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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3  
4 CLARK COUNTY, Self-Insured  
Employer,

5 Petitioner,

6 vs.


7 BRENT BEAN; STATE OF  
8 NEVADA, NEVADA DEPARTMENT  
OF ADMINISTRATIONS APPEAL  
9 OFFICE,

10 Respondents.

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District Court Case No. A-18-73957-J

11 JOINT APPENDIX

12  
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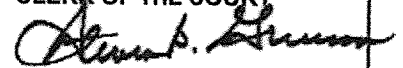
<b>DOCUMENT</b>	<b>DATE</b>	<b>VOLUME</b>	<b>BATES NUMBER</b>
Amended Petitioner's Motion for Stay Pending Appeal to the Nevada Supreme Court and Request for Order Shortening Time, or, in the Alternative, Motion for Temporary Stay	03/28/19	II	JA000341 – JA000365
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Correspondence from Claimant's Counsel to CORVEL	11/30/16	I	JA000064
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CLARK COUNTY, Self-Insured Employer,  
  
Petitioner,

CASE NO: A-18-773957-J  
DEPT NO: 16

vs.

BRENT BEAN; STATE OF NEVADA,  
NEVADA DEPARTMENT OF  
ADMINISTRATIONS APPEAL OFFICE,  
  
Respondents.

**PETITIONER'S OPENING BRIEF**

**(Oral Argument Requested)**

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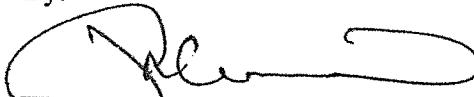
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1 COMES NOW the Petitioner, CLARK COUNTY ("Petitioner")[COUNTY], by and  
2 through its attorney, DALTON L. HOOKS, JR., ESQ., and hereby submits their Opening Brief  
3 concerning the above referenced matter. This pleading is filed pursuant to NRS 233B.135. This  
4 Opening Brief is based on the papers and pleadings on file herein, the attached Points and  
5 Authorities and any oral argument at the time of the hearing on the Petition.  
6

7 Dated this 10<sup>th</sup> day of July, 2018.

8 Respectfully submitted,

9 HOOKS MENG SCHAAN & CLEMENT  
By:

10 

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**III.**  
**STATEMENT OF THE ISSUES ON APPEAL**

1. Whether The Appeals Officer's Decision And Order Improperly Relied On The Non-Binding Authority Of An Attorney General's Opinion In Determining The Issue Of The Respondent/Claimant's Entitlement To A PPD Award.
2. Whether The Appeals Officer's Failure to Properly Apply Statutory And Case Law Authority Amounts To An Error of Law And/Or Abuse Of Discretion Warranting Reversal.

**IV.**  
**PRELIMINARY STATEMENT**

The instant Petition for Judicial Review concerns the Appeals Officer's Decision and Order dated April 19, 2018 reversing a January 24, 2017 determination by Petitioner, CLARK COUNTY denying the Respondent/Claimant's request for a permanent partial disability ("PPD") award. *See* ROA at pp. 3-10. In the underlying matter, the Appeals Officer ignored and/or misinterpreted controlling case law and statutes. As such her Decision amounts to a clear error of law, and in light of substantial evidence in the underlying appeal, is clearly unsupportable and constitutes reversible error or an abuse of discretion by Appeals Officer.

At issue is the Appeals Officer's reliance on Attorney General Opinion 2002-28, which provided basis for calculating the Respondent/Claimant's PPD award. Moreover, the Appeals Officer specifically elected not to apply the binding Supreme Court of Nevada case of *Howard v. City of Las Vegas*, 120 P.3d 410 (Nev. 2005), which amounts to a legal question and, therefore, must necessarily be resolved by this Court without deference to the Appeals Officer's findings of fact.

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...

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V.  
STATEMENT OF RELEVANT FACTS

On November 7, 2014, the Claimant, BRENT BEAN ("Respondent/Claimant"), a CLARK COUNTY firefighter alleged an occupational disease following his retirement. *ROA* at pg. 143. Importantly, the Respondent/Claimant retired from the CLARK COUNT FIRE DEPT. effective July 25, 2011. *ROA* at pg. 146. According to the C-4, the Respondent/Claimant was diagnosed with prostate cancer, and thereafter completed his claim on December 22, 2014. *ROA* at pg. 143, 151. Petitioner subsequently completed a C-3, which noted they doubted the validity of the claim due to late reporting. *ROA* at pg. 144. A C-1 was completed on December 24, 2014 and signed by both the Respondent/Claimant and employer on that date. *ROA* at pg. 145.

Effective January 13, 2015, the Petitioner/COUNTY issued its determination accepting the claim for prostate cancer. *ROA* at pg. 179. The Respondent/Claimant went forward with treatment for prostate cancer with Dr. David Ludlow, who recommended the Respondent/Claimant for a prostatectomy. *ROA* at pg. 155-158. The Respondent/Claimant underwent said prostatectomy on February 25, 2015. *ROA* at pg. 159-163. After appropriate follow-up, on June 24, 2016, Dr. Ludlow concluded that the Respondent/Claimant had reached maximum medical improvement ("MMI") and specifically noted, "from my standpoint he is cured from disease." *ROA* at pg. 166. The acceptance of the prostate cancer and the medical treatment received for this condition were not disputed in the underlying appeal.

Thereafter, the Respondent/Claimant obtained an evaluation with a rating physician off the Division of Industrial Relations ("DIR") rotating list. *ROA* at pg. 168. Following an evaluation on November 2, 2106 with Dr. Charles E. Quaglieri, the Respondent/Claimant was found to have a forty percent (40%) whole person impairment as a result of his prostate cancer.



1 *ROA* at pg. 169-173. The Respondent/Claimant, via counsel, requested the Petitioner/COUNTY  
2 award the 40% PPD as recommended by Dr. Quaglieri. *ROA* at pg. 178.

3 On January 24, 2017, the Petitioner/SIE sent correspondence to the  
4 Respondent/Claimant, advising that the Petitioner/COUNTY would not offer the PPD award.  
5 *ROA* at pg. 181. As specified in that letter, the Petitioner/COUNTY indicated that because the  
6 claim was made after retirement, and pursuant to NRS 617.453(4)(a), the Respondent/Claimant  
7 was not entitled to receive any monetary compensation for his occupational disease other than  
8 payment of medical benefits. *Id.*

9 On or about January 26, 2017, the Respondent/Claimant filed a request for hearing  
10 regarding the Petitioner's January 24, 2017 determination. *ROA* at pg. 182. The matter was  
11 subsequently bypassed directly to the Appeals Office. *ROA* at pg. 183-184. Following  
12 proceedings before Appeals Officer Georganne Bradley, the Appeals Officer REVERSED the  
13 Petitioner's January 24, 2017 determination and remanded the Petitioner to offer the  
14 Respondent/Claimant a 40% PPD award based upon the earnings at the time of his retirement  
15 from Clark County. *ROA* at pg. 9. In so doing, the Appeals Officer notes that she declined to  
16 extend the Nevada Supreme Court case of *Howard v. City of Las Vegas*, 120 P.3d 410 (Nev.  
17 2005), to determine the calculation of permanent partial disability awards. *ROA* at pg. 8.

18 On May 3, 2018, Petitioner filed its Petition for Judicial Review regarding the Appeals  
19 Officer's April 19, 2018 Decision and Order, which was assigned as case number A-18-773957-  
20 J. Petitioner additionally submitted a Motion for Stay of the Order and argument by the parties  
21 was held. Subsequent to that Motion hearing, the parties entered into a Stipulation and Order  
22 Granting a Temporary Stay which was filed with this Court on May 25, 2018, with Notice of  
23 Entry having been filed on May 29, 2018.

VI.  
STANDARD OF REVIEW

The Nevada Administrative Procedure Act, as contained in NRS 233B, outlines the standard for review to be used when conducting a judicial review of a final decision of an agency. NRS 233B.135 states, in relevant part, the following:

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

- (a) Conducted by the court without a jury; and
- (b) Confined to the record.

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

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

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the Petitioner/Respondent/Claimant 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.**

See NRS 233B.135 (emphasis added).

In reviewing of a petition for relief from an administrative decision, the District Court

1 may not disturb the decision of an Appeals Officer unless the decision was clearly erroneous or  
2 constituted an abuse of discretion. *See Nevada Indus. Comm'n v. Reese*, 93 Nev. 115, 560 P.2d  
3 1352 (1977). With specific regard to factual determinations, the decision of the Appeals Officer,  
4 as the initial trier of fact, are conclusive so long as they are supported by evidence which a  
5 reasonable mind would consider to be sufficient to support the Appeal Officer's conclusion. *See*  
6 *Nevada Indus. Comm'n v. Williams*, 91 Nev. 686, 541 P.2d 905 (1975). The court may not  
7 substitute its own judgment as to the weight of evidence, but rather is limited to determining  
8 whether the Appeals Officer's determination was arbitrary or capricious. *See McCracken v.*  
9 *Fancy*, 98 Nev. 30, 639 P.2d 552 (1982).

10 As to issues of law, it is appropriate for the reviewing court to make an independent  
11 judgment, rather than use a more deferential standard of review. *See Maxwell v. State Indus. Ins.*  
12 *Sys.*, 109 Nev. 327, 849 P.2d 267 (1993). While purely legal questions are reviewed de novo, the  
13 appeals officer's fact-based conclusions of law are entitled to deference when supported by  
14 substantial evidence. *See Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d  
15 378, 383 (2008). A "pure legal question" is a question that is not dependent upon and must  
16 necessarily be resolved without reference to any fact in the case before the court. An example of  
17 a pure legal question might be a challenge to the facial validity of a statute. *See Beavers v. State*  
18 *Dept. of Motor Vehicles & Pub. Safety*, 109 Nev. 435, 851 P.2d 432 (1993).

19 In the present matter, the decision of the Appeals Officer specifically elects not to apply  
20 the case of *Howard v. City of Las Vegas*, 120 P.3d 410 (Nev. 2005), which amounts to a legal  
21 question. The Appeals Officer then rendered her decision to calculate the value of the PPD award  
22 at issue based on Attorney General Opinion 2002-28, even though the binding *Howard* case was  
23 decided subsequently. As argued herein, the Appeals Officer's decision constitutes an abuse of  
24

1 discretion or misapplication of law.

2  
3 **VII.**  
4 **LEGAL ARGUMENT**

5 **A. Attorney General Opinions are Not Binding on this Court; therefore, the**  
6 **Appeals Officer's Reliance on the Same Amounts to a Clear Error of Law**  
7 **and/or Abuse of Discretion.**

8 As this Court is aware, Petitioner filed its Petition for Judicial Review on May 3, 2018  
9 and Motion for Stay on May 9, 2018. Since that time – on May 31, 2018 – the Supreme Court of  
10 Nevada issued its Opinion in *Montage Marketing, LLC v. Washoe County ex rel., et al.*;  
11 wherein the Justice Hardesty wrote: “*regardless of the import of the Attorney General’s*  
12 *Opinion, it is not binding on this court.*” 134 Nev. Adv. Op. 39, n. 1 (May 31, 2018)  
13 (emphasis added).

14 While on the other hand, “[I]legal precedents of this Court should be respected until  
15 they are shown to be unsound in principle.” *Grotts v. Zahner*, 115 Nev. 339, 989 P.2d 415  
16 (1999).

17 The doctrine of stare decisis imposes a severe burden on the litigant who  
18 asks us to disavow one of our precedents. For the doctrine not only plays an  
19 important role in orderly adjudication; it also serves the broader societal  
20 interests in evenhanded, consistent, and predictable application of legal  
21 rules.

22 *Id.* (citing *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 1400 S.Ct. 2647, 65  
23 L.Ed.2d 757 (1980)).

24 Here, the Appeals Officer based her decision on the non-binding 2002 Attorney  
General’s Opinion while ignoring the controlling 2005 Supreme Court of Nevada *Howard*  
case. As such, the Appeals Officer’s April 19, 2018 Decision and Order is predicated upon a  
clear error of law and/or abuse of discretion. Therefore, the Petitioner’s Petition for Judicial

1 Review is warranted, and the Decision of the Appeals Officer is properly REVERSED.

2 **B. Attorney General Opinion 2002-28 is an Incomplete Hypothetical and Not on**  
3 **Par to the Facts at Hand; Therefore, the Appeals Officer's Reliance on the**  
4 **Same Amounts to a Clear Error of Law and/or Abuse of Discretion.**

5 In 2002, the Attorney General ("AG") produced Attorney General Opinion 2002-28,  
6 which states in part that a firefighter's "date of separation from service in such capacity and  
7 wages earned immediately prior to such date of separate form the basis upon which disability  
8 benefits are to be calculated." *ROA* at pg. 129. The Opinion goes on to narrow the issue: "When  
9 a firefighter [] retires from public services, *becomes employed by a private company*, and is  
10 subsequently diagnosed with heart disease, does the claim for coverage belong to the previous  
11 public employer's insurance carrier or to the current employer's insurance carrier? *Under these*  
12 *hypothetical facts*, what is the date upon which wages are calculated?" *Id.* (emphasis added).

13 Clearly, the incomplete hypothetical posed by the AG's Opinion is by no means  
14 analogous to the instant case. First, the Opinion presumes that a retired firefighter is earning a  
15 higher or lower "salary" following retirement because s/he becomes employed by a private  
16 company. Here, there is no evidence that Respondent/Claimant is earning a "salary" or wage as  
17 contemplated under the Nevada Industrial Insurance Act.

18 Second, further in the Opinion, the AG speculates that the Legislature intended disability  
19 benefits for an occupational disease would be based upon wages earned prior to the covered  
20 employee's separation for public service as a firefighter. *Id.* at pp. 132. However, it is now clear  
21 what the Supreme Court of Nevada would – and did – do. The *Howard* case was decided three  
22 years after the AG Opinion and represents the only mandatory authority for the Court to follow  
23 on the issue at hand. Therefore, the Appeals Officer's Decision and Order – relying on the AG  
24 Opinion as to the manner of calculating the value of the Petitioner/Claimant's PPD award – is

1 a clear error of law and/or abuse of discretion. The Appeals Officer's Decision must be  
2 REVERSED and the January 24, 2017 determination from the Petitioner is properly  
3 AFFIRMED.

4 **C. The Appeals Officer's Failure to Follow Controlling Statutory And Case Law**  
5 **Authority, Constituting A Clear Error of Law And/or Abuse of Discretion.**

6 In *Howard*, Oscar Howard was a retired firefighter who attempted to assert a claim for  
7 disability benefits resulting from a claim for heart disease. The Supreme Court of Nevada  
8 concluded that when a retired claimant becomes eligible for occupational disease benefits, the  
9 claimant is entitled to receive medical benefits *but may not receive any disability compensation*  
10 *if the claimant is not earning any wages* at the time of his application. *Howard*, 120 P.3d at 411  
11 (emphasis added).

12 **i. Any Argument That Permanent Partial Disability Amounts to a Medical**  
13 **Benefit is Unsupportable.**

14 Consistent with NRS 617.453, payment of medical treatment expenses is proper when a  
15 claimant has been impacted by a disabling cancer. The statute provides in pertinent part:

16 **NRS 617.453 Cancer as occupational disease of firefighters.**

17 4. Compensation awarded to the employee or his or her dependents for  
18 disabling cancer pursuant to this section must include:

19 (a) Full reimbursement for related expenses incurred for **medical**  
20 **treatments**, surgery and hospitalization in accordance with the schedule  
21 of fees and charges established pursuant to NRS 616C.260 or, if the  
22 insurer has contracted with an organization for managed care or with  
23 providers of health care pursuant to NRS 616B.527, the amount that is  
24 allowed for the treatment or other services under that contract; and

(b) The compensation provided in chapters 616A to 616D, inclusive, of  
NRS for the disability or death.

See NRS 617.453(4) (2015).

1 In this case, the Petitioner/COUNTY does not contest its responsibility for payment of  
2 the medical expenses incurred for treatment of the Respondent/Claimant's prostate cancer and, in  
3 fact, did so without issue. However, because permanent partial disability benefits are analogous  
4 to the temporary total disability benefits which arise from the same statutes as contemplated in  
5 *Howard*, the Petitioner/COUNTY properly declined to offer a PPD award in this case.

6 Any attempt to argue that a PPD award constitutes medical benefits is unsupportable.  
7 The American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth  
8 Edition – which has been adopted under NRS 616C.110 – defines **disability** as an alteration of  
9 the individual's capacity to meet *personal, social or occupational demands* or statutory or  
10 regulatory requirements because of an impairment. Nowhere in the Nevada Industrial Insurance  
11 Act is a claimant's permanent partial disability defined as a **medical benefit**. Clearly, medical  
12 benefit contemplates medical treatments, surgery, hospitalization, physical therapy, and  
13 prescriptions; not disability awards such as a PPD award.

14 **ii. As A Retiree, the Respondent Has No Wages for Calculation of Disability**  
15 **Benefits and is, Therefore, Not Entitled to PPD Benefits.**

16 Within NRS 617, under the section addressing compensation for disability and death,  
17 NRS 617.430 provides in part:

18 **NRS 617.430 Eligibility; limitations.**

19 1. Every employee who is disabled or dies because of an occupational  
20 disease, as defined in this chapter, arising out of and in the course of  
21 employment in the State of Nevada, or the dependents, as that term is defined  
22 in chapters 616A to 616D, inclusive, of NRS, of an employee whose death is  
23 caused by an occupational disease, are entitled to the compensation provided  
24 by those chapters for temporary disability, permanent disability or death, as  
the facts may warrant ...

See NRS 617.430 (2015).

1 This entitlement must be specifically addressed in light of the Respondent's/Claimant's  
2 status as a retiree. Going back to the analysis in *Howard*, the Court first looked at NRS 617.420,  
3 which states:

4 No compensation may be paid under this chapter for disability which does not  
5 incapacitate the employee for at least 5 cumulative days within a 20-day  
6 period from earning full wages, but if the incapacity extends for 5 or more  
7 days within a 20-day period, the compensation must then be computed from  
the date of disability. The limitations in this section do not apply to medical  
benefits, which must be paid from the date of application for payment of  
medical benefits.

8 *Howard*, 120 P.3d at 411.

9 The Court then held that when a retired claimant becomes eligible for occupational  
10 disease benefits, *the claimant is entitled to receive medical benefits but may not receive any*  
11 *disability compensation if the claimant is not earning any wages.* *Id.*, 120 P.3d at 412  
12 (emphasis added). The Court's rationale for this ruling is based on two reasons. First, retirement  
13 benefits are not included in NRS 617.050's definition of "compensation" and no other provision  
14 suggests that retirement benefits should be included within the meaning of wages.<sup>1</sup> Second, a  
15 retiree has usually lost no salary or wages due to the impairment. *Id.*

16 The Court in *Howard* unequivocally stated that the period immediately preceding the  
17 occupational disease is the date from which we *must* calculate disability benefits. *See Howard*,  
18 120 P.3d at 412 (citing *Mirage v. State Dept. of Administration*, 110 Nev. 257, 871 P.2d 317  
19 (1994) (emphasis added). In reaching this conclusion, the Court in *Howard* looked at case law  
20 from multiple jurisdictions and appropriately noted that "a retired New Hampshire claimant, like  
21  
22

23 <sup>1</sup> See NAC 616C.423 (describing items included in average monthly wage but omitting retirement  
24 benefits.)



1 a retired Nevada claimant, is effectively denied disability benefits because his weekly wage  
2 calculation amounts to zero.” *Id.*

3 The purpose of a PPD award is an attempt to place the recipient in the same position that  
4 he would have been had no disability occurred. In other words, a PPD award compensates a  
5 claimant, at least in large part, for loss of future earning capacity. In this case, the  
6 Respondent/Claimant was retired, collecting retirement benefits, and not earning a wage when he  
7 became disabled. Accordingly, any disablement in this case will not affect his income, as the  
8 income in question is not dependent upon his wholeness as a worker or other factors. Likewise  
9 and of even greater importance, any disability will not prevent him from continuing to receive  
10 retirement benefits.

11 Notably, the Respondent/Claimant has continually argued in the matter below that a PPD  
12 award is not a disability benefit. However, such an argument is clearly erroneous as the amount  
13 of any PPD award, like TTD benefits, are entirely based upon wages. To illustrate the wage-  
14 based nature of a PPD award, it is worth reviewing the applicable statutes and regulations  
15 concerning the calculation of a claimant’s AMW.<sup>2</sup> Namely, NAC 616C.420, NAC 616C.423,  
16 and NAC 616C.432 are applicable to the instant matter.

17 NAC 616C.420 defines “average monthly wage” as:

18 [T]he total gross value of all money, goods and services received by an  
19 injured employee from his employment to compensate him for his time or  
20 services and is used as the base for calculating the rate of compensation for  
21 the injured employee.

22 See NAC 616C.420 (2015). Further, NAC 616C.423, lists the items to be included in the AMW

23 <sup>2</sup> NRS 617.453(4)(b) provides that retired firefighters who develop disabling cancer may receive “[t]he  
24 compensation provided in chapters 616A to 616D.” See NRS 617.453(4)(b) (2015). Accordingly, the  
aforementioned chapters and corresponding regulations are used to calculate a claimant’s AMW when an  
occupational disease, such as cancer, is at issue.

1 as follows:

- 2 1. Money, goods and services which are paid within the period used to  
3 calculate the average monthly wage include, but are not limited to:  
4 (a) Wages;  
5 (b) Commissions which are prorated over the period used to calculate  
6 the average monthly wage;  
7 (c) Incentive pay;  
8 (d) Payment for sick leave;  
9 (e) Bonuses which are prorated over the period used to calculate the  
10 average monthly wage;  
11 (f) Termination pay;  
12 (g) Tips which are collected and disbursed by the employer which are  
13 not paid at the discretion of the customer;  
14 (h) Tips reported by the employee pursuant to NRS 616B.227;

9 ...

- 10 (i) Allowance for tools or for the rental of hand and power tools not  
11 normally provided by the employee;  
12 (j) Salary;  
13 (k) Payment for piecework;  
14 (l) Payment for vacation;  
15 (m) Payment for holidays;  
16 (n) Payment for overtime;  
17 (o) Payment for travel when it is paid to compensate the employee for  
18 the time spent in travel; and  
19 (p) The reasonable market value of either board or room, or both. At  
20 least \$150 per month will be allowed for board and room, \$5 per day  
21 or \$1.50 per meal for board, and \$50 per month for a room.

16 See NAC 616C.423 (2015).

17 Additionally, the method for calculating the AMW is specified thusly;

18 The average monthly wage will be calculated by multiplying the average daily  
19 wage of an employee during a period of earnings by 30.44. The following  
20 formulas will be used to compute an average daily wage and an average  
21 monthly wage:

- 21 1. Gross earnings divided by days in period of earnings = average daily wage.  
22 2. Average daily wage x 30.44 = average monthly wage.

23 See NAC 616C.432 (2015). Interestingly, retirement benefits are not included in the AMW

1 calculation and the *Howard* court expressly excluded the same. *See Howard*, 120 P.3d at 411.

2 Finally, NAC 616C.441 provides the same method for calculating an AMW as set forth in  
3 *Howard* and *Mirage*. It states:

4 1. The earnings of an injured employee on the date on which an accident  
5 occurs or **the date on which an injured employee is no longer able to work**  
6 **as a result of contracting an occupational disease will be used to calculate**  
7 **the average monthly wage.**

8 *See* NAC 616C.441 (2015) (emphasis added). In summary, it cannot be disputed that an  
9 employer, insurer, or third-party administrator must look to the claimant's AMW in order to  
10 calculate a PPD award. *See id.* Accordingly, PPD awards are absolutely based on AMW.

11 Following the mandatory authority of the *Howard* case, and applying the relevant statutes  
12 and regulations, the Respondent's average monthly wage – as calculated pursuant to NAC  
13 616C.435 – amounts to \$0; thereby the PPD award is also \$0. Here, the Respondent's earliest  
14 period of disability was the date of diagnosis on 11/07/14. *ROA* at pg. 143. At that time, the  
15 Respondent was retired and earning no wage. As stated above, the idea of disability is tied to  
16 earning capacity. Therefore, while the Respondent contracted an occupational disease, he has  
17 not been disabled from earning a wage. As such, he is precluded from earning TTD and/or  
18 precluded from any entitlement to a PPD award.

19 Additionally, the Court's ruling in *Howard* can be gleaned from NRS 616C.390(6),  
20 which denies TTD or vocational rehabilitation benefits where a claimant has retired. As  
21 reasoned: there should be no award for disability benefits where there are no "wages" lost. In  
22 fact, a retired claimant maintains his exact same income; unaffected by his occupational injury or  
23 disease. In the instance of a permanent partial disability award, going back to the AMA Guides  
24 definition, there is no disability to occupational demands where there is no occupational income

1 lost.

2 ...

3 The *Howard* Court also comments that the date of disability for Mr. Howard was the date  
4 of his heart attack and the date immediately preceding the occupational disease is the date from  
5 which disability benefits are properly calculated. *Howard*, 120 P.3d at 412; *see also Mirage v.*  
6 *State. Dept. of Administration*, 110 Nev. 257, 871 P.2d 317 (1994). In other words: disability  
7 benefits trigger at the time of disablement. This has been addressed in NRS 617.060 as well as  
8 NRS 617.420 (*supra*). NRS 617.060 provides:

9 **617.060 “Disablement” and “total disablement” defined.**

10 “Disablement” and “total disablement” are used interchangeably in this  
11 chapter and mean the event of becoming physically incapacitated by reason of  
12 an occupational disease arising out of and in the course of employment as  
13 defined in this chapter *from engaging, for remuneration or profit, in any*  
14 *occupation for which he or she is or becomes reasonably fitted by education,*  
15 *training or experience.*

16 *See* NRS 617.060 (2015) (emphasis added).

