IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRELL E. WHITE,

Appellant,

v.

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

Respondents.

SUPREME COURT NO: 76737

DISTRICT COURT NO: A-17-760282-J

RESPONDENTS' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — **Page No(s).**

STATUTES

OTHER

NRAP 26.1 DISCLOSURE

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

1. The Respondent, STATE OF NEVADA, ex rel. DIVISION OF FORESTRY, is a governmental party and therefore exempt from the NRAP 26.1 disclosure requirements.
2. The Respondent, CANNON COCHRAN MANAGEMENT SERVICES, INC. aka CCMSI, states that it does not have any parent corporation, or any publicly held corporation that owns 10% or more of its stock, nor any publicly held corporation that has a direct financial interest in the outcome of the litigation. NRAP 26.1(a).
3. The undersigned counsel of record for STATE OF NEVADA, ex rel. DIVISION OF FORESTRY and CANNON COCHRAN MANAGEMENT SERVICES, INC. aka CCMSI has appeared in this matter before District Court. DANIEL L. SCHWARTZ, ESQ. has also appeared for the same at the administrative proceedings before the Department of Administration.

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

DATED this 24 day of April, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
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I.

STATEMENT OF THE CASE

This is a workers' compensation case. On December 22, 2015, Claimant DARRELL E. WHITE (hereinafter "Appellant") was an inmate of the Nevada Department of Corrections (hereinafter "NDOC"). Appellant 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, Appellant received time off of his sentence as well as a nominal wage.

On the date in question, Appellant alleged injury and his claim was accepted thereafter. Respondent Administrator CANNON COCHRAN MANAGEMENT SERVICES, INC. aka CCMSI (hereinafter "Administrator") calculated Appellant's average monthly wage (hereinafter "AMW") based on what Appellant was earning at the time of the injury. Appellant 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. Appellant appealed.

On August 16, 2017, the Appeals Officer affirmed the AMW determination. The Appeals Officer acknowledged that Appellant was attempting to make out a constitutional argument that Appellant 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 Appellant 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.

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

After receiving written briefs, on July 25, 2018, the District Court found that the Appeals Officer's Decision was supported by substantial evidence and denied the Petition for Judicial Review. Appellant appealed to the Supreme Court.

II.

SUMMARY OF THE ARGUMENT

Appellant alleges that his average monthly wage should be recalculated after his release from prison. However, NRS 616C.425 is clear and dispositive. The only fact that can be considered when calculating average monthly wage is the date of the accident/injury. There are no "alternative methods." A review of NRS 616C.425 should end this inquiry.

Appellant also makes a constitutional argument, claiming that Administrator must essentially "pay" him minimum wage. The problem for Appellant is that Administrator is not an employer and is not "paying" Appellant. Administrator is issuing workers' compensation benefits which are calculated by statute. Minimum

wage laws apply to employers, not workers' compensation Administrators that are calculating benefits according to a statutory scheme.

Finally, it must not be lost that Appellant was injured while participating in a voluntary work program in exchange for time off of his sentence. There are explicit carve outs for inmates in the Nevada Industrial Insurance Act and the calculation of an average monthly wage is not one of them. The legislature absolutely had the power to provide a carve out for recalculation of benefits for injured workers who happen to be incarcerated at the time of their injury, yet they did not.

Put simply, no party is contesting that Appellant's average monthly wage was not properly calculated at the time of his injury/accident. That is the only potential avenue of inquiry in this case. If Appellant's wages were properly calculated at the time of his injury/accident, then his wages were properly calculated for the lifetime of his claim. This appeal should be denied.

III.

STATEMENT OF THE ISSUES FOR REVIEW

1. WHETHER THE AMOUNT OF INDUSTRIAL INSURANCE COMPENSATION AND BENEFITS MUST BE DETERMINED AS OF THE DATE OF THE ACCIDENT OR INJURY TO THE EMPLOYEE, AND WHETHER THEIR RIGHTS THERETO BECOME FIXED AS OF THAT DATE. NRS 616C.425

...

