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**DISTRICT COURT
CLARK COUNTY, NEVADA**

* * *

DARRELL E. WHITE, an individual;

Petitioner,

v.

STATE OF NEVADA, ex rel. DIVISION
OF FORESTRY; CANNON COCHRAN
MANAGEMENT SERVICES, INC. aka
CCMSI, a foreign corporation.

Respondents.

Case No.: A-17-760282-J
Dept. No.: Department 32

**PETITION FOR JUDICIAL
REVIEW**

Petitioner, Darrell E. White, through his attorneys of the law firm of Gallian Welker & Beckstrom, LC, hereby files his Petition for Judicial Review of the Decision of the Appeals Officer, Charles York, filed on August 16, 2017, a true and correct copy of which is attached as Exhibit 1.

This Petition for Judicial Review is filed pursuant to NRS 616C.370, which mandates that judicial review shall be the sole and exclusive judicial proceeding in contested industrial insurance claims under NRS 2333.130, et seq.

The decision of the Appeals Officer was contrary to the Nevada Constitution and statutory provisions and presents an issue of 1st impression for the Court.

Pursuant to NRS 233B.133, petitioner Darrell E. White specifically requests that the Court entertain written briefs and oral argument.

DATED this 21st day of August 2017.

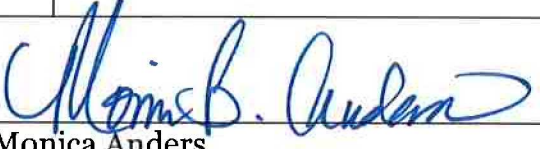
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August 2017, I caused the **PETITION FOR JUDICIAL REVIEW** to be served by depositing a true and correct copy of the same in the U.S. Mail at Las Vegas, Nevada, in a sealed envelope, first class postage fully prepaid to the persons listed below:

Department of Administration Appeals Division 1050 E. William Street, Ste. 450 Carson City, NV 89701	Darrell E. White 3947 Blue Wave Dr. Las Vegas, NV 89115
Nevada Division of Forestry 2478 Fairview Drive Carson City, NV 89701	CCMSI P.O. Box 4990 Carson City, NV 89701
Daniel L. Schwartz, Esq. Lewis, Brisbois, Bisgaard & Smith, LLP 2300 W. Sahara Ave., Ste. 300, Box 28 Las Vegas, NV 89102	


Monica Anders
An employee of Gallian Welker Beckstrom, LC

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WHITE V. STATE
EXHIBIT 1
APPEALS OFFICER DECISION AND ORDER

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WHITE V. STATE
EXHIBIT 1
APPEALS OFFICER DECISION AND ORDER

FILED

AUG 16 2017

NEVADA DEPARTMENT OF ADMINISTRATION

BEFORE THE APPEALS OFFICER

APPEALS OFFICE

In the Matter of the Contested
Industrial Insurance Claim

of

DARRELL WHITE
3947 BLUE WAVE DRIVE
LAS VEGAS, NV 89115,

Claimant.

Claim No.: 15C62G394045

Hearing No.: 1701007-SA

Appeal No.: 1707925-CJY

Employer:
STATE OF NEVADA
DIVISION OF FORESTRY
2478 FAIRVIEW DRIVE
CARSON CITY, NV 89701

DECISION AND ORDER

The above-captioned appeal came on for hearing before Appeals Officer CHARLES J. YORK, ESQ., on February 17, 2017. The claimant, DARRELL WHITE (hereinafter referred to as "claimant"), was represented by his attorney, TRAVIS BARRICK, ESQ., of GALLIAN WELKER & BECKSTROM. The Employer's Administrator, CCMSI (hereinafter referred to as "Administrator"), was represented by DANIEL L. SCHWARTZ, ESQ., of LEWIS BRISBOIS BISGAARD & SMITH LLP.

On September 29, 2016, Administrator issued a determination regarding claimant's average monthly wage (hereinafter referred to as "AMW") calculation. The claimant filed an appeal of that determination to the Hearing Officer in Carson City, Nevada, to generate Hearing No. 1701007-SA. On November 8, 2016, the Hearing Officer issued a Decision and Order affirming the determination regarding AMW. Claimant appealed that decision to the Appeals Officer in Carson City, Nevada, generating Appeal No. 1701563-RKN. The claimant filed a Motion for Change Venue of Venue to the appeals office in Las Vegas, Nevada. That Motion was granted on December 19, 2016, and the file was transferred to the Department of Administration in Las Vegas, Nevada, generating Appeal No. 1707925-CJY.

1 After reviewing the documentary evidence and considering the arguments of counsel,
2 the Appeals Officer finds and decides as follows:

3 **FINDINGS OF FACT**

4 1. On December 22, 2015, claimant alleged injury to his right hand as a result of
5 stepping off of a porta potty trailer and hitting his right hand on the bumper of the crew bus. The
6 physician on the C-4 Form diagnosed an open fracture of right third MP joint. (Exhibit A at 5)

7
8 2. Employer completed the C-3 Form. (Exhibit A at 6)

9 3. The Supervisor Accident/Injury/Incident Report was also completed. (Exhibit
10 A at 1-3)

11 4. Claimant presented to Dr. John Rogers on December 22, 2015. A fracture was
12 noted. (Exhibit A at 7-8)

13 5. Claimant presented to UMC on December 23, 2015. An open comminuted and
14 evulsion fracture of distal 3rd metacarpal was diagnosed. (Exhibit A at 9-34)

15 6. Claimant presented to Dr. David Fadell on January 8, 2016. The impression
16 noted fracture, middle finger, metacarpal head, dorsal aspect, articular but not in need of surgical
17 intervention. A Thermaplast splint for the index finger was applied. (Exhibit A at 35-37)

18 7. On January 25, 2016, the claim was accepted for a right hand 3rd MP joint
19 fracture. (Exhibit A at 38)

20 8. On February 24, 2016, claimant returned to Dr. Fadell. The brace was
21 discontinued. (Exhibit A at 39)

22 9. On April 25, 2016, claimant was advised that he was required to treat even
23 through incarceration. (Exhibit A at 40)

24 10. On April 29, 2016, claimant was advised that his claim would close if he did
25 not follow up with medical treatment. (Exhibit A at 41)

1 11. On June 3, 2016, Administrator advised claimant that his claim would be
2 closed. (Exhibit A at 42)

3 12. On July 7, 2016, claimant was released from the custody of the NDOC.
4

5 13. On August 4, 2016, claimant was advised that the Administrator would
6 schedule him for a consult with Dr. Bronstein. (Exhibit A at 43)

7 14. On August 18, 2016, claimant presented to Dr. Bronstein. He recommended
8 discontinuing the brace and a partial ostectomy. (Exhibit A at 44-52)

9 15. On September 1, 2016, claimant was seen by PA-C Frank Urbina at Urgent
10 Care. Claimant was taken off of work. (Exhibit A at 53-63)

11 16. On September 20, 2016, claimant was advised that the request for compensation
12 during incarceration was denied. (Exhibit A at 64)

13 17. On September 29, 2016, claimant was advised of his average monthly wage.
14 (Exhibit A at 65-74)

15 18. On September 29, 2016, claimant returned to Dr. Bronstein. Surgery was
16 discussed. (Exhibit A at 75-86)

17 19. On October 18, 2016, claimant was advised that he was no longer eligible for
18 TTD benefits effective September 30, 2016, as he was released to full duty. (Exhibit A at 87)

19 20. On October 19, 2016, claimant presented to Dr. Bronstein for surgery. (Exhibit
20 A at 88-93)

21 21. On October 20, 2016, claimant was advised of an overpayment of benefits.
22 (Exhibit A at 94-95)

23 22. On October 25, 2016, claimant returned for postoperative evaluation. (Exhibit
24 A at 96-103)

25 23. Claimant returned to Dr. Bronstein on November 8, 2016. Occupational
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1 therapy was ordered. (Exhibit A at 104)

2 24. Following Hearing No. 1701007-SA, the Hearing Officer issued a Decision and
3 Order dated November 8, 2016, affirming the September 29, 2016 determination related to the average
4 monthly wage. (Exhibit A at 105-107)

5 25. Following Hearing No. 1701217-SA, the Hearing Officer issued a Decision and
6 Order dated November 22, 2016, affirming the October 20, 2016 determination terminating TTD
7 benefits and asserting an overpayment. (Exhibit A at 108-109)

8 26. On December 1, 2016, claimant's counsel appealed the November 8, 2016
9 Decision and Order and the November 22, 2016 Decision and Order. (Exhibit A at 110-111)

10 27. An Order consolidating appeals was filed. (Exhibit A at 112)

11 28. A Motion for Change of Venue was filed by claimant's counsel. (Exhibit A at
12 113-115) An Order granting same was filed. (Exhibit A at 116)

13 29. These findings of fact are based upon substantial evidence within the record.