17 Further, the Supreme Court of Nevada has considered the issue of disablement as it  
18 relates to occupational diseases and held:

19 [I]n order to become eligible for disability benefits, the employee must be  
20 incapacitated by the occupational disease for a least five cumulative days  
21 within a twenty-day period **earning full wage.**

22 *See Mirage v. State Dept. of Admin.*, 110 Nev. at 260, 871 P.2d 317 (1994); *see also Manwill v.*  
23 *Clark County*, 123 Nev. 238, 244 (2007); *Employers Ins. Co. of Nevada v. Daniels*, 122 Nev.  
24 1009, 1014 (2006). Moreover, the Court has stated:

An employee is not entitled to compensation from the mere contraction of an  
occupational disease. Instead, compensation ... flows from a disablement  
resulting from such a disease.

1 See *Daniels*, 122 Nev. at 1027 (internal quotations omitted).

2 Thus, in looking at the standards of disablement, they are focused on the fact that there  
3 must be a loss of ability in earning a wage from an occupation. The *Mirage* Court has indicated  
4 that for occupational disease cases, compensation in terms of average monthly wage must be  
5 computed from the date of disability. In fact, the Supreme Court of Nevada has definitively held  
6 “[o]nly after the employee becomes disabled does it become necessary to look to NRS Chapter  
7 616 for the method of calculating the employee’s average wage.” *Mirage*, 871 P.2d at 319.

8 As in the *Howard* case, the Respondent, as a retiree, was properly denied an award for  
9 PPD as he has no wages on which to calculate a PPD award. His income consists of retirement  
10 benefits from the fire department; which is not considered “compensation.” Nor is there  
11 evidence of alternate employment. Accordingly, the Respondent was not earning an actual wage  
12 as contemplated under NAC 616C.423 from which any PPD benefit could be calculated.

13 X.  
14 CONCLUSION

15 The Appeals Officer’s Decision and Order, dated April 19, 2018, is for the myriad of  
16 reasons set forth heretofore erroneous, arbitrary and capricious. Namely, the Appeals Officer  
17 ignored and/or misinterpreted controlling case law and statutes in ordering the Petitioner to offer  
18 a PPD award calculated in a manner not provided under statute or controlling law. As such, the  
19 April 19, 2018 Decision and Order is predicated upon a clear error of law and/or abuse of  
20 discretion. Therefore, the January 24, 2017 determination of the Petitioner should have been  
21 AFFIRMED.

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...  
For the reasons set forth herein, the Petitioner, CLARK COUNTY, respectfully requests that this honorable Court provide the following relief:

1. That the District Court GRANT's the instant Petition for Judicial Review and,
2. That the Appeals Officer's Decision and Order dated 04/19/18 be REVERSED as erroneous based on the arguments raised by Petitioner herein with instruction to AFFIRM the Petitioner's January 24, 2017 determination.

Dated this 10<sup>th</sup> day of July, 2018

Submitted by:

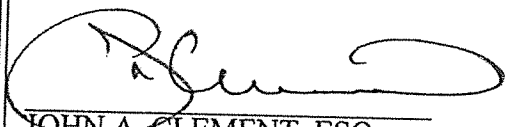


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XI.

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing 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 N.R.A.P 28(d), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

  
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7-10-18  
DATE

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am employee of the law firm of HOOKS MENG SCHAAN & CLEMENT, and on this 10<sup>th</sup> day of July, 2018, I am serving the foregoing

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☒ Placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Las Vegas, Nevada, postage prepaid, following ordinary business practices.

☒ Personal delivery by runner or messenger service.

☐ Federal Express or other overnight delivery.

Dated this 10<sup>th</sup> day of July, 2018.

  
An Employee of HOOKS MENG SCHAAN  
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DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY )

Petitioners )

vs. )

BRENT BEAN and THE DEPARTMENT  
OF ADMINISTRATION, HEARINGS  
DIVISION, )

Respondents. )

CASE NO. : A-18-773957-J  
DEPT. NO. : XVI

**PETITIONER'S ANSWERING BRIEF**

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I.

STATEMENT OF ISSUES

Whether the Appeals Officer's April 19, 2018 Decision and Order is supported by substantial evidence and devoid of legal error.

Under Appeal No. 1710715-GB, whether the Insurer's January 24, 2016 determination declining to offer a permanent partial disability award was proper.

II.

STATEMENT OF CASE

This is the petition of the Employer, CLARK COUNTY (hereinafter "Petitioner"), for review of the Appeals Officer's January 24, 2018 Decision and Order, wherein the Appeals Officer reversed Petitioner's January 24, 2016 determination denying to offer Claimant, BRENT BEAN (hereinafter "Respondent") a permanent partial disability award under the October 15, 2014 claim for occupationally related prostate cancer.

After extensive litigation and medical opinions, the Appeals Officer issued a Decision and Order, in pertinent part, as follows:

IT IS HEREBY ORDERED that the Insurer's January 24, 2017 determination is REVERSED. The Insurer is REMANDED to offer Claimant the forty percent (40%) whole person permanent partial disability award as found by Dr. Quaglieri. (Appeal No 1710715-GB)

(Record on Appeal, hereinafter "ROA" pages 3-10).

Petitioner thereafter timely filed the instant Petition for Judicial Review of the Appeals Officer's Decision and Order with this Court. The Appeals Officer's Decision and Order was not arbitrary nor capricious and must be affirmed.

///

III.

STATEMENT OF FACTS

On or about November 7, 2015, Respondent reported the onset of an occupational disease that was contracted while in the course and scope of his employment as a firefighter with the Clark County Fire Department. Respondent was diagnosed with prostate cancer. Liability for the claim was appropriately accepted and Respondent received various modalities of medical care, including a prostatectomy. Petitioner's refusal to offer a permanent partial disability award based upon Dr. Charles Quaglieri's disability findings is the subject of this appeal.

Respondent retired as a firefighter with Petitioner on July 24, 2011 or July 25, 2011.

On October 15, 2014, Respondent completed blood work that revealed elevated prostate specific antigen (PSA) levels. (ROA page 71) Respondent came under the care of Dr. David Ludlow for his prostate condition. Respondent was diagnosed with malignant neoplasm of prostate and underwent a prostatectomy on February 24, 2015. Respondent was subsequently declared medically stable and ratable. Dr. Ludlow opined that Respondent would require ongoing medication for erectile dysfunction following claim closure. Dr. Ludlow confirmed that the medication was needed as a direct result of the prostate cancer. (ROA pages 72-106)

On November 2, 2016, Dr. Quaglieri evaluated Respondent for permanent partial disability. Dr. Quaglieri concluded that Respondent qualified for thirty-nine percent (39%) whole person impairment as a result of the occupationally related prostate cancer condition. Respondent was granted sixteen percent (16%) whole person impairment for the prostatectomy, ten percent (10%) whole person impairment for incontinence and twenty percent (20%) whole person impairment for loss of sexual function. (ROA pages 107-111)

1 On November 30, 2016, Petitioner was notified that Dr. Quaglieri miscalculated  
2 Respondent's impairment and that the correct whole person impairment sum should have been  
3 forty percent (40%). For that reason, Petitioner was asked to offer Respondent the forty percent  
4 (40%) whole person impairment award. (ROA pages 112-117)  
5

6 On November 30, 2016, Petitioner was asked to authorize ongoing erectile dysfunction  
7 medication following claim closure. (ROA pages 118-120)  
8

9 On December 1, 2016, Petitioner notified Respondent that there appeared to be a  
10 calculation error in Dr. Quaglieri's disability report and was seeking clarification. (ROA pages  
11 121-126)  
12

13 On January 4, 2017, Dr. Quaglieri issued a statement verifying his calculation error and  
14 outlined that Respondent's whole person impairment was forty percent (40%). (ROA page 127)  
15

16 On January 9, 2017, an electronic mail communication was sent to Petitioner outlining  
17 that the Attorney General Opinion 2002-28 established that firefighter's "date of separation from  
18 service in such capacity and wages earned immediately prior to such date of separate form the  
19 basis upon which disability benefits are to be calculated." (ROA pages 128-136)  
20

21 On January 24, 2017, Petitioner notified Respondent that they were declining to offer a  
22 permanent partial disability award because the claim for occupational disease was filed after his  
23 retirement. Petitioner concluded that Respondent was therefore not entitled to receive any  
24 compensation, including permanent partial disability, for his industrial injury. (ROA pages 137-  
25 138) Respondent appealed that determination to the Hearing Officer. The parties subsequently  
26 agreed to transfer the matter directly to the Appeals Officer for final administrative decision.  
27

28 The Appeals Officer instructed the parties to submit briefs in support of their positions  
concerning the legal question as to whether Howard v. City of Las Vegas, 120 P.3d 410 (2005)

1 disqualified Respondent from being entitled to permanent partial disability compensation  
2 benefits. On September 20, 2017, Respondent submitted his Opening Brief. Claimant argued  
3 that, for the purpose of calculating his permanent partial disability, his average monthly wage  
4 must be calculated using the wages from the date of his retirement. (ROA pages 34-40) On  
5 October 30, 2017, Petitioner filed its Answering Brief in support of their position that  
6 Respondent's average monthly wage was zero for the purpose of calculating his permanent  
7 partial disability. (ROA pages 24-33) Respondent filed his Reply Brief on December 11, 2017,  
8 wherein he distinguishes the difference between seeking temporary total disability benefits from  
9 permanent partial disability benefits when a claim for occupational cancer is filed after  
10 retirement. (ROA pages 19-23)

11  
12  
13 On April 19, 2018, the Appeals Officer filed a Decision and Order reversing Petitioner's  
14 January 24, 2017 determination. Under Conclusion of Law 2, the Appeals Officer found that:

15  
16 NRS 617.453(4) provides in pertinent part that compensation  
17 awarded to a firefighter or his or her dependents for disabling  
18 cancer pursuant to this section must include full reimbursement  
19 for related expenses incurred for medical treatments, surgery and  
20 hospitalization and the compensation provided in chapters 616A  
21 to 616D, inclusive of NRS for the disability or death. Subsection  
22 5 of the statute makes it clear that the firefighter's retirement prior  
23 to submitting a claim does not bar compensation for his claim  
24 simply because he has retired. The rebuttable presumption  
25 provided by subsection 5 applied to disabling cancer diagnosed  
26 after the termination of his employment. Also relevant is NRS  
27 617.430(1), which provides in pertinent part that every employee  
28 who is disabled or dies because of an occupational disease, or the  
dependents of an employee whose death is caused by an  
occupational disease, is entitled to the compensation provided by  
NRS 616A-D for temporary disability, permanent disability, or  
death, as the facts may warrant, subject to the modifications  
mentioned in Chapter 617.

27 Under Conclusion of Law 3, the Appeals Officer provided her interpretation of Howard's  
28 application to the matter at hand. The Appeals Officer found that:



1 The Nevada Supreme Court case of Howard considered the extent  
2 to which a firefighter who retires and, thereafter, suffers a heart  
3 attack, is entitled to temporary total disability benefits. The Court  
4 held that although Nevada law is clear that retired firefighters who  
5 sustain a disability post-retirement are entitled to medical benefits,  
6 the Legislature's method for calculating compensation precludes  
7 an award for temporary total disability benefits when the retired  
8 firefighters are not earning wages at the time of the disability. In  
9 Howard, the specific issue was whether the retired firefighter,  
10 who submitted a claim for heart disease, was entitled to temporary  
11 total disability benefits.

12 Under Conclusion of Law 4, the Appeals Officer weighed in on the briefs submitted by the  
13 parties and concluded that:

14 For the reasons set forth in Claimant's Opening and Reply Briefs,  
15 this Court finds and concludes that Claimant is entitled to receive  
16 an otherwise proper permanent partial disability award despite the  
17 fact that he was retired when his claim was filed and permanent  
18 disability determined to exist. NRS 617.453(4) provides that a  
19 firefighter with a cancer claim is entitled to not only medical  
20 benefits but also disability benefits to which is entitled pursuant  
21 to NRS 616A-D. Nothing set forth in NRS 616C.490 or the  
22 regulations governing permanent partial disability provides that a  
23 person is not entitled to permanent partial disability benefits once  
24 he is no longer working. NRS 616C.390 expressly provides that  
25 a retired person, upon reopening, may not receive temporary total  
26 disability benefits or vocational rehabilitation benefits. The  
27 Legislature could have, but did not, exclude permanent partial  
28 disability benefits from the benefits to which a claimant is entitled  
after retirement. Unlike temporary total disability benefits, which  
are intended to compensate the injured worker during the  
temporary period in which he is not working, permanent partial  
disability benefits are intended to compensate the injured worker  
for permanent physical impairment. This Court therefore declines  
to extend the Supreme Court's holding in Howard to permanent  
partial disability awards.

29 The Appeals Officer ruled under Conclusion of Law 5 that:

30 There is no statute, regulation, or case law that provides that a  
31 retired firefighter with an accepted occupational disease claim  
32 may be deprived of an otherwise properly determined permanent  
33 partial disability award. Furthermore, no other grounds for denial  
34 were asserted or argued by the Insurer, this Court finds Dr.

1 Quaglieri's permanent partial disability rating evaluation to be  
2 thorough and properly performed.

3 Under Conclusion of Law 6, the Appeals Officer decided that:

4 For the reasons stated in Claimant's written briefs, the Appeals  
5 Officer concludes that the permanent partial disability awarded  
6 shall be calculated based upon the wages the Claimant was  
7 earning at the time of his retirement from the Clark County Fire  
8 Department. The Nevada Supreme Court's decision in Howard  
9 does not address permanent partial disability awards and, as stated  
10 above, the Appeals Officer declines to extend the Court's holding  
11 in that case to permanent partial disability awards; the Court's  
12 holding was not based on NRS 617.453 or 616C.490 which are  
13 applicable in the instant case. To conclude that the Claimant's  
14 PPD award must be calculated based on his wages on the date of  
disability (i.e zero) would, from a practical perspective, render  
subsection (5) of NRS 617.453 meaningless. By its very terms,  
subsection (5) refers to cancer diagnosed after the firefighter is no  
longer employment; the "date of disability" would always be post-  
retirement for purposes of awarding of benefits pursuant to NRS  
617.453 unless evidence to rebut the presumption is presented.

15 Thus, the Appeals Officer ordered Petitioner to calculate Respondent's average monthly wage  
16 for the purpose of calculating the permanent partial disability award based upon the wages he  
17 was earning at the time of his retirement. (ROA pages 3-10). Petitioner timely filed a Petition  
18 for Judicial Review. Petitioner also filed a Motion for Stay and Motion for Order Shortening  
19 Time, or, in the Alternative, Motion for Temporary Stay, which was denied.  
20

21 **IV.**

22 **LEGAL ARGUMENT**

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

25 Judicial review of a final decision of an administrative agency is governed by NRS  
26 233B.135, which provides in pertinent part, the following:  
27

28 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

1 burden of proof is on the party attacking or resisting the decision to show  
2 that the final decision is invalid pursuant to subsection.

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

- 8 (a) In violation of constitutional or statutory provisions;  
9 (b) In excess of the statutory authority of the agency;  
10 (c) Made upon unlawful procedure;  
11 (d) Affected by other error of law;  
12 (e) Clearly erroneous in view of the reliable, probative and  
13 substantial evidence on the whole record; or  
14 (f) Arbitrary or capricious or characterized by abuse of discretion.

15 Relating to the standard of review of administrative decisions, our Supreme Court has  
16 held that the factual findings made by administrative adjudicators are not disturbed on appeal  
17 unless they lack the support of substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d 324  
18 (1984); SIIS v. Thomas, 101 Nev. 293, 701 P.2d 1012 (1985); SIIS v. Swinney, 103 Nev. 17,  
19 731 P.2d 359 (1987); SIIS v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990). Thus, on appeal,  
20 "the central inquiry is whether substantial evidence in the record supports the agency decision."  
21 Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 583, 854 P.2d 862, 865 (1993).

22 Substantial evidence is "that quantity and quality of evidence which a reasonable  
23 [person] could accept as adequate to support a conclusion." State Employment Sec. Dep't v.  
24 Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986). Therefore, if the agency's  
25 decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary  
26 and capricious. Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 547, 2 P.3d 850, 854 (2000).  
27 The Court must defer to an agency's findings of fact only as long as the findings are supported  
28 by substantial evidence. Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d  
378, 383-84 (2008).

1 On the other hand, purely legal questions may be decided by the District Court without  
2 deference to an agency determination, upon de novo review. SIIS v. Khweiss, 108 Nev. at 126,  
3 825 P.2d at 220 (1992). Furthermore, the construction of a statute is a question of law, subject  
4 to de novo review. See State, Dep't of Motor Vehicles v. Lovett, 110 Nev. 473, 476, 874 P.2d  
5 1274, 1249 (1994).  
6

7 **I. Claimant Maintains that NRS 617.453(5) Controls the Methodology for**  
8 **Awarding of Benefits of Retired Firefighters**

9 Petitioner argues that there is no statute to support the Appeals Officer's Decision and  
10 Order concerning Respondent's average monthly wage because he was retired and had no wages  
11 during the eighty-four (84) days preceding his disabling occupational cancer condition.  
12

13 NRS 617.453(5) clearly contemplated this issue and applies to this matter. NRS  
14 617.453(5) states:

15 5. Disabling cancer is presumed to have developed or  
16 manifested itself out of and in the course of the employment of  
17 any firefighter described in this section. This rebuttable  
18 presumption applies to disabling cancer diagnosed after the  
19 termination of the person's employment if the diagnosis occurs  
20 within a period, not to exceed 60 months, which begins with the  
21 last date the employee actually worked in the qualifying capacity  
22 and extends for a period calculated by multiplying 3 months by  
23 the number of full years of his or her employment. This rebuttable  
24 presumption must control the awarding of benefits pursuant to this  
25 section unless evidence to rebut the presumption is presented.  
26

27 NRS 617.453(5) asserts that the "awarding of benefits" is based upon "a period  
28 calculated by multiplying 3 months by the number of full years of his or her employment," but  
shall "not to exceed 60 months, which begins with the last date the employment actually worked  
in the qualifying capacity."

In this case, Respondent was employed for over thirty (30) full years of qualifying  
capacity from his July 20, 1981 date of hire through his July 25, 2011 date of retirement. Based

1 upon NRS 617.453(5), Respondent's thirty (30) full years of qualifying employment is then  
2 multiplied by three (3) months, resulting in ninety (90) months, which far exceeds the sixty (60)  
3 month limit.

4  
5 Respondent retired on July 25, 2011. Respondent was diagnosed with prostate cancer  
6 on November 7, 2014 and thereafter filed the necessary documents to perfect a claim for  
7 occupational cancer disease benefits. Thus, Respondent was diagnosed with his disabling cancer  
8 approximately forty (40) months after his retirement, which is clearly within the sixty (60)  
9 months requirement granted by NRS 617.453(5).

10  
11 Therefore, pursuant to NRS 617.453(5), Respondent qualifies for the full "awarding of  
12 benefits pursuant to this section," including the calculation of his average monthly wage for the  
13 purpose of calculating his permanent partial disability award, based upon his disabling cancer  
14 being diagnosed, filed and accepted for workers' compensation benefits at approximately forty  
15 (40) months post retirement. Clearly Respondent's eligibility for the "awarding of benefits" is  
16 well within the sixty (60) months period that he qualifies for based upon his thirty (30) full years  
17 of qualifying employment.

18  
19 In accordance with NRS 617.453(5), Respondent has demonstrated that his average  
20 monthly wage for the purpose of calculating his permanent partial disability award must be  
21 based upon the wages he was earning at the time of his retirement. These facts clearly support  
22 the Appeals Officer's April 19, 2018 Decision and Order that is the subject of these proceeding.  
23 As such, Petitioner's Motion for Stay Pending Petition for Judicial Review must be denied as  
24 they have failed to demonstrate a strong showing that it is likely to prevail on the merits of the  
25 appeal or that it will suffer irreparable harm.

26  
27 ///

1           **II. The Evidence Supports the Appeals Officer's April 19, 2018 Decision and**  
2           **Order**

3           Petitioner asserts that the Appeals Officer's Decision and Order was erroneous, arbitrary  
4 and capricious because it misinterpreted controlling case law and statutes when ruling on  
5 Respondent's entitlement to permanent partial disability award compensation benefits.  
6 Petitioner's arguments lack merit and are a clear attempt to reweigh the evidence and reconsider  
7 the arguments previously submitted in their briefs and during oral arguments.  
8

9           The crux of the issue to be determined in this brief is whether Howard controls the  
10 methodology for wage calculation for the purpose of calculating permanent partial disability.

11          The Appeals Officer correctly noted under Conclusion of Law 3 that:

12                   The Nevada Supreme Court case of Howard considered the extent  
13 to which a firefighter who retires and, thereafter, suffers a heart  
14 attack, is entitled to temporary total disability benefits. The Court  
15 held that although Nevada law is clear that retired firefighters who  
16 sustain a disability post-retirement are entitled to medical benefits,  
17 the Legislature's method for calculating compensation precludes  
18 an award for temporary total disability benefits when the retired  
19 firefighters are not earning wages at the time of the disability. In  
20 Howard, the specific issue was whether the retired firefighter,  
21 who submitted a claim for heart disease, was entitled to temporary  
22 total disability benefits.

23          The Appeals Officer correctly noted under Conclusion of Law 4 that:

24                   For the reasons set forth in Claimant's Opening and Reply Briefs,  
25 this Court finds and concludes that Claimant is entitled to receive  
26 an otherwise proper permanent partial disability award despite the  
27 fact that he was retired when his claim was filed and permanent  
28 disability determined to exist. NRS 617.453(4) provides that a  
firefighter with a cancer claim is entitled to not only medical  
benefits but also disability benefits to which is entitled pursuant  
to NRS 616A-D. Nothing set forth in NRS 616C.490 or the  
regulations governing permanent partial disability provides that a  
person is not entitled to permanent partial disability benefits once  
he is no longer working. NRS 616C.390 expressly provides that  
a retired person, upon reopening, may not receive temporary total  
disability benefits or vocational rehabilitation benefits. The

1 Legislature could have, but did not, exclude permanent partial  
2 disability benefits from the benefits to which a claimant is entitled  
3 after retirement. Unlike temporary total disability benefits, which  
4 are intended to compensate the injured worker during the  
5 temporary period in which he is not working, permanent partial  
6 disability benefits are intended to compensate the injured worker  
7 for permanent physical impairment. This Court therefore declines  
8 to extend the Supreme Court's holding in Howard to permanent  
9 partial disability awards.

10 In Howard, the Court considered whether a firefighter who retires and, thereafter, suffers  
11 a heart attack, is entitled to temporary total disability benefits. The Court confirmed that retired  
12 firefighters are entitled to all medical benefits for their occupationally related condition,  
13 however, the "method for calculating compensation precludes an award for temporary total  
14 disability benefits when the retired firefighters are not earning wages at the time of the  
15 disability."

16 Howard is clearly distinguishable from the case at hand because Respondent is not  
17 seeking temporary total disability for lost wages. Under Howard, the Court differentiated  
18 between workers' compensation benefits related to medical benefits and those benefits  
19 associated with disability compensation in the form of lost wages caused by the occupational  
20 disease. While the Court made it clear that it intended for the injured worker to be precluded  
21 from obtaining temporary total disability compensation if the claim for disability was filed after  
22 retirement, the Court further made it clear that it did not intend for the decision to affect medical  
23 benefits in any way.

24 The Court intended for the injured worker to remain entitled to all medical benefits  
25 associated with the physical injury, which includes permanent partial disability caused by  
26 permanent physical disfigurement. Permanent partial disability is a medical benefit intended to  
27 compensate the injured worker for permanent physical damage caused by the industrial injury  
28

1 or occupational disease and not a form of disability compensation associated with lost wages.  
2 In this case, Respondent's prostate was removed due to a compensable occupationally related  
3 cancer. Respondent was found to have sustained forty percent (40%) whole person impairment  
4 related to his significant occupational disease. Permanent partial disability is a medical benefit  
5 directly related to the removal of the prostate and its residual effects. Thus, permanent partial  
6 disability is in no way intended to replace lost wages, as was held in Howard.  
7

8 NRS 616C.490(5) states in part:  
9

10 5. Unless the regulations adopted pursuant to NRS  
11 616C.110 provide otherwise, a rating evaluation must include an  
12 evaluation of the loss of motion, sensation and strength of an  
13 injured employee if the injury is of a type that might have caused  
14 such a loss. Except in the case of claims accepted pursuant to NRS  
15 616C.180, no factors other than the degree of physical impairment  
16 of the whole person may be considered in calculating the  
17 entitlement to compensation for a permanent partial disability.

18 NRS 616C.490 establishes that permanent partial disability is not related to temporary  
19 total disability compensation that is associated with lost wages. Instead, permanent partial  
20 disability is a medical benefit directly related to the permanent loss of physical function, such  
21 as loss of range of motion, loss of sensation, and loss of strength, and is intended to compensate  
22 the injured worker for the physical damage caused by the occupational disease. Nothing in  
23 Howard sought to eliminate compensation related to permanent partial disability because  
24 permanent partial disability is not intended to compensate the injured worker for lost wages.  
25

26 The Court specifically stated that the issue on appeal in Howard involved eligibility for  
27 temporary total disability compensation when the injured worker was retired and not earning  
28 wages at the time the claim was filed. The Court solely considered whether an injured worker  
is entitled to temporary total disability compensation related lost time caused by the  
occupationally related heart condition. Nevertheless, the Court reiterated that "when a retired



1 claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive  
2 medical benefits but may not receive any disability compensation if the claimant is not earning  
3 any wages.”  
4

5 In further distinguishing Howard from the present matter, the Court outlined that:

6 Second, a retiree usually has lost no salary due to the impairment.  
7 However, the claimant may lose money in the form of medical  
8 expenses attributable to the work-related disability; for these  
9 expenses, NRS 617.420 provides no prohibition. As we held in  
10 *Gallagher*, retired claimants will still be able to claim medical  
11 expenses, despite not being entitled to receive compensation  
12 based on lost wages.  
13 ...

14 Because Howard was retired and not earning an actual wage at the  
15 time of his disability, from which a lost wage may be calculated,  
16 he is not entitled to disability compensation in the form of lost  
17 wages.  
18 ...