IV.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

On December 22, 2015, Appellant alleged injury to his right hand as a result of stepping off of a porta potty trailer and hitting his right hand on the bumper of the crew bus. The physician on the C-4 Form diagnosed an open fracture of right third MP joint. (Appendix p. 61) (hereinafter "APP p. ___")

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

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

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

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

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

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

On February 24, 2016, Appellant returned to Dr. Fadell. The brace was discontinued. (APP p. 95)

On April 25, 2016, Appellant was advised that he was required to treat even through incarceration. (APP p. 96)

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

On June 3, 2016, Administrator advised Appellant that his claim would be closed. (APP p. 98)

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

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

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

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

On September 20, 2016, Appellant was advised that the request for compensation during incarceration was denied. (APP p. 120)

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

On September 29, 2016, Appellant returned to Dr. Bronstein. Surgery was discussed. (APP pp. 131-142)

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

On October 19, 2016, Appellant presented to Dr. Bronstein for surgery. (APP pp. 144-149)

On October 20, 2016, Appellant was advised of an overpayment of benefits. (APP pp. 150-151)

On October 25, 2016, Appellant returned for postoperative evaluation. (APP pp. 152-159)

Appellant returned to Dr. Bronstein on November 8, 2016. Occupational therapy was ordered. (APP p. 160)

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

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

On December 1, 2016, Appellant's counsel appealed the November 8, 2016 Decision and Order and the November 22, 2016 Decision and Order. (APP pp. 166-167)

An Order consolidating appeals was filed. (APP p. 168)

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

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

On August 16, 2017, the Appeals Officer affirmed the September 29, 2016 AMW determination. The Appeals Officer acknowledged that Appellant was attempting to make out a constitutional argument that Appellant 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 Appellant 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. (APP pp. 36-43)

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

On July 25, 2018, the District Court found that the Appeals Officer's Decision was supported by substantial evidence and denied the Petition for Judicial Review. Appellant appealed to the Supreme Court.

V.

JURISDICTION

A. ROUTING STATEMENT

Under NRAP 17(b)(10), this case would be presumptively assigned to the Court of Appeals as it concerns a Petition for Judicial Review of an administrative agency's final decision.

B. 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 Appellant 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, this 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).

In determining whether an administrative decision is supported by substantial evidence, the methodology for this Court is also well-defined. First, for each issue appealed, the pertinent rule of law is identified. Thereafter, the evidence 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, this 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.

Furthermore, a decision that is affected by error of law cannot be found to be supported by substantial evidence. A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, thus, an abuse of discretion that warrants reversal. Titanium Metals, *supra*.

NRS 616A.010(2) and (4) are clear that Nevada no longer has liberal construction. Issues must be decided on their merits, and not according to the common law principle that requires statutes governing workers' compensation to

be liberally construed. That means workers' compensation statutes must not be interpreted or construed broadly or liberally in favor of any party.

VI.

LEGAL ARGUMENT

A. APPELLANT'S BURDEN BEFORE THE APPEALS OFFICER

It was the Appellant, not Respondents, who had the burden of proving 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 Appellant has the burden of going beyond speculation and conjecture. That means that the Appellant must establish all facets of the claim by a preponderance of all the evidence. To prevail, Appellant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, Id.; 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). ("preponderance of the evidence" is "evidence which is of greater weight or is

more convincing than the evidence which is offered in opposition." Black's Law Dictionary)

NRS 616A.010(2)makes it clear that:

> A claim for compensation filed pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS must be decided on its merit and not according to the principle of common law that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature.

B. APPELLANT'S WAGE AT THE TIME OF INJURY CONTROLS

As discussed above, Appellant was injured while participating in a *voluntary* State work program which allows inmates to perform work for the Division of Forestry in exchange for time off their sentence. The program also paid the inmates a nominal wage. As a result, Appellant's AMW was deemed to be $22.93 which resulted in a daily rate of $0.50. (APP pp. 121-130) Appellant does not contest that this calculation was incorrect. Rather, Appellant argues that his AMW should be re-calculated based on what the State minimum wage was on the day of his release. The problem with Appellant's argument is that the legislature has clearly opined that an injured employee's wage is ***fixed*** at the date of injury. There are no other "alternative methods" to re-calculate AMW.

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> **NRS 616C.425 Date of determination of amount of compensation and benefits. Except as otherwise provided by a specific statute:**
>
> 1. The amount of compensation and benefits and the person or 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.
>
> 2. If the employee incurs a subsequent injury or disability that primarily arises from a previous accident or injury that arose out of 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 compensation and benefits to which the Appellant is entitled.