14 30. Any find of fact more appropriately deemed a conclusion of law shall be so
15 deemed and vice versa.

16 CONCLUSIONS OF LAW

17 1. It is the claimant, not the Administrator, who has the burden of proving his
18 case; and that is by a preponderance of all the evidence. State Industrial Insurance System v. Hicks,
19 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div.,
20 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

21 2. In attempting to prove his case, the claimant has the burden of going beyond
22 speculation and conjecture. That means that the claimant must establish the work related injury and
23 his disability, the extent of his disability, and all facets of the claim by a preponderance of the
24 evidence. To prevail, the claimant must present and prove more evidence than an amount which

1 would make his case and her opponent's "evenly balanced." Maxwell v. SIIS, 109 Nev. 327, 849 P.
2 2d 267 (1993); SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671
3 P.2d 29 (1983); 3, A. Larson, The Law of Workmen's Compensation, §80.33(a).

4 3. NRS 616A.065(1) defines Average Monthly Wage as follows:

5 Except as otherwise provided in Subsection 3, "average monthly
6 wage means the lesser of:

7 (a) The monthly wage actually received or deemed to have
8 been received by the employee on the date of accident or
injury to the employee, excluding remuneration from
employment:

9 (1) Not subject to the Nevada Industrial Insurance
Act or the Nevada Occupational Diseases Act;
and

10 (2) For which coverage is elective, but has not
been elected.

11 4. NAC 616.435 provides the periods used for calculating the average monthly
12 wage and generally requires a history of earnings for a period of twelve (12) weeks to be used in order
13 to calculate an average monthly wage.

14 5. NAC 616C.435(7) is the catch all provision of the NAC and provides that the
15 methods to be used in calculating the average monthly wage of an employee should be reasonable and
16 fair.

17 6. NRS 616C.475 provides that the temporary total disability ("TTD") amount to
18 be paid is sixty-six and two-thirds percent (66 2/3%) of the average monthly wage.

19 7. The claimant appealed the determination advising him of his AMW.
20 Administrator utilized the wage information provided by the Employer and properly calculated the
21 AMW.

22 8. Claimant was injured December 22, 2015 while employed by Nevada
23 Department of Forestry. At that time, he was an inmate at the Nevada Department of Corrections
24 (hereinafter referred to as "NDOC"). Claimant is covered for injuries occurring while such employed
25 (NRS 616B.028). Claimant was released from the custody of NDOC on July 7, 2016. Subsequent to
26 his release, he was declared "unable to work" by Dr. Andrew Bronstein (for a certain period of time)
27
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1 and then released on or about December 28, 2016 (full duty). Thus, there is no doubt that claimant,
2 subsequent to release from custody, was declared unable to work until Dr. Bronstein's release on
3 December 2016.

4 9. Counsel for claimant contends that pursuant to NRS 616C.475 and NRS
5 616C.500, the claimant is entitled to receive temporary total disability (hereinafter referred to as
6 "TTD") and or temporary partial disability (hereinafter referred to as "TPD") benefits after release
7 from custody and during the period of disability or restrictions. Claimant is entitled to these benefits.
8 However, the question remains at what wage base.
9

10 10. Counsel for claimant contends that under the Nevada Constitution (Article 15)
11 along with the minimum wage established by the office of the Labor Commissioner (\$7.25 per hour),
12 the AMW determination should be reversed.
13

14 11. The Appeals Officer understands counsel's concern and argument but claimant
15 entered into this "employment" at the wage set by the work program/prison industry and is entitled to
16 the benefits established by the Division of the Department of Corrections. This was voluntary work
17 related where the claimant received a nominal amount of money but received credit (time off) of his
18 sentence. NRS 616B. 028(2) outlines that the offender (claimant) is not entitled to any rights and
19 remedies established by Chapter 616A to 617 of the Nevada Revised Statutes.
20

21 12. Consequently, the determination of September 29, 2016 was appropriate.
22 Counsel for the claimant made it quite clear that he wanted to challenge this determination on
23 Constitutional grounds. The Appeals Officer appreciates counsel's honesty and efforts but sees no
24 evidence that changes his opinion that claimant was compensated accordingly to the terms of this
25 voluntary program.

26 13. Please note that the Appeals Officer does not have any evidence concerning the
27 establishment of an AMW in a case such as this. No evidence was produced (and perhaps there is
28

1 none by the Department of Corrections regulators governing this type of issue). This falls back on
2 NRS 616.425 which does outline that the amount of compensation must be determined as of the date
3 of the accident. The statute, along with NAC 616C.425 and NAC 616C.435, leads the Appeals
4 Officer to conclude the AMW was properly established.

5
6 **DECISION AND ORDER**

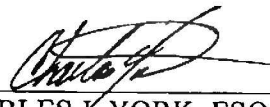
7 The claimant has failed to establish that the AMW calculation is improper.

8 IT IS HEREBY ORDERED that the Hearing Officer's Decision and Order of
9 November 8, 2016, which affirmed the Administrator September 29, 2016 AMW calculation
10 determination, is AFFIRMED.

11 IT IS ALSO ORDERED that the Administrator September 29, 2016 AMW calculation
12 determination is AFFIRMED.


13 IT IS SO ORDERED.

14 DATED this 16th day of August, 2017.

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18 CHARLES J. YORK, ESQ.
Appeals Officer

19 **NOTICE:** Pursuant to NRS 616C.370, should any party desire to appeal this final decision of
20 the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within
21 thirty (30) days after service of this Order.

22 Submitted by,
LEWIS BRISBOIS BISGAARD & SMITH LLP

23 
24 By: _____
25 Daniel L. Schwartz, Esq.
26 Nevada Bar No. 5125
27 2300 West Sahara Avenue, Suite 300, Box 28
28 Las Vegas, Nevada 89102
Attorneys for the Employer/Administrator

1 CERTIFICATE OF MAILING

2 The undersigned, an employee of the State of Nevada, Department of Administration,
3 Appeals Division, does hereby certify that, on the date shown below, a true and correct copy of the
4 foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the appropriate
5 addressee runner file maintained by the Division, 2200 South Rancho Drive, Suite 220, Las Vegas,
6 Nevada, to the following:

7 Darrell White
8 3947 Wave Drive
9 Las Vegas, NV 89115

10 Travis Barrick, Esq.
11 Gallian Welker & Beckstrom
12 540 E. St. Louis Avenue
13 Las Vegas, NV 89104

14 STATE OF NEVADA
15 DIVISION OF FORESTRY
16 Attn: Carol Nelson
17 2478 Fairview Drive
18 Carson City, NV 89701

19 STATE OF NEVADA RISK MGMT
20 Attn: Ana Andrews- Dept. Risk Mgr.
21 201 S. Roop Street, Ste. 201
22 Carson City, NV 89701-6752

23 CCMSI
24 Attn: Elizabeth Hickson
25 PO Box 4990
26 Carson City, NV 89702-4490

27 Daniel Schwartz, Esq.
28 Lewis Brisbois Bisgaard & Smith LLP
2300 W. Sahara Avenue, Ste. 300, Box 28
Las Vegas, NV 89102

25 DATED this 16th day of August, 2017.

26 
27 _____
28 An employee of the STATE OF NEVADA

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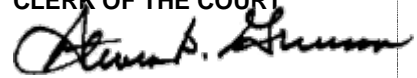
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9 Email: daniel.schwartz@lewisbrisbois.com
10 *Attorneys for Respondents,*
11 *State of Nevada Division of Forestry and*
12 *Cannon Cochran Management Services, Inc. (CCMSI)*

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 DARRELL E. WHITE, an individual,
11
12 Petitioner,

12 v.