19 For the forgoing reasons, we conclude that a retired firefighter’s  
20 entitlement to occupational disease benefits does not include  
21 compensation for temporary total disability benefits when the  
22 firefighter is not earning any wages. Accordingly, we affirm the  
23 order of the district court.  
24

25 In every instance, the Court in Howard specifically cited that its decision related solely  
26 to temporary total disability compensation related to lost wages. Since Howard had no intention  
27 of limiting compensation related to the recovery of permanent partial disability, we must look  
28 to the Attorney General’s opinion on how to calculate a permanent partial disability award when  
the injured worker is retired at the time claim was filed.

On August 7, 2002, the Attorney General issued an official opinion regarding this exact  
issue. In its opinion, the Attorney General concluded that a “firefighter’s or police officer’s date  
of separation from service in such capacity and wages earned immediately prior to such date of  
separation form the basis upon which disability benefits are to be calculated.” The Attorney

1 General determined that this calculation method would prevent "an absurd result" of using "a  
2 significantly higher, or lower, salary in another (post-retirement) occupation" when calculating  
3 disability benefits. (ROA pages 127-133)  
4

5 In this case, there is no dispute that Respondent qualifies for forty percent (40%) whole  
6 person related to his occupationally related and accepted prostate cancer condition. However,  
7 Petitioner is of the position that Respondent has a zero dollar (\$0) wage base for the purpose of  
8 calculating the value of the permanent partial disability because he was retired at the time of the  
9 claim. Although Respondent is not seeking temporary total disability related to lost wages, he  
10 is seeking compensation for the medical portion of his case due to a permanent disability  
11 sustained when his prostate was removed due to occupationally related cancer.  
12

13 Respondent maintains that a common sense approach must be adopted in order to avoid  
14 the "absurd result" identified by the Attorney General. Assigning a zero dollar (\$0) value for  
15 the purpose of calculating a monetary award for the forty percent (40%) permanent partial  
16 disability is patently unfair and leads to the "absurd result" that is the foundation of this appeal.  
17 As noted above, permanent partial disability is a medical benefit that is intended to compensate  
18 the injured worker for the permanent physical damage and disfiguration caused by the  
19 occupational disease. Ignoring the Attorney General opinion would absolutely result in the  
20 "absurd result" that the Attorney General sought to avoid.  
21  
22

23 Pursuant to the Attorney General's opinion, Respondent's wages, for the purpose of  
24 calculating his permanent partial disability award, should be his July 24, 2011 or July 25, 2011  
25 retirement date. Utilizing the last wage Respondent actually earned prior to his retirement avoids  
26 the "absurd" resulted contemplated by the Attorney General. Petitioner must therefore be  
27 ordered to calculate Respondent's wages based upon his earnings at the time of retirement.  
28

1 Petitioner must then be ordered to calculate the permanent partial disability award and offer it  
2 to Claimant.

3 Based upon the foregoing, Respondent has establishes that Howard is clearly  
4 distinguishable from the current appeal, as the present matter does not involve the recovery of  
5 temporary total disability compensation related to lost wages. Howard does not control the  
6 methodology for calculating Respondent's average monthly wage for the purpose placing a  
7 monetary value on the calculation of Respondent's forty percent (40%) permanent partial  
8 disability. Since Howard does not impact this issue, the Appeals Officer correctly found that  
9 wages from the date of Respondent's retirement must be utilized for the purpose of calculating  
10 the permanent partial disability award.

11  
12  
13 **III. Claimant Distinguishes the Difference Between Seeking Temporary Total**  
14 **Disability Benefits from Permanent Partial Disability Benefits When a**  
15 **Claim for Occupational Cancer is Filed After Retirement**

16 Petitioner disputes Respondent's argument that permanent partial disability is not a  
17 medical benefit. Respondent is not attempting to distinguish medical benefits from disability  
18 benefits because it is simply a fact that these two (2) benefits are different. Respondent is not  
19 asking for wage replacement benefits. Instead, Respondent is requesting that his entitlement for  
20 compensation due to the medical incident that happened to him and the ensuing permanent  
21 physical condition that resulted in the removal of his prostate.

22  
23 Petitioner argues that medical benefits are intended to mean medical treatment, surgery,  
24 hospitalization, physical therapy and prescriptions but not disability awards related to the  
25 permanent physical damage caused by the occupational disease. They cite the American  
26 Medical Association's *Guides to the Evaluation of Permanent Impairment* that defines disability  
27 as "an alteration of the individual's capacity to meet personal, social or occupational demands  
28

1 or statutory or regulatory requirements because of an impairment.” In this instance, Petitioner  
2 fails to consider what personal and social demands were contemplated under this standard.  
3 Clearly the functionality of the body is certainly personal and social. It is undeniable that  
4 Respondent is altered as a result of this incident. The removal of his prostate and the resulting  
5 permanent residual effects is an “alteration” of Respondent’s individual capacity to meet his  
6 personal, social and/or occupational demands.  
7

8 It has been argued that Howard analyzed NRS 617.420 and cited in part that “[T]he  
9 limitations in this section do not apply to medical benefits, which must be paid from the date of  
10 application for payment of medical benefits.” This is where Respondent argued that NRS  
11 617.455 contemplates that it will be difficult to pinpoint a date of injury/exposure. So,  
12 Respondent’s employment is conclusively presumed to be the cause of the disease. Thus, the  
13 date of application is the date he last worked for these purposes.  
14

15 Petitioner further argued that Howard precludes the payment of permanent partial  
16 disability compensation if Respondent is not earning any wages when a claim for benefits is  
17 filed. While this is true for temporary total disability compensation, Petitioner cannot say that  
18 Respondent has lost no use or function of his body for his non work related activities.  
19 Respondent is left disabled, both as to work and as to life in general. The workers’ compensation  
20 system contemplates these losses and provides separately that Respondent is entitled to  
21 permanent partial disability for his physical damage. In this case, Respondent had his prostate  
22 removed as a result of cancer and has suffered permanent residual dysfunction.  
23  
24

25 The Appeals Officer ruled under Conclusion of Law 5 that:  
26

27 There is no statute, regulation, or case law that provides that a  
28 retired firefighter with an accepted occupational disease claim  
may be deprived of an otherwise properly determined permanent  
partial disability award. Furthermore, no other grounds for denial

1                   were asserted or argued by the Insurer, this Court finds Dr.  
2                   Quaglieri's permanent partial disability rating evaluation to be  
3                   thorough and properly performed.

4                   NRS 617.455 is clearly meant to compensate Respondent over his lifetime for any lung  
5                   or heart disease he suffers after fulfilling his initial length of employment obligation. The intent  
6                   is that Respondent be as fully compensated as possible during and after his service. Petitioner  
7                   diminishes this intent by excluding the portion of benefits designed to compensate for permanent  
8                   damage. NRS 617.455 is designed to compensate for exposure while employed and extends  
9                   coverage after employment.

10                  Despite what Petitioner would like for this Court to believe, Howard simply addressed  
11                  the issue of entitlement to temporary total disability compensation for lost wages when a  
12                  claimant was retired and not earning wages at the time the claim was filed. Howard was never  
13                  intended to be applied to issues involving permanent partial disability as that issue does not  
14                  involve disability compensation related to lost wages. As such, there is no available case law to  
15                  adequately and fairly compensate Respondent for the permanent physical damage caused by the  
16                  removal of his prostate and the resulting dysfunction.

17                  In contrast, the Attorney Generals' 2002 opinion clearly addressed the identical issue  
18                  presented in this case. Specifically, the Attorney General concluded that a "firefighter's or  
19                  police officer's date of separation from service in such capacity and wages earned immediately  
20                  prior to such date of separation form the basis upon which disability benefits are to be  
21                  calculated." The Attorney General determined that this calculation method would prevent "an  
22                  absurd result" of using "a significantly higher, or lower, salary in another (post-retirement)  
23                  occupation" when calculating disability benefits. If Petitioner's position is allowed to stand,  
24                  25  
26  
27  
28

1 then this case will effectively result in the "absurd" outcomes in the Attorney General sought to  
2 prevent.

3 Under Conclusion of Law 6, the Appeals Officer decided that:

4  
5 For the reasons stated in Claimant's written briefs, the Appeals  
6 Officer concludes that the permanent partial disability awarded  
7 shall be calculated based upon the wages the Claimant was  
8 earning at the time of his retirement from the Clark County Fire  
9 Department. The Nevada Supreme Court's decision in Howard  
10 does not address permanent partial disability awards and, as stated  
11 above, the Appeals Officer declines to extend the Court's holding  
12 in that case to permanent partial disability awards; the Court's  
13 holding was not based on NRS 617.453 or 616C.490 which are  
14 applicable in the instant case. To conclude that the Claimant's  
15 PPD award must be calculated based on his wages on the date of  
16 disability (i.e zero) would, from a practical perspective, render  
17 subsection (5) of NRS 617.453 meaningless. By its very terms,  
18 subsection (5) refers to cancer diagnosed after the firefighter is no  
19 longer employment; the "date of disability" would always be post-  
20 retirement for purposes of awarding of benefits pursuant to NRS  
21 617.453 unless evidence to rebut the presumption is presented.

22 In conclusion, Respondent's wages at the time of his retirement must be utilize in the  
23 calculation of his permanent partial disability. Arguing that Respondent qualifies for forty  
24 percent (40%) whole person impairment for his occupationally related cancer condition and then  
25 attempting to apply a standard intended solely for the payment of temporary total disability  
26 compensation related to lost wages is clearly inappropriate and insulting to Respondent, who  
27 has suffered significant permanent impairment, and would result in an absurd outcome that goes  
28 against the clear intentions of the Nevada legislature. For that reason, the Appeals Officer  
correctly ordered Petitioner to calculate Respondent's permanent partial disability award using  
the wages from the date of his retirement.

///

///

V.

**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 records. Respondent respectfully requests entry of this Honorable Court's order AFFIRMING the Appeals Officer Decision and Order as outlined above. Respondent is entitled to a permanent partial disability award that is calculated using his wages from the time of his retirement.

DATED this 9<sup>th</sup> day of August, 2018.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By: 

**GABRIEL A. MARTINEZ, ESQ.**

Nevada Bar No. 000326

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1 **CERTIFICATE OF COMPLIANCE**

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

8 I understand that I may be subject to sanctions in the event that the accompanying brief  
9 is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.  
10

11 DATED this 7<sup>th</sup> day of August, 2018.

12 GREENMAN, GOLDBERG, RABY & MARTINEZ

13  
14 By: 

15 **GABRIEL A. MARTINEZ, ESQ.**

16 Nevada Bar No. 000326

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23 *Attorneys for Petitioner*  
24  
25  
26  
27  
28



CERTIFICATE OF MAILING

I hereby certify that on the 9<sup>th</sup> day of August, 2018, I deposited a true and correct copy of the RESPONDENT'S ANSWERING BRIEF in the U.S. Mails, postage fully prepaid, enclosed in envelopes addressed as follows:

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DISTRICT COURT  
CLARK COUNTY, NEVADA

14 CLARK COUNTY, )  
15 )  
16 Petitioner )  
17 )  
18 vs. ) CASE NO. : A-18-773957-J  
19 ) DEPT. NO. : XVI  
20 BRENT BEAN and THE DEPARTMENT )  
21 OF ADMINISTRATION, HEARINGS )  
22 DIVISION, )  
23 )  
24 Respondents. )  
25 )  
26 )  
27 )  
28 )

**ORDER DENYING PETITION FOR JUDICIAL REVIEW**

21 This matter came before this Court on October 25, 2018 on the Petition for Judicial  
22 Review filed by Petitioner, CLARK COUNTY. Petitioner was represented by DALTON L.  
23 HOOKS, JR., ESQ. of the law firm HOOKS MENG & CLEMENT. Respondent, BRENT  
24 BEAN, was represented by LISA M. ANDERSON, ESQ. of the law firm of GREENMAN  
25 GOLDBERG RABY & MARTINEZ. No other parties were present or represented.  
26  
27  
28

Greenman Goldberg Raby Martinez  
ACCIDENT INJURY ATTORNEYS

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

1 After a review and consideration of the record, the Points and Authorities on file herein,  
2 and oral arguments of counsel, the Court determined as follows:

3 Petitioner argued the legal question as to whether Howard v. City of Las Vegas, 120 P.3d  
4 410 (2005) disqualified Respondent from being entitled to permanent partial disability  
5 compensation benefits. Respondent argued that, for the purpose of calculating his permanent  
6 partial disability, his average monthly wage must be calculated using the wages from the date  
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9 In Howard, the Court considered whether a firefighter who retires and, thereafter, suffers  
10 a heart attack, is entitled to temporary total disability benefits. The Court confirmed that retired  
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12 however, the "method for calculating compensation precludes an award for temporary total  
13 disability benefits when the retired firefighters are not earning wages at the time of the  
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16 Howard is distinguishable from the case at hand because Respondent is not seeking  
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18 workers' compensation benefits related to medical benefits and those benefits associated with  
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10 NRS 616C.490(5) states in part:  
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12 5. Unless the regulations adopted pursuant to NRS  
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23 as loss of range of motion, loss of sensation, and loss of strength, and is intended to compensate  
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26 permanent partial disability is not intended to compensate the injured worker for lost wages.

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1 The Court specifically stated that the issue on appeal in Howard involved eligibility for  
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11 In further distinguishing Howard from the present matter, the Court outlined that:

12 Second, a retiree usually has lost no salary due to the impairment.  
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25 For the forgoing reasons, we conclude that a retired firefighter's  
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27 compensation for temporary total disability benefits when the  
28 firefighter is not earning any wages. Accordingly, we affirm the  
order of the district court.

In every instance, the Court in Howard specifically cited that its decision related solely  
to temporary total disability compensation related to lost wages. Howard thus had no intention  
of limiting compensation related to the recovery of permanent partial disability.

1 Petitioner further argued that there is no statute to support the Appeals Officer's Decision  
2 and Order concerning Respondent's average monthly wage because he was retired and had no  
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4  
5 NRS 617.453(5) contemplated this issue and applies to this matter. NRS 617.453(5)  
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18 NRS 617.453(5) asserts that the "awarding of benefits" is based upon "a period  
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20 shall "not to exceed 60 months, which begins with the last date the employment actually worked  
21 in the qualifying capacity."

22 In this case, Respondent was employed for over thirty (30) full years of qualifying  
23 capacity from his July 20, 1981 date of hire through his July 25, 2011 date of retirement. Based  
24 upon NRS 617.453(5), Respondent's thirty (30) full years of qualifying employment is then  
25 multiplied by three (3) months, resulting in ninety (90) months, which exceeded the sixty (60)  
26 month limit.

27 ///

28 ///

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1 Respondent retired on July 25, 2011. Respondent was diagnosed with prostate cancer  
2 on November 7, 2014 and thereafter filed the necessary documents to perfect a claim for  
3 occupational cancer disease benefits. Thus, Respondent was diagnosed with his disabling cancer  
4 approximately forty (40) months after his retirement, which is within the sixty (60) months  
5 requirement granted by NRS 617.453(5).  
6

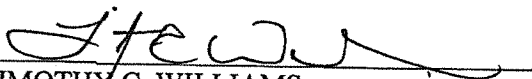
7 Therefore, pursuant to NRS 617.453(5), Respondent qualifies for the full "awarding of  
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9 purpose of calculating his permanent partial disability award, based upon his disabling cancer  
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11 (40) months post-retirement. Thus, Respondent's eligibility for the "awarding of benefits" is  
12 well within the sixty (60) months period that he qualifies for based upon his thirty (30) full years  
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16 2018. In paragraph 16, the Appeals Officer found, "[t]hat the evidence supports Claimant's  
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18 applicable statute disqualifies claimants from those benefits." In addition, Respondent relied on  
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21 sixty (60) months after the last date of employment. Thus, the award of benefits based on the  
22 period calculated by multiplying three months by the number of full years of employment is  
23 under Nevada Law and specifically for firefighters who suffer from cancer as an occupational  
24 disease.  
25

26 ///  
27  
28


1 In light of the foregoing, the Petition for Judicial Review is hereby DENIED.

2 Dated this 1 day of March, 2019.

3  
4  
5   
6 TIMOTHY C. WILLIAMS  
DISTRICT COURT JUDGE *CT*

7 Submitted by:

8  
9 GREENMAN, GOLDBERG, RABY & MARTINEZ

10   
11 LISA M. ANDERSON, ESQ.

12 Nevada Bar No. 004907

13 THADDEUS J. YUREK, III, ESQ.

14 Nevada Bar No. 011332

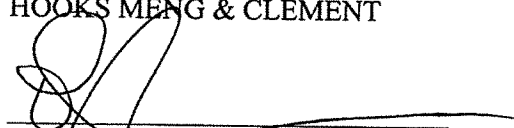
601 South Ninth Street

15 Las Vegas, Nevada 89101

*Attorney for Respondent*

16  
17 Approved as to form ~~and content~~:

18 HOOKS MENG & CLEMENT

19   
20 DALTON L. HOOKS, JR., ESQ.

21 Nevada Bar No. 008121

22 JOHN A. CLEMENT, ESQ.

Nevada Bar No. 008030

23 2820 West Charleston Boulevard

Suite C-23

24 Las Vegas, Nevada 89102

*Attorney for Petitioner*





NOAS

DALTON L. HOOKS, JR., ESQ., Nevada Bar No. 8121

JOHN A. CLEMENT, ESQ., Nevada Bar No. 8030

HOOKS MENG SCHAAN & CLEMENT

2820 W. Charleston Blvd., Ste. C-23

Las Vegas, Nevada 89102

Telephone No. (702) 766-4672

Facsimile No. (702) 919-4672

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY, Self-Insured  
Employer,

Petitioner,

vs.

BRENT BEAN; STATE OF  
NEVADA, NEVADA  
DEPARTMENT OF  
ADMINISTRATIONS APPEAL  
OFFICE,

Respondents.

CASE NO: A-18-773957-J

DEPT NO: 16

**NOTICE OF APPEAL**

TO: BRENT BEAN, Respondent and,

TO: LISA ANDERSON, ESQ., of GREENMAN GOLDBERG RABY &  
MARTINEZ, counsel of record for Respondent.

JA000289

Case Number A-18-773957-1

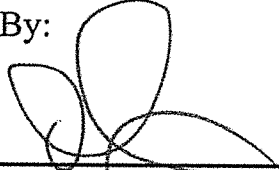
NOTICE IS HEREBY GIVEN that Petitioner, Self-Insured Employer CLARK COUNTY (hereinafter referred to as "Appellant"), in the above entitled action, hereby appeals to the Supreme Court of the State of Nevada from the attached "Decision and Order" entered in this action on or about March 1, 2019 which denied Petitioner's Petition for Judicial Review and the "Notice of Entry of Order" filed on or about March 4, 2019.

DATED this 22nd day of March, 2019

Respectfully submitted,

HOOKS MENG & CLEMENT

By:

A handwritten signature in black ink, appearing to be "Dalton L. Hooks, Jr.", written over a horizontal line.

DALTON L. HOOKS, JR., ESQ.

JOHN A. CLEMENT, ESQ.

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**CERTIFICATE OF SERVICE**

Pursuant to NRCF 5(b), I certify that I am employee of the law firm of  
HOOKS MENG & CLEMENT, and on this 22nd day of March, 2019, I am serving  
the foregoing **NOTICE OF APPEAL** and that on this date I deposited for mailing  
at Las Vegas, Nevada, a true copy of the attached document addressed to:

MR. BRENT BEAN  
3405 AMISH AVENUE  
NORTH LAS VEGAS, NV 89031

LISA M. ANDERSON, ESQ.  
GREENMAN GOLDBERG RABY & MARTINEZ  
601 S NINTH ST  
LAS VEGAS, NV 89101

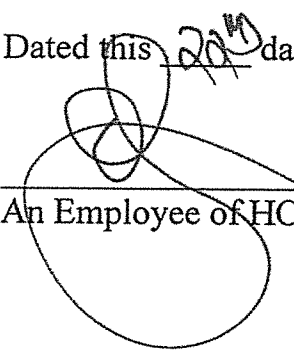
APPEALS OFFICER GEORGANNE W. BRADLEY, ESQ.  
DEPARTMENT OF ADMINISTRATION  
2200 SOUTH RANCHO DR., STE. 220  
LAS VEGAS, NV 89102  
APPEAL NO.: **1710715-GB**

KIMBERLY BUCHANAN  
ERIN DEFRATES  
LESLIE RIBADENEIRA  
CLARK COUNTY RISK MANAGEMENT  
500 S GRAND CENTRAL PARKWAY, 5<sup>TH</sup> FLOOR  
LAS VEGAS, NV 89106  
CLAIM NO.: **0583-WC-15-0000098**

DEONNE CONTINE, DIRECTOR, STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
5151 E MUSSER ST  
CARSON CITY, NV 89701

AARON D. FORD, NEVADA ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY NV 89701

Dated this 20<sup>th</sup> day of March, 2019



\_\_\_\_\_  
An Employee of HOOKS MENG & CLEMENT

**LIST OF EXHIBITS**

**EXHIBIT 1:** Notice of Entry of Order, dated 03/04/19

*Steven D. Grierson*

1 NEOJ  
2 LISA M. ANDERSON, ESQ.  
3 Nevada Bar No. 0004907  
4 GABRIEL A. MARTINEZ, ESQ.  
5 Nevada Bar No. 000326  
6 GREENMAN GOLDBERG RABY & MARTINEZ  
7 601 South Ninth Street  
8 Las Vegas, Nevada 89101  
9 Phone: 702.384.1616 ~ Fax: 702.384.2990  
10 Email: landerson@ggrmlawfirm.com  
11 Email: gmartinez@ggrmlawfirm.com  
12 Attorneys for Respondent

13 DISTRICT COURT  
14 CLARK COUNTY, NEVADA

15 CLARK COUNTY )

16 Petitioner )

17 vs. )

18 BRENT BEAN and THE DEPARTMENT )  
19 OF ADMINISTRATION, HEARINGS )  
20 DIVISION, )

21 Respondents. )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

CASE NO. : A-18-773957-J  
DEPT. NO. : XVI

29 NOTICE OF ENTRY OF ORDER

30 TO: All parties of interest.

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

32 ///

33 ///

34 ///

35 ///


36 ///

37 ///

1 entered in the above-entitled matter on the 4<sup>th</sup> day of March, 2019, a copy of which is attached.

2 DATED this 4<sup>th</sup> day of March, 2019.

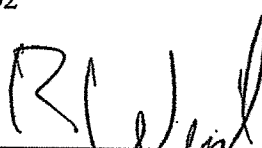
3 GREENMAN, GOLDBERG, RABY & MARTINEZ

4  
5 By:   
6 LISA A. ANDERSON, ESQ.  
7 Nevada Bar No. 4907  
8 GABRIEL A. MARTINEZ, ESQ.  
9 Nevada Bar No. 326  
601 South Ninth Street  
Las Vegas, Nevada 89101  
Attorneys for Petitioner

28 CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GREENMAN, GOLDBERG,  
RABY & MARTINEZ, and that on the 4<sup>th</sup> day of March, 2019, I caused the foregoing  
document entitled NOTICE OF ENTRY OF ORDER to be served upon those persons designated  
by parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial  
District Court eFiling System in accordance with the mandatory electronic service requirements  
of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules and  
depositing a true and correct copy in a sealed envelope, postage fully prepaid, addressed as  
follows:

Dalton L. Hooks, Jr., Esq.  
HOOKS MENG & CLEMENT  
2820 West Charleston Boulevard  
Suite C-23  
Las Vegas, Nevada 89102

  
An Employee of GREENMAN, GOLDBERG, RABY & MARTINEZ



*Steven D. Grierson*

1 **ORDD**  
2 **LISA M. ANDERSON, ESQ.**  
3 Nevada Bar No. 004907  
4 **THADDEUS J. YUREK III, ESQ.**  
5 Nevada Bar No. 011332  
6 **GREENMAN, GOLDBERG, RABY & MARTINEZ**  
7 601 South Ninth Street  
8 Las Vegas, Nevada 89101  
9 Phone: (702) 384-1616  
10 Facsimile: (702) 384-2990  
11 Email: lanserson@ggrmlawfirm.com  
12 tyurek@ggrmlawfirm.com  
13 *Attorneys for Respondent*

DISTRICT COURT  
CLARK COUNTY, NEVADA

CLARK COUNTY,

Petitioner

vs.

BRENT BEAN and THE DEPARTMENT  
OF ADMINISTRATION, HEARINGS  
DIVISION,

Respondents.

CASE NO. : A-18-773957-J  
DEPT. NO. : XVI

**ORDER DENYING PETITION FOR JUDICIAL REVIEW**

This matter came before this Court on October 25, 2018 on the Petition for Judicial Review filed by Petitioner, CLARK COUNTY. Petitioner was represented by DALTON L. HOOKS, JR., ESQ. of the law firm HOOKS MENG & CLEMENT. Respondent, BRENT BEAN, was represented by LISA M. ANDERSON, ESQ. of the law firm of GREENMAN GOLDBERG RABY & MARTINEZ. No other parties were present or represented.

Greenman Goldberg Raby Martinez /  
ACCIDENT INJURY ATTORNEYS

<input checked="" type="checkbox"/> Summary Judgment	<input type="checkbox"/> Motion to Dismiss by Pett(s)
<input type="checkbox"/> Stipulated Judgment	
<input type="checkbox"/> Default Judgment	
<input type="checkbox"/> Judgment of Arbitration	
<input type="checkbox"/> Voluntary Dismissal	
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3 Petitioner argued the legal question as to whether Howard v. City of Las Vegas, 120 P.3d  
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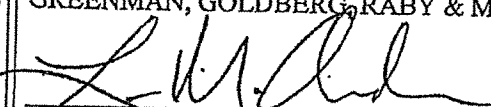
1 In light of the foregoing, the Petition for Judicial Review is hereby DENIED.

2 Dated this 1 day of March, 2019.

3  
4  
5   
6 TIMOTHY C. WILLIAMS  
7 DISTRICT COURT JUDGE *CJL*

8 Submitted by:

9 GREENMAN, GOLDBERG, RABY & MARTINEZ

10   
11 LISA M. ANDERSON, ESQ.

