Case No. 76737

IN THE SUPREME COURT OF NEVADA

DARRELL E. WHITE, an individual;

Petitioner,

v.

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

Respondents.

On Appeal of the Decision of the Eighth Judicial District Court, Dept. 32, Judge Rob Bare presiding

PETITIONER'S REPLY BRIEF
Oral Argument requested

TRAVIS N. BARRICK, Esq.
Nevada Bar No. 9257
GALLIAN WELKER & BECKSTROM, L.C.
540 E. St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Petitioner
Darrell E. White

NRAP 26.1 DISCLOSURE.

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

1. The Petitioner, DARRELL E. WHITE, is an individual to whom the corporate ownership disclosures under NRAP 26.1 are inapplicable. Petitioner is appearing under his proper name and is not using any pseudonym.
2. The undersigned counsel of record has appeared in this matter before the District Court and in the prior administrative proceedings related thereto.

Dated this 8th day of May 2019.

By: _____
TRAVIS N. BARRICK, Esq.
Nevada Bar No. 9257
GALLIAN WELKER & BECKSTROM, L.C.
540 E. St. Louis Avenue
Las Vegas, NV 89104
Attorneys for Petitioner White

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I. STATEMENT OF JURISDICTION.

Judicial review of the decisions of an Appeals Officer is proper under NRS 616C.370 following the filing of a claim under NRS 616C.020, and the Appeals Officer's rendering of a final decision on any such claim.[1] The above being completed and the instant appeal arising from the District Court's order denying the Petition for Judicial Review, jurisdiction is proper under NRS 616C.370, NRAP 3A(a),[2] and NRAP 3A(b)(7).[3]

II. ROUTING STATEMENT.

While NRAP 17(b)(9),[4] presumptively assigning the instant matter to the Court of Appeals, may be applicable as to general subject matter, the Supreme Court should retain the case under authority of NRAP 17(a)(11) or

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[1] NRS 616C.370 Judicial review.

1. No judicial proceedings may be instituted for compensation for an injury or death under chapters 616A to 616D, inclusive, of NRS unless: (a) A claim for compensation is filed as provided in NRS 616C.020; and (b) A final decision of an appeals officer has been rendered on such claim.

2. Judicial proceedings instituted for compensation for an injury or death, under chapters 616A to 616D, inclusive, of NRS are limited to judicial review of the decision of an appeals officer.

[2] (a) Standing to Appeal. A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial.

[3] (b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action: (7) An order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children.

[4] (b) Cases Assigned to Court of Appeals. ... The following case categories are presumptively assigned to the Court of Appeals: (9) Administrative agency cases except those involving tax, water, or public utilities commission determinations.

NRAP 17(a)(12),[5] as the Court deems most applicable. The principal issue presented, involving, as it does, the deprivation, by various manner and means, of economic rights of an individual following release from incarceration, raises constitutional questions of first impression and of statewide public importance and applicability. This issue has been raised throughout the administrative process and the Petition for Judicial Review presented to District Court.[6]

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

The current application of NRS 616A - 616C, inclusive, and NAC 616C, as clearly demonstrated in the instant matter, miscalculates [7] the industrial insurance benefits' Average Monthly Wage ("AMW") for Temporary Total or Partial Disability ("TTD" and "TPD," respectively) of an individual following release from incarceration, thereby resulting in an unreasonable and unfair deprivation of economic rights that is inconsistent

[5] (a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following: (11) Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and (12) Matters raising as a principal issue a question of statewide public importance...

[6] Specific citations to the record are not listed, but the record adequately supports the assertion made here.

[7] By failing to account for all relevant "money, goods and services" under NAC 616C.423

with and, therefore, unconstitutional under the Nevada Constitution, Article 15, §16 [8] as well as Article 1, §8.[9]

IV. STANDARD OF REVIEW.

Issues related to Petitioner's burden of proof and this Court's applicable standard of review have been well expounded in both the Petitioner's Opening Brief and Respondents' Answering Brief, and nothing is added here beyond recapitulation of the following:

NRS 233B.135(3) allows the Court conducting the judicial review to "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;... (d) Affected by other error of law;... or (f) Arbitrary or capricious or characterized by abuse of discretion." Any decision affected by an error of law cannot be found to be supported by substantial evidence and, as such, is arbitrary or capricious, constituting an abuse of discretion that warrants reversal.[10]

[8] Except as otherwise provided in this section, each employer shall pay a wage to each employee of not less than the hourly rate set forth in this subsection.
[9] No person shall be deprived of life, liberty, or property, without due process of law.
[10] *See Titanium Metals Corp. v. Clark County*, 99 Nev. 397, 663 P.2d 355 (1983).