13 STATE OF NEVADA, ex rel. DIVISION
14 OF FORESTRY; CANNON COCHRAN
15 MANAGEMENT SERVICES, INC. aka
16 CCMSI, a foreign corporation,

16 Respondents.

CASE NO.: A-17-760282-J

DEPT NO.: XXXII

18 **NOTICE OF ENTRY OF ORDER**

19 YOU, AND EACH OF YOU, please take notice than an **ORDER DENYING**
20 **PETITIONER'S PETITION FOR JUDICIAL REVIEW** was entered on July 25, 2018

21 ///

22 ///

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28 ///

1 and is attached hereto and made a part hereof.

2 DATED this 25 day of July, 2018.

3 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

4 By: 

5 DANIEL L. SCHWARTZ, ESQ.

6 Nevada Bar No. 5125

7 JOEL P. REEVES, ESQ.

8 Nevada Bar No. 013231

9 2300 W. Sahara Ave. Ste. 300

10 Las Vegas, Nevada 89102

11 *Attorneys for Respondents*

CERTIFICATE OF SERVICE

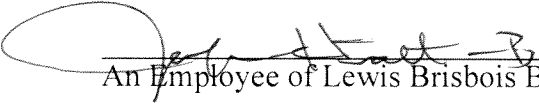
Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 25 day of July, 2018, service of the attached **NOTICE OF ENTRY OF ORDER** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

Travis Barrick, Esq.
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540 E. St. Louis Avenue
Las Vegas, NV 89104

Ana Andrews
STATE OF NEVADA
Risk Management Division
201 South Roop Street, Suite 201
Carson City, NV 89701

Staci Jones
CANNON COCHRAN MANAGEMENT SERVICES, INC.
P. O. Box 4990
Carson City, NV 89702

Department of Administration
Hearings Division – Appeals Office
Attn: Appeals Officer Charles York, Esq.
2200 S. Rancho Dr. Ste. 220
Las Vegas, NV 89102
Appeal No.: 1707925-CJY


An Employee of Lewis Brisbois Bisgaard & Smith, LLP

Steven D. Grierson

1 **ORDR**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 *****

5
6 **DARRELL E. WHITE, an**
7 **individual;**

8 **Petitioner,**

CASE NO. A-17-760282-J

DEPT. NO. 32

9 **vs.**

10 **STATE OF NEVADA, ex rel.**
11 **DIVISION OF FORESTRY;**
12 **CANNON COCHRAN**
13 **MANAGEMENT SERVICES,**
14 **INC. aka CCMSI, a foreign**
15 **corporation.**

16 **Respondents.**

17 **DECISION AND ORDER**

18 **Procedural and Factual Background**

19 This case arises from the denial of a temporary total disability ("TTD") at an
20 average monthly wage ("AMW") that was at least equal to the State's minimum wage
21 for the 174 days, after Petitioner Darrell E. White ("Petitioner") was released from
22 custody at Nevada Department of Corrections ("NDOC"). On December 22, 2015,
23 Petitioner injured his right middle finger as a result of stepping off of a porta-potty
24 trailer and hitting his right hand on the bumper of a crew bus while at work for the
25 Nevada Department of Forestry as an inmate. Petitioner was subsequently diagnosed
26 with an open fracture on the right middle finger. On July 7, 2016, Petitioner was
27 released from the custody of NDOC.
28

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

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CLERK OF THE COURT

1 On August 17, 2016, Petitioner was examined by Dr. Bronstein who observed a
2 "healed fracture with a dorsal avulsion fragment that is dorsally displaced." Dr.
3 Bronstein made an entry of "patient may work, full duty."

4 On September 29, 2016 CCSMI, the Third-Party Administrator ("TPA") of
5 Petitioner's claim, informed Petitioner that his AMW for TTD was \$22.93 for a daily
6 rate of \$0.50.

7 On October 26, 2016, Petitioner was again examined by Dr. Bronstein, who
8 recommended surgery on the middle finger and noted that, as of October 19, 2016,
9 Petitioner was "unable to work." On or about November 15, 2016, Dr. Bronstein
10 performed surgery on Petitioner's finger and on November 21, 2016, Petitioner was
11 authorized for continuing physical therapy, which was approved for an additional four
12 weeks.

13 On December 28, 2016, the TPA informed Petitioner that he had completed his
14 medical treatment and was referring him out for a PPD. Accordingly, Petitioner was
15 under physicians care for his injury from July 7, 2016, the date of his release from
16 NDOC, until December 28, 2016, for a total of 174 days.

17 On March 17, 2017, the Appeals Officer conducted an Appeal Hearing. On
18 August 17, 2017, the Appeals Officer issued the Decision and Order, wherein it was
19 determined that the "TPA's determination of AMW was appropriate; because
20 Petitioner is not entitled to any rights or remedies established by Chapter 616A to 617
21 of the Nevada Revised Statutes." It was also determined that Petitioner was unable to
22 work until Dr. Brownstein's release on December 28, 2016.

23 On August 21, 2017, Petitioner filed this Petition for Judicial Review.
24 Petitioner argues that the decision of the Appeals Officer was contrary to the Nevada
25 Constitution, Article 15, §16, given that the TPA determined that the appropriate
26 compensation for the Petitioner was for TTD based upon an AMW that is less than the
27 State's minimum wage for the 174 days after his release from custody.
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1 **Conclusions of Law**

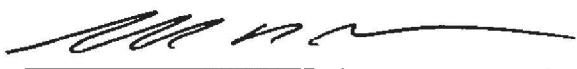
2 When reviewing a record on appeal, NRS 233B.135 provides that the
3 District Court is limited to the record on appeal and may not “reweigh the
4 evidence, reassess the witnesses’ credibility, or substitute the administrative law
5 judge’s judgment with [its] own.” *Nellis Motors v. State, Dep’t of Motor Vehicles*,
6 197 P.3d 1061, 1066 (Nev. 2008). The burden of proof is on the Petitioner to show
7 that the Appeals Officer’s decision was not supported by the law, was clearly
8 erroneous in view of the substantial evidence, or was an abuse of discretion. NRS
9 233B.135(2), (3)(d)-(f). In determining whether a decision is supported by
10 substantial evidence, the court should determine whether the evidence is such that
11 “a reasonable man could accept as adequate to support a conclusion.” *Maxwell v.*
12 *State Indus. Ins. Sys.*, 109 Nev. 327, 331 (1993). Therefore, the question before
13 this Court is whether there is substantial evidence in order to support the Appeals
14 Officer’s decision and whether the Appeals Officer’s decision was clearly
15 erroneous and an abuse of discretion. *Id.*

16 Petitioner contends NRS 616B.028 did not apply to him once he was
17 released from custody. NRS 616B.028 provides that inmates who are “engaged in
18 work in a prison industry or work program” are “entitled to coverage under the
19 modified program of industrial insurance.” Petitioner asserts that the statute does
20 not address what occurs after the inmate is released from custody and therefore
21 could be interpreted for the inmate to accrue new benefits. However, NRS
22 616C.500(2) does address this issue, by providing that injured employees “are
23 entitled to receive such benefits if the injured employee is released from
24 incarceration during the period of disability...” Petitioner reasons that because his
25 worker’s compensation payments began once he was released from incarceration,
26 they should be calculated at the minimum wage of his date of release on July 7,
27 2016, which was \$7.25 per hour, instead of his AMW at the time of his accident.
28

1 Petitioner contends that it is unconstitutional under the Nevada Constitution
2 Article 15, §16, for the TPA to compensate Petitioner for TTD based upon an
3 AMW that is less than the States minimum wage for the 174 days after his release.
4 However, NRS 616C.425(1) requires "that the amount of compensation and
5 benefits and the person or persons entitled thereto must be determined as of the
6 date of the accident or injury to the employee, and their rights thereto become fixed
7 as of that date." Petitioner does not dispute the date of his injury being December
8 22, 2015, while still incarcerated with NDOC, nor does he dispute that his AMW at
9 the time of his injury was \$22.93 for a daily rate of \$0.50. Petitioner's
10 compensation is therefore set at his AMW at the date of his injury. Petitioner was
11 "employed" on a voluntary program which allowed him to earn time off of his
12 sentence in addition to a small amount of wages. As such, the Appeals Officer's
13 decision that all compensation is determined at the date of the accident was not
14 erroneous, arbitrary, or an abuse of discretion, and was in fact based upon
15 substantial evidence.