12 Nevada Bar No. 004907

13 THADDEUS J. YUREK, III, ESQ.

14 Nevada Bar No. 011332

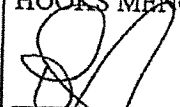
15 601 South Ninth Street

16 Las Vegas, Nevada 89101

17 *Attorney for Respondent*

18 Approved as to form and content:

19 HOOKS MENG & CLEMENT

20   
21 DALTON L. HOOKS, JR., ESQ.

22 Nevada Bar No. 008121

23 JOHN A. CLEMENT, ESQ.

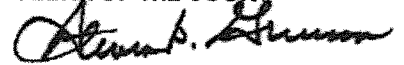
24 Nevada Bar No. 008030

25 2820 West Charleston Boulevard

26 Suite C-23

27 Las Vegas, Nevada 89102

28 *Attorney for Petitioner*



**NOCB**

DALTON L. HOOKS, JR., ESQ., Nevada Bar No. 8121  
JOHN A. CLEMENT, ESQ., Nevada Bar No. 8030  
HOOKS MENG SCHAAAN & CLEMENT  
2820 W. Charleston Blvd., Ste. C-23  
Las Vegas, Nevada 89102  
Telephone No. (702) 766-4672  
Facsimile No. (702) 919-4672  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CLARK COUNTY, Self-Insured  
Employer,

Petitioner,

vs.

BRENT BEAN; STATE OF  
NEVADA, NEVADA  
DEPARTMENT OF  
ADMINISTRATIONS APPEAL  
OFFICE,

Respondents.

**CASE NO:** A-18-773957-J  
**DEPT NO:** 16

**NOTICE OF FILING BOND**

NOTICE IS HEREBY GIVEN that Petitioner, CLARK COUNTY, Self-Insured Employer (hereinafter referred to as "Petitioner"), by and through its attorneys DALTON L. HOOKS, JR., ESQ., and JOHN A. CLEMENT, ESQ., and HOOKS MENG & CLEMENT deposited with the Clerk of this Court a check in the



amount of \$500.00 for security, which is attached hereto.

DATED this 15th day of March, 2019

Respectfully submitted,

HOOKS MENG & CLEMENT

By:

A handwritten signature in black ink, appearing to be "Dalton L. Hooks, Jr.", written over a horizontal line.

DALTON L. HOOKS, JR., ESQ.


JOHN A. CLEMENT, ESQ.

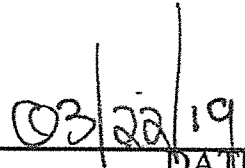
Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**AFFIRMATION PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding pleading filed in  
District Court Case No. A-18-773957-J does not contain the social security number  
of any person.

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.  
JOHN A. CLEMENT, ESQ.  
HOOKS MENG & CLEMENT  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

  
\_\_\_\_\_  
DATE

**CERTIFICATE OF SERVICE**

Pursuant to NRC 5(b), I certify that I am employee of the law firm of  
HOOKS MENG & CLEMENT, and on this 22 day of March, 2019, I am serving  
the foregoing **NOTICE OF FILING BOND** and that on this date I deposited for  
mailing at Las Vegas, Nevada, a true copy of the attached document addressed to:

MR. BRENT BEAN  
3405 AMISH AVENUE  
NORTH LAS VEGAS, NV 89031

LISA M. ANDERSON, ESQ.  
GREENMAN GOLDBERG RABY & MARTINEZ  
601 S NINTH ST  
LAS VEGAS, NV 89101

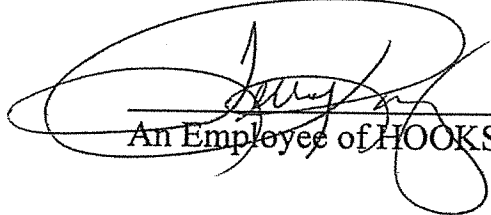
APPEALS OFFICER GEORGANNE W. BRADLEY, ESQ.  
DEPARTMENT OF ADMINISTRATION  
2200 SOUTH RANCHO DR., STE. 220  
LAS VEGAS, NV 89102  
APPEAL NO.: **1710715-GB**

KIMBERLY BUCHANAN  
ERIN DEFRATES  
LESLIE RIBADENEIRA  
CLARK COUNTY RISK MANAGEMENT  
500 S GRAND CENTRAL PARKWAY, 5<sup>TH</sup> FLOOR  
LAS VEGAS, NV 89106  
CLAIM NO.: **0583-WC-15-0000098**

DEONNE CONTINE, DIRECTOR, STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
5151 E MUSSER ST  
CARSON CITY, NV 89701

AARON D. FORD, NEVADA ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY NV 89701

Dated this 22nd day of March, 2019

  
An Employee of HOOKS MENG & CLEMENT

JA000308



DALTON L. HOOKS, JR., ESQ., Nevada Bar No. 8121  
JOHN A. CLEMENT, ESQ., Nevada Bar No. 8030  
HOOKS MENG & CLEMENT  
2820 W. Charleston Blvd., Ste. C-23  
Las Vegas, Nevada 89102  
Telephone No. (702) 766-4672  
Facsimile No. (702) 919-4672  
Attorneys for Petitioner  
CLARK COUNTY, Self Insured Employer

DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY, Self-Insured  
Employer,

Petitioner,

vs.

BRENT BEAN; STATE OF  
NEVADA, NEVADA  
DEPARTMENT OF  
ADMINISTRATIONS APPEAL  
OFFICE,

Respondents.

**CASE NO:** A-18-773957-J

**DEPT NO:** 16

**CASE APPEAL STATEMENT**

1. Name of appellant filing this case appeal statement:

**Clark County, Self-Insured Employer**

2. Identify the judge issuing the decision, judgment, or order appealed from:

**Hon. Timothy C. Williams, Eighth Judicial District Court**

JA000309

Case Number: A-18-773957-J

3. Identify each appellant and the name and address of counsel for each appellant:

**DALTON L. HOOKS, JR., ESQ., Nevada Bar No. 8121**  
**JOHN A. CLEMENT, ESQ., Nevada Bar No. 8030**  
**HOOKS MENG & CLEMENT**  
**2820 W. Charleston Blvd., Ste. C-23**  
**Las Vegas, Nevada 89102**  
**Attorneys for CLARK COUNTY, Self-Insured Employer**

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

**LISA M. ANDERSON, ESQ.**  
**GREENMAN GOLDBERG RABY & MARTINEZ**  
**601 S. NINTH ST.**  
**LAS VEGAS, NV 89101**  
**Attorney for Respondent BRENT BEAN**

**AARON D. FORD, NEVADA ATTORNEY GENERAL**  
**OFFICE OF THE ATTORNEY GENERAL**  
**100 NORTH CARSON STREET**  
**CARSON CITY, NV 89701**  
**Attorney for Respondent STATE OF NEVADA**

**DEONNE CONTINE, DIRECTOR, STATE OF NEVADA**  
**DEPARTMENT OF ADMINISTRATION APPEAL OFFICE**  
**5151 E. MUSSER ST.**  
**CARSON CITY, NV 89701**

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

**No.**

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

**Appellant was represented by retained counsel in the district court.**

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

**Appellant is represented by retained counsel on appeal.**

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

**Appellant was not granted leave to proceed in forma pauperis.**

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

**The Petition for Judicial Review of the Appeals Officer's Decision of April 19, 2018 was filed in the district court on May 3, 2018.**

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

**The District Court denied Petitioner/Appellant Clark County's Petition for Judicial Review thereby affirming the Appeals Officer's Decision and Order which reversed Clark County's determination to deny Respondent/Claimant's request for a permanent partial disability award.**

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

**This matter has not been the subject of a previous appeal to or original writ proceeding in the Supreme Court.**

12. Indicate whether this appeal involves child custody or visitation:

**No.**

...

...



13.If this is a civil case, indicate whether this appeal involves the possibility of settlement:

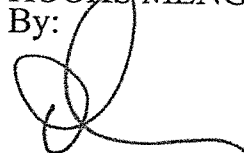
**Unlikely.**

DATED this 22 day of March, 2019

Respectfully submitted,

HOOKS MENG & CLEMENT

By:



DALTON L. HOOKS, JR., ESQ.

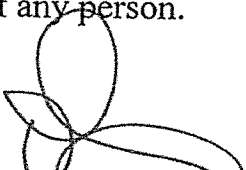
JOHN A. CLEMENT, ESQ.

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**AFFIRMATION PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding pleading filed in  
District Court Case No. A-18-773957-J does not contain the social security number  
of any person.

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.  
JOHN A. CLEMENT, ESQ.  
HOOKS MENG & CLEMENT  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

03/22/19  
\_\_\_\_\_  
DATE

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am employee of the law firm of  
HOOKS MENG & CLEMENT, and on this 22<sup>d</sup> day of March, 2019, I am serving  
the foregoing **CASE APPEAL STATEMENT** and that on this date I deposited  
for mailing at Las Vegas, Nevada, a true copy of the attached document addressed  
to:

MR. BRENT BEAN  
3405 AMISH AVENUE  
NORTH LAS VEGAS, NV 89031

LISA M. ANDERSON, ESQ.  
GREENMAN GOLDBERG RABY & MARTINEZ  
601 S NINTH ST  
LAS VEGAS, NV 89101

APPEALS OFFICER GEORGANNE W. BRADLEY, ESQ.  
DEPARTMENT OF ADMINISTRATION  
2200 SOUTH RANCHO DR., STE. 220  
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APPEAL NO.: **1710715-GB**

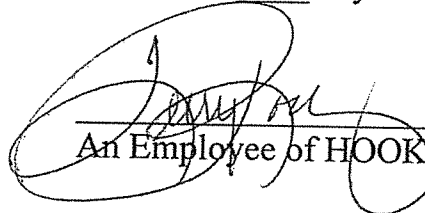
KIMBERLY BUCHANAN  
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CLARK COUNTY RISK MANAGEMENT  
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LAS VEGAS, NV 89106  
CLAIM NO.: **0583-WC-15-0000098**

DEONNE CONTINE, DIRECTOR, STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
5151 E MUSSER ST  
CARSON CITY, NV 89701

JA000315

AARON D. FORD, NEVADA ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY NV 89701

Dated this 22nd day of March, 2019

  
An Employee of HOOKS MENG & CLEMENT

JA000316



MSTY

DALTON L. HOOKS, JR., ESQ., Nevada Bar No. 8121

JOHN A. CLEMENT, ESQ., Nevada Bar No. 8030

HOOKS MENG & CLEMENT

2820 W. Charleston Blvd., Ste. C-23

Las Vegas, Nevada 89102

Telephone No. (702) 766-4672

Facsimile No. (702) 919-4672

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CLARK COUNTY, Self-Insured  
Employer,

Petitioner,

vs.

BRENT BEAN; STATE OF  
NEVADA, NEVADA  
DEPARTMENT OF  
ADMINISTRATIONS APPEAL  
OFFICE,

Respondents.

**CASE NO:** A-18-773957-J

**DEPT NO:** 16

**PETITIONER'S MOTION FOR STAY PENDING APPEAL TO THE  
NEVADA SUPREME COURT AND REQUEST FOR ORDER  
SHORTENING TIME, OR, IN THE ALTERNATIVE, MOTION FOR  
TEMPORARY STAY**

COMES NOW, Petitioner, CLARK COUNTY, Self-Insured Employer

(hereinafter referred to as "Petitioner"), by and through its attorneys, DALTON L.

HOOKS, JR., ESQ., and JOHN A. CLEMENT, ESQ., of HOOKS MENG & CLEMENT, and hereby moves this Court for a Stay of the Order of this Court dated March 4, 2019, which denied Petitioner's Petition for Judicial Review of Appeals Officer, GEORGANNE BRADLEY, ESQ.'s, Decision and Order filed on April 19, 2018. Petitioner further moves this Court for an Order Shortening Time, or, in the alternative, a Temporary Stay.

This Motion is made and based upon the attached memorandum of points and authorities, the exhibits attached hereto and any oral arguments permitted on this matter.

Dated this 26<sup>th</sup> day of March, 2019.

Respectfully submitted,

HOOKS MENG & CLEMENT

By:



---

DALTON J. HOOKS, JR., ESQ.

JOHN A. CLEMENT, ESQ.

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**AFFIDAVIT IN SUPPORT OF ORDER SHORTENING TIME**

STATE OF NEVADA     )  
                                      ) ss.  
COUNTY OF CLARK    )

I, DALTON L. HOOKS, JR., ESQ., do hereby swear under penalty of perjury that the following assertions are true to the best of my knowledge and belief:

1. Affiant is a partner with HOOKS MENG & CLEMENT, the attorneys of record for the Petitioner in the above-entitled action, and has personal knowledge as to the matters set forth herein;

2. This Affidavit is made in support of an ex-parte order shortening time for Petitioner's Motion for Stay to be heard;

3. Affiant has good cause to request this Court for an Order Shortening Time.

4. NRS 616C.375 mandates that an Appeals Officer's Decision and Order is not stayed unless the District Court issues an Order of Stay within thirty (30) days from the date of the entry of the District Court's Decision and Order; NRAP 4(a) requires that the subject Order be appealed within 30 days from the date of the Order. Therefore, this Motion cannot be heard in the normal course.

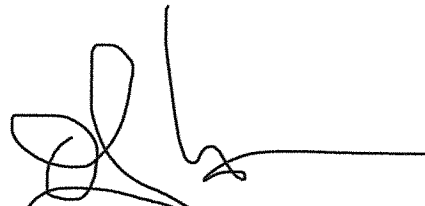
5. The Decision and Order of the District Court was entered 03/04/19. A stay must be granted on or before 04/03/19;

6. If this matter cannot be heard on or before 04/03/19, Appellant respectfully requests that this honorable Court enter a Temporary Stay until this Motion can be heard.

7. This Motion is made in good faith and is not made for the purposes of delay or undue advantage.

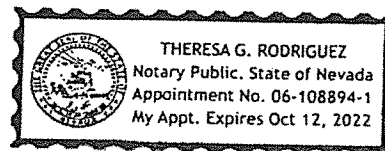
FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 01<sup>st</sup> day of March, 2019.

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.

SUBSCRIBED AND SWORN  
to before me by AFFIANT  
this 01<sup>st</sup> day of March, 2019.

  
\_\_\_\_\_  
THERESA G. RODRIGUEZ  
Notary Public





**NOTICE OF MOTION**

**TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE  
COUNSEL**

**PLEASE TAKE NOTICE** that the undersigned will bring the above and foregoing Motion for Stay Pending Appeal to the Nevada Supreme Court on for hearing before the Court on the \_\_\_\_ day of \_\_\_\_\_, 2019 at \_\_\_\_\_ a.m./p.m.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2019.

HOOKS MENG & CLEMENT

By:

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.

JOHN A. CLEMENT, ESQ.

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**I.**  
**STATEMENT OF FACTS**

On 12/07/14, BRENT BEAN (“Respondent/Claimant”), a CLARK COUNTY firefighter alleged an occupational disease following his retirement. (ROA pp. 9, 12) The Respondent retired from the CLARK COUNT FIRE DEPTMENT effective 07/25/11. (ROA pg. 12) According to the C-4, or about 11/07/14, the Respondent was diagnosed with prostate cancer, and thereafter completed his claim on 12/22/14. (ROA pg. 9) CLARK COUNTY completed a C-3 (ROA pg. 10) The C-1 was completed on 12/24/14 and signed by both the Respondent and the employer. (ROA pg. 11)

Effective 01/13/15, the Petitioner issued the determination letter accepting the claim for prostate cancer. (ROA pg. 45) The Respondent went forward with treatment for prostate cancer. Treating physician Dr. David Ludlow recommended a prostatectomy. (ROA pp. 13-16) The Respondent underwent the prostatectomy on 02/25/15. (ROA pp. 17-29) After appropriate follow-up, on 06/24/16, Dr. Ludlow concluded that the Respondent had reached maximum medical improvement (“MMI”) and specifically noted, “from my standpoint he is cured from disease.” (ROA pg. 32) Neither the acceptance of the instant claim for prostate cancer nor the appropriateness of the medical treatment received are not in dispute.

Thereafter, the Respondent obtained an evaluation with a rating physician off the Division of Industrial Relations (“DIR”) rotating list. (ROA pg. 34) Following an evaluation on 11/02/16, rating physician, Dr. Charles E. Quaglieri, found the Respondent to have a forty (40%) whole person impairment as a result of his prostate cancer. (ROA pp. 35-40) Through counsel, the Respondent requested that the Petitioner award the 40%, permanent partial disability (“PPD”). (ROA pg. 44)

Through the determination letter dated 01/24/17, the Petitioner advised the Respondent that the Petitioner would not offer the PPD award. (ROA pg. 47) As detailed in the letter, the Petitioner indicated that because the claim was made after retirement, and pursuant to NRS 617.453(4)(a), the Respondent was not entitled to receive any monetary compensation for his occupational disease, other than payment of medical benefits. (ROA pg. 47)

On or about 01/26/17, the Respondent filed a request for hearing regarding the Petitioner’s determination. (ROA pg. 48) The matter was bypassed directly to the Appeals Office. (ROA pp. 49-50)

Proceedings before Appeals Officer Georganne Bradley were conducted and the Appeals Officer, REVERSED the Petitioner’s 01/21/17 determination and remanded the Petitioner to offer the Respondent a 40% PPD award. (ROA pg. 7) On 05/03/18, the Petitioner filed its’ Petition for Judicial Review. (ROA pp. 51-

63) The matter was heard by the District Court and on March 4, 2019 an Order Denying the Petition for Judicial Review was entered. (Exhibit 1) Notice of Appeal to the Nevada Supreme Court was filed 03/22/19. Petitioner hereby files the instant Motion for Stay for Pending Appeal to the Nevada Supreme Court.

## II.

### POINTS & AUTHORITIES

#### LEGAL ARGUMENTS

##### A. This Court Has Jurisdiction to Grant the Stay Requested By the Petitioner.

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

A party must ordinarily move first in the district court for the following relief:

- (A) A stay of the judgment or order of, or proceedings in a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeal for an extraordinary writ;
- (B) approval of a supersedeas bond; or
- (C) an order suspending, modifying, restoring or granting an injunction while an appeal or original writ petition is pending

NRS 233B.140 provides that:

1. A petitioner who applies for a stay of the final decision in a contested case shall file and serve a written motion for the stay on the agency and all parties of record to the proceeding at the time of filing the petition for judicial review.
2. In determining whether to grant a stay, the court shall consider the same factors as are considered for a preliminary injunction under Rule 65 of the Nevada Rules of Civil Procedure.
- 3.

4. In making a ruling, the court shall:

- (a) Give deference to the trier of fact; and
- (b) Consider the risk to the public, if any, of staying the administrative decision.

**NRCF Rule 65** provides in pertinent part as follows:

(a) Preliminary injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision

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

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

**B. A Stay is Appropriate Pending the Outcome of Petitioner's Appeal**

The Nevada Supreme Court has stated that an Insurer's proper course when aggrieved by a decision is to seek a stay. *See* NRS 616C.375; *See also* *DIR v.*

*Circus Circus*, 101 Nev. 405, 705 P.2d 645, 649 (1985). The Court also

recognized that a stay should be granted where it can be shown that the Appellant

would suffer irreparable injury during the pendency of the appeal, if the stay is not granted. *See White Pine Power v. Public Service Commission*, 76 Nev. 263, 252 P.2d 256 (1960).

In determining whether to issue a stay pending disposition of an appeal, the Nevada Supreme Court has continually held that in determining whether to grant a stay, the Court considers the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay is denied, (2) whether appellant will suffer irreparable or serious injury if the stay is denied, (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits of the appeal. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982 (Nev. 2000); *See also Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948). Moreover, the Nevada Supreme Court has held that no factor carries more weight than the others, although, if one or two factors are especially strong, they may counterbalance other weak factors. *See Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36 (2004).

**1. Denial of the Instant Motion for Stay Will Result in Irreparable Harm to the Petitioner.**

One of the factors used in weighing the Petitioner's Motion for Stay is whether the Petitioner will suffer irreparable or serious injury if the stay is not granted. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 166 Nev. 650, 659, 6

P.3d 982, 987 (2000) (citing NRAP 8(c)). The Nevada Supreme Court has also recognized that a stay should be granted where it can be shown that the Appellant would suffer irreparable injury during the pendency of the appeal, if the stay is not granted. *See White Pine Power v. Public Service Commission*, 76 Nev. 263, 252 P.2d 256 (1960).

In *Ransier v. SIIS*, 104 Nev. 742, 766 P.2d 274 (1988), the Nevada Supreme Court held that an insurer may not seek recoupment of benefits paid to a claimant that were later found to be unwarranted on appeal. Specifically, the court stated that an insurer “cannot recoup contested benefits that were paid, but thereafter ruled unjustified on appeal.” *See Ransier v. SIIS*, 104 Nev. 742, 745, 766 P.2d 274 (1988). However, it must be noted that NRS 616C.138 was recently modified to allow insurers to recover amounts paid during the pendency of an appeal “from a health or casualty insurer” if the insurer is found to be entitled to the same. The recent modification is not applicable here and does not provide recourse to the Petitioner. As such the court’s decision in, *Ransier v. SIIS*, all but ensures that an affected self-insured employer such as Petitioner CLARK COUNTY in the present case, will be irreparably harmed in matters where the payment of benefits is ordered in error. Here, absent the granting of the instant Motion for Stay, the Appeals Officer’s order and the subsequent denial of

the Petition for Judicial Review result in the Petitioner having to offer an extremely large (40%) PPD award that was properly denied.

If a stay is not granted, the Petitioner will be forced to comply with the 04/19/18 Decision and Order and offer a forty (40%) PPD award. The significance of the award coupled with the absence of a prescribed method by which to recover funds later deemed to have been improperly awarded support the granting of the instant Motion for Stay. For these reasons, the Petitioner, respectfully requests this Motion for Stay be granted pending the outcome of its' appeal to the Nevada Supreme Court.

**2. The Respondent Will NOT be Harmed if the Stay is Granted.**

The Respondent will not suffer irreparable or serious harm if Petitioner's Motion for Stay is granted. The only matter at issue is an unwarranted PPD award and any order adjusting the Petitioner's determination would reimburse the Respondent for back-due compensation. Given the respective positions of the parties, the Petitioner is in a position to be irreparably harmed, however, there is no such risk to the Respondent. The granting of Petitioner's Motion for Stay will not create a circumstance for the Respondent that is either irreversible or irreparable. The greater potential for harm rests with the Petitioner.



3. **Petitioner's Appeal to the Nevada Supreme Court is Likely to Succeed on the Merits.**

A party requesting a stay must also prove a reasonable likelihood of success on the merits. The applicable standard of review is found in NRS 233B.135. The factors to be considered when reviewing an agency decision are in part found in subsection 3, which delineates the following;

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

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

a. **The Decision at Issue Was An Error of Law**

The issue of payment of disability benefits in the case of an occupational disease claimed post-retirement, has been addressed by the Nevada Supreme Court in *Howard v. City of Las Vegas*, 121 Nev. 691, 120 P.3d 410 (2005). Therein, the Court concluded that “a retired Nevada claimant, is effectively denied disability benefits because his weekly wage calculation amounts to zero.” *See id.* Respondent sought to distinguish this decision as applied to the issue of permanent partial disability benefits, despite the Court’s ruling in *Howard*.

In *Howard*, Oscar Howard was a retired firefighter who attempted to assert a claim for disability benefits resulting from a claim for heart disease. The Nevada Supreme Court concluded that when a retired claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive medical benefits but may not receive any disability compensation if the claimant is not earning any wages at the time of his/her application. *Howard v. City of Las Vegas*, 120 P.3d 410, 411 (2005).

i. **The Argument that Permanent Partial Disability Amounts to A Medical Benefit Is Misplaced.**

Consistent with NRS 617.453, payment of medical treatment expenses is proper when a claimant has been impacted by a disabling cancer. That statute states in pertinent part:

**NRS 617.453 Cancer as occupational disease of firefighters.**

4. Compensation awarded to the employee or his or her dependents for disabling cancer pursuant to this section must include:

(a) Full reimbursement for related expenses incurred for **medical treatments**, surgery and hospitalization in accordance with the schedule of fees and charges established pursuant to NRS 616C.260 or, if the insurer has contracted with an organization for managed care or with providers of health care pursuant to NRS 616B.527, the amount that is allowed for the treatment or other services under that contract; and

(b) The compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death.

See NRS 617.453(4) (2015). In the case at hand, the Petitioner does not contest its responsibility for payment of the expenses incurred for treatment of the Respondent's prostate cancer. The issue before the court at this juncture is narrow. PPD benefits are disability benefits as contemplated by the court in *Howard*. Therefore, the Petitioner declined to offer a PPD award in this case.

Notably, the attempt to characterize a PPD award as a medical benefit is an unsupported error of law. Specifically, the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, which has been adopted under NRS 616C.110, defines **disability** as an alteration of the individual's capacity to meet *personal, social or occupational demands* or statutory or regulatory requirements because of an impairment. Nowhere in the Nevada Industrial Insurance Act is a claimant's permanent partial disability defined as a **medical benefit**. Clearly medical benefit contemplates medical treatments, surgery, hospitalization, physical therapy and prescriptions, not disability awards such as a PPD award.

- ii. **As A Retiree the Respondent Has No Wages For Calculation of Disability Benefits. As Is the Case With TTD Benefits, There Is No PPD Award Which The Respondent Is Entitled To.**

Within NRS 617, under the section addressing compensation for disability and death, NRS 617.430 provides:

**NRS 617.430 Eligibility; limitations.**

1. Every employee who is disabled or dies because of an occupational disease, as defined in this chapter, arising out of and in the course of employment in the State of Nevada, or the dependents, as that term is defined in chapters 616A to 616D, inclusive, of NRS, of an employee whose death is caused by an occupational disease, are entitled to the compensation provided by those chapters for temporary disability, permanent disability or death, as the facts may warrant ...

See NRS 617.430 (2015). The limitation must be addressed in light of the Respondent's status as a retiree.

While the issue in *Howard* was the denial of temporary total disability ("TTD") benefits, the logic applied in reaching that conclusion is applicable to the instant issue. The *Howard* Court began its analysis with NRS 617.420 which states:

No compensation may be paid under this chapter for disability which does not incapacitate the employee for at least 5 cumulative days within a 20-day period from earning full wages, but if the incapacity extends for 5 or more days within a 20-day period, the compensation must then be computed from the date of disability. The limitations in this section do not apply to medical benefits, which must be paid from the date of application for payment of medical benefits.

See NRS 617.420 (2015). The Court held that when a retired claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive medical benefits but may not receive any disability compensation if the claimant is not earning any wages. See *Howard*, 120 P.3d at 412. The Court's rationale for this ruling is based on two reasons. First, retirement benefits are not included in

NRS 617.050's definition of "compensation," and no other provision suggests that retirement benefits should be included within the meaning of wages.<sup>1</sup> Second, a retiree has usually lost no salary or wages due to the impairment. *Id.*

Additional support for this analysis, and the Court's ruling, can be gleaned from NRS 616C.390(6) which denies TTD or vocational rehabilitation benefits where a claimant has retired. As the Court reasoned in *Howard*, there should be no award for disability benefits where there are no "wages" lost. In fact, a retired claimant maintains his exact same income, unaffected by his occupational injury or disease. In the instance of a permanent partial disability ("PPD") award, going back to the AMA Guides definition, there is no disability to occupational demands where there is no occupational income lost.

The *Howard* Court also comments that the date of disability for Mr. Howard was the date of his heart attack, and the date immediately preceding the occupational disease is the date from which disability benefits are properly calculated. *See Howard*, 120 P.3d at 412; *see also Mirage v. State. Dept. of Administration*, 871 P.2d 317, 319. In other words, disability benefits trigger at the time of disablement. This has been addressed in NRS 617.060 as well as NRS 617.420 (cited previously above). NRS 617.060 provides:

**617.060 "Disablement" and "total disablement" defined.**

---

<sup>1</sup> See NAC 616C.423 (describing items included in average monthly wage but omitting retirement benefits.)

“Disablement” and “total disablement” are used interchangeably in this chapter and mean the event of becoming physically incapacitated by reason of an occupational disease arising out of and in the course of employment as defined in this chapter *from engaging, for remuneration or profit, in any occupation for which he or she is or becomes reasonably fitted by education, training or experience.*

See NRS 617.060 (2015) (emphasis added).

Further, the Nevada Supreme Court has considered the issue of disablement as it relates to occupational diseases and held:

[I]n order to become eligible for disability benefits, the employee must be incapacitated by the occupational disease for a least five cumulative days within a twenty-day period **earning full wage.**

See *Mirage v. State Dept. of Admin.*, 110 Nev. 257, 260, 871 P.2d 317 (1994); see also *Manwill v. Clark County*, 123 Nev. 238, 244 (2007); *Employers Ins. Co. of Nevada v. Daniels*, 122 Nev. 1009, 1014 (2006). Moreover, the Court has stated:

An employee is not entitled to compensation from the mere contraction of an occupational disease. Instead, compensation ... flows from a disablement resulting from such a disease.

See *Daniels*, 122 Nev. at 1027 (internal quotations omitted). Thus, in looking at the standards of disablement, they are focused on the fact that there must be a loss of ability in earning a wage from an occupation. The Court has indicated in *Mirage v. State Dept. of Admin.*, that for occupational disease cases compensation in terms of average monthly wage must be computed from the date of disability.

In fact, the Nevada Supreme Court has definitively held, “[o]nly after the

employee becomes disabled does it become necessary to look to NRS Chapter 616 for the method of calculating the employee's average wage." *Mirage*, 871 P.2d at 319.

As in the *Howard* case, the Respondent, as a retiree, was properly denied an award for PPD. Respondent lacks wages from which to calculate a disability award. Respondent's retirement income is not considered "compensation." The Respondent was not earning any actual wage as contemplated under NAC 616C.423, from which a disability benefit could be calculated. Even if the 40% PPD award were proper, the net result is a \$0 award.

**b. The Decision Was Not Supported By Substantial Evidence, Was Clearly Erroneous and Amounted to An Abuse of Discretion.**

The standard of review is whether there is substantial evidence to support the underlying decision. The reviewing court should limit its review of administrative decisions to determine if they are based upon substantial evidence. *North Las Vegas v. Public Service Common*, 83 Nev. 278, 291, 429 P.2d 66 (1967); *McCracken v. Fancy*, 98 Nev. 30, 639 P.2d 552 (1982). Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, *Maxwell v. SIIS*, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993). When reviewing administrative decisions, this Court has held that, on factual determinations, the findings and ultimate decisions of an agency are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. *Nevada Industrial Common v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977).

The Court in *Howard* unequivocally states that the period immediately preceding the occupational disease is the date from which we must calculate disability benefits. *See Howard*, 120 P.3d at 412 (citing *Mirage v. State Dept. of Administration*). In reaching this conclusion, the Court in *Howard* looked at case law from multiple jurisdictions, and appropriately noted that “a retired New Hampshire claimant, like a retired Nevada claimant, is effectively denied disability benefits because his weekly wage calculation amounts to zero.” *Id.* Following the mandatory authority of *Howard* and applying the relevant statutes and regulations, the Respondent’s average monthly wage, as calculated pursuant to NAC 616C.435, amounts to \$0. Any subsequent PPD award also amounts to \$0. Importantly, the Legislature has made no special provisions for firefighters or police officers as to the date of calculation. Here, the Respondent’s earliest period of disability was the date of diagnosis on 11/07/14. (ROA at pp. 9, 13) At that time, the Claimant was retired and earning no wage. As stated above, the idea of disability is tied to earning capacity. In this case, while the Respondent contracted an occupational disease, he has not been disabled from earning a wage, and therefore just as he is precluded from earning TTD, he is similarly precluded from any entitlement to a PPD award. To assert that the *Howard* Court never intended this result fails to properly consider the logic and opinion expressed in the case itself. To arrive at the calculation desired by the Respondent requires a method of calculation not contemplated by the applicable



statutes. In view of the foregoing, the Decision and Order of the Appeals Officer was clearly erroneous in that it deviates from the applicable statutes and the law expounded by the court in *Howard*. Awarding Respondent a PPD and the method of calculation were an improper interpretation and application of NRS 617.453.

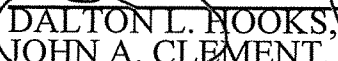
### **III.** **CONCLUSION**

Based on all of the above, it is the belief of the Petitioner, CLARK COUNTY, that a stay of this Court's Order entered 03/04/19 is necessary to prevent irreparable harm to the Petitioner.

Wherefore, Petitioner, CLARK COUNTY, respectfully requests that this honorable Court grant its Motion for Stay Pending Supreme Court Appeal.


Dated this 26<sup>th</sup> day of March, 2019.

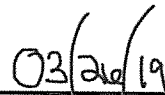
HOOKS MENG & CLEMENT  
By: 

  
DALTON L. HOOKS, JR., ESQ.  
JOHN A. CLEMENT, ESQ.  
2820 W. Charleston Blvd., Ste. C-23  
Las Vegas, NV 89102  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

**AFFIRMATION PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding pleading filed in District Court Case No. A-18-773957-J does not contain the social security number of any person.

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.  
JOHN A. CLEMENT, ESQ.  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

  
\_\_\_\_\_  
DATE

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am employee of the law firm of HOOKS MENG & CLEMENT, and on this \_\_\_\_\_ day of March, 2019, I am serving the foregoing **MOTION FOR STAY PENDING APPEAL TO THE NEVADA SUPREME COURT AND REQUEST FOR ORDER SHORTENING TIME, OR, IN THE ALTERNATIVE, MOTION FOR TEMPORARY STAY** was made this date by depositing for mailing at Las Vegas, Nevada, a true copy of the attached document addressed to:

MR. BRENT BEAN  
3405 AMISH AVENUE  
NORTH LAS VEGAS, NV 89031

LISA M. ANDERSON, ESQ.  
GREENMAN GOLDBERG RABY & MARTINEZ  
601 S NINTH ST  
LAS VEGAS, NV 89101

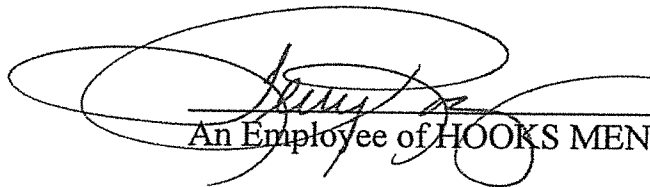
APPEALS OFFICER GEORGANNE W. BRADLEY, ESQ.  
DEPARTMENT OF ADMINISTRATION  
2200 SOUTH RANCHO DR., STE. 220  
LAS VEGAS, NV 89102  
APPEAL NO.: **1710715-GB**

KIMBERLY BUCHANAN  
ERIN DEFRATES  
LESLIE RIBADENEIRA  
CLARK COUNTY RISK MANAGEMENT  
500 S GRAND CENTRAL PARKWAY, 5<sup>TH</sup> FLOOR  
LAS VEGAS, NV 89106  
CLAIM NO.: **0583-WC-15-0000098**

DEONNE CONTINE, DIRECTOR, STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
5151 E MUSSER ST  
CARSON CITY, NV 89701

AARON D. FORD, NEVADA ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY NV 89701

Dated this 26<sup>th</sup> day of March, 2019

  
An Employee of HOOKS MENG & CLEMENT

*Steven D. Grierson*

MSTY

DALTON L. HOOKS, JR., ESQ., Nevada Bar No. 8121

JOHN A. CLEMENT, ESQ., Nevada Bar No. 8030

HOOKS MENG & CLEMENT

2820 W. Charleston Blvd., Ste. C-23

Las Vegas, Nevada 89102

Telephone No. (702) 766-4672

Facsimile No. (702) 919-4672

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CLARK COUNTY, Self-Insured  
Employer,

Petitioner,

vs.

BRENT BEAN; STATE OF  
NEVADA, NEVADA  
DEPARTMENT OF  
ADMINISTRATIONS APPEAL  
OFFICE,

Respondents.

**CASE NO:** A-18-773957-J

**DEPT NO:** 16

DEPARTMENT XVI  
NOTICE OF HEARING  
DATE 4-2-19 TIME 9:00 am  
APPROVED BY CSG

**AMENDED**

**PETITIONER'S MOTION FOR STAY PENDING APPEAL TO THE  
NEVADA SUPREME COURT AND REQUEST FOR ORDER  
SHORTENING TIME, OR, IN THE ALTERNATIVE, MOTION FOR  
TEMPORARY STAY**

COMES NOW, Petitioner, CLARK COUNTY, Self-Insured Employer

(hereinafter referred to as "Petitioner"), by and through its attorneys, DALTON L.

HOOKS, JR., ESQ., and JOHN A. CLEMENT, ESQ., of HOOKS MENG & CLEMENT, and hereby moves this Court for a Stay of the Order of this Court dated March 4, 2019, which denied Petitioner's Petition for Judicial Review of Appeals Officer, GEORGANNE BRADLEY, ESQ.'s, Decision and Order filed on April 19, 2018. Petitioner further moves this Court for an Order Shortening Time, or, in the alternative, a Temporary Stay.

This Motion is made and based upon the attached memorandum of points and authorities, the exhibits attached hereto and any oral arguments permitted on this matter.

Dated this 26<sup>th</sup> day of March, 2019.

Respectfully submitted,

HOOKS MENG & CLEMENT

By:

A handwritten signature in black ink, appearing to be "Dalton L. Hooks, Jr.", written over a horizontal line.

DALTON L. HOOKS, JR., ESQ.

JOHN A. CLEMENT, ESQ.

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**AFFIDAVIT IN SUPPORT OF ORDER SHORTENING TIME**

STATE OF NEVADA     )  
                                      ) ss.  
COUNTY OF CLARK    )

I, DALTON L. HOOKS, JR., ESQ., do hereby swear under penalty of perjury that the following assertions are true to the best of my knowledge and belief:

1. Affiant is a partner with HOOKS MENG & CLEMENT, the attorneys of record for the Petitioner in the above-entitled action, and has personal knowledge as to the matters set forth herein;

2. This Affidavit is made in support of an ex-parte order shortening time for Petitioner's Motion for Stay to be heard;

3. Affiant has good cause to request this Court for an Order Shortening Time.

4. NRS 616C.375 mandates that an Appeals Officer's Decision and Order is not stayed unless the District Court issues an Order of Stay within thirty (30) days from the date of the entry of the District Court's Decision and Order; NRAP 4(a) requires that the subject Order be appealed within 30 days from the date of the Order. Therefore, this Motion cannot be heard in the normal course.


5. The Decision and Order of the District Court was entered 03/04/19. A stay must be granted on or before 04/03/19;

6. If this matter cannot be heard on or before 04/03/19, Appellant respectfully requests that this honorable Court enter a Temporary Stay until this Motion can be heard.

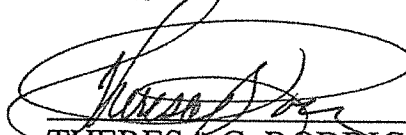
7. This Motion is made in good faith and is not made for the purposes of delay or undue advantage.

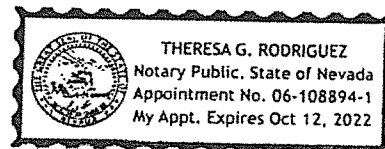
FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 01<sup>st</sup> day of March, 2019.

  
DALTON L. HOOKS, JR., ESQ.

SUBSCRIBED AND SWORN  
to before me by AFFIANT  
this 20<sup>th</sup> day of March, 2019.

  
THERESA G. RODRIGUEZ  
Notary Public

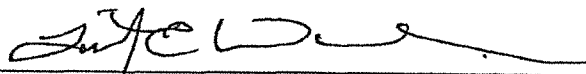




**ORDER SHORTENING TIME**

Having read the Affidavit of counsel in support of Petitioner's Motion for an Order Shortening Time, and good cause appearing therefore, it is hereby ordered, adjudged and decreed that Petitioner's Motion for Order Shortening Time be, and is hereby, GRANTED. The hearing on Petitioner's Motion for Stay will take place on the 2 day of April, 2019, at the time of 9:00 a.m. or as soon thereafter as counsel may be heard.


DATED this 28 day of March, 2019.

  
\_\_\_\_\_  
District Court Judge cn

Respectfully submitted,

HOOKS MENG & CLEMENT

By:

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.  
JOHN A. CLEMENT, ESQ.  
Attorneys for Petitioner,  
CLARK COUNTY, Self-Insured Employer

**NOTICE OF MOTION**

**TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE  
COUNSEL**

PLEASE TAKE NOTICE that the undersigned will bring the above and  
foregoing Motion for Stay Pending Appeal to the Nevada Supreme Court on for  
hearing before the Court on the 2<sup>nd</sup> day of April, 2019 at  
9:00 (a.m.)/p.m.

Dated this 26 day of March, 2019.

HOOKS MENG & CLEMENT

By:

  
\_\_\_\_\_  
DALTON L. HOOKS, JR., ESQ.

JOHN A. CLEMENT, ESQ.

Attorneys for Petitioner

CLARK COUNTY, Self-Insured Employer

**I.**  
**STATEMENT OF FACTS**

On 12/07/14, BRENT BEAN (“Respondent/Claimant”), a CLARK COUNTY firefighter alleged an occupational disease following his retirement. (ROA pp. 9, 12) The Respondent retired from the CLARK COUNTY FIRE DEPARTMENT effective 07/25/11. (ROA pg. 12) According to the C-4, or about 11/07/14, the Respondent was diagnosed with prostate cancer, and thereafter completed his claim on 12/22/14. (ROA pg. 9) CLARK COUNTY completed a C-3 (ROA pg. 10) The C-1 was completed on 12/24/14 and signed by both the Respondent and the employer. (ROA pg. 11)

Effective 01/13/15, the Petitioner issued the determination letter accepting the claim for prostate cancer. (ROA pg. 45) The Respondent went forward with treatment for prostate cancer. Treating physician Dr. David Ludlow recommended a prostatectomy. (ROA pp. 13-16) The Respondent underwent the prostatectomy on 02/25/15. (ROA pp. 17-29) After appropriate follow-up, on 06/24/16, Dr. Ludlow concluded that the Respondent had reached maximum medical improvement (“MMI”) and specifically noted, “from my standpoint he is cured from disease.” (ROA pg. 32) Neither the acceptance of the instant claim for prostate cancer nor the appropriateness of the medical treatment received are not in dispute.

Thereafter, the Respondent obtained an evaluation with a rating physician off the Division of Industrial Relations (“DIR”) rotating list. (ROA pg. 34) Following an evaluation on 11/02/16, rating physician, Dr. Charles E. Quaglieri, found the Respondent to have a forty (40%) whole person impairment as a result of his prostate cancer. (ROA pp. 35-40) Through counsel, the Respondent requested that the Petitioner award the 40%, permanent partial disability (“PPD”). (ROA pg. 44)

Through the determination letter dated 01/24/17, the Petitioner advised the Respondent that the Petitioner would not offer the PPD award. (ROA pg. 47) As detailed in the letter, the Petitioner indicated that because the claim was made after retirement, and pursuant to NRS 617.453(4)(a), the Respondent was not entitled to receive any monetary compensation for his occupational disease, other than payment of medical benefits. (ROA pg. 47)

On or about 01/26/17, the Respondent filed a request for hearing regarding the Petitioner’s determination. (ROA pg. 48) The matter was bypassed directly to the Appeals Office. (ROA pp. 49-50)

Proceedings before Appeals Officer Georganne Bradley were conducted and the Appeals Officer, REVERSED the Petitioner’s 01/21/17 determination and remanded the Petitioner to offer the Respondent a 40% PPD award. (ROA pg. 7) On 05/03/18, the Petitioner filed its’ Petition for Judicial Review. (ROA pp. 51-

63) The matter was heard by the District Court and on March 4, 2019 an Order Denying the Petition for Judicial Review was entered. (Exhibit 1) Notice of Appeal to the Nevada Supreme Court was filed 03/22/19. Petitioner hereby files the instant Motion for Stay for Pending Appeal to the Nevada Supreme Court.

## II.

### **POINTS & AUTHORITIES**

#### **LEGAL ARGUMENTS**

##### **A. This Court Has Jurisdiction to Grant the Stay Requested By the Petitioner.**

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

A party must ordinarily move first in the district court for the following relief:

- (A) A stay of the judgment or order of, or proceedings in a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeal for an extraordinary writ;
- (B) approval of a supersedeas bond; or
- (C) an order suspending, modifying, restoring or granting an injunction while an appeal or original writ petition is pending

NRS 233B.140 provides that:

1. A petitioner who applies for a stay of the final decision in a contested case shall file and serve a written motion for the stay on the agency and all parties of record to the proceeding at the time of filing the petition for judicial review.
2. In determining whether to grant a stay, the court shall consider the same factors as are considered for a preliminary injunction under Rule 65 of the Nevada Rules of Civil Procedure.

4. In making a ruling, the court shall:

- (a) Give deference to the trier of fact; and
- (b) Consider the risk to the public, if any, of staying the administrative decision.

**NRCF Rule 65** provides in pertinent part as follows:

(a) Preliminary injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision

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

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

**B. A Stay is Appropriate Pending the Outcome of Petitioner's Appeal**

The Nevada Supreme Court has stated that an Insurer's proper course when aggrieved by a decision is to seek a stay. *See* NRS 616C.375; *See also* *DIR v.*

*Circus Circus*, 101 Nev. 405, 705 P.2d 645, 649 (1985). The Court also

recognized that a stay should be granted where it can be shown that the Appellant

would suffer irreparable injury during the pendency of the appeal, if the stay is not granted. *See White Pine Power v. Public Service Commission*, 76 Nev. 263, 252 P.2d 256 (1960).

In determining whether to issue a stay pending disposition of an appeal, the Nevada Supreme Court has continually held that in determining whether to grant a stay, the Court considers the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay is denied, (2) whether appellant will suffer irreparable or serious injury if the stay is denied, (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits of the appeal. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982 (Nev. 2000); *See also Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948). Moreover, the Nevada Supreme Court has held that no factor carries more weight than the others, although, if one or two factors are especially strong, they may counterbalance other weak factors. *See Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36 (2004).

**1. Denial of the Instant Motion for Stay Will Result in Irreparable Harm to the Petitioner.**

One of the factors used in weighing the Petitioner's Motion for Stay is whether the Petitioner will suffer irreparable or serious injury if the stay is not granted. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 166 Nev. 650, 659, 6

P.3d 982, 987 (2000) (citing NRAP 8(c)). The Nevada Supreme Court has also recognized that a stay should be granted where it can be shown that the Appellant would suffer irreparable injury during the pendency of the appeal, if the stay is not granted. *See White Pine Power v. Public Service Commission*, 76 Nev. 263, 252 P.2d 256 (1960).

In *Ransier v. SIIS*, 104 Nev. 742, 766 P.2d 274 (1988), the Nevada Supreme Court held that an insurer may not seek recoupment of benefits paid to a claimant that were later found to be unwarranted on appeal. Specifically, the court stated that an insurer “cannot recoup contested benefits that were paid, but thereafter ruled unjustified on appeal.” *See Ransier v. SIIS*, 104 Nev. 742, 745, 766 P.2d 274 (1988). However, it must be noted that NRS 616C.138 was recently modified to allow insurers to recover amounts paid during the pendency of an appeal "from a health or casualty insurer" if the insurer is found to be entitled to the same. The recent modification is not applicable here and does not provide recourse to the Petitioner. As such the court’s decision in, *Ransier v. SIIS*, all but ensures that an affected self-insured employer such as Petitioner CLARK COUNTY in the present case, will be irreparably harmed in matters where the payment of benefits is ordered in error. Here, absent the granting of the instant Motion for Stay, the Appeals Officer’s order and the subsequent denial of



the Petition for Judicial Review result in the Petitioner having to offer an extremely large (40%) PPD award that was properly denied.

If a stay is not granted, the Petitioner will be forced to comply with the 04/19/18 Decision and Order and offer a forty (40%) PPD award. The significance of the award coupled with the absence of a prescribed method by which to recover funds later deemed to have been improperly awarded support the granting of the instant Motion for Stay. For these reasons, the Petitioner, respectfully requests this Motion for Stay be granted pending the outcome of its' appeal to the Nevada Supreme Court.

**2. The Respondent Will NOT be Harmed if the Stay is Granted.**

The Respondent will not suffer irreparable or serious harm if Petitioner's Motion for Stay is granted. The only matter at issue is an unwarranted PPD award and any order adjusting the Petitioner's determination would reimburse the Respondent for back-due compensation. Given the respective positions of the parties, the Petitioner is in a position to be irreparably harmed, however, there is no such risk to the Respondent. The granting of Petitioner's Motion for Stay will not create a circumstance for the Respondent that is either irreversible or irreparable. The greater potential for harm rests with the Petitioner.

**3. Petitioner's Appeal to the Nevada Supreme Court is Likely to Succeed on the Merits.**

A party requesting a stay must also prove a reasonable likelihood of success on the merits. The applicable standard of review is found in NRS 233B.135. The factors to be considered when reviewing an agency decision are in part found in subsection 3, which delineates the following;

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

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

**a. The Decision at Issue Was An Error of Law**

The issue of payment of disability benefits in the case of an occupational disease claimed post-retirement, has been addressed by the Nevada Supreme Court in *Howard v. City of Las Vegas*, 121 Nev. 691, 120 P.3d 410 (2005). Therein, the Court concluded that “a retired Nevada claimant, is effectively denied disability benefits because his weekly wage calculation amounts to zero.” *See id.*

Respondent sought to distinguish this decision as applied to the issue of permanent partial disability benefits, despite the Court’s ruling in *Howard*.

In *Howard*, Oscar Howard was a retired firefighter who attempted to assert a claim for disability benefits resulting from a claim for heart disease. The Nevada Supreme Court concluded that when a retired claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive medical benefits but may not receive any disability compensation if the claimant is not earning any wages at the time of his/her application. *Howard v. City of Las Vegas*, 120 P.3d 410, 411 (2005).

i. **The Argument that Permanent Partial Disability Amounts to A Medical Benefit Is Misplaced.**

Consistent with NRS 617.453, payment of medical treatment expenses is proper when a claimant has been impacted by a disabling cancer. That statute states in pertinent part:

**NRS 617.453 Cancer as occupational disease of firefighters.**

4. Compensation awarded to the employee or his or her dependents for disabling cancer pursuant to this section must include:

(a) Full reimbursement for related expenses incurred for **medical treatments**, surgery and hospitalization in accordance with the schedule of fees and charges established pursuant to NRS 616C.260 or, if the insurer has contracted with an organization for managed care or with providers of health care pursuant to NRS 616B.527, the amount that is allowed for the treatment or other services under that contract; and

(b) The compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death.

*See* NRS 617.453(4) (2015). In the case at hand, the Petitioner does not contest its responsibility for payment of the expenses incurred for treatment of the Respondent's prostate cancer. The issue before the court at this juncture is narrow. PPD benefits are disability benefits as contemplated by the court in *Howard*. Therefore, the Petitioner declined to offer a PPD award in this case.

Notably, the attempt to characterize a PPD award as a medical benefit is an unsupported error of law. Specifically, the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, which has been adopted under NRS 616C.110, defines **disability** as an alteration of the individual's capacity to meet *personal, social or occupational demands* or statutory or regulatory requirements because of an impairment. Nowhere in the Nevada Industrial Insurance Act is a claimant's permanent partial disability defined as a **medical benefit**. Clearly medical benefit contemplates medical treatments, surgery, hospitalization, physical therapy and prescriptions, not disability awards such as a PPD award.

- ii. **As A Retiree the Respondent Has No Wages For Calculation of Disability Benefits. As Is the Case With TTD Benefits, There Is No PPD Award Which The Respondent Is Entitled To.**

Within NRS 617, under the section addressing compensation for disability and death, NRS 617.430 provides:

**NRS 617.430 Eligibility; limitations.**

1. Every employee who is disabled or dies because of an occupational disease, as defined in this chapter, arising out of and in the course of employment in the State of Nevada, or the dependents, as that term is defined in chapters 616A to 616D, inclusive, of NRS, of an employee whose death is caused by an occupational disease, are entitled to the compensation provided by those chapters for temporary disability, permanent disability or death, as the facts may warrant ...

See NRS 617.430 (2015). The limitation must be addressed in light of the Respondent's status as a retiree.

While the issue in *Howard* was the denial of temporary total disability ("TTD") benefits, the logic applied in reaching that conclusion is applicable to the instant issue. The *Howard* Court began its analysis with NRS 617.420 which states:

No compensation may be paid under this chapter for disability which does not incapacitate the employee for at least 5 cumulative days within a 20-day period from earning full wages, but if the incapacity extends for 5 or more days within a 20-day period, the compensation must then be computed from the date of disability. The limitations in this section do not apply to medical benefits, which must be paid from the date of application for payment of medical benefits.

See NRS 617.420 (2015). The Court held that when a retired claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive medical benefits but may not receive any disability compensation if the claimant is not earning any wages. See *Howard*, 120 P.3d at 412. The Court's rationale for this ruling is based on two reasons. First, retirement benefits are not included in

NRS 617.050's definition of "compensation," and no other provision suggests that retirement benefits should be included within the meaning of wages.<sup>1</sup> Second, a retiree has usually lost no salary or wages due to the impairment. *Id.*

Additional support for this analysis, and the Court's ruling, can be gleaned from NRS 616C.390(6) which denies TTD or vocational rehabilitation benefits where a claimant has retired. As the Court reasoned in *Howard*, there should be no award for disability benefits where there are no "wages" lost. In fact, a retired claimant maintains his exact same income, unaffected by his occupational injury or disease. In the instance of a permanent partial disability ("PPD") award, going back to the AMA Guides definition, there is no disability to occupational demands where there is no occupational income lost.

The *Howard* Court also comments that the date of disability for Mr. Howard was the date of his heart attack, and the date immediately preceding the occupational disease is the date from which disability benefits are properly calculated. *See Howard*, 120 P.3d at 412; *see also Mirage v. State. Dept. of Administration*, 871 P.2d 317, 319. In other words, disability benefits trigger at the time of disablement. This has been addressed in NRS 617.060 as well as NRS 617.420 (cited previously above). NRS 617.060 provides:

**617.060 "Disablement" and "total disablement" defined.**

---

<sup>1</sup> See NAC 616C.423 (describing items included in average monthly wage but omitting retirement benefits.)

“Disablement” and “total disablement” are used interchangeably in this chapter and mean the event of becoming physically incapacitated by reason of an occupational disease arising out of and in the course of employment as defined in this chapter *from engaging, for remuneration or profit, in any occupation for which he or she is or becomes reasonably fitted by education, training or experience.*

See NRS 617.060 (2015) (emphasis added).

Further, the Nevada Supreme Court has considered the issue of disablement as it relates to occupational diseases and held:

[I]n order to become eligible for disability benefits, the employee must be incapacitated by the occupational disease for a least five cumulative days within a twenty-day period **earning full wage.**

See *Mirage v. State Dept. of Admin.*, 110 Nev. 257, 260, 871 P.2d 317 (1994); see also *Manwill v. Clark County*, 123 Nev. 238, 244 (2007); *Employers Ins. Co. of Nevada v. Daniels*, 122 Nev. 1009, 1014 (2006). Moreover, the Court has stated:

An employee is not entitled to compensation from the mere contraction of an occupational disease. Instead, compensation ... flows from a disablement resulting from such a disease.

See *Daniels*, 122 Nev. at 1027 (internal quotations omitted). Thus, in looking at the standards of disablement, they are focused on the fact that there must be a loss of ability in earning a wage from an occupation. The Court has indicated in *Mirage v. State Dept. of Admin.*, that for occupational disease cases compensation in terms of average monthly wage must be computed from the date of disability. In fact, the Nevada Supreme Court has definitively held, “[o]nly after the

employee becomes disabled does it become necessary to look to NRS Chapter 616 for the method of calculating the employee's average wage." *Mirage*, 871 P.2d at 319.

As in the *Howard* case, the Respondent, as a retiree, was properly denied an award for PPD. Respondent lacks wages from which to calculate a disability award. Respondent's retirement income is not considered "compensation." The Respondent was not earning any actual wage as contemplated under NAC 616C.423, from which a disability benefit could be calculated. Even if the 40% PPD award were proper, the net result is a \$0 award.

**b. The Decision Was Not Supported By Substantial Evidence, Was Clearly Erroneous and Amounted to An Abuse of Discretion.**

The standard of review is whether there is substantial evidence to support the underlying decision. The reviewing court should limit its review of administrative decisions to determine if they are based upon substantial evidence. *North Las Vegas v. Public Service Common*, 83 Nev. 278, 291, 429 P.2d 66 (1967); *McCracken v. Fancy*, 98 Nev. 30, 639 P.2d 552 (1982). Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, *Maxwell v. SIIS*, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993). When reviewing administrative decisions, this Court has held that, on factual determinations, the findings and ultimate decisions of an agency are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. *Nevada Industrial Common v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977).



The Court in *Howard* unequivocally states that the period immediately preceding the occupational disease is the date from which we must calculate disability benefits. *See Howard*, 120 P.3d at 412 (citing *Mirage v. State Dept. of Administration*). In reaching this conclusion, the Court in *Howard* looked at case law from multiple jurisdictions, and appropriately noted that “a retired New Hampshire claimant, like a retired Nevada claimant, is effectively denied disability benefits because his weekly wage calculation amounts to zero.” *Id.* Following the mandatory authority of *Howard* and applying the relevant statutes and regulations, the Respondent’s average monthly wage, as calculated pursuant to NAC 616C.435, amounts to \$0. Any subsequent PPD award also amounts to \$0. Importantly, the Legislature has made no special provisions for firefighters or police officers as to the date of calculation. Here, the Respondent’s earliest period of disability was the date of diagnosis on 11/07/14. (ROA at pp. 9, 13) At that time, the Claimant was retired and earning no wage. As stated above, the idea of disability is tied to earning capacity. In this case, while the Respondent contracted an occupational disease, he has not been disabled from earning a wage, and therefore just as he is precluded from earning TTD, he is similarly precluded from any entitlement to a PPD award. To assert that the *Howard* Court never intended this result fails to properly consider the logic and opinion expressed in the case itself. To arrive at the calculation desired by the Respondent requires a method of calculation not contemplated by the applicable

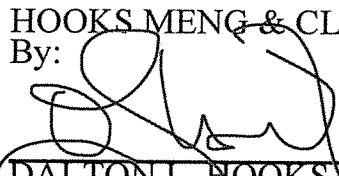
statutes. In view of the foregoing, the Decision and Order of the Appeals Officer was clearly erroneous in that it deviates from the applicable statutes and the law expounded by the court in *Howard*. Awarding Respondent a PPD and the method of calculation were an improper interpretation and application of NRS 617.453.

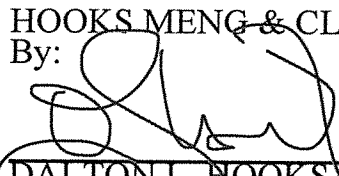
### **III.** **CONCLUSION**

Based on all of the above, it is the belief of the Petitioner, CLARK COUNTY, that a stay of this Court's Order entered 03/04/19 is necessary to prevent irreparable harm to the Petitioner.

Wherefore, Petitioner, CLARK COUNTY, respectfully requests that this honorable Court grant its Motion for Stay Pending Supreme Court Appeal.

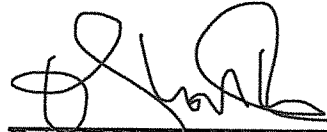
Dated this 26<sup>th</sup> day of March, 2019.

HOOKS MENG & CLEMENT  
By: 

  
\_\_\_\_\_  
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Las Vegas, NV 89102  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

**AFFIRMATION PURSUANT TO NRS 239B.030**

The undersigned does hereby affirm that the preceding pleading filed in District Court Case No. A-18-773957-J does not contain the social security number of any person.



DALTON L. HOOKS, JR., ESQ.  
JOHN A. CLEMENT, ESQ.  
Attorneys for Petitioner  
CLARK COUNTY, Self-Insured Employer

03/26/19  
DATE

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am employee of the law firm of  
HOOKS MENG & CLEMENT, and on this 28th day of March, 2019, I am serving  
the foregoing **AMENDED PETITIONER'S MOTION FOR STAY PENDING**  
**APPEAL TO THE NEVADA SUPREME COURT AND REQUES FOR**  
**ORDER SHORTENING TIME, OR, IN THE ALTERNATIVE, MOTION**  
**FOR TEMPORARY STAY** and that on this date I deposited for mailing at Las  
Vegas, Nevada, a true copy of the attached document addressed to:

MR. BRENT BEAN  
3405 AMISH AVENUE  
NORTH LAS VEGAS, NV 89031

LISA M. ANDERSON, ESQ.  
GREENMAN GOLDBERG RABY & MARTINEZ  
601 S NINTH ST  
LAS VEGAS, NV 89101

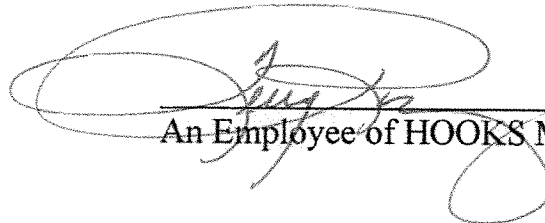
APPEALS OFFICER GEORGANNE W. BRADLEY, ESQ.  
DEPARTMENT OF ADMINISTRATION  
2200 SOUTH RANCHO DR., STE. 220  
LAS VEGAS, NV 89102  
APPEAL NO.: **1710715-GB**

KIMBERLY BUCHANAN  
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LESLIE RIBADENEIRA  
CLARK COUNTY RISK MANAGEMENT  
500 S GRAND CENTRAL PARKWAY, 5<sup>TH</sup> FLOOR  
LAS VEGAS, NV 89106  
CLAIM NO.: **0583-WC-15-0000098**

DEONNE CONTINE, DIRECTOR, STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
5151 E MUSSER ST  
CARSON CITY, NV 89701

AARON D. FORD, NEVADA ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL  
100 NORTH CARSON STREET  
CARSON CITY NV 89701

Dated this 28<sup>th</sup> day of March, 2019

  
An Employee of HOOKS MENG & CLEMENT

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**Keywords:** *work engagement, organizational commitment, turnover intentions, organizational citizenship behaviors, organizational trust*

**Regulatory Impact Analysis**

**Abstract**

**Abstract**

Supervisors' and employees' perceptions of the effects of the intervention on the work environment and on the work environment factors were measured by means of a questionnaire. The questionnaire was distributed to the supervisors and employees in the intervention group and the control group. The questionnaire was distributed to the supervisors and employees in the intervention group and the control group. The questionnaire was distributed to the supervisors and employees in the intervention group and the control group.

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**Copyright Clearance Center**

**Abstract**

doi:10.1017/S0022292412001719

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**Abstract**

**References**

**Abstract**

**Keywords:**

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

Dated this 28<sup>th</sup> day of March, 2019.

GREENMAN, GOLDBERG, RABY & MARTINEZ

By



LISA M. ANDERSON, ESQ.

Nevada Bar No. 004907

THADDEUS J. YUREK III, ESQ.

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Las Vegas, Nevada 89101

Attorneys for Claimant

Greenman Goldberg Raby Martinez  
ACCIDENT INJURY ATTORNEYS

POINTS AND AUTHORITIES

STATEMENT OF CASE

On or about November 7, 2015, Respondent reported the onset of an occupational disease that was contracted while in the course and scope of his employment as a firefighter with the Clark County Fire Department. Respondent was diagnosed with prostate cancer. Liability for the claim was appropriately accepted and Respondent received various modalities of medical care, including a prostatectomy. Petitioner's refusal to offer a permanent partial disability award based upon Dr. Charles Quaglieri's disability findings is the subject of this appeal.

Respondent retired as a firefighter with Petitioner on July 24, 2011 or July 25, 2011.

On October 15, 2014, Respondent completed blood work that revealed elevated prostate specific antigen (PSA) levels. (ROA page 71) Respondent came under the care of Dr. David Ludlow for his prostate condition. Respondent was diagnosed with malignant neoplasm of prostate and underwent a prostatectomy on February 24, 2015. Respondent was subsequently declared medically stable and ratable. Dr. Ludlow opined that Respondent would require ongoing medication for erectile dysfunction following claim closure. Dr. Ludlow confirmed that the medication was needed as a direct result of the prostate cancer. (ROA page 72-106)

On November 2, 2016, Dr. Quaglieri evaluated Respondent for permanent partial disability. Dr. Quaglieri concluded that Respondent qualified for thirty-nine percent (39%) whole person impairment as a result of the occupationally related prostate cancer condition. Respondent was granted sixteen percent (16%) whole person impairment for the prostatectomy, ten percent (10%) whole person impairment for incontinence and twenty percent (20%) whole person impairment for loss of sexual function. (ROA pages 107-111)



1 On November 30, 2016, Petitioner was notified that Dr. Quaglieri miscalculated  
2 Respondent's impairment and that the correct whole person impairment sum should have been  
3 forty percent (40%). For that reason, Petitioner was asked to offer Respondent the forty percent  
4 (40%) whole person impairment award. (ROA pages 112-117)  
5

6 On November 30, 2016, Petitioner was asked to authorize ongoing erectile dysfunction  
7 medication following claim closure. (ROA pages 118-120)  
8

9 On December 1, 2016, Petitioner notified Respondent that there appeared to be a  
10 calculation error in Dr. Quaglieri's disability report and was seeking clarification. (ROA pages  
11 121-126)  
12

13 On January 4, 2017, Dr. Quaglieri issued a statement verifying his calculation error and  
14 outlined that Respondent's whole person impairment was forty percent (40%). (ROA page 127)  
15

16 On January 9, 2017, an electronic mail communication was sent to Petitioner outlining  
17 that the Attorney General Opinion 2002-28 established that firefighter's "date of separation from  
18 service in such capacity and wages earned immediately prior to such date of separate form the  
19 basis upon which disability benefits are to be calculated." (ROA pages 128-136)  
20

21 On January 24, 2017, Petitioner notified Respondent that they were declining to offer a  
22 permanent partial disability award because the claim for occupational disease was filed after his  
23 retirement. Petitioner concluded that Respondent was therefore not entitled to receive any  
24 compensation, including permanent partial disability, for his industrial injury. (ROA pages 137-  
25 128) Respondent appealed that determination to the Hearing Officer. The parties subsequently  
26 agreed to transfer the matter directly to the Appeals Officer for final administrative decision.  
27

28 The Appeals Officer instructed the parties to submit briefs in support of their positions  
concerning the legal question as to whether Howard v. City of Las Vegas, 120 P.3d 410 (2005)

1 disqualified Respondent from being entitled to permanent partial disability compensation  
2 benefits. On September 20, 2017, Respondent submitted his Opening Brief. Claimant argued  
3 that, for the purpose of calculating his permanent partial disability, his average monthly wage  
4 must be calculated using the wages from the date of his retirement. (ROA pages 34-40) On  
5 October 30, 2017, Petitioner filed its Answering Brief in support of their position that  
6 Respondent's average monthly wage was zero for the purpose of calculating his permanent  
7 partial disability. (ROA pages 24-33) Respondent filed his Reply Brief on December 11, 2017,  
8 wherein he distinguishes the difference between seeking temporary total disability benefits from  
9 permanent partial disability benefits when a claim for occupational cancer is filed after  
10 retirement. (ROA pages 19-23)

13 On April 19, 2018, the Appeals Officer filed a Decision and Order reversing Petitioner's  
14 January 24, 2017 determination. Under Conclusion of Law 2, the Appeals Officer found that:

16 NRS 617.453(4) provides in pertinent part that compensation  
17 awarded to a firefighter or his or her dependents for disabling  
18 cancer pursuant to this section must include full reimbursement  
19 for related expenses incurred for medical treatments, surgery and  
20 hospitalization and the compensation provided in chapters 616A  
21 to 616D, inclusive of NRS for the disability or death. Subsection  
22 5 of the statute makes it clear that the firefighter's retirement prior  
23 to submitting a claim does not bar compensation for his claim  
24 simply because he has retired. The rebuttable presumption  
25 provided by subsection 5 applied to disabling cancer diagnosed  
26 after the termination of his employment. Also relevant is NRS  
27 617.430(1), which provides in pertinent part that every employee  
28 who is disabled or dies because of an occupational disease, or the  
dependents of an employee whose death is caused by an  
occupational disease, is entitled to the compensation provided by  
NRS 616A-D for temporary disability, permanent disability, or  
death, as the facts may warrant, subject to the modifications  
mentioned in Chapter 617.

27 Under Conclusion of Law 3, the Appeals Officer provided her interpretation of Howard's  
28 application to the matter at hand. The Appeals Officer found that:

1 The Nevada Supreme Court case of Howard considered the extent  
2 to which a firefighter who retires and, thereafter, suffers a heart  
3 attack, is entitled to temporary total disability benefits. The Court  
4 held that although Nevada law is clear that retired firefighters who  
5 sustain a disability post-retirement are entitled to medical benefits,  
6 the Legislature's method for calculating compensation precludes  
7 an award for temporary total disability benefits when the retired  
8 firefighters are not earning wages at the time of the disability. In  
9 Howard, the specific issue was whether the retired firefighter,  
10 who submitted a claim for heart disease, was entitled to temporary  
11 total disability benefits.

12 Under Conclusion of Law 4, the Appeals Officer weighed in on the briefs submitted by the  
13 parties and concluded that:

14 For the reasons set forth in Claimant's Opening and Reply Briefs,  
15 this Court finds and concludes that Claimant is entitled to receive  
16 an otherwise proper permanent partial disability award despite the  
17 fact that he was retired when his claim was filed and permanent  
18 disability determined to exist. NRS 617.453(4) provides that a  
19 firefighter with a cancer claim is entitled to not only medical  
20 benefits but also disability benefits to which is entitled pursuant  
21 to NRS 616A-D. Nothing set forth in NRS 616C.490 or the  
22 regulations governing permanent partial disability provides that a  
23 person is not entitled to permanent partial disability benefits once  
24 he is no longer working. NRS 616C.390 expressly provides that  
25 a retired person, upon reopening, may not receive temporary total  
26 disability benefits or vocational rehabilitation benefits. The  
27 Legislature could have, but did not, exclude permanent partial  
28 disability benefits from the benefits to which a claimant is entitled  
after retirement. Unlike temporary total disability benefits, which  
are intended to compensate the injured worker during the  
temporary period in which he is not working, permanent partial  
disability benefits are intended to compensate the injured worker  
for permanent physical impairment. This Court therefore declines  
to extend the Supreme Court's holding in Howard to permanent  
partial disability awards.

29 The Appeals Officer ruled under Conclusion of Law 5 that:

30 There is no statute, regulation, or case law that provides that a  
31 retired firefighter with an accepted occupational disease claim  
32 may be deprived of an otherwise properly determined permanent  
33 partial disability award. Furthermore, no other grounds for denial  
34 were asserted or argued by the Insurer, this Court finds Dr.

Greenman Goldberg Raby Martinez, P.A.  
ACCIDENT INJURY ATTORNEYS

1 Quaglieri's permanent partial disability rating evaluation to be  
2 thorough and properly performed.

3 Under Conclusion of Law 6, the Appeals Officer decided that:

4 For the reasons stated in Claimant's written briefs, the Appeals  
5 Officer concludes that the permanent partial disability awarded  
6 shall be calculated based upon the wages the Claimant was  
7 earning at the time of his retirement from the Clark County Fire  
8 Department. The Nevada Supreme Court's decision in Howard  
9 does not address permanent partial disability awards and, as stated  
10 above, the Appeals Officer declines to extend the Court's holding  
11 in that case to permanent partial disability awards; the Court's  
12 holding was not based on NRS 617.453 or 616C.490 which are  
13 applicable in the instant case. To conclude that the Claimant's  
14 PPD award must be calculated based on his wages on the date of  
disability (i.e zero) would, from a practical perspective, render  
subsection (5) of NRS 617.453 meaningless. By its very terms,  
subsection (5) refers to cancer diagnosed after the firefighter is no  
longer employment; the "date of disability" would always be post-  
retirement for purposes of awarding of benefits pursuant to NRS  
617.453 unless evidence to rebut the presumption is presented.

15 Thus, the Appeals Officer ordered Petitioner to calculate Respondent's average monthly wage  
16 for the purpose of calculating the permanent partial disability award based upon the wages he  
17 was earning at the time of his retirement. (ROA pages 3-10) Petitioner timely filed a Petition  
18 for Judicial Review. Petitioner also filed a Motion for Stay, which was denied.  
19

20 On March 1, 2019, the District Court executed the Order Denying Petition for Judicial  
21 Review. The District Court found that:

22 Permanent partial disability is a medical benefit intended to  
23 compensate the injured worker for permanent physical damage  
24 caused by the industrial injury or occupational disease and not a  
25 form of disability compensation associated with lost wages. In  
26 this case, Respondent's prostate was removed due to a  
27 compensable occupationally related cancer. Respondent was  
28 found to have sustained forty percent (40%) whole person  
impairment related to his significant occupational disease.  
Permanent partial disability is a medical benefit directly related to  
the removal of the prostate and its residual effects. Thus,

1 permanent partial disability is not intended to replace lost wages,  
2 as was held in Howard.

3 The District Court also found that:

4 NRS 616C.490 establishes that permanent partial disability is not  
5 related to temporary total disability compensation that is  
6 associated with lost wages. Instead, permanent partial disability  
7 is a medical benefit directly related to the permanent loss of  
8 physical function, such as loss of range of motion, loss of  
9 sensation, and loss of strength, and is intended to compensate the  
10 injured worker for the physical damage caused by the  
11 occupational disease. Nothing in Howard sought to eliminate  
12 compensation related to permanent partial disability because  
13 permanent partial disability is not intended to compensate the  
14 injured worker for lost wages.

15 ...  
16 In every instance, the Court in Howard specifically cited that its  
17 decision related solely to temporary total disability compensation  
18 related to lost wages. Howard thus had no intention of limiting  
19 compensation related to the recovery of permanent partial  
20 disability.

21 The District Court further found that:

22 Therefore, pursuant to NRS 617.453(5), Respondent qualifies for  
23 the full "awarding of benefits pursuant to this section," including  
24 the calculation of his average monthly wage for the purpose of  
25 calculating his permanent partial disability award, based upon his  
26 disabling cancer being diagnosed, filed and accepted for workers'  
27 compensation benefits at approximately forty (40) months post-  
28 retirement. Thus, Respondent's eligibility for the "awarding of  
benefits" is well within the sixty (60) months period that he  
qualifies for based upon his thirty (30) full years of qualifying  
employment.

The District Court thus concluded that:

The Court has review the Decision and Order filed by the Appeals  
Officer on April 19, 2018. In paragraph 16, the Appeals Officer  
found, "[t]hat the evidence supports Claimant's entitlement to  
partial disability compensation benefits on the grounds that  
neither Howard nor applicable statute disqualifies claimants from  
those benefits." In addition, Respondent relied on NRS  
617.453(5) which permits the "awarding of benefits" and creates  
a rebuttable presumption for disabling cancer diagnosed after

1 termination of employment, within a period not to exceed sixty  
2 (60) months after the last date of employment. Thus, the award  
3 of benefits based on the period calculated by multiplying three  
4 months by the number of full years of employment is under  
Nevada Law and specifically for firefighters who suffer from  
cancer as an occupational disease.

5 Petitioner appeals the District Court's Order Denying Petition for Judicial Review.  
6 Petitioner also filed a Motion for Stay.

### 7 LEGAL DISCUSSION

#### 8 I. THE APPLICATION FOR STAY PENDING APPEAL IS UNWARRANTED

9 An order for stay is not a right to be exercised, but a matter of judicial discretion to be  
10 used by the Court, when appropriate, upon application of a party. NRS 233B.140(3) provides  
11 that in making a ruling, the Court shall give deference to the trier of fact and consider the risk to  
12 the public, if any, of staying the administrative decision.  
13

14 When considering an application for a stay order pending appeal, there are four factors  
15 which must be addressed:  
16

- 17 1) Whether the petitioner for the stay order has made a *strong* showing that it is  
18 likely to prevail on the merits of the appeal;  
19
- 20 2) Whether or not the petitioner has shown it would sustain irreparable injury absent  
21 the stay order;  
22
- 23 3) Whether or not the issuance of a stay order would substantially harm the other  
24 interested parties; and  
25
- 26 4) Where the public interest lies.

27 Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d 1371, 1374 (Nev. 1975);  
28 American Horse Protection Assoc. v. Frizzel, 403 F.Supp. 1206, 1215 (Nev. 1975). In this  
matter, a stay is unwarranted as Petitioner has failed to meet the burden of making a strong

1 showing that it is likely to prevail on the merits or that it will sustain irreparable injury absent  
2 the stay order. Moreover, a stay is unwarranted because the issuance of a stay order will  
3 substantially harm one of the other interested parties and the public interest favors Respondent.  
4 The administrative determination that is the subject of this appeal is tantamount to an attempt  
5 by Petitioner to deny Respondent permanent partial disability benefits to which he is entitled.  
6

7 **A. PETITIONER HAS NOT MADE A STRONG SHOWING THAT IT WILL**  
8 **PREVAIL ON THE MERITS.**

9 In order to show that it will prevail on the merits, Petitioner has the burden of  
10 demonstrating that the Appeals Officer's decision was factually or legally incorrect and that the  
11 Appeals Officer acted arbitrarily or capriciously. NRS 233B.135(2); Campbell v. Nevada Tax  
12 Com'n, 853 P.2d 717 (Nev. 1993). In determining the appropriateness of the Appeals Officer's  
13 decision, this Court may not substitute its judgment for that of the Appeals Officer as to the  
14 weight of the evidence. N.R.S. 233B.135; SIIS v. Campbell, 862 P.2d 1184 (Nev. 1993);  
15 Campbell v. Nev. Tax Com'n, 853 P.2d 717 (Nev. 1993). On questions of fact, this Court is  
16 limited to determining whether *substantial evidence* exists in the record to support the Appeals  
17 Officer's decision. Desert Inn Casino & Hotel v. Moran, 106 Nev. 334, 792 P.2d 400, 401  
18 (1990); SIIS v. Swinney, 103 Nev. 17, 20, 731 P.2d 359, 361 (1987). Substantial evidence is  
19 "that quantity and quality of evidence which a reasonable [person] could accept as adequate to  
20 support a conclusion." State of Nevada Emplmt. Sec. Dept. v. Hilton Hotels Corp., 102 Nev.  
21 606, 607-08, 729 P.2d 497, 498 (1986), quoting Robertson Transp. Co. v. P.S.C., 39 Wis.2d 653,  
22 159 N.W.2d. 636, 638 (1968). In the instant case, Petitioner has failed to meet its burden of  
23 demonstrating that the Appeals Officer's decision was factually or legally incorrect. Petitioner  
24 has also failed to show that the Appeals Officer acted arbitrarily or capriciously. Thus, the  
25 District Court correct denied Petitioner's Petition for Judicial Review.  
26  
27  
28

LEGAL ARGUMENT

I. The Evidence Supports The District Court's Order Denying Petition For Judicial Review When Concluding That The Appeals Officer, For The Purpose Of Calculating Permanent Partial Disability, Did Not Error When Concluding That The Average Monthly Wage Must Be Calculated Using The Wages From The Date Of His Retirement

In its Motion for Stay, Petitioner argues that it will prevail upon the merits of the appeal because the Appeals Officer's decision was erroneous, arbitrary and capricious because it misinterpreted controlling case law and statutes when ruling on Respondent's entitlement to permanent partial disability award compensation benefits. Petitioner's arguments lack merit and are a clear attempt to reweigh the evidence and reconsider the arguments previously submitted in their briefs and during oral arguments.

The crux of the issue to be determined in this brief is whether Howard controls the methodology for wage calculation for the purpose of calculating permanent partial disability. The Appeals Officer correctly noted under Conclusion of Law 3 that:

The Nevada Supreme Court case of Howard considered the extent to which a firefighter who retires and, thereafter, suffers a heart attack, is entitled to temporary total disability benefits. The Court held that although Nevada law is clear that retired firefighters who sustain a disability post-retirement are entitled to medical benefits, the Legislature's method for calculating compensation precludes an award for temporary total disability benefits when the retired firefighters are not earning wages at the time of the disability. In Howard, the specific issue was whether the retired firefighter, who submitted a claim for heart disease, was entitled to temporary total disability benefits.

The Appeals Officer correctly noted under Conclusion of Law 4 that:

For the reasons set forth in Claimant's Opening and Reply Briefs, this Court finds and concludes that Claimant is entitled to receive an otherwise proper permanent partial disability award despite the fact that he was retired when his claim was filed and permanent disability determined to exist. NRS 617.453(4) provides that a firefighter with a cancer claim is entitled to not only medical



1 benefits but also disability benefits to which is entitled pursuant  
2 to NRS 616A-D. Nothing set forth in NRS 616C.490 or the  
3 regulations governing permanent partial disability provides that a  
4 person is not entitled to permanent partial disability benefits once  
5 he is no longer working. NRS 616C.390 expressly provides that  
6 a retired person, upon reopening, may not receive temporary total  
7 disability benefits or vocational rehabilitation benefits. The  
8 Legislature could have, but did not, exclude permanent partial  
9 disability benefits from the benefits to which a claimant is entitled  
10 after retirement. Unlike temporary total disability benefits, which  
11 are intended to compensate the injured worker during the  
12 temporary period in which he is not working, permanent partial  
13 disability benefits are intended to compensate the injured worker  
14 for permanent physical impairment. This Court therefore declines  
15 to extend the Supreme Court's holding in Howard to permanent  
16 partial disability awards.

17 In Howard, the Court considered whether a firefighter who retires and, thereafter, suffers  
18 a heart attack, is entitled to temporary total disability benefits. The Court confirmed that retired  
19 firefighters are entitled to all medical benefits for their occupationally related condition,  
20 however, the "method for calculating compensation precludes an award for temporary total  
21 disability benefits when the retired firefighters are not earning wages at the time of the  
22 disability."

23 Howard is clearly distinguishable from the case at hand because Respondent is not  
24 seeking temporary total disability for lost wages. Under Howard, the Court differentiated  
25 between workers' compensation benefits related to medical benefits and those benefits  
26 associated with disability compensation in the form of lost wages caused by the occupational  
27 disease. While the Court made it clear that it intended for the injured worker to be precluded  
28 from obtaining temporary total disability compensation if the claim for disability was filed after  
retirement, the Court further made it clear that it did not intend for the decision to affect medical  
benefits in any way.

///

1 The Court intended for the injured worker to remain entitled to all medical benefits  
2 associated with the physical injury, which includes permanent partial disability caused by  
3 permanent physical disfiguration. Permanent partial disability is a medical benefit intended to  
4 compensate the injured worker for permanent physical damage caused by the industrial injury  
5 or occupational disease and not a form of disability compensation associated with lost wages.  
6 In this case, Respondent's prostate was removed due to a compensable occupationally related  
7 cancer. Respondent was found to have sustained forty percent (40%) whole person impairment  
8 related to his significant occupational disease. Permanent partial disability is a medical benefit  
9 directly related to the removal of the prostate and its residual effects. Thus, permanent partial  
10 disability is in no way intended to replace lost wages, as was held in Howard.

11  
12  
13 NRS 616C.490(5) states in part:

14 5. Unless the regulations adopted pursuant to NRS  
15 616C.110 provide otherwise, a rating evaluation must include an  
16 evaluation of the loss of motion, sensation and strength of an  
17 injured employee if the injury is of a type that might have caused  
18 such a loss. Except in the case of claims accepted pursuant to NRS  
19 616C.180, no factors other than the degree of physical impairment  
of the whole person may be considered in calculating the  
entitlement to compensation for a permanent partial disability.

20 NRS 616C.490 establishes that permanent partial disability is not related to temporary  
21 total disability compensation that is associated with lost wages. Instead, permanent partial  
22 disability is a medical benefit directly related to the permanent loss of physical function, such  
23 as loss of range of motion, loss of sensation, and loss of strength, and is intended to compensate  
24 the injured worker for the physical damage caused by the occupational disease. Nothing in  
25 Howard sought to eliminate compensation related to permanent partial disability because  
26 permanent partial disability is not intended to compensate the injured worker for lost wages.  
27  
28

1 The Court specifically stated that the issue on appeal in Howard involved eligibility for  
2 temporary total disability compensation when the injured worker was retired and not earning  
3 wages at the time the claim was filed. The Court solely considered whether an injured worker  
4 is entitled to temporary total disability compensation related lost time caused by the  
5 occupationally related heart condition. Nevertheless, the Court reiterated that “when a retired  
6 claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive  
7 medical benefits but may not receive any disability compensation if the claimant is not earning  
8 any wages.”  
9

10 In further distinguishing Howard from the present matter, the Court outlined that:  
11

12 Second, a retiree usually has lost no salary due to the impairment.  
13 However, the claimant may lose money in the form of medical  
14 expenses attributable to the work-related disability; for these  
15 expenses, NRS 617.420 provides no prohibition. As we held in  
16 *Gallagher*, retired claimants will still be able to claim medical  
17 expenses, despite not being entitled to receive compensation  
18 based on lost wages.  
19 ...

20 Because Howard was retired and not earning an actual wage at the  
21 time of his disability, from which a lost wage may be calculated,  
22 he is not entitled to disability compensation in the form of lost  
23 wages.  
24 ...

25 For the forgoing reasons, we conclude that a retired firefighter’s  
26 entitlement to occupational disease benefits does not include  
27 compensation for temporary total disability benefits when the  
28 firefighter is not earning any wages. Accordingly, we affirm the  
order of the district court.

In every instance, the Court in Howard specifically cited that its decision related solely  
to temporary total disability compensation related to lost wages. Since Howard had no intention  
of limiting compensation related to the recovery of permanent partial disability, we must look

1 to the Attorney General's opinion on how to calculate a permanent partial disability award when  
2 the injured worker is retired at the time claim was filed.

3 On August 7, 2002, the Attorney General issued an official opinion regarding this exact  
4 issue. In its opinion, the Attorney General concluded that a "firefighter's or police officer's date  
5 of separation from service in such capacity and wages earned immediately prior to such date of  
6 separation form the basis upon which disability benefits are to be calculated." The Attorney  
7 General determined that this calculation method would prevent "an absurd result" of using "a  
8 significantly higher, or lower, salary in another (post-retirement) occupation" when calculating  
9 disability benefits. (ROA pages 127-133)  
10

11 In this case, there is no dispute that Respondent qualifies for forty percent (40%) whole  
12 person related to his occupationally related and accepted prostate cancer condition. However,  
13 Petitioner is of the position that Respondent has a zero dollar (\$0) wage base for the purpose of  
14 calculating the value of the permanent partial disability because he was retired at the time of the  
15 claim. Although Respondent is not seeking temporary total disability related to lost wages, he  
16 is seeking compensation for the medical portion of his case due to a permanent disability  
17 sustained when his prostate was removed due to occupationally related cancer.  
18

19 Respondent maintains that a common sense approach must be adopted in order to avoid  
20 the "absurd result" identified by the Attorney General. Assigning a zero dollar (\$0) value for  
21 the purpose of calculating a monetary award for the forty percent (40%) permanent partial  
22 disability is patently unfair and leads to the "absurd result" that is the foundation of this appeal.  
23 As noted above, permanent partial disability is a medical benefit that is intended to compensate  
24 the injured worker for the permanent physical damage and disfiguration caused by the  
25  
26  
27  
28

1 occupational disease. Ignoring the Attorney General opinion would absolutely result in the  
2 “absurd result” that the Attorney General sought to avoid.

3 Pursuant to the Attorney General’s opinion, Respondent’s wages, for the purpose of  
4 calculating his permanent partial disability award, should be his July 24, 2011 or July 25, 2011  
5 retirement date. Utilizing the last wage Respondent actually earned prior to his retirement avoids  
6 the “absurd” resulted contemplated by the Attorney General. Petitioner must therefore be  
7 ordered to calculate Respondent’s wages based upon his earnings at the time of retirement.  
8 Petitioner must then be ordered to calculate the permanent partial disability award and offer it  
9 to Claimant.  
10

11 Based upon the foregoing, Respondent has establishes that Howard is clearly  
12 distinguishable from the current appeal, as the present matter does not involve the recovery of  
13 temporary total disability compensation related to lost wages. Howard does not control the  
14 methodology for calculating Respondent’s average monthly wage for the purpose placing a  
15 monetary value on the calculation of Respondent’s forty percent (40%) permanent partial  
16 disability. Since Howard does not impact this issue, the Appeals Officer correctly found that  
17 wages from the date of Respondent’s retirement must be utilized for the purpose of calculating  
18 the permanent partial disability award.  
19  
20

21  
22 **II. Claimant Distinguishes The Difference Between Seeking Temporary Total**  
23 **Disability Benefits from Permanent Partial Disability Benefits When A Claim**  
**For Occupational Cancer Is Filed After Retirement**

24 Petitioner disputes Respondent’s argument that permanent partial disability is not a  
25 medical benefit. Respondent is not attempting to distinguish medical benefits from disability  
26 benefits because it is simply a fact that these two (2) benefits are different. Respondent is not  
27 asking for wage replacement benefits. Instead, Respondent is requesting that his entitlement for  
28

1 compensation due to the medical incident that happened to him and the ensuing permanent  
2 physical condition that resulted in the removal of his prostate.

3         Petitioner argues that medical benefits are intended to mean medical treatment, surgery,  
4 hospitalization, physical therapy and prescriptions but not disability awards related to the  
5 permanent physical damage caused by the occupational disease. They cite the American  
6 Medical Association's *Guides to the Evaluation of Permanent Impairment* that defines disability  
7 as "an alteration of the individual's capacity to meet personal, social or occupational demands  
8 or statutory or regulatory requirements because of an impairment." In this instance, Petitioner  
9 fails to consider what personal and social demands were contemplated under this standard.  
10 Clearly the functionality of the body is certainly personal and social. It is undeniable that  
11 Respondent is altered as a result of this incident. The removal of his prostate and the resulting  
12 permanent residual effects is an "alteration" of Respondent's individual capacity to meet his  
13 personal, social and/or occupational demands.  
14

15         It has been argued that Howard analyzed NRS 617.420 and cited in part that "[T]he  
16 limitations in this section do not apply to medical benefits, which must be paid from the date of  
17 application for payment of medical benefits." This is where Respondent argued that NRS  
18 617.455 contemplates that it will be difficult to pinpoint a date of injury/exposure. So,  
19 Respondent's employment is conclusively presumed to be the cause of the disease. Thus, the  
20 date of application is the date he last worked for these purposes.  
21

22         Petitioner further argued that Howard precludes the payment of permanent partial  
23 disability compensation if Respondent is not earning any wages when a claim for benefits is  
24 filed. While this is true for temporary total disability compensation, Petitioner cannot say that  
25 Respondent has lost no use or function of his body for his non work related activities.  
26  
27  
28

1 Respondent is left disabled, both as to work and as to life in general. The workers' compensation  
2 system contemplates these losses and provides separately that Respondent is entitled to  
3 permanent partial disability for his physical damage. In this case, Respondent had his prostate  
4 removed as a result of cancer and has suffered permanent residual dysfunction.  
5

6 The Appeals Officer ruled under Conclusion of Law 5 that:

7 There is no statute, regulation, or case law that provides that a  
8 retired firefighter with an accepted occupational disease claim  
9 may be deprived of an otherwise properly determined permanent  
10 partial disability award. Furthermore, no other grounds for denial  
11 were asserted or argued by the Insurer, this Court finds Dr.  
Quaglieri's permanent partial disability rating evaluation to be  
thorough and properly performed.

12 NRS 617.455 is clearly meant to compensate Respondent over his lifetime for any lung  
13 or heart disease he suffers after fulfilling his initial length of employment obligation. The intent  
14 is that Respondent be as fully compensated as possible during and after his service. Petitioner  
15 diminishes this intent by excluding the portion of benefits designed to compensate for permanent  
16 damage. NRS 617.455 is designed to compensate for exposure while employed and extends  
17 coverage after employment.  
18

19 Despite what Petitioner would like for this Court to believe, Howard simply addressed  
20 the issue of entitlement to temporary total disability compensation for lost wages when a  
21 claimant was retired and not earning wages at the time the claim was filed. Howard was never  
22 intended to be applied to issues involving permanent partial disability as that issue does not  
23 involve disability compensation related to lost wages. As such, there is no available case law to  
24 adequately and fairly compensate Respondent for the permanent physical damage caused by the  
25 removal of his prostate and the resulting dysfunction.  
26  
27  
28

1 In contrast, the Attorney Generals' 2002 opinion clearly addressed the identical issue  
2 presented in this case. Specifically, the Attorney General concluded that a "firefighter's or  
3 police officer's date of separation from service in such capacity and wages earned immediately  
4 prior to such date of separation form the basis upon which disability benefits are to be  
5 calculated." The Attorney General determined that this calculation method would prevent "an  
6 absurd result" of using "a significantly higher, or lower, salary in another (post-retirement)  
7 occupation" when calculating disability benefits. If Petitioner's position is allowed to stand,  
8 then this case will effectively result in the "absurd" outcomes in the Attorney General sought to  
9 prevent.  
10

11  
12 Under Conclusion of Law 6, the Appeals Officer decided that:

13 For the reasons stated in Claimant's written briefs, the Appeals  
14 Officer concludes that the permanent partial disability awarded  
15 shall be calculated based upon the wages the Claimant was  
16 earning at the time of his retirement from the Clark County Fire  
17 Department. The Nevada Supreme Court's decision in Howard  
18 does not address permanent partial disability awards and, as stated  
19 above, the Appeals Officer declines to extend the Court's holding  
20 in that case to permanent partial disability awards; the Court's  
21 holding was not based on NRS 617.453 or 616C.490 which are  
22 applicable in the instant case. To conclude that the Claimant's  
23 PPD award must be calculated based on his wages on the date of  
24 disability (i.e zero) would, from a practical perspective, render  
25 subsection (5) of NRS 617.453 meaningless. By its very terms,  
26 subsection (5) refers to cancer diagnosed after the firefighter is no  
27 longer employment; the "date of disability" would always be post-  
28 retirement for purposes of awarding of benefits pursuant to NRS  
617.453 unless evidence to rebut the presumption is presented.

24 In conclusion, Respondent's wages at the time of his retirement must be utilize in the  
25 calculation of his permanent partial disability. Arguing that Respondent qualifies for forty  
26 percent (40%) whole person impairment for his occupationally related cancer condition and then  
27 attempting to apply a standard intended solely for the payment of temporary total disability  
28



1 compensation related to lost wages is clearly inappropriate and insulting to Respondent, who  
2 has suffered significant permanent impairment, and would result in an absurd outcome that goes  
3 against the clear intentions of the Nevada legislature. For that reason, the Appeals Officer  
4 correctly ordered Petitioner to calculate Respondent's permanent partial disability award using  
5 the wages from the date of his retirement.  
6

7 **B. PETITIONER WILL NOT SUFFER IRREPARABLE HARM.**

8 Petitioner has the burden of demonstrating that it will suffer irreparable harm if the stay  
9 order is not issued. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374;  
10 American Horse Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. Petitioner argues in its  
11 Motion that if the stay is not granted, it will be irreparably harmed because of the payment of  
12 benefits. This argument, however, is without merit since there are no Nevada Supreme Court  
13 cases that indicate irreparable harm results from the sole payment of money. To the contrary,  
14 the Nevada Supreme Court, in DIIR v. Circus Circus Enterprises, held that:  
15  
16

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

22 101 Nev. 405, 408, 705 P.2d 645, 648 (1985). The court also indicated that "...it is clearly the  
23 injured worker and not the employer who is more likely to be irreparably harmed when  
24 immediate payment of benefits is contrasted with delayed payment pending the outcome of the  
25 hearing on the merits." Id. Respondent is the party more likely to be harmed by the issuance of  
26 a stay since he would continue to be denied and the payment of appropriate benefits currently  
27 being withheld.  
28

///  
28

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

3       In determining whether or not to issue a stay, the Court must consider whether the  
4       issuance of a stay order will substantially harm an interested party. Dollar Rent a Car of  
5       Washington v. Travelers Indem., 774 F.2d at 1374; American Horse Protection Assoc. v. Frizzel,  
6       403 F.Supp. at 1215. In this matter, the issuance of a stay is unwarranted because it would  
7       substantially harm Respondent, an interested party, by further delaying the payment of industrial  
8       injury benefits, in the form of permanent partial disability, for a legitimate and compensable  
9       occupationally industrially cancer condition. Moreover, the continued delay of benefits is  
10      contrary to the policy expressed by the Nevada Supreme Court in DIIR v. Circus Circus  
11      Enterprises, supra.

12  
13       **D. THE PUBLIC INTEREST FAVORS PETITIONER IN THE INSTANT CASE.**

14       In determining whether to issue a stay, the Court must consider where the public interest  
15       lies. Dollar Rent a Car of Washington v. Travelers Indem., 774 F.2d at 1374; American Horse  
16       Protection Assoc. v. Frizzel, 403 F.Supp. at 1215. A stay in this matter is unwarranted since  
17       there is no public interest which will be sacrificed by the Court's refusal to grant the stay.  
18

19       The issue in this case involves Petitioner denying permanent partial disability benefits  
20       on the grounds that he has a zero dollar (\$0) average monthly wage. Clearly, the evidence  
21       confirms that it is Petitioner that has misapplied case law and statute in these proceedings.  
22       Petitioner has made no allegation that such action will force it into liquidation, necessitate the  
23       termination of employees, or result in any similar outcome that might affect the public interest.  
24

25       **CONCLUSION**

26       Petitioner's Motion for Stay must be denied since it has not made a strong showing that  
27       it is likely to prevail on the merits of the appeal or that it will suffer irreparable harm. Moreover,  
28

1 Respondent's interest will be adversely affected by the issuance of a stay order and the public  
2 interest will be unaffected either way. Based on the foregoing, Respondent hereby respectfully  
3 requests that the District Court's Order Denying Petition for Judicial Review remain in force as  
4 entered, and that Petitioner's Motion for Stay be denied.  
5

6 Dated this 28<sup>th</sup> day of March, 2019.

7 GREENMAN, GOLDBERG, RABY & MARTINEZ

8  
9 By: 

10 LISA M. ANDERSON, ESQ.

11 Nevada Bar No. 004907

12 THADDEUS J. YUREK III, ESQ.

13 Nevada Bar No. 011332

14 **GREENMAN, GOLDBERG, RABY & MARTINEZ**

15 601 South Ninth Street

16 Las Vegas, Nevada 89101


17 (702) 384-1616  
18  
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28

CERTIFICATE OF MAILING

I hereby certify that on the 28<sup>th</sup> day of March, 2019, I deposited a true and correct copy of the RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION FOR STAY PENDING SUPREME COURT APPEAL in the U.S. Mails, postage fully prepaid, enclosed in envelopes addressed as follows:

Dalton L. Hooks, Jr. Esq.  
HOOKS, MENG, & CLEMENT  
2820 West Charleston Boulevard  
Suite C-23  
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Attorney for Petitioner

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

  
An Employee of GREENMAN, GOLDBERG, RABY & MARTINEZ

Greenman Goldberg Raby Martinez /  
ACCIDENT INJURY ATTORNEYS



1 **ODM**  
2 **LISA M. ANDERSON, ESQ.**  
3 Nevada Bar No. 004907  
4 **THADDEUS J. YUREK III, ESQ.**  
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13 tyurek@ggrmlawfirm.com  
14 *Attorneys for Respondent*

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 CLARK COUNTY, )

13 )  
14 Petitioner )

15 vs. )

CASE NO. : A-18-773957-J

DEPT. NO. : XVI

16 BRENT BEAN and THE DEPARTMENT )  
17 OF ADMINISTRATION, HEARINGS )  
18 DIVISION, )

19 Respondents. )  
20 )

21 **ORDER DENYING MOTION FOR STAY PENDING**  
22 **SUPREME COURT APPEAL**

23 This matter came before this Court on April 2, 2019 regarding Petitioner's Motion for  
24 Stay Pending Supreme Court Appeal. LISA M. ANDERSON, ESQ. and THADDEUS J.  
25 YUREK III, ESQ. of the law firm of GREENMAN GOLDBERG RABY & MARTINEZ  
26 submitted documents on behalf of Respondent, BRENT BEAN. DALTON L. HOOKS, JR. of  
27 the law firm HOOKS MENG & CLEMENT submitted documents on behalf of Petitioner,  
28 CLARK COUNTY.

AUG 16 2019

JA000389

1 After a review and consideration of the arguments of counsel, the Points and Authorities  
2 on file herein, and supplementation, the Court determined as follows:

3 The Court has assessed the four (4) factors as set forth in Fritz Hansen A/S v. Eighth  
4 Judicial Dist. Court, 116 Nev. 650, 657 and in light of the current posture of this case, has  
5 decided to DENY the Petition for Stay Pending Appeal.  
6

7 The Court has review the March 4, 2019 Order Denying the Petition for Judicial Review.  
8 Petitioner argued the legal question as to whether Howard v. City of Las Vegas, 120 P.3d 410  
9 (2005) disqualified Respondent from being entitled to permanent partial disability compensation  
10 benefits. Respondent argued that, for the purpose of calculating his permanent partial disability,  
11 his average monthly wage must be calculated using the wages from the date of his retirement.  
12

13 In Howard, the Court considered whether a firefighter who retires and, thereafter, suffers  
14 a heart attack, is entitled to temporary total disability benefits. The Court confirmed that retired  
15 firefighters are entitled to all medical benefits for their occupationally related condition,  
16 however, the "method for calculating compensation precludes an award for temporary total  
17 disability benefits when the retired firefighters are not earning wages at the time of the  
18 disability."  
19

20 Howard is distinguishable from the case at hand because Respondent is not seeking  
21 temporary total disability for lost wages. Under Howard, the Court differentiated between  
22 workers' compensation benefits related to medical benefits and those benefits associated with  
23 disability compensation in the form of lost wages caused by the occupational disease. While the  
24 Court made it clear that it intended for the injured worker to be precluded from obtaining  
25 temporary total disability compensation if the claim for disability was filed after retirement, the  
26 Court further made it clear that it did not intend for the decision to affect medical benefits.  
27  
28

1 Permanent partial disability is a medical benefit intended to compensate the injured  
2 worker for permanent physical damage caused by the industrial injury or occupational disease  
3 and not a form of disability compensation associated with lost wages. In this case, Respondent's  
4 prostate was removed due to a compensable occupationally related cancer. Respondent was  
5 found to have sustained forty percent (40%) whole person impairment related to his significant  
6 occupational disease. Permanent partial disability is a medical benefit directly related to the  
7 removal of the prostate and its residual effects. Thus, permanent partial disability is not intended  
8 to replace lost wages, as was held in Howard.  
9

10  
11 NRS 616C.490(5) states in part:

12 5. Unless the regulations adopted pursuant to NRS  
13 616C.110 provide otherwise, a rating evaluation must include an  
14 evaluation of the loss of motion, sensation and strength of an  
15 injured employee if the injury is of a type that might have caused  
16 such a loss. Except in the case of claims accepted pursuant to NRS  
17 616C.180, no factors other than the degree of physical impairment  
18 of the whole person may be considered in calculating the  
19 entitlement to compensation for a permanent partial disability.

20 NRS 616C.490 establishes that permanent partial disability is not related to temporary  
21 total disability compensation that is associated with lost wages. Instead, permanent partial  
22 disability is a medical benefit directly related to the permanent loss of physical function, such  
23 as loss of range of motion, loss of sensation, and loss of strength, and is intended to compensate  
24 the injured worker for the physical damage caused by the occupational disease. Nothing in  
25 Howard sought to eliminate compensation related to permanent partial disability because  
26 permanent partial disability is not intended to compensate the injured worker for lost wages.

27 ///

28 ///

///

1 The Court specifically stated that the issue on appeal in Howard involved eligibility for  
2 temporary total disability compensation when the injured worker was retired and not earning  
3 wages at the time the claim was filed. The Court solely considered whether an injured worker  
4 is entitled to temporary total disability compensation related lost time caused by the  
5 occupationally related heart condition. Nevertheless, the Court reiterated that "when a retired  
6 claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive  
7 medical benefits but may not receive any disability compensation if the claimant is not earning  
8 any wages."

9  
10  
11 In further distinguishing Howard from the present matter, the Court outlined that:

12 Second, a retiree usually has lost no salary due to the impairment.  
13 However, the claimant may lose money in the form of medical  
14 expenses attributable to the work-related disability; for these  
15 expenses, NRS 617.420 provides no prohibition. As we held in  
16 *Gallagher*, retired claimants will still be able to claim medical  
17 expenses, despite not being entitled to receive compensation  
18 based on lost wages.

19 ...

20 Because Howard was retired and not earning an actual wage at the  
21 time of his disability, from which a lost wage may be calculated,  
22 he is not entitled to disability compensation in the form of lost  
23 wages.

24 ...

25 For the forgoing reasons, we conclude that a retired firefighter's  
26 entitlement to occupational disease benefits does not include  
27 compensation for temporary total disability benefits when the  
28 firefighter is not earning any wages. Accordingly, we affirm the  
order of the district court.

In every instance, the Court in Howard specifically cited that its decision related solely  
to temporary total disability compensation related to lost wages. Howard thus had no intention  
of limiting compensation related to the recovery of permanent partial disability.



1 Petitioner further argued that there is no statute to support the Appeals Officer's Decision  
2 and Order concerning Respondent's average monthly wage because he was retired and had no  
3 wages during the eighty-four (84) days preceding his disabling occupational cancer condition.

4  
5 NRS 617.453(5) contemplated this issue and applies to this matter. NRS 617.453(5)  
6 states:

7 5. Disabling cancer is presumed to have developed or  
8 manifested itself out of and in the course of the employment of  
9 any firefighter described in this section. This rebuttable  
10 presumption applies to disabling cancer diagnosed after the  
11 termination of the person's employment if the diagnosis occurs  
12 within a period, not to exceed 60 months, which begins with the  
13 last date the employee actually worked in the qualifying capacity  
14 and extends for a period calculated by multiplying 3 months by  
15 the number of full years of his or her employment. This rebuttable  
16 presumption must control the awarding of benefits pursuant to this  
17 section unless evidence to rebut the presumption is presented.

18 NRS 617.453(5) asserts that the "awarding of benefits" is based upon "a period  
19 calculated by multiplying 3 months by the number of full years of his or her employment," but  
20 shall "not to exceed 60 months, which begins with the last date the employment actually worked  
21 in the qualifying capacity."

22 In this case, Respondent was employed for over thirty (30) full years of qualifying  
23 capacity from his July 20, 1981 date of hire through his July 25, 2011 date of retirement. Based  
24 upon NRS 617.453(5), Respondent's thirty (30) full years of qualifying employment is then  
25 multiplied by three (3) months, resulting in ninety (90) months, which exceeded the sixty (60)  
26 month limit.

27 ///

28 ///

///

1 Respondent retired on July 25, 2011. Respondent was diagnosed with prostate cancer  
2 on November 7, 2014 and thereafter filed the necessary documents to perfect a claim for  
3 occupational cancer disease benefits. Thus, Respondent was diagnosed with his disabling cancer  
4 approximately forty (40) months after his retirement, which is within the sixty (60) months  
5 requirement granted by NRS 617.453(5).  
6

7 Therefore, pursuant to NRS 617.453(5), Respondent qualifies for the full "awarding of  
8 benefits pursuant to this section," including the calculation of his average monthly wage for the  
9 purpose of calculating his permanent partial disability award, based upon his disabling cancer  
10 being diagnosed, filed and accepted for workers' compensation benefits at approximately forty  
11 (40) months post-retirement. Thus, Respondent's eligibility for the "awarding of benefits" is  
12 well within the sixty (60) months period that he qualifies for based upon his thirty (30) full years  
13 of qualifying employment.  
14

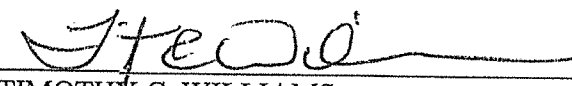
15 The Court has review the Decision and Order filed by the Appeals Officer on April 19,  
16 2018. In paragraph 16, the Appeals Officer found, "[t]hat the evidence supports Claimant's  
17 entitlement to partial disability compensation benefits on the grounds that neither Howard nor  
18 applicable statute disqualifies claimants from those benefits." In addition, Respondent relied on  
19 NRS 617.453(5) which permits the "awarding of benefits" and creates a rebuttable presumption  
20 for disabling cancer diagnosed after termination of employment, within a period not to exceed  
21 sixty (60) months after the last date of employment. Thus, the award of benefits based on the  
22 period calculated by multiplying three months by the number of full years of employment is  
23 under Nevada Law and specifically for firefighters who suffer from cancer as an occupational  
24 disease.  
25

26  
27 ///  
28

Greenman Goldberg Raby Martinez, P.A.  
ACCIDENT INJURY ATTORNEYS

1 In light of the foregoing, and the applicable of NRS 233B.140, Petitioner's Motion for  
2 Stay Pending Supreme Court Appeal shall be DENIED.

3 Dated this 22 day of August, 2019.

6   
7 TIMOTHY C. WILLIAMS  
8 DISTRICT COURT JUDGE CF

9 Submitted by:

10 GREENMAN GOLDBERG RABY & MARTINEZ

11   
12  
13 LISA M. ANDERSON, ESQ.

14 Nevada Bar No. 004907

15 THADDEUS J. YUREK, III, ESQ.

16 Nevada Bar No. 011332

17 2770 South Maryland Parkway

18 Suite 100

19 Las Vegas, Nevada 89109

20 (702) 384-1616

21 Attorney for Respondent

22 Approved as to form and content:

23 HOOKS MENG & CLEMENT

24 *Unable to acquire  
25 a signature after  
26 multiple attempts.*

27 DALTON L. HOOKS, JR., ESQ.

28 Nevada Bar No. 008121

JOHN A. CLEMENT, ESQ.

Nevada Bar No. 008030

2820 West Charleston Boulevard

Suite C-23

Las Vegas, Nevada 89102

Attorney for Petitioner

1 TROA  
2 APPEALS OFFICE  
2200 S. Rancho Drive Suite 220  
3 Las Vegas NV 89102  
(702) 486-2527  
4

5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 CLARK COUNTY, Self-Insured Employer, )  
8 Petitioner, )

9 vs. )

10 BRENT BEAN, STATE OF NEVADA, )  
NEVADA DEPARTMENT OF )  
11 ADMINISTRATIONS APPEAL OFFICE, )  
12 Respondents. )

Case No.: A-18-773957-J  
Dept. No.: 16  
ROA No.: 1814283-GB  
Appeal No.: 1710715-GB

13 TRANSMITTAL OF RECORD ON APPEAL


14 TO: STEVEN GRIERSON, Clerk of the above-captioned Court:

15 Pursuant to NRS 233B.131, the transmittal of the entire Record on Appeal, in  
16 accordance with the Nevada Administrative Procedure Act (Chapter 233B of the Nevada  
17 Revised Statutes), is hereby made as follows:

18 1. The entire Record herein, including each and every pleading, document, affidavit,  
19 order, decision and exhibit now on file with the Appeal Office, at 2200 S. Rancho Drive Suite  
20 220, Las Vegas, Nevada 89102, under the Nevada Industrial Insurance Act, in the above-  
21 captioned action, including the court reporter's transcripts if available, of the testimony of the  
22 Appeal Officer hearing.

23 2. This Transmittal.

24 DATED this 7th day of June, 2018.

25  
26   
27 Zoe McGough, Legal Secretary II  
28 An Employee of the Hearings Division

DOC001  
00001

JA000396

1 ROA  
2 APPEALS OFFICE  
3 2200 S. Rancho Drive Suite 220  
4 Las Vegas NV 89102  
5 (702) 486-2527

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 CLARK COUNTY, Self-Insured Employer, )

9 Petitioner, )

10 vs. )

11 BRENT BEAN, STATE OF NEVADA, )  
12 NEVADA DEPARTMENT OF )  
13 ADMINISTRATIONS APPEAL OFFICE, )

14 Respondents. )

Case No.: A-18-773957-J

Dept. No.: 16

ROA No.: 1814283-GB

Appeal No.: 1710715-GB

15 RECORD ON APPEAL IN ACCORDANCE WITH THE  
16 NEVADA ADMINISTRATIVE PROCEDURE ACT

17 BRENT BEAN  
18 3405 AMISH AVE  
19 N LAS VEGAS NV 89031

20 LISA M ANDERSON ESQ  
21 GREENMAN GOLDBERG RABY & MARTINEZ  
22 601 S NINTH ST  
23 LAS VEGAS NV 89101

24 CLARK COUNTY RISK MGMT  
25 ATTN ERIN DEFRATES  
26 500 S GRAND CENTRAL PKWY 5TH FL  
27 LAS VEGAS NV 89106

28 DALTON HOOKS JR ESQ  
HOOKS MENG SCHAAAN & CLEMENT, PLLC  
2820 W CHARLESTON BLVD STE C23  
LAS VEGAS NV 89102

CORVEL CORPORATION  
P O BOX 61228  
LAS VEGAS NV 89160-1228

DOC002  
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**INDEX**

**ROA NUMBER: 1814283-GB**  
**Appeal No.: 1710715-GB**

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RECORD ON APPEAL IN ACCORDANCE WITH THE NEVADA ADMINISTRATIVE PROCEDURE ACT	002	00002
DECISION AND ORDER OF APPEALS OFFICER GEORGANNE BRADLEY FILED APRIL 19, 2018	003	00003-00010
SUBSTITUTION OF ATTORNEYS FILED MARCH 15, 2018	004	00011-00013
CORRESPONDENCE FROM DALTON HOOKS TO APPEALS OFFICER GEOGANNE BRADLEY (SENT VIA EMAIL) DATED FEBRUARY 27, 2018	005	00014
CORRESPONDENCE ( <b>PROPOSED DECISION AND ORDER</b> ) FROM LISA ANDERSON ESQ. TO DALTON HOOKS JR ESQ. FILED FEBRUARY 12, 2018	006	00015
CORRESPONDENCE ( <b>DECISION LETTER</b> ) FROM APPEALS OFFICER GEORGANNE BRADLEY TO LISA ANDERSON ESQ. DATED JANUARY 8, 2018	007	00016-00018
CLAIMANT'S REPLY BRIEF FILED DECEMBER 11, 2017	008	00019-00023
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ROA NUMBER: 1814283-GB  
Appeal No.: 1710715-GB

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CLAIMANT'S HEARING MEMORANDUM FILED APRIL 26, 2017	014	00055-00060
CLAIMANT'S EVIDENCE PACKAGE (CLAIMANT'S EXHIBIT 1, MARKED BUT NOT ADMITTED) FILED APRIL 26, 2017	015	00061-00138
SELF-INSURED EMPLOYER PRODUCTION OF RELATED DOCUMENTS EMPLOYER'S EXHIBIT A, MARKED BUT NOT ADMITTED) FILED APRIL 24, 2017	016	00139-00184
NOTICE OF APPEAL AND ORDER TO APPEAR FILED DATED MARCH 28, 2017	017	00185-00190
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FILED

APR 19 2018

BEFORE THE APPEALS OFFICER

APPEALS OFFICE

In the Matter of the Contested  
Industrial Insurance Claim of:

Claim No. : 0583WC150000098

Appeal No. : 1710715-GB

BRENT BEAN

Claimant.

DECISION AND ORDER

The above-referenced matter came on for hearing before Appeals Officer GEORGANNE W. BRADLEY, ESQ. Claimant, BRENT BEAN (hereinafter referred to as "Claimant"), was represented by counsel, THADDEUS J. YUREK III, ESQ. and LISA M. ANDERSON, ESQ. of the law firm GREENMAN, GOLDBERG, RABY & MARTINEZ. The Employer, CLARK COUNTY FIRE DEPARTMENT (hereinafter referred to as "Employer") and the Insurer, CORVEL (hereinafter referred to as "Insurer"), were represented by DALTON L. HOOKS, JR., ESQ. of the law firm ALVERSON TAYLOR MORTENSEN & SANDERS.

On January 24, 2016, the Insurer notified Claimant that they were not offering a permanent partial disability award. The Insurer's rationale was that Claimant was not entitled to any compensation benefits, including permanent partial disability, for his claim for occupationally related cancer because he was retired when the claim was filed. Claimant appealed that determination to the Hearing Officer, who affirmed the Insurer's determination. Claimant timely appealed the Hearing Officer's decision.

After considering the arguments of counsel and reviewing the documentary evidence herein, including the written briefs submitted by the parties, the Appeals Officer finds and decides as follows:

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Greenman Goldberg Raby Martinez  
ATTORNEYS  
ACCIDENT INJURY ATTORNEYS



FINDINGS OF FACT

- 1  
2 1. That Claimant retired as a firefighter with the Clark County Fire Department on July 25,  
3 2011.
- 4  
5 2. That on October 15, 2014, Claimant completed blood work that revealed elevated  
6 prostate specific antigen (PSA) levels. Claimant came under the care of Dr. David Ludlow for  
7 his prostate condition.
- 8  
9 3. That Claimant was diagnosed with malignant neoplasm of prostate and underwent a  
10 prostatectomy on February 24, 2015. Claimant was subsequently declared medically stable and  
11 ratable. Dr. Ludlow opined that Claimant would require ongoing medication for erectile  
12 dysfunction following claim closure. Dr. Ludlow confirmed that the medication was needed as  
13 a direct result of the prostate cancer.
- 14  
15 4. That on November 2, 2016, Dr. Charles Quaglieri evaluated Claimant for permanent  
16 partial disability evaluation. Dr. Quaglieri concluded that Claimant qualified for thirty-nine  
17 percent (39%) whole person impairment as a result of the occupationally related prostate cancer  
18 condition. Claimant was granted sixteen percent (16%) whole person impairment for the  
19 prostatectomy, ten percent (10%) whole person impairment for incontinence and twenty percent  
20 (20%) whole person impairment for loss of sexual function.
- 21  
22 5. That on November 30, 2016, Claimant notified the Insurer that Dr. Quaglieri had  
23 miscalculated the impairment and that the correct whole person impairment sum was forty  
24 percent (40%). For that reason, the Insurer was asked to offer Claimant a forty percent (40%)  
25 whole person impairment award.
- 26  
27 6. That on November 30, 2016, the Insurer was asked to authorize ongoing erectile  
28 dysfunction medication following claim closure.

1 7. That on December 1, 2016, the Insurer notified Claimant that there appeared to be a  
2 calculation error in Dr. Quaglieri's disability report and was seeking clarification.

3 8. That on January 4, 2017, Dr. Quaglieri issued a statement acknowledging his calculation  
4 error and confirmed that Claimant's whole person impairment was forty percent (40%).  
5

6 9. That on January 9, 2017, an electronic mail communication was sent to the Insurer  
7 outlining that the Attorney General Opinion 2002-28 established that firefighter's "date of  
8 separation from service in such capacity and wages earned immediately prior to such date of  
9 separate form the basis upon which disability benefits are to be calculated."  
10

11 10. That on January 24, 2017, the Insurer notified Claimant that they were declining to offer  
12 a permanent partial disability award because the claim for occupational disease was filed after  
13 his retirement. The Insurer concluded that Claimant was therefore not entitled to receive any  
14 compensation benefits, including permanent partial disability, for his industrial injury.  
15

16 11. That Claimant appealed that determination to the Hearing Officer. The parties  
17 subsequently agreed to transfer the matter directly to the Appeals Officer for final administrative  
18 decision.

19 12. That this Court ordered the parties to submit briefs concerning the legal question as to  
20 whether Howard v. City of Las Vegas, 120 P.3d 410 (2005) disqualified Claimant from being  
21 entitled to permanent partial disability compensation benefits.  
22

23 13. That Claimant submitted his Opening Brief on the application of Howard on September  
24 20, 2017.

25 14. That the Insurer/Employer submitted their Answering Brief on the application of  
26 Howard on October 30, 2017.  
27

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DWB

1 15. That Claimant submitted his Reply Brief on the application of Howard on December 11,  
2 2017.

3 16. That the evidence supports Claimant's entitlement to permanent partial disability  
4 compensation benefits on the grounds that neither Howard nor any applicable <sup>statute</sup> ~~status~~ disqualifies  
5 Claimant from those benefits.  
6

7 17. That these findings of fact are based upon the credible and substantial evidence within  
8 the record.  
9

10 18. That any Findings of Fact more appropriately deemed a Conclusion of Law shall be so  
11 deemed, and vice versa.

12 CONCLUSIONS OF LAW

13 1. Claimant retired from the Clark County Fire Department effective July 25, 2011. On or  
14 about December 22, 2014, Claimant filed a claim for compensation under NRS 617. Effective  
15 January 13, 2015, the Insurer issued its determination accepting the claim for prostate cancer.  
16 Following treatment, Claimant was found to have a forty percent (40%) whole person  
17 impairment as a result of his occupationally related prostate cancer. The Insurer declined to  
18 offer the award because the claim was made after retirement. The Insurer contends that Claimant  
19 is only entitled to the payment of medical benefits and not any monetary compensation.  
20

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2. NRS 617.452(4) provides in pertinent part that compensation awarded to a firefighter or his or her dependents for disabling cancer pursuant to this section must include full reimbursement for related expenses incurred for medical treatments, surgery and hospitalization and the compensation provided in chapters 616A to 616D, inclusive of NRS for the disability or death. Subsection 5 of the statute makes it clear that the firefighter's retirement prior to submitting a claim does not bar compensation for his claim simply because he has retired. The rebuttable presumption provided by subsection 5 applied to disabling cancer diagnosed after the termination of his employment. Also relevant is NRS 617.430(1), which provides in pertinent part that every employee who is disabled or dies because of an occupational disease, or the dependents of an employee whose death is caused by an occupational disease, is entitled to the compensation provided by NRS 616A-D for temporary disability, permanent disability, or death, as the facts may warrant, subject to the modifications mentioned in Chapter 617.

3. The Nevada Supreme Court case of Howard considered the extent to which a firefighter who retires and, thereafter, suffers a heart attack, is entitled to temporary total disability benefits. The Court held that although Nevada law is clear that retired firefighters who sustain a disability post-retirement are entitled to medical benefits, the Legislature's method for calculating compensation precludes an award for temporary total disability benefits when the retired firefighters are not earning wages at the time of the disability. In Howard, the specific issue was whether the retired firefighter, who submitted a claim for heart disease, was entitled to temporary total disability benefits.

4. For the reasons set forth in Claimant's Opening and Reply Briefs, this Court finds and concludes that Claimant is entitled to receive an otherwise proper permanent partial disability award despite the fact that he was retired when his claim was filed and permanent disability

1 determined to exist. NRS 617.453(4) provides that a firefighter with a cancer claim is entitled  
2 to not only medical benefits but also disability benefits to which is entitled pursuant to NRS  
3 616A-D. Nothing set forth in NRS 616C.490 or the regulations governing permanent partial  
4 disability provides that a person is not entitled to permanent partial disability benefits once he is  
5 no longer working. NRS 616C.390 expressly provides that a retired person, upon reopening,  
6 may not receive temporary total disability benefits or vocational rehabilitation benefits. The  
7 Legislature could have, but did not, exclude permanent partial disability benefits from the  
8 benefits to which a claimant is entitled after retirement. Unlike temporary total disability  
9 benefits, which are intended to compensate the injured worker during the temporary period in  
10 which he is not working, permanent partial disability benefits are intended to compensate the  
11 injured worker for permanent physical impairment. This Court therefore declines to extend the  
12 Supreme Court's holding in Howard to permanent partial disability awards.  
13  
14

15 5. There is no statute, regulation, or case law that provides that a retired firefighter with an  
16 accepted occupational disease claim may be deprived of an otherwise properly determined  
17 permanent partial disability award. Furthermore, no other grounds for denial were asserted or  
18 argued by the Insurer, this Court finds Dr. Quaglieri's permanent partial disability rating  
19 evaluation to be thorough and properly performed.  
20

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6. For the reasons stated in Claimant's written briefs, the Appeals Officer concludes that the permanent partial disability award shall be calculated based upon the wages the Claimant was earning at the time of his retirement from the Clark County Fire Department. The Nevada Supreme Court's decision in Howard does not address permanent partial disability awards and, as stated above, the Appeals Officer declines to extend the Court's holding in that case to permanent partial disability awards; the Court's holding was not based on NRS 617.453 or 616C.490 which are applicable in the instant case. To conclude that the Claimant's PPD award must be calculated based on his wages on the date of disability (i.e., zero) would, from a practical perspective, render subsection (5) of NRS 617.453 meaningless. By its very terms, subsection (5) refers to cancer diagnosed after the firefighter is no longer employed; the "date of disability" would always be post-retirement for purposes of awarding of benefits pursuant to NRS 617.453 unless evidence to rebut the presumption is presented.

**ORDER**

IT IS HEREBY ORDERED that the Insurer's January 24, 2017 determination is REVERSED. The Insurer is REMANDED to offer Claimant the forty percent (40%) whole person permanent partial disability award as found by Dr. Quaglieri.

IT IS SO ORDERED this 19<sup>th</sup> day of April, 2018.

Georgianne W. Bradley  
Georgianne W Bradley, Esq.  
APPEALS OFFICER

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

Greenman Goldberg Raby Martinez /  
ACCIDENT INJURY ATTORNEYS

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing was duly mailed, postage prepaid OR placed in the appropriate addressee file maintained by the Division, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102, to the following:

BRENT BEAN  
3405 AMISH AVENUE  
NORTH LAS VEGAS, NEVADA 89031

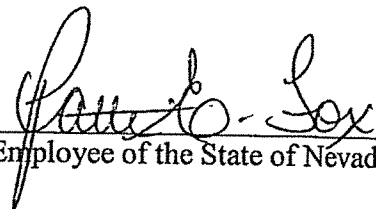
LISA M. ANDERSON, ESQ.  
GREENMAN GOLDBERG RABY & MARTINES  
601 SOUTH NINTH STREET  
LAS VEGAS, NEVADA 89101

DALTON L. HOOKS, JR., ESQ.  
ALVERSON TAYLOR MORTENSEN & SANDERS  
6605 GRAND MONTECITO PARKWAY  
SUITE 200  
LAS VEGAS, NEVADA 89149

SANDRA SWICKARD  
CLARK COUNTY RISK MANAGEMENT  
500 SOUTH GRAND CENTRAL PARKWAY  
SUITE 200  
LAS VEGAS, NEVADA 89106

CORVEL  
P.O. BOX 61228  
LAS VEGAS, NEVADA 89160

DATED this 19th April day of ~~February~~, 2018.

  
Employee of the State of Nevada

ORIGINAL

DALTON L. HOOKS, JR., ESQ., Nevada Bar #8121  
HOOKS MENG SCHAAN & CLEMENT  
2820 W. Charleston Blvd., Ste. C-23  
Las Vegas, NV 89102  
702-766-4672 (Phone)  
702-919-4672 (Fax)  
Attorneys for Self-Insured Employer CLARK COUNTY  
and TPA CORVEL

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
APPEALS OFFICE

STATE OF NEVADA  
DEPT. OF ADMINISTRATION  
APPEALS OFFICE  
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AND  
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In the Matter of the Contested  
Insurance Claim

of

BRENT BEAN  
3405 AMISH AVE.  
N. LAS VEGAS, NV 89031

APPEAL NO.: 1710715-GB  
HEARING NO.: 1708666-SE  
CLAIM NO.: 0583-WC-15-0000098

Employer:

CLARK COUNTY RISK MGMT  
500 S GRAND CENTRAL PKWY 5<sup>TH</sup> FL  
LAS VEGAS NV 89106

SUBSTITUTION OF ATTORNEYS

Self-Insured Employer, CLARK COUNTY and the Third-Party Administrator, CorVel,  
hereby substitutes DALTON L. HOOKS, JR. ESQ., of the law firm of HOOKS, MENG,  
SCHAAN & CLEMENT, as their attorney of record in the above-entitled action in the place and  
stead of the law firm of ALVERSON, TAYLOR, MORTENSEN & SANDERS.

Dated this 1st day of MARCH, 2018.

CLARK COUNTY and CORVEL

By:

Sign Name Kimberly Buchanan

Print Name Kimberly Buchanan

AUTHORIZED REPRESENTATIVE

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1

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HOOKS, MENG, SCHAAN & CLEMENT



CONSENT TO SUBSTITUTION OF ATTORNEYS

The undersigned hereby consents to the substitution of DALTON L. HOOKS, JR. ESQ., of the law firm of HOOKS, MENG, SCHAAAN & CLEMENT, as attorney for the Self-Insured Employer, CLARK COUNTY and the Third-Party Administrator, CorVel, in place and stead of ALVERSON, TAYLOR, MORTENSEN & SANDERS.

Dated this 13<sup>th</sup> day of MAY, 2018.

HOOKS, MENG, SCHAAAN & CLEMENT  
By:

  
DALTON L. HOOKS, JR., ESQ.

CONSENT TO SUBSTITUTION OF ATTORNEYS

The undersigned hereby acknowledges that I have reviewed, consent, and agree to the foregoing Substitution of Attorneys in the above-entitled action.

Dated this 08<sup>th</sup> day of FEB, 2018.

ALVERSON, TAYLOR, MