. Blake and Mr. Theobald note Petitioner's prior hearing exposure but directly relate the ensuring severity of the hearing loss to employment related exposures. Further, Dr. Becker verified that Petitioner's hearing loss did not originate with his employment, but opined that the work related exposures contributed to the steady decline in

hearing capabilities. Thus the totality of the reporting establishes a "direct causal connection" between the extent of Petitioner's hearing loss and tinnitus and his job as a police officer. Petitioner is not placed in this type of situation outside of his employment. Since there was not a singular moment when Petitioner sustained hearing damage, the reporting clearly establishes that his occupational exposures contributed to Petitioner's level of hearing damage, which is a natural incident of his employment and qualifies for coverage as an occupational disease. It is clear that Petitioner's work conditions and work environment directly contributed to the February 9, 2016 claim for occupational hearing loss.

Although Petitioner started his career as a police officer with a minor hearing deficit, it was Petitioner's job in law enforcement that significantly accelerated his hearing loss and produced the tinnitus. NRS 616C.175 addresses the issue of when industrial factors aggravate or accelerate a pre-existing condition.

NRS 616C.175 states:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an injury by accident arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> Ê shall be deemed to be an injury by accident that is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

Respondent denied liability for Petitioner's bilateral hearing loss and tinnitus. Respondent based its denial on the fact that Claimant had some hearing deficit at the time of his 2003 hire date. Respondent has acknowledged the hearing deficit from 2003, however, he maintains that the ensuing hearing loss and tinnitus is associated with employment related noise

exposure. Thus it was Petitioner's occupational exposures that accelerated his future hearing losses.

The reporting from the audiologists, Ms. Blake and Mr. Theobald, establishes that Petitioner had some hearing loss at the time of his 2003 hire as a police officer. However, these audiologists verified that Petitioner's hearing loss progressively worsened due to employment related noise exposure.

Ms. Blake confirmed that it was her opinion that Petitioner's hearing loss was "not a consequence of the normal aging process for either ear and is suggestive of noise exposure." Ms. Blake noted that during his eleven (11) years on active patrol, Petitioner's hearing has progressively worsened as a result of being "exposed to sirens, gunfire during range qualifications, and a radio piece in his left ear, and then a lapel microphone on his left side."

Mr. Theobald verified that there is a likelihood of a pre-existing underlying condition contributing to Petitioner's hearing loss in the left ear, "however, there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." In the years following Petitioner's 2003 hire date, Mr. Theobald opined that Petitioner's "hearing has significantly decreased bilaterally. Hearing decrease is considered significant if a change of 10dB or more occur at three or more hearing thresholds."

Furthermore, Dr. Becker confirmed that, while Petitioner's job did not cause the hearing loss, his job was absolutely a "contributing factor" in the loss that developed after his 2003 hire date as a police officer.

NRS 616C.175 addresses the issue of when an industrial injury "aggravates, precipitates or accelerates" a pre-existing condition. This statute mandates that an Insurer is responsible for treatment related to a pre-existing condition if the industrial injury "aggravates, precipitates or

accelerates" the pre-existing condition. Moreover, if the Insurer denies responsibility for treatment related to a pre-existing condition, this statute requires the Insurer to "prove by a preponderance of the evidence that the subsequent (industrial) injury is not a substantial contributing cause of the resulting condition."

In this case, Respondent has completely failed to meet its statutory obligation of proving by "a preponderance of the evidence" that Petitioner's occupationally related noise exposure is "not a substantial contributing cause of the resulting condition." Petitioner began experiencing increased hearing loss and the development of tinnitus symptoms after his 2003 hire date as a police officer. This fact was documented in Ms. Blake, Mr. Theobald and Dr. Becker's reporting. Petitioner's job as a police officer regularly exposed him to extremely loud sirens, unprotected sounds of gunfire, a radio piece in the left ear and a lapel radio in close proximity to this left ear. It was during these activities that resulted in the acceleration of hearing loss following his 2003 hire date.

Petitioner experienced minimal hearing deficit at the time of his 2003 hire date. During the subsequent years of active patrol duty, Petitioner was exposed to wide-ranging sources of loud noise without protection. In fact, the reporting verified that Petitioner's increased hearing loss in the left ear compared to the right ear was related to the use of the ear piece in the left ear and the lapel radio on the left side. These exposures were a "contributing factor" in Petitioner's accelerated hearing loss and the development of tinnitus. The current level of hearing loss has been directly related to his occupation as a police officer.

Therefore, Petitioner's job as a police officer is clearly the primary contributing cause of the current level of hearing loss and the development of tinnitus. The reporting from Ms. Blake, Mr. Theobald and Dr. Becker confirms that Petitioner's occupation noise exposure was the

primary contributing cause of the current hearing loss and tinnitus. Although there was a pre-employment finding of mild hearing loss at the time of his 2003 hiring as a police officer, the subsequent deterioration of his hearing abilities and current need for hearing aids is directly related to his employment as a police officer. Therefore, based upon the extensive nature of the industrial noise exposures, Petitioner's worsening hearing loss and tinnitus is industrially related.

Thus, the Appeals Officer incorrectly applied the NRS 616C.150 and NRS 617.440 when finding that Petitioner's hearing loss condition did not qualify for benefits as an industrial injury or occupational disease. Petitioner's hearing loss absolutely qualifies for benefits under NRS 616C.440. Moreover, the available reporting demonstrates that Claimant's mild pre-existing hearing loss at the tire of his hire as a police officer was aggravated and accelerated by the ensuring years of occupational noise exposures.

B. RESPONDENT WILL NOT SUFFER IRREPARABLE HARM.

Respondent has the burden of demonstrating that it will suffer irreparable harm if the stay order is not issued. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. Respondent argues in its Motion that if the stay is not granted, it will be irreparably harmed because of the payment of benefits. This argument, however, is without merit since there are no Nevada Supreme Court cases that indicate irreparable harm results from the sole payment of money. To the contrary, the Nevada Supreme Court, in DIIR v. Circus Circus Enterprises, held that:

> ...the object of workers' (sic) compensation social legislation is to provide the disabled worker with benefits during the period of his disability so that the worker and his dependents may survive the catastrophe which the temporary cessation of necessary income occasions.

101 Nev. 405, 408, 705 P.2d 645, 648 (1985). The court also indicated that "...it is clearly the injured worker and not the employer who is more likely to be irreparably harmed when immediate payment of benefits is contrasted with delayed payment pending the outcome of the hearing on the merits." Id. (Emphasis added). Respondent is the party more likely to be harmed by the issuance of a stay since liability for the February 9, 2016 claim would continue to be denied and the payment of appropriate benefits withheld.

C. THE ISSUANCE OF A STAY ORDER WILL SUBSTANTIALLY HARM AN INTERESTED PARTY.

In determining whether or not to issue a stay, the Court must consider whether the issuance of a stay order will substantially harm an interested party. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. In this matter, the issuance of a stay is unwarranted because it would substantially harm Petitioner, an interested party, by further delaying the payment of industrial injury benefits for a legitimate and compensable occupationally related hearing loss. Moreover, the continued delay of benefits is contrary to the policy expressed by the Nevada Supreme Court in DIIR v. Circus Circus Enterprises, *supra*.

D. THE PUBLIC INTEREST FAVORS PETITIONER IN THE INSTANT CASE.

In determining whether to issue a stay, the Court must consider where the public interest lies. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. A stay in this matter is unwarranted since there is no public interest which will be sacrificed by the Court's refusal to grant the stay.

The issue in this case involves Respondent denying a legitimate occupationally related hearing loss condition that clearly developed and was aggravated from a non-industrial source, as specifically considered under NRS 616C.175(1). Clearly, the evidence confirms that

Respondent's current hearing loss was aggravated and exacerbated by occupational factors and hazards related to his occupation as a police officer. Respondent has made no allegation that such action will force it into liquidation, necessitate the termination of employees, or result in any similar outcome that might affect the public interest.

CONCLUSION

Respondent's Motion for Stay must be denied since it has not made a strong showing that it is likely to prevail on the merits of the appeal or that it will suffer irreparable harm. Moreover, Petitioner's interest will be adversely affected by the issuance of a stay order and the public interest will be unaffected either way. Based on the foregoing, Claimant hereby respectfully requests that the District Court's Order Granting Petition for Judicial Review remain in force as entered, and that Respondent's Motion for Stay be denied.

Dated this 13th day of July, 2018.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By: _____

LISA M. ANDERSON, ESQ.
Nevada Bar No. 004907
THADDEUS J. YUREK III, ESQ.
Nevada Bar No. 011332
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601 South Ninth Street
Las Vegas, Nevada 89101
(702) 384-1616

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of July, 2018, I deposited a true and correct copy of the PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR STAY PENDING SUPREME COURT APPEAL in the U.S. Mails, postage fully prepaid, enclosed in envelopes addressed as follows:

Daniel L. Schwartz, Esq.
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Attorney for Respondents

Georganne Bradley, Esq.
Appeals Officer
DEPARTMENT OF ADMINISTRATION
HEARINGS DIVISION
2200 South Rancho Drive
Suite 220
Las Vegas, Nevada 89102

An Employee of GREENMAN, GOLDBERG, RABY & MARTINEZ

DISTRICT COURT
CLARK COUNTY, NEVADA

Worker's Compensation Appeal	COURT MINUTES	July 16, 2018

A-17-759871-J Jared Spangler, Petitioner(s)
vs.
Henderson City of, Respondent(s)

July 16, 2018 **3:00 AM** **Respondents' Motion for Stay Pending Supreme Court Appeal and Motion for Order Shortening Time**

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Lauren Kidd

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- The Court GRANTS Respondents motion for stay pending appeal. The object of the appeal is to prevent duplication of effort and resources that would result if the remanded proceedings were to continue before the Appeals Officer. Respondent would incur some irreparable harm if the stay were denied because the Respondent would be required to pay benefits to Petitioner with no statutory mechanism to recover such benefits if Petitioner were to prevail on appeal. Petitioner has not supported any claim of irreparable harm through some further delay in the payment of benefits because Petitioner has not identified any upcoming treatment that would not be covered by insurance, or otherwise outside of Petitioner's ability to pay pending appeal. Finally, although the Court does not believe that there exists a "likelihood" of success on appeal, the Court does recognize that there is indeed a "possibility" of success on appeal, as this Court's decision required an interpretation of the term "accident" as used in NRS 616C.175(1), which interpretation has not been the subject of any clear precedent.

CLERK'S NOTE: This minute order has been distributed to: Lisa Anderson, Esq. (FAX- 702.384.2990) and Daniel Schwartz, Esq. (FAX- 702.366.9563). // 7/20/18 lk

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DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER, Petitioner, v. CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE, Respondents.	CASE NO.: A-17-759871-J DEPT NO.: II

ORDER GRANTING MOTION FOR STAY

After careful review and consideration of Petitioners' Motion for Stay, Respondent's Opposition, the oral argument of the parties, and good cause appearing:

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AUG 1 0 2018

4816-7244-7343.1 / 26990-1176

The Court GRANTS Respondents motion for stay pending appeal. The object of the appeal is to prevent duplication of effort and resources that would result if the remanded proceedings were to continue before the Appeals Officer. Respondent would incur some irreparable harm if the stay were denied because the Respondent would be required to pay benefits to Petitioner with no statutory mechanism to recover such benefits if Petitioner were to prevail on appeal. Petitioner has not supported any claim of irreparable harm through some further delay in the payment of benefits because Petitioner has not identified any upcoming treatment that would not be covered by insurance, or otherwise outside of Petitioner's ability to pay pending appeal. Finally, although the Court does not believe that there exists a "likelihood" of success on appeal, the Court does recognize that there is indeed a "possibility" of success on appeal, as this Court's decision required an interpretation of the term "accident" as used in MRS 616C.175(1), which interpretation has not been the subject of any clear precedent.

IT IS HEREBY ORDERED that Petitioner's Motion for Stay of this Court's June 18, 2018 Decision and Order is GRANTED.

DATED this 16th day of August, 2018.

DISTRICT COURT JUDGE
RICHARD F. SCOTTI

Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
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Las Vegas, Nevada 89102
Attorneys for Respondents

Approved as to form and content:

GREENMAN, GOLDBERG, RABY & MARTINEZ

By: Unable to obtain signature
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Attorneys for Respondents,
City of Henderson and Cochran
Management Services, Inc. (CCMSI)

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner,

v.

CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE,

Respondents.

CASE NO.: A-17-759871-J

DEPT NO.: II

NOTICE OF ENTRY OF ORDER

YOU, AND EACH OF YOU, please take notice than an **ORDER GRANTING MOTION FOR STAY** was entered on August 20, 2018 and is

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attached hereto and made a part hereof.

DATED this 21 day of August, 2018.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 5125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
2300 W. Sahara Ave. Ste. 300
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Attorneys for Respondents

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that I did cause a true copy of **NOTICE OF ENTRY OF ORDER** to be placed in the United States Mail, with first class postage prepaid to:

Lisa Anderson, Esq.
GREENMAN, GOLDBERG, RABY & MARTINEZ
601 South Ninth Street
Las Vegas, NV 89101

City of Henderson
Attn: Sally Ihmels
P.O. Box 95050, MSC 127
Henderson, NV 89009-5050

CCMSI
Sue Riccio
P.O. Box 35350
Las Vegas, NV 89133

DATED this 21st day of August, 2018.

An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

ORDR
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Attorneys for Respondents,
City of Henderson and Cochran
Management Services, Inc. (CCMSI)

DISTRICT COURT

CLARK COUNTY, NEVADA

JARED SPANGLER,

Petitioner,

v.

CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI), THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS OFFICE,

Respondents.

CASE NO.: A-17-759871-J

DEPT NO.: II

ORDER GRANTING MOTION FOR STAY

After careful review and consideration of Petitioners' Motion for Stay, Respondent's Opposition, the oral argument of the parties, and good cause appearing:

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AUG 1 0 2018

The Court GRANTS Respondents motion for stay pending appeal. The object of the appeal is to prevent duplication of effort and resources that would result if the remanded proceedings were to continue before the Appeals Officer. Respondent would incur some irreparable harm if the stay were denied because the Respondent would be required to pay benefits to Petitioner with no statutory mechanism to recover such benefits if Petitioner were to prevail on appeal. Petitioner has not supported any claim of irreparable harm through some further delay in the payment of benefits because Petitioner has not identified any upcoming treatment that would not be covered by insurance, or otherwise outside of Petitioner's ability to pay pending appeal. Finally, although the Court does not believe that there exists a "likelihood" of success on appeal, the Court does recognize that there is indeed a "possibility" of success on appeal, as this Court's decision required an interpretation of the term "accident" as used in MRS 616C.175(1), which interpretation has not been the subject of any clear precedent.

IT IS HEREBY ORDERED that Petitioner's Motion for Stay of this Court's June 18, 2018 Decision and Order is GRANTED.

DATED this 16th day of August, 2018.

DISTRICT COURT JUDGE
RICHARD F. SCOTTI

Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
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