16 Thus, is hereby ORDERED, ADJUDICATED, and DECREED that
17 Petitioner's Petition for Judicial Review is DENIED.
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20

21 Dated this 19 day of July 2018.
22
23
24

25 

26 **Rob Bare**
27 **Judge, District Court, Department 32**
28

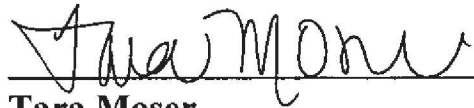
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CERTIFICATE OF SERVICE

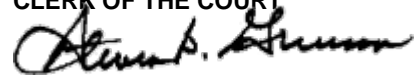
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Case No. A-17-760282-J

Department: 32

IN THE 8TH JUDICIAL DISTRICT COURT

DARRELL E. WHITE,

Petitioner,

vs.

STATE OF NEVADA, EX REL DIVISION OF FORESTRY, ET ALL,

Respondents

On Appeal of the Decision of the Appeals Officer, Charles York
Department of Administration

PETITIONER'S REPLY BRIEF

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I. ARGUMENT.

Respondent's reliance on NRS 616B and NRS 616C in this situation are misplaced.

A. The limitations of NRS 616B.028 did not apply to Mr. White, once he was released from custody.

By way of their Answering Brief, the Respondents cite NRS 616B for the proposition that it "limited the workers' compensation rights that Petitioner was entitled to." (Answering Brief at 10:1-2)

NRS 616B.028 states that a "confined" offender is covered by the Modified Program and "is not entitled to any rights and remedies established by the provisions of chapters 616A to 617, inclusive." The statute is silent as to benefits once a person is released from custody. This "hole" in the scheme means that the statute and regulations are subject to more than one reasonable interpretation, and therefore ambiguous and subject to judicial review.

"If, however, a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply." *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007).

"When a statute is ambiguous, we construe it "consistently with what reason and public policy would indicate the Legislature intended." *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006)

(quoting *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001)).

Here, the Legislature has not opined upon the benefits due to an offender, once he is released from custody. Accordingly, Mr. White asserts that the limitations of the Modified Program did not apply to him, once he was released from custody.

Other western jurisdictions have dealt with similar issues, but there does not appear to be precisely relevant case law from those jurisdictions, because they do not share the exact same prisoner workers compensation schemes.

For example, in **California**, under their Labor Code, inmates engaged in firefighting are not entitled to any compensation while confined, but their benefits, if any, begin upon their release.¹

In *Meredith*, the issue on appeal was whether the release inmate was entitled to the maximum weekly rate, or the minimum weekly rate, based upon the fact that he was injured while performing firefighting services. The California Supreme Court upheld the lower Court's determination that the inmate was only entitled to the minimum weekly rate. In his dissent, Justice Mosk opined as follows:

¹ *Meredith v. Workers' Comp. Appeals Bd.*, 19 Cal. 3d 777, 780 (1977), citing Cal. Labor Code §4453(c).

Petitioner has paid his debt to society and he is totally disabled; thus, there is no rational basis for treating him differently from others who have suffered the same disability while engaged in the same activity. To do so is to impose punitive treatment upon this petitioner not merely for the penal term provided by law but for his life.

In **Oregon**, under its Inmate Injury Act, O.R.S. §655.515(1), “no benefits, except medical services ... shall accrue to the inmate until the date of release from confinement and shall be based upon the condition of the inmate at that time.

In the *Johnson* case, the Oregon Supreme Court interpreted the Inmate Injury Act and found that an inmate was not entitled to compensation benefits while incarcerated and affirmed the Workers’ Compensation Board’ ruling that the inmates benefits re-started upon his release.²

In **Washington**, its minimum wage statute, RCW 49.46.010(k), includes a specific exclusion for incarcerated persons.

In the *Hill* case, a former inmate made an appeal similar to Mr. White, arguing that the wage calculation based upon \$0.85 resulted in “time-loss payments insufficient to meet his basic needs.” The Washington Supreme Court, acknowledging the “ramifications on inmate

² *Johnson v. RSG Forest Products*, 129 Or. App. 192, 194, 878 P.2d 449, 450 (1994).

time-loss compensation claims,” rejected his argument, in part, because of the statutory minimum wage exclusion.³

Here, the Nevada Constitution, Art. 15, §16, contains no such exclusion, so the rationale should not apply.

In **Utah**, by way of Utah Code Ann. §35-1-43(5), and confirmed in the *Kofoed* case, inmates are not entitled to workers compensation benefits at all, because they are not considered “employees.”⁴

In **Arizona**, by way of A.R.S. §23-1031, workers’ compensation benefits are “suspended during the period of time that the employee ... is incarcerated.”

In the *Aranda* case, the Arizona Supreme Court affirmed the suspension of benefits, which were awarded prior to incarceration.⁵ Because, at the time, he was to remain incarcerated for an indefinite period of time, the Court did not address resumption of his benefits upon his release. But speaking generally, the stated that “when the individual returns to the labor market, his payments will resume so as to enable him to be self-sufficient to the same degree as other non-prisoners.”⁶

³ *Hill v. Dept. of Lab. And Industry*, 161 Wash. App. 286, 298, 253 P.3d 430, 436(2011).

⁴ *Kofoed v. Industrial Com’n of Utah*, 872 P.2d 484, 486 (1994).

⁵ *Aranda v. Industrial Co’mn of Arizona*, 195 Ariz. 403, 409, 989 P.2d 157, 163 (1999).

⁶ *Aranda*, 195 Ariz. at 409.

What is consistently evident from these jurisdictions is that workers compensation benefits, if any, begin after the inmate is released.

The ambiguity in NRS 616B.028 exists, and in order to make the scheme consistent with the Nevada Constitution, the Court should find that the limitations of NRS 616B.028 did not apply to Mr. White, once he was released from custody.

B. Mr. White was entitled a calculation of AMW from the date he was no longer able to work.

By way of their Answering Brief, the Respondents concede that Mr. White was entitled to TTD, but argue that he is not entitled to a new AMW calculation. (Answering Brief at 9:19-20)

By way of their Answering Brief, the Respondents cite NRS 616C.425 for the narrow proposition that the **only** way to calculate the AMW is based upon the wages on the “date of the injury.” (Answering Brief at 8:15-16)

However, NAC 616C.441 provides that the “earnings of an injured employee on the date on which an accident occurs **or the date on which an injured employee is no longer able to work** as a result of contracting an occupational disease will be used to calculate the average monthly wage.” (emphasis added)

Here, after his injury on 12/22/15, Mr. White was transferred to a

medical camp, Three Lakes Conservation Camp where he performed light labor until his release on 7/1/16. (Transcript, ROA at 12)

After his release, Dr. Bronstein, in his 10/25/16 report, was the 1st physician to state that Mr. White was “unable to work,” as of 10/19/16. (ROA at 96-104)

As late as 8/17/16, Dr. Bronstein stated that Mr. White was able to work. (ROA at 44-45)

None of Dr. Faddell’s reports placed a work restriction on Mr. White, nor did Dr. Rogers or the UMC ER treatment records. (ROA at 7-39)

Thus, the Respondent’s wage calculation letter of 9/29/16 (ROA at 65-74) was calculated in error, because it was based upon a time period when there were no work restrictions on Mr. White.

NAC 616C.435 (7) provides that if “these methods of determining a period of earnings **cannot be applied reasonably and fairly**, an average monthly wage must be calculated by the insurer at 100 percent of:

... (b) The hourly wage on the day the injury or illness occurs, calculated by using the projected working schedule.”

Accordingly, the date for calculating Mr. White’s AMW is 10/19/16, not 12/22/15. On 10/19/16, and for the 12 weeks prior to this date, his

wages could not have been less than the minimum hourly wage, and it was unconstitutional base an AMW on any amount that less than that amount.

C. Public policy supports Mr. White's claim of computing his AMW based upon the constitutional minimum wage.

Nevada has a unique workers compensation program for inmates. It is not surprising that the Legislature failed to address unusual circumstances, such as Mr. White's. The fact that this issue does to appear to have raised before is an indicator of just how rare such a situation arises and that finding in favor of Mr. White will not open the floodgates and create an inordinate burden upon the insurer.

Reason and the public policy of providing wage replacement benefits argue against the Respondent's position that Mr. White was only entitled to \$.50 per day, once he was released. Unable to work due to his injury and recuperation from surgery, the Respondent's position left him destitute and utterly dependent upon others, through no fault of his own.

As stated above in the Mosk dissent in the *Meredith* case:

Petitioner has paid his debt to society and he is totally disabled; thus, there is no rational basis for treating him differently from others who have suffered the same disability while engaged in the same activity. To do so is to impose punitive treatment upon this petitioner not merely for the penal term provided by law but for his life.

II. CONCLUSION.

For the reasons set forth above, Mr. White requests that the Court reverse the Decision of the Appeals Officer, remand the matter to the Appeals Office, and direct the Appeals Officer to order the TPA to recalculate the AMW for the 174 days post-incarceration, based upon an amount no less than the minimum wage, under NAC 616C.435(7)(b), using the projected working schedule.

Dated this 21st day of January 2018.

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WORD in 14 font size Georgia type face.

I further certify that this brief complies with the page or type volume limitations in NRAP 32(a)(7) because it is proportionally spaced, has a typeface of 14 points and contains 1589 words and does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in

particular, NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number of the Appendix. 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 22nd day of January 2018

By: 

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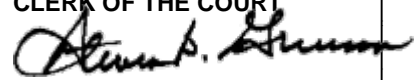
CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January 2018, I mailed a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** to the counsel listed below:

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12 *Cannon Cochran Management Services, Inc. (CCMSI)*

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 DARRELL E. WHITE, an individual,
11
12 Petitioner,
13
14 v.

CASE NO.: A-17-760282-J

DEPT NO.: XXXII

15 STATE OF NEVADA, ex rel. DIVISION
16 OF FORESTRY; CANNON COCHRAN
17 MANAGEMENT SERVICES, INC. aka
18 CCMSI, a foreign corporation,

19 Respondents.

18 RESPONDENTS' ANSWERING BRIEF

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I.

STATEMENT OF THE CASE

This is a workers' compensation case. On December 22, 2015, Claimant DARRELL E. WHITE (hereinafter "Petitioner") was an inmate of the Nevada Department of Corrections (hereinafter "NDOC"). Petitioner had agreed to participate in a voluntary work program with Respondent Employer STATE OF NEVADA, ex rel. DIVISION OF FORESTRY (hereinafter "Employer"). In exchange for providing work for Employer, Petitioner received time off of his sentence as well as a nominal wage.

On the date in question, Petitioner alleged injury and his claim was accepted thereafter. Respondent Administrator CANNON COCHRAN MANAGEMENT SERVICES, INC. aka CCMSI (hereinafter "Administrator") calculated Petitioner's average monthly wage (hereinafter "AMW") based on what Petitioner was earning at the time of the injury. Petitioner appealed that AMW determination and alleged that his wages should have been recalculated after he was released from custody to reflect the State minimum wage. The Hearing Officer affirmed Administrator's determination. Petitioner appealed.

On August 16, 2017, the Appeals Officer affirmed the AMW determination. The Appeals Officer acknowledged that Petitioner was attempting to make out a constitutional argument that Petitioner should be entitled to a minimum wage of \$7.25 per hour to be used to calculate his AMW. However, the Appeals Officer held that Petitioner was "employed" in a voluntary program which allowed him to earn time off of his sentence in addition to a nominal wage and under NRS 616C.425, all compensation is determined at the date of the accident.

Petitioner filed the instant Petition for Judicial Review to contest the August 16, 2017 Decision and Order.

...

...

...

1 II.

2 **STATEMENT OF THE ISSUES**

- 3 1. Whether substantial rights of Petitioner have been prejudiced as set forth in NRS
4 233B.135(3) because the Appeals Officer's Decision and Order filed on August 16, 2017 was:
- 5 (a) in violation of constitutional or statutory provisions;
 - 6 (b) in excess of statutory authority of the agency;
 - 7 (c) made upon unlawful procedure;
 - 8 (d) affected by other error of law;
 - 9 (e) clearly erroneous in view of the reliable, probative and substantial evidence
10 on the whole record; or
 - 11 (f) arbitrary or capricious or characterized by abuse of discretion; and
- 12 2. Whether the Appeals Officer's Decision and Order was based upon substantial
13 evidence as required by NRS 233B.125.

14 III.

15 **STATEMENT OF FACTS**

16 On December 22, 2015, Petitioner alleged injury to his right hand as a result of stepping
17 off of a porta potty trailer and hitting his right hand on the bumper of the crew bus. The physician
18 on the C-4 Form diagnosed an open fracture of right third MP joint. (Record on Appeal p. 61)
19 (hereinafter "ROA p. ____")

20 Employer completed the C-3 Form. (ROA p. 62)

21 The Supervisor Accident/Injury/Incident Report was also completed. (ROA pp. 57-60)

22 Petitioner presented to Dr. John Rogers on December 22, 2015. A fracture was noted.
23 (ROA pp. 63-64)

24 Petitioner presented to UMC on December 23, 2015. An open comminuted and evulsion
25 fracture of distal 3rd metacarpal was diagnosed. (ROA pp. 65-90)

26 Petitioner presented to Dr. David Fadell on January 8, 2016. The impression noted
27 fracture, middle finger, metacarpal head, dorsal aspect, articular but not in need of surgical
28 intervention. A Thermaplast splint for the index finger was applied. (ROA pp. 91-93)

1 On January 25, 2016, the claim was accepted for a right hand 3rd MP joint fracture. (ROA
2 p. 94)

3 On February 24, 2016, Petitioner returned to Dr. Fadell. The brace was discontinued.
4 (ROA p. 95)

5 On April 25, 2016, Petitioner was advised that he was required to treat even through
6 incarceration. (ROA p. 96)

7 On April 29, 2016, Petitioner was advised that his claim would close if he did not follow
8 up with medical treatment. (ROA p. 97)

9 On June 3, 2016, Administrator advised Petitioner that his claim would be closed. (ROA
10 p. 98)

11 On July 7, 2016, Petitioner was released from the custody of the NDOC.

12 On August 4, 2016, Petitioner was advised that the Administrator would schedule him for
13 a consult with Dr. Bronstein. (ROA p. 99)

14 On August 18, 2016, Petitioner presented to Dr. Bronstein. He recommended
15 discontinuing the brace and a partial ostectomy. (ROA pp. 100-108)

16 On September 1, 2016, Petitioner was seen by PA-C Frank Urbina at Urgent Care.
17 Petitioner was taken off of work. (ROA pp. 109-119)

18 On September 20, 2016, Petitioner was advised that the request for compensation during
19 incarceration was denied. (ROA p. 120)

20 On September 29, 2016, Petitioner was advised of his average monthly wage (hereinafter
21 "AMW"). It was noted that Petitioner's AMW was \$22.93 which resulted in a daily rate of \$0.50.
22 (ROA pp. 121-130)

23 On September 29, 2016, Petitioner returned to Dr. Bronstein. Surgery was discussed.
24 (ROA pp. 131-142)

25 On October 18, 2016, Petitioner was advised that he was no longer eligible for TTD
26 benefits effective September 30, 2016, as he was released to full duty. (ROA p. 143)

27 On October 19, 2016, Petitioner presented to Dr. Bronstein for surgery. (ROA pp. 144-
28 149)

1 On October 20, 2016, Petitioner was advised of an overpayment of benefits. (ROA pp.
2 150-151)

3 On October 25, 2016, Petitioner returned for postoperative evaluation. (ROA pp. 152-159)

4 Petitioner returned to Dr. Bronstein on November 8, 2016. Occupational therapy was
5 ordered. (ROA p. 160)

6 Following Hearing No. 1701007-SA, the Hearing Officer issued a Decision and Order
7 dated November 8, 2016, affirming the September 29, 2016 determination related to the average
8 monthly wage. (ROA pp. 161-163)

9 Following Hearing No. 1701217-SA, the Hearing Officer issued a Decision and Order
10 dated November 22, 2016, affirming the October 20, 2016 determination terminating TTD
11 benefits and asserting an overpayment. (ROA pp. 164-165)