I. STATEMENT OF THE CASE.

This matter is before the Court on appeal from the District Court's declination to undertake Judicial Review of the miscalculation and subsequent Appeals Officer's confirmation of the AMW for DARRELL E. WHITE ("Mr. White" or "Petitioner"). The initial miscalculation is predicated on multiple errors and, in conjunction with the statute's failure to enumerate or implement a necessary post-incarceration adjustment to achieve the intended purpose of either TPD or TTD, unreasonably, unfairly, and unconstitutionally compels a free man to subsist on $0.50 per day.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

The facts and procedural posture of the case have been thoroughly and adequately stated in both the Petitioner's Opening Brief and the Respondents' Answering Brief, and reiteration here is unnecessary.

III. SUMMARY OF ARGUMENT.

The Nevada legislature has, through unawareness, indifference, or other unknown reason, neglected to address and provide appropriate remedy for the particular, and admittedly atypical, situation that arises in this case. This failure of action cannot reasonably be construed to express

the specific intent of the legislature, and, lacking that imprimatur, demands remedy by this Court.

This lack of legislative guidance allows the Third-Party Administrator ("TPA") to unfairly and improperly calculate AMW, as a basis for TPD or TTD, for any individual whose disability arises during incarceration. The TPA calculation is in error because it disregards the full text of NAC 616.423 which requires consideration of more than mere wages, and it also fails to contemplate the implications of similarly purposed statutory provisions which would yield a greater AMW than is relied on in the instant case. These alternate AMW calculations serve to illustrate the absurdity of the result that is achieved here, which is neither reasonable nor fair in accord with the intent of NAC 616C.435(7).

The initial miscalculation and / or failure to provide any post-incarceration adjustment of AMW creates a deprivation of the economic rights of a free citizen that is inconsistent with and unconstitutional under the Nevada Constitution, Article 15, §16 as well as Article 1, §8. The constitutional mandate for a State minimum wage and the associated statutes in NRS 608 are an essential underlying predicate for any provision of income and wage replacement under industrial insurance (workers' compensation) benefits. This underlying mandate rationally compels that

any such provided benefits reflect a calculation of AMW that also comports with the Constitutional and statutory minimum wage requirements. Any failure to so provide violates Article 15, §16, the logical implications of NRS 616C.440(2), NRS 616C.475(2), and NRS 616C.500(2), and, very likely, due process considerations under Article 1, §8.

In addition to the particular individual damage thrust upon Mr. White, the current regime generally disincentivizes participation in prison work programs by effectively shifting all risk of loss, however extreme, to the inmate or the inmate's estate. Notwithstanding the potential civil rights complications of such a result, this entirely erodes the purpose of and benefit to the State achieved by such inmate work programs.

IV. ARGUMENT.

a. Legislative or agency failure to compose statutes or regulations that address and provide a solution for the instant matter should not be viewed as dispositive.

Respondents rely heavily on the failure of the relevant NRS or NAC Chapters to enumerate a specific remedy for the outcome that arises in this case, asserting strongly that "the legislature has clearly contemplated the exact situation at bar and has not provided [a solution]." This assertion of contemplation and subsequent rejection is without support or citation to

either corroborative legislative history or another statute disallowing a remedy as sought by Mr. White, presumably resting solely on faith in the omniscience of the legislature. In short, it is a bald assertion that if a law doesn't exist, an all-knowing legislature intended its nonexistence.

Logically, this is not so. As Supreme Court Justice Scalia once opined, it is "impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 672, 107 S. Ct. 1442, 1472, 94 L. Ed. 2d 615 (1987). The situation at bar is very much atypical and an outlier in the realm of workers' compensation proceedings, thus making it logically most likely that this exact situation was never even contemplated, and the legislature's unawareness is the reason that no proper mechanism or solution exists.

Far from being prohibited, an AMW calculation better suited to Mr. White's situation is reasonably allowed under the as-written legislative mandate, and the TPA should reasonably exercise its agency authority to recalculate in compliance with relevant statutes and the Constitution.

b. The AMW, even for the 12/22/2015 date of injury, is improperly calculated under NAC 616C.423 and in consideration of NAC 616C.435(7) and similar provisions under NRS 616A.