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

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

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1. The State Minimum Wage Has No Bearing On AMW

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

2. The Date That Work Restrictions Begin Have No Bearing On AMW

Appellant argues that the "default" method for calculating AMW is predicated on the assumption that work restrictions begin on the date of injury. Appellant is incorrect. NRS 616C.425 is clear and makes no mention of the date when work restrictions began. The only date that matters for calculating AMW is the date of injury. Appellant's allegation that AMW can be calculated from the date that work restrictions begin is unsupported by law and, if adopted, would result in a substantial number of workers' compensation claimant's never getting

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[1] See NAC 616C.423, NAC 616C.432, and NAC 616C.435 regarding calculation of AMW.

[2] Nevada Constitution, Article 15, Section 16 (including citation from Office of Labor Commissioner as cited by Appellant)

an AMW calculation. Indeed, consider a claimant that never gets work restrictions but nonetheless proves entitlement to a permanent partial disability ("PPD"). How would this claimant know what his AMW is if he never had work restrictions? The answer is simple: there are no alternative ways to calculate AMW. The date of injury controls in every single case.

3. There Is No "Fairness" Calculation As Appellant Has Alleged

Appellant cites to NAC 616C.435 and claims that AMW calculations "should be reasonable and fair" and that Appellant's calculation is not "reasonable and fair" because it is so low. However, first off, Appellant acknowledges that the work program he was involved with at the time of his injury was voluntary. Appellant was not required to participate in that program and he received credit for his sentence by participating in it. Indeed, by participating in the program, NRS 616B.028 applied and limited the workers' compensation rights that Appellant was entitled to. Appellant agreed to the program and its limited rights in exchange for credit against his incarceration term. If Appellant believed that this arrangement was "unfair," he did not have to participate in the program and could have simply served out his sentence.

Second, NAC 616C.435 provides the "period used to calculate average monthly wage" and outlines the various methods that can be used to determine what wages are used in that calculation. NAC 616C.435 does not alter the date

which controls when AMW is calculated from; that is fixed at the date of injury. Rather, NAC 616C.435 indeed contemplates the *period* used to actually calculate the AMW. The subsections of NAC 616C.435 rank the preferences for the period used. The most preferable period is the 12 weeks which precede the date of injury. However, if 12 weeks do not accurately represent that claimant's wages, a one (1) year period can be used. If there are not 12 weeks worth of wages, the minimum that can used is 4 weeks. If 4 weeks are not available, a projected wage must be used.

However, if none of the above methods can "be applied reasonably and fairly, an average monthly wage must be calculated by the insurer at 100 percent of: (a) The sum which reasonably represents the average monthly wage of the injured employee as defined in NAC 616C.420 to 616C.447, inclusive, ***at the time the injury*** or illness occurs; or (b) The hourly wage ***on the day the injury*** or illness occurs, calculated by using the projected working schedule." NAC 616C.435(7)

Appellant alleges that section (7) should be analyzed in this case because it contains the words "reasonable and fair" and Appellant argues that his current calculation is not fair. However, Appellant does not consider the context in which the words "reasonable and fair" appear. Indeed, even if none of the other methods for calculating AMW could be applied to Appellant's case (and Appellant has not argued for such a position), section (7) clearly states that wages at the time of

injury control. Thus, even one of the sections which Appellant purports to rely on undercuts his case.

4. Entitlement To TPD Has Nothing To Do With How AMW Is Calculated

It appears that Appellant has confused entitlement to total partial disability ("TPD") benefits with AMW calculation. Appellant argues that NRS 616C.500(2) should control this matter because it states that an injured inmate is "entitled to receive [TPD] benefits if the injured employee is released from incarceration during the period of disability." However, no one is arguing that Appellant is not entitled to TPD benefits. Just because Appellant became entitled to wage replacement benefits upon his release from incarceration does not mean that he is entitled to a new AMW calculation. This citation to NRS 616C.500(2) has nothing to do with how AMW is calculated.

In conclusion, the legislature has clearly contemplated the exact situation at bar and has not provided some sort of carve out which would allow an inmate who is injured while participating in a work program to somehow reestablish his entitlement to benefits as the date upon which the inmate is released. Just like every other claimant in the state, Appellant's AMW was determined based upon the wages he was earning at the time of his injury. NRS 616C.425. Though novel, Appellant's argument for a recalculated AMW is without merit. The Appeals

Officer's August 16, 2017 Decision and Order was proper. This Petition for Judicial Review should be denied.

VII.

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 asks this Court to affirm the Appeals Officer's Decision and Order and deny Appellant's Petition for Judicial Review.

Dated this 24 day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 3,931 words and 403 lines of text.

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

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4. 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.

Respectfully submitted,
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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 24th day of April, 2019, 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/or electronic service as follows:

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