12 On December 1, 2016, Petitioner's counsel appealed the November 8, 2016 Decision and
13 Order and the November 22, 2016 Decision and Order. (ROA pp. 166-167)

14 An Order consolidating appeals was filed. (ROA p. 168)

15 A Motion for Change of Venue was filed by Petitioner's counsel. (ROA pp. 169-171) An
16 Order granting same was filed. (ROA p. 172)

17 This matter came on for hearing before the Appeals Officer on March 14, 2017. Petitioner
18 testified that, while he was incarcerated, the State had a program which allowed him to perform
19 work for the Division of Forestry. The work was totally voluntary, i.e. Petitioner did not have to
20 participate in the work program if he did not want to. However, if he did participate in the work
21 program, he could earn credit to get time taken off of his sentence. He was also paid a nominal fee
22 of between \$18 and \$22 a month. (ROA pp. 19:3-23:20)

23 On August 16, 2017, the Appeals Officer affirmed the September 29, 2016 AMW
24 determination. The Appeals Officer acknowledged that Petitioner was attempting to make out a
25 constitutional argument that Petitioner should be entitled to a minimum wage of \$7.25 per hour to
26 be used to calculate his AMW. However, the Appeals Officer held that Petitioner was "employed"
27 in a voluntary program which allowed him to earn time off of his sentence in addition to a nominal
28 wage and under NRS 616C.425, all compensation is determined at the date of the accident. (ROA

1 pp. 36-43)

2 Petitioner filed the instant Petition for Judicial Review to contest the August 16, 2017
3 Decision and Order.

4 IV.

5 JURISDICTION

6 1. STANDARD OF REVIEW

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

8 **NRS 233B.135 Judicial review: Manner of conducting; burden
9 of; standard for review.**

10 1. Judicial review of a final decision of an agency must be:

11 (a) Conducted by the court without a jury; and

12 (b) Confined to the record.

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

16 2. The final decision of the agency shall be deemed
17 reasonable and lawful until reversed or set aside in whole or in part
18 by the court. The burden of proof is on the party attacking or
19 resisting the decision to show that the final decision is invalid
20 pursuant to subsection 3.

21 3. The court shall not substitute its judgment for that of the
22 agency as to the weight of evidence on a question of fact. The court
23 may remand or affirm the final decision or set it aside in whole or in
24 part if substantial rights of the petitioner have been prejudiced
25 because the final decision of the agency is:

26 (a) In violation of constitutional or statutory provisions;

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

28 (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.

...

1 The standard of review is whether there is substantial evidence to support the underlying
2 decision. The reviewing court should limit its review of administrative decisions to determine if
3 they are based upon substantial evidence. North Las Vegas v. Public Service Comm'n., 83 Nev.
4 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). Substantial
5 evidence is that quantity and quality of evidence which a reasonable man would accept as
6 adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270
7 (1993); and Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839 (1997).

8 When reviewing administrative court decisions, the Court has held that, on factual
9 determinations, the findings and ultimate decisions of an appeals officer are not to be disturbed
10 unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial
11 Comm'n. v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977). An administrative determination
12 regarding a question of fact will not be set aside unless it is against the manifest weight of the
13 evidence. Nevada Indus. Comm'n. v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984). A
14 decision by an appeals officer that is based upon the credibility of Respondent and other witnesses
15 is "not open to appellate review." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 585, 854 P.2d
16 862, 867 (1993).(emphasis added)

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

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

1 Substantial evidence has been defined as that quantity and quality of evidence which a
2 reasonable man could accept as adequate to support a conclusion. State Emp't Sec. Dep't v.
3 Hilton Hotels Corp., 102 Nev. 606, 608 at n.1, 729 P.2d 497 (1986). Additionally, substantial
4 evidence is not to be considered in isolation from opposing evidence, but evidence that survives
5 whatever in the record fairly detracts from its weight. Universal Camera Corp. v. NLRB, 340 U.S.
6 474, 477, 488 (1951); Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546 (9th
7 Cir. 1991). This latter point is clearly the significance of the requirement in NRS 233B.135(3)(e)
8 which states that the reviewing court consider the whole record.

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

13 V.

14 **LEGAL ARGUMENT**

15 **A. THE APPEALS OFFICER'S DECISION IS SUPPORTED BY**
16 **SUBSTANTIAL EVIDENCE.**

17 It is the Petitioner, not the Respondents, who has the burden of proving his case, and that is
18 by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567,
19 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323
20 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

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

1 NRS 616A.010 makes it clear that:

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

5 Based upon the present information, the evidence supports the AMW determination at
6 issue. As such, the findings of the Appeals Officer were based on substantial evidence.

7 **B. PETITIONER'S WAGE AT THE TIME OF INJURY CONTROLS**

8 As discussed above, Petitioner was injured while participating in a State work program
9 which allows inmates to perform work for the Division of Forestry in exchange for time off their
10 sentence. The program also paid the inmates a nominal wage. As a result, Petitioner's AMW was
11 deemed to be \$22.93 which resulted in a daily rate of \$0.50. (ROA pp. 121-130) Petitioner does
12 not contest that this calculation was incorrect. Rather, Petitioner suggests that upon his release
13 from custody his "status changed" and therefore his AMW should be re-calculated based on what
14 the State minimum wage was on the day of his release. The problem with Petitioner's argument is
15 that the legislature has clearly opined that an injured employee's wage is *fixed* at the date of
16 injury.

17 **NRS 616C.425 Date of determination of amount of**
18 **compensation and benefits. Except as otherwise provided by a**
specific statute:

19 1. The amount of compensation and benefits and the person or
20 persons entitled thereto must be determined as of the date of the
accident or injury to the employee, and their rights thereto become
fixed as of that date.

21 2. If the employee incurs a subsequent injury or disability that
22 primarily arises from a previous accident or injury that arose out of
23 and in the course of his or her employment, the date of the previous
accident or injury must be used to determine the amount of
24 compensation and benefits to which the Petitioner is entitled.

25 With respect to statutory interpretation, the Nevada Supreme Court has held that "the word
26 'must'...imposes a mandatory requirement." Liberty Mut. v. Thomasson, 317 P.3d 831, 833 (Nev.
27 2014)

1 At the date of injury, Petitioner was earning \$0.50 per day. If that wage was proper on the
2 date of injury (and there is no argument that it was not), then Petitioner's wages were properly
3 calculated for the duration of Petitioner's claim. There is no provision in either the workers'
4 compensation system or the State Constitution that provides that an inmate is entitled to a
5 recalculated AMW on the date of their release.

6 It should also be recognized that the wage replacement benefits (such as TTD and TPD)
7 calculated by using the AMW are not wages, per se.¹ As the term would suggest, wage
8 replacement benefits are indeed a *benefit* that a workers' compensation Petitioner is entitled to. As
9 such, while it may be true that the Nevada Constitution provides that "each employer shall pay a
10 wage to each employee [of no less than \$7.25 per hour],"² Respondent Administrator is not an
11 employer and is not paying Petitioner a wage. Respondent Administrator is providing Petitioner
12 with a benefit under the workers' compensation system, a benefit that is fixed on the date of
13 injury.

14 Further, it appears that Petitioner has confused entitlement to total partial disability
15 ("TPD") benefits with AMW calculation. Petitioner argues that NRS 616C.500(2) should control
16 this matter because it states that an injured inmate is "entitled to receive [TPD] benefits if the
17 injured employee is released from incarceration during the period of disability." However, no one
18 is arguing that Petitioner is not entitled to TPD or TTD benefits. Just because Petitioner became
19 entitled to wage replacement benefits upon his release from incarceration does not mean that he is
20 entitled to a new AMW calculation.

21 Finally, Petitioner argues that his AMW calculation is "unfair." However, Petitioner also
22 acknowledges that the work program he was involved with at the time of his injury was voluntary.
23 Petitioner was not required to participate in that program and he received credit for his sentence by
24

25
26 ¹ See NAC 616C.423, NAC 616C.432, and NAC 616C.435 regarding calculation of AMW.