Respondents mistakenly state that the calculation of the $22.93 AMW as of 12/22/2015 is undisputed, but no fact is more central to the instant complaint than this erroneous calculation, whether such error arises from incompatibility with the NAC, the NRS, or the Nevada Constitution.

NAC 616C.420 indicates that AMW "means the total gross value of **all money, goods and services** received by an injured employee from his or her employment to compensate for his or her time or services" (emphasis added). This definition is further expanded in NAC 616C.423, specifically disallowing limitation to just hourly wages or salary.[1] Consideration therein is even made for compensation in the form of room and board, which is assigned a monetary compensable value of $150 per month.[2]

Mr. White is well aware that the room and board are provided (or, more accurately, imposed) as an aspect of incarceration independent from any work an inmate may do, but this consideration and valuation is highlighted here to illustrate the absurdity of sole reliance on what

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[1] NAC 616C.423 Items included in average monthly wage. 1. Money, goods and services which are paid within the period used to calculate the average monthly wage include, **but are not limited to: (a) Wages; ... (j) Salary**; (emphasis added)

[2] NAC 616C.423(p) The reasonable market value of either board or room, or both. At least $150 per month will be allowed for board and room, $5 per day or $1.50 per meal for board, and $50 per month for a room.

Respondents oft refer to as Mr. White's "nominal wage." When an inmate is released from custody, provision of room and board are properly classified as benefits the inmate no longer possesses and must secure from his own income, so the calculation of AMW should not exclude them from "the gross value of all money, goods and services" being provided on the presumed date of injury, because room and board were, very much so, services provided on such date. Inclusion of this value alone would move Mr. White's AMW up to $172.93, almost eight times the current calculation yet still hardly reflective of the actual value of the benefit provided.

Respondents also regularly note in their answer that work performed by Mr. White is "in exchange for time off his sentence." This point is fully conceded, and the value for this exchange, or, better said, the compensation for the work performed, should also be recognized as part of "all money, goods and services." It is acknowledged that the monetary value of even a single earned day of freedom is so invaluable as to elude a financial definition, but some monetary valuation should certainly be apportioned to the AMW calculation. Mr. White urges that it should at least be no less than $1,765.52 per month (8 hours x $7.25 / hour x 30.44 days).

Even though it is clear that wages alone are not sufficient basis for calculation of AMW, it is even more egregious for Respondents to solely

rely on what they term a "nominal wage." "Nominal," is defined in Black's Law Dictionary as "titular; existing in name only; not real or substantial," and, in the context of inmate work programs, this nominal wage is mostly proffered only to distinguish such work from any slavery or involuntary servitude allowable under the 13th Amendment as a direct punishment for the crime for with the inmate is incarcerated. It is unadulterated jiggery-pokery[3] to attempt to predicate a freed man's workers' compensation benefits on an hourly wage that is indisputably "not real."

Interestingly, even those individuals actually compelled into involuntary servitude as a result of a criminal offense are entitled to a greater AMW than Mr. White has been granted in this instance. Specifically, NRS 616A.195(2) stipulates that adults who are ordered by the court to perform community service are eligible for an AMW of $50 per month,[4] with the consideration there that any such individual, as a free person, would not otherwise be precluded from engaging in other concurrent and more financially lucrative employment. This latter

[3] Courtesy of Justice Scalia in *King v. Burwell*, 135 S. Ct. 2480, 2500, 192 L. Ed. 2d 483 (2015).
[4] NRS 616A.195 "Employee": Persons ordered by court to perform community service. Any person: 2. Eighteen years of age or older who has been ordered by any court to perform community service pursuant to NRS 176.087, upon compliance by the convicted person or the supervising authority, while engaged in that work, shall be deemed, for the purpose of chapters 616A to 616D, inclusive, of NRS, an employee of the supervising authority at a wage of $50 per month, and is entitled to the benefits of those chapters.

consideration makes any direct analogy inapt, but this particular statute illustrates the clear error imposed by an AMW of $22.93.

Respondents may also seek to define, by repeated use of the word "voluntary," the work Mr. White performed for the Division of Forestry as that of a volunteer, and, if such is their intent,[5] even that appellation warrants a higher degree of compensation. Specifically, NRS 616A.130 mandates an AMW of $100 per month for a volunteer in a state organization.[6] Again, this particular statute contemplates the reality that an unincarcerated volunteer may have other sources of employment income, and so the analogy is only drawn here to illustrate the instant error and not to define an inapposite cap for Mr. White's claim.

Respondents reject Mr. White's expectation that NAC 616C.435(7) dictates a calculation that is "applied reasonable and fairly;" however, incorporation of that particular language in that particular clause speaks

[5] Mr. White assumes that the repetition of "voluntary" in relation to the work performed is more likely an attempt to link the concept of voluntariness with a waiver or assumption of risk. If so, this assertion is meritless. Exclusive of involuntary servitude, all work is a voluntary exercise, wherein individuals exchange their labor for a benefit or value. This basic presumption and fact of life is not obviated here, simply because Mr. White volunteered while incarcerated.

[6] NRS 616A.130 "Employee": Volunteer workers in program for public service. Persons who perform volunteer work in any formal program which is being conducted: 1. Within a state or local public organization; ... and who are not specifically covered by any other provisions of chapters 616A to 616D, inclusive, of NRS, while engaged in such volunteer work, may be deemed by an insurer, for the purposes of those chapters, as employees of that organization at a wage of $100 per month

more broadly, clearly indicating the expected purpose of NAC 616C and related chapters of the NRS is to arrive at workers' compensation that is reasonable and fair to the individual receiving the benefit. The legislature's intent is quite clear and specific, so, even if the mechanism to achieve that intent is less clear, a reasonable and fair outcome is required.

c. The Constitutional and statutory mandates for a minimum wage are applicable regardless of date of injury used for AMW.

Respondents argue that a "review of NRS 616C.425 should end this inquiry," at least as relates to calculation of the AMW on the date of injury. Mr. White does not concede to that assertion and maintains the arguments presented in the Petitioner's Opening Brief; however, Mr. White strongly urges that, in any case, a particular date of injury cannot be used to open a loophole in contravention of constitutional and statutory rights.[7]

As relates to state matters, a state constitution holds supremacy over any enactments, whether by statute or regulatory implementation, and the Nevada Constitution (not merely a statue) mandates a minimum wage.[8] NRS 616C.425 is subject to conformity to this requirement, or, phrased alternatively, NRS 616C.425 and all related chapters and sections only

[7] The implementation and enforcement of the minimum wage is effected through NRS 208.250 to NRS 208.290, inclusive.

[8] Nevada constitution Article 15, §16 A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be [$7.25] per hour worked.

reside in a universe in which such a minimum wage is mandated and enforced. Therefore, regardless of what date of injury a particular workers' compensation statute may point to, it is an underlying assumption that the worker's wage for calculation of the AMW on that indicated date was a constitutionally and statutorily compliant minimum wage.

This latter point establishes the link between AMW and the minimum wage. Mr. White has not argued, as the Respondents believe, that TTD or TPD should be construed as wages, *per se*, thus necessitating payments commensurate with the current minimum wage requirements. It is well understood that workers' compensation is not precisely a wage. Workers' compensation is a wage substitution or, more precisely, "financial support provided to an injured worker covering income"[9] which, in Nevada, is, perforce, related directly to a mandatory minimum wage.

Respondents' reliance on the unusual circumstances of Mr. White's calculated income on the indicated date of injury creates an untenable outcome not in accord with the expectation of workers' compensation, as well as one potentially harmful to other workers. Consider, for example, an instance wherein an adult individual, not incarcerated, is employed full-time but, due perhaps to alienage, at less than the mandatory minimum

[9] Black's Law Dictionary

wage. If that individual is disabled under such circumstances, the position argued by Respondents would necessitate that such individual would merit a calculation of AMW based on an illegal salary. Clearly, it is not the intent of the statute to compel the state's own agencies to engage, even indirectly, in activity that does not effect full constitutional compliance.

NRS 616C.500(2) (for Permanent and Temporary Partial Disabilities)[10] expresses a provision under which "an injured employee [... is] not entitled to accrue or be paid any benefits for a ... disability during the time the employee is incarcerated. The injured employee [... is] entitled to receive such benefits if the injured employee is released from incarceration during the period of disability." This clause relates to disability arising prior to incarceration, so this provision is referenced in the Petitioner's Opening Brief not simply, as Respondents apprehend, to establish a right to receive TPD or TTD post-incarceration, but, rather, it is referenced with the intent of illustrating the scope of the right that is reinstated following incarceration and the consequences of failure to fully reinstate such a right.

This statutory provision (along with those in Footnote 10) reflects arguments made above regarding the purpose of workers' compensation and the altered circumstances of incarceration. The necessity of workers'

[10] As well as NRS 616C.440(2) (relating to Permanent Total Disability) and NRS 616C.475(2) (relating to Temporary Total Disability)

compensation is obviated for the period in which an individual is incarcerated because the associated expenses of living are largely mooted, but, upon release, the exigencies of free living reinstitute that need for a full income or wage substitution. Even more important is the recognition that the deprivation of the economic right to receive this disability benefit constitutes a substantial portion of the penalty associated with the crime leading to incarceration. Consequently, upon release, when the imposition of penalty is terminated, the entirety of the economic rights is restored.

The full restoration of economic rights above stands in stark contrast to Mr. White's circumstance. Mr. White was justifiably (at least statutorily) deprived of certain economic rights during the period of his incarceration, but there is no statutory or constitutional basis under which continued deprivation of that right extends beyond release. For 144 days following his release, Mr. White was medically unable to work as a result of an injury sustained while incarcerated, and, because of the TPA's calculation of AMW, Mr. White was a freed man afforded solely the effective wage associated with an inmate. This outcome, unintentional as it must be, constitutes an undue deprivation of a fundamental economic right which is unconstitutional under the Nevada Constitution Article 1, §8.

d. The policy, as structured, negatively impacts other inmates, prison work programs generally, and the State's intended goal to benefit the community and reduce recidivism.

In addition to the particular damage thrust upon Mr. White, the current regime, by assuring that all of risk of financial loss as may arise under the prison work program, ranging from TPD to potentially even death, must, of necessity, be borne by the inmate or the inmate's estate, would create, if it were to be broadly promulgated, a general disinclination to inmate participation in prison work programs. As noted, although this particular situation is unlikely to arise with a high degree of regularity, this is surely not the intended effect of the statutes governing AMW calculation, standing, as it does, in opposition to the State's desire to promote inmate work programs that benefit the community through both the work itself and the reduced recidivism rate.

V. CONCLUSION.

For the reasons set forth above, Mr. White requests that the Court reverse the decision of the District Court and remand the matter to the Appeals Office for recalculation of AMW for the 144-day period following Mr. White's incarceration. The AMW calculation should be based on the full scope of relevant criteria under NAC 616C.420 and NAC 616C.423 as of

the day of injury and further ensure compliance with NAC 616.435(7) and the Nevada Constitution. In the alternative, the AMW calculation should accommodate an adjustment reflecting his release from incarceration that restores the economic rights of which he is unduly deprived, based upon an amount no less than the minimum wage.

Dated this 8th day of May 2019.

By: _____
TRAVIS N. BARRICK, Esq.
Nevada Bar No. 9257
GALLIAN WELKER & BECKSTROM, L.C.
540 E. St. Louis Avenue
Las Vegas, NV 89104
Attorneys for Petitioner White

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 14 font size Georgia type face.

2. I further certify that this brief complies with the page- or type-volume limitations in NRAP 32(a)(7) because, exclusive of those sections excluded under NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains approximately 3,107 words within 14 pages.

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 that every assertion in the brief regarding matters in the record be supported by reference to the page and volume number, if any, of the Appendix.

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.

Dated this 7th day of May 2019.

By: _____
TRAVIS N. BARRICK, Esq.
Nevada Bar No. 9257
GALLIAN WELKER & BECKSTROM, L.C.
540 E. St. Louis Avenue
Las Vegas, NV 89104
Attorneys for Petitioner White

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **PETITIONER'S REPLY BRIEF** was made on the 7th day of May 2019, by U.S. Mail, postage prepaid, to the following Respondents' counsel:

Daniel L. Schwartz, SBN 5125
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Avenue
Las Vegas, Nevada 89102
Telephone: (702) 893-3383
Facsimile: (702) 366-9563
daniel.schwartz@lewisbrisbois.com
Attorneys for Respondents

By: _____
TRAVIS N. BARRICK, Esq.
Nevada Bar No. 9257
GALLIAN WELKER & BECKSTROM, L.C.
540 E. St. Louis Avenue
Las Vegas, NV 89104
Attorneys for Petitioner White