27 ² Nevada Constitution, Article 15, Section 16 (including citation from Office of Labor
28 Commissioner as cited by Petitioner)

1 participating in it. Indeed, by participating in the program, NRS 616B.028³ applied and limited the
2 workers' compensation rights that Petitioner was entitled to. Petitioner agreed to the program and
3 its limited rights in exchange for credit against his incarceration term. If Petitioner believed that
4 this arrangement was "unfair," he did not have to participate in the program and could have simply
5 served out his sentence.

6 In conclusion, the legislature has clearly contemplated the exact situation at bar and has not
7 provided some sort of carve out which would allow an inmate who is injured while participating in
8 a work program to somehow reestablish his entitlement to benefits as the date upon which the
9 inmate is released. Just like every other claimant in the state, Petitioner's AMW was determined
10 based upon the wages he was earning at the time of his injury. NRS 616C.425. Though novel,
11 Petitioner's argument for a recalculated AMW is without merit. The Appeals Officer's August 16,
12 2017 Decision and Order was proper. This Petition for Judicial Review should be denied.

13 ...

14 ...

15 ...

16

17

18

19

20 ³ NRS 616B.028 Modified program of industrial insurance for offenders in prison industry or
21 work program.

22 1. Any offender confined at the state prison, while engaged in work in a prison industry or
23 work program, whether the program is operated by an institution of the Department of
24 Corrections, by contract with a public entity or by a private employer, is entitled to coverage under
25 the modified program of industrial insurance established by regulations adopted by the Division if
26 the Director of the Department of Corrections complies with the provisions of the regulations, and
27 coverage is approved by a private carrier.

28 2. An offender is limited to the rights and remedies established by the provisions of the
modified program of industrial insurance established by regulations adopted by the Division. The
offender is not entitled to any rights and remedies established by the provisions of chapters 616A
to 617, inclusive, of NRS.

3. The Division shall, in cooperation with the Department of Corrections and the Risk
Management Division of the Department of Administration, adopt regulations setting forth a
modified program of industrial insurance to provide offenders with industrial insurance against
personal injuries arising out of and in the course of their work in a prison industry or work
program.

1 VI.

2 CONCLUSION

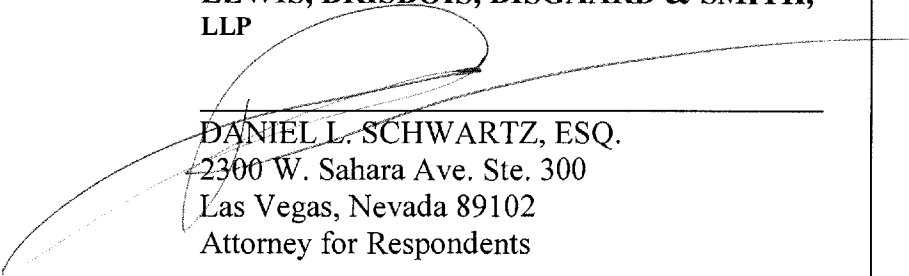
3 Based upon the foregoing, the Appeals Officer's Decision and Order was appropriate. The
4 Appeals Officer's Decision and Order was based on sound legal theories and factual conclusions
5 that are amply supported by the record.

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

8 Dated this 12 day of January, 2018.

9 Respectfully submitted,

10 **LEWIS, BRISBOIS, BISGAARD & SMITH,**
11 **LLP**

12 
13 **DANIEL L. SCHWARTZ, ESQ.**
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15 **Las Vegas, Nevada 89102**
16 **Attorney for Respondents**

1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that I have read this appellate brief and, to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify
4 that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular
5 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be
6 supported by appropriate references to the record on appeal. I understand that I may be subject to
7 sanctions in the event that the accompanying brief is not in conformity with the requirements of
8 the Nevada Rules of Appellate procedure.

9 Dated this 12 of January, 2018.

10 Respectfully submitted,

11 LEWIS BRISBOIS BISGAARD & SMITH LLP

12
13 By

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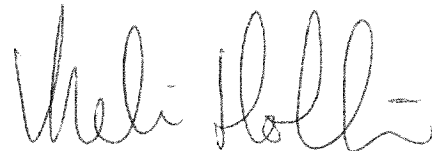
CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 12th day of January, 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, as follows:

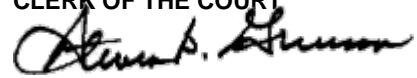
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An employee of LEWIS BRISBOIS BISGAARD &
SMITH LLP



Case No. A-17-760282-J

Department: 32

IN THE 8TH JUDICIAL DISTRICT COURT

DARRELL E. WHITE,

Petitioner,

vs.

STATE OF NEVADA, EX REL DIVISION OF FORESTRY, ET ALL,

Respondents

On Appeal of the Decision of the Appeals Officer, Charles York
Department of Administration

PETITIONER'S OPENING BRIEF

TRAVIS BARRICK, ESQ
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TABLE OF AUTHORITIES

CASES

Seino v. Employers Ins. Co. of Nevada, 121 Nev. 146, 149, 11P.3d 1107 (2005), citing *Beavers v. State, Dep't of Mtr. Vehicles*, 109 Nev. 435, 438, 851 P.2d 432, 434 (1993)..... ii

STATUTES AND REGULATIONS

Nevada Constitution, Article 15, §16..... 4, 5

NRS 616B.028.....	3
NRS 616C.500(2).....	4
NAC 616C.435.....	4

I. STATEMENT OF JURISDICTION.

This Court has jurisdiction over this appeal pursuant to NRS 616C.370.

II. ROUTING STATEMENT.

Not relevant.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

It is unconstitutional, under the Nevada Constitution, Article 15, §16, for the TPA to compensate Mr. White for Temporary Total Disability based upon an Average Monthly Wage that is less than the State's minimum wage for the 174 days after his release from custody.

IV. STANDARD OF REVIEW.

Agency decisions based upon questions of statutory construction "are purely legal issues, and [the Supreme Court] reviews pure questions of law de novo." *Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 149, 11P.3d 1107 (2005), citing *Beavers v. State, Dep't of Mtr. Vehicles*, 109 Nev. 435, 438, 851 P.2d 432, 434 (1993).

I. STATEMENT OF THE CASE.

This matter comes before the Court on a Petition for Judicial Review of the Order of the Appeals Officer, denying Mr. White Temporary Total Disability at an Average Monthly Wage that was at least equal to the State's minimum wage for the 174 days, after his release from custody at the NDOC.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

On 12/22/15, Mr. White injured his Right Long Finger, while in the employ of the Nevada Department of Forestry as a Nevada state prisoner. He was examined by Dr. John R. Rogers (Grover C. Dils Medical Center) who reviewed the x-ray report and diagnosed the injury as an "oval articular bone fragment ... positioned dorsal to extensor tendon."¹

On 1/8/16, he was examined by Dr. Fadell (Hand Surgery Specialists of Nevada), who confirmed the fracture and prescribed a brace for the finger, which Dr. Fadell ordered to be worn for the next 4 weeks.²

On 2/24/16, Mr. White was examined by Dr. Fadell, who noted "fracture fragments" beneath the skin. He was to continue "working on

¹ Dr. Rogers ER Notes and x-ray report, ROA at 181-182.

² Dr. Fadell exam notes, ROA at 184-192.

range of motion” and was allowed to discontinue the brace.³

On 7/7/16, Mr. White was released from the custody of the NDOC, as he had expired his sentence and was not on parole.⁴

On 8/17/16, Mr. White was examined by Dr. Bronstein, who observed a “healed fracture with an dorsal avulsion fragment that is dorsally displaced.” Dr. Bronstein made an ambiguous entry of “Patient may work, Full duty. (No work status change).”⁵

On 9/29/16, CCSMI, the Third-Party Administrator (“TPA”) of Mr. White’s claim, informed Mr. White that his Average Monthly Wage (“AMW”) for Temporary Total Disability (“TTD”) was “\$22.30 for a daily rate of \$0.50.”⁶

On 10/25/16, Mr. White was examined by Dr. Bronstein, who recommended surgery on the R-finger and noted that, as of 10/19/16, Mr. White was “unable to work.” Dr. Bronstein also prescribed a splint for Mr. White’s finger.⁷

On or about 11/15/16, Dr. Bronstein performed surgery on Mr. White’s finger, and on 11/21/16, Dr. Bronstein authorized continuing

³ Dr. Fadell exam notes, ROA at 194.

⁴ Decision and Order, ROA at 40; Transcript of Hearing, ROA at 15-16.

⁵ Dr. Bronstein exam notes, ROA at 200-201.

⁶ CCMSI Notice of Average Daily Wage, ROA at 203.

⁷ Dr. Bronstein exam notes, ROA at 205-208.

physical therapy, which was approved for an additional 4 weeks.⁸

On 12/28/16, the TPA informed Mr. White that he had completed his medical treatment and was referring him out for a PPD.⁹

Accordingly, Mr. White was under a physician's care for his injury from 7/7/16, the date of his release from NDOC, until 12/28/16, for a total of 174 days.

On 3/17/17, the Appeals Officer conducted an Appeal Hearing, wherein Mr. Barrick reiterated the arguments in his Appeal Memorandum,¹⁰ alleging that it is unconstitutional to pay Mr. White less than the minimum wage for the period after release from custody.¹¹

On 8/17/17, the Appeals Officer issued the Decision and Order, wherein it was determined that the TPA's determination of AMW was "appropriate," because Mr. White "is not entitled to any rights and remedies established by Chapter 616A to 617 of the Nevada Revised Statutes."¹² It was also determined that "there is no doubt that the claimant, subsequent to release from custody, was declared unable to work until Dr. Bronstein's release on December 2016."¹³

⁸ Dr. Bronstein authorization for physical therapy, ROA at 210-213.

⁹ CCMSI Notice of PPD Exam, ROA at 217-218.

¹⁰ Claimant's Appeal Memorandum, ROA at 177-178.

¹¹ Transcript of Hearing, ROA at 29-30.

¹² Decision and Order, ROA at 6-7.

¹³ Decision and Order, ROA at 6.

The Decision and Order also cited NAC 616.435 for the basis for calculating the AMW, which the TPA used, but also cited NAC 616C.435(7) as a “catch all provision” which provides that the method used for calculating the AMW “should be reasonable and fair.”¹⁴

III. SUMMARY OF ARGUMENT.

It is unconstitutional, under the Nevada Constitution, Article 15, §16, for the TPA to compensate Mr. White for Temporary Total Disability based upon an Average Monthly Wage that is less than the State’s minimum wage for the 174 days after his release from custody.

IV. ARGUMENT.

A. Mr. White is entitled to TTD at an AMW that is no less than the minimum wage for the 174 days post-release from the NDOC.

NRS 616B.028 provides that an inmate “confined at the state prison” is entitled to coverage under the modified program ... established by the NDOC. Accordingly, the TPA was fully justified in establishing Mr. White’s TTD, based upon an AMW at \$22.93, for a daily rate of \$.50, **but only** for the period during which Mr. White was incarcerated, specifically from 12/22/15 to 7/6/16. But neither NRS 616B.028 nor the NDOC regulations specify the entitlement to TTD once the inmate is released

¹⁴ Decision and Order, ROA at 5.

from custody. In this case, Mr. White was under a physician's care for his injury from 7/7/16, the date of his release from NDOC, until 12/28/16, for a total of 174 days.

NRS 616C.500(2), which sets forth Temporary Partial Disability ("TPD") compensation, **does** address this issue, where it states that the injured inmate is "entitled to receive such benefits if the injured employee is released from incarceration during the period of disability."

The Nevada Constitution, Article 15, §16 states, "each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." And, according to the Office of the Labor Commissioner, the minimum wage for workers in Nevada, as of 4/1/16, is "no less than \$7.25 per hour."

Accordingly, payment of TTD, based upon an AMW calculated on less than the minimum wage for the 174 days post-release from the NDOC violates the Nevada Constitution. Mr. White was an injured employee whose status changed during the period of treatment for his injury. The insurer should not be entitled to a windfall, simply because Mr. White was no longer incarcerated.

It should be obvious that it is patently unfair to pay Mr. White \$0.50 per day for the period when he was not incarcerated, as one purposes of

the TTD is to provide at least the minimum income to the worker while they are under a doctor's care and unable to earn a wage. His needs while incarcerated are minimal, compared to his needs upon release, which include housing & utilities, food, transportation, just to name a few. It is inconceivable that he could meet these needs on \$0.50 per day.

V. CONCLUSION.

For the reasons set forth above, Mr. White requests that the Court reverse the Decision of the Appeals Officer, remand the matter to the Appeals Office, and order the TPA to recalculate the AMW for the 174 days post-incarceration, based upon an amount no less than the minimum wage, under NAC 616C.435(7).

Dated this 13th day of December 2017.

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this

brief has been prepared in a proportionally spaced typeface using WORD in 14 font size Georgia type face.

I further certify that this brief complies with the page or type volume limitations in NRAP 32(a)(7) because it is proportionally spaced, has a typeface of 14 points and contains 1100 words and does not exceed 12 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number of the Appendix. 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 13th day of December 2017

By: 

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540 E. S. Louis Avenue
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Attorney for Petitioner White

STATEMENT OF RELATED CASES

None.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2017, I mailed a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** to the counsel listed below:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

DARRELL E. WHITE,
Appellant,

v.
STATE OF NEVADA, ex rel. DIVISION OF
FORESTRY; CANNON COCHRAN
MANAGEMENT SERVICES, INC.
Respondents.

No. 76737

Electronically Filed
Sep 12 2018 08:04 a.m.

Elizabeth A. Brown
Clerk of Supreme Court
**DOCKETING STATEMENT
CIVIL APPEALS**

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department Thirty-Two
County Clark Judge Rob Bare
District Ct. Case No. A-17-760282-J

2. Attorney filing this docketing statement:

Attorney Travis N. Barrick Telephone 702/892-3500
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Client(s) Darrell E. White

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

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Client(s) Division of Forestry and Canon Cochran Management Service Inc.

Attorney No Others Known Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
☐ Venue
☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

8. Nature of the action. Briefly describe the nature of the action and the result below:

Petitioner sought Judicial Review of the Workers Compensation Appeals Officer's determination in favor of the Respondents.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Mr. White is appealing the District Court's Decision which affirmed the Appeals Officer's determination in Respondent's favor.

This is a matter of first impression for the Court.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: Mr. White's case presents a "hole" in the Workers Compensation program. His status under the NDOC's Modified Program raises the issue of computation of his Average Daily Wage for the period AFTER he was released from custody.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Court of Appeals

NRAP 17(b)(4) Administrative Agency appeals except those involving tax, water or public utilities commission determinations.

14. Trial. If this action proceeded to trial, how many days did the trial last? 0

Was it a bench or jury trial? No Trial

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 07/25/2018

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served 07/25/2018

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See *AA Primo Builders v. Washington*, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed 08/16/2018

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:
The District Court entered a final judgment on Mr. White's Petition for Judicial Review of an agency determination.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Darrell E. White

State of Nevada ex rel. Division of Forestry

Cannon Cochran Management Services, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Darrell E. White - improper computation of Average Daily Wage

State of Nevada ex rel. Division of Forestry - computation of ADW was proper.

Cannon Cochran Management Services, Inc. - computation of ADW was proper.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

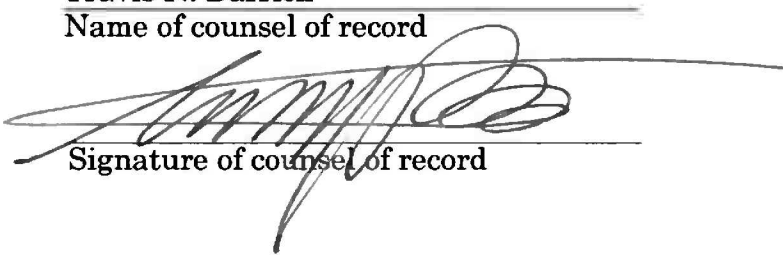
VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Darrell E. White
Name of appellant

Travis N. Barrick
Name of counsel of record

08/28/2018
Date


Signature of counsel of record

Nevada, Clark
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 12th day of September, 2018, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Lewis Brisbois Bisgaard & Smith, LLP
2300 W. Sahara Ave., Ste. 300,
Las Vegas, NV 89102

Clerk of the Supreme Court
408 E. Clark Avenue
Las Vegas, NV 89101

Dated this

12th

day of

September, 2018


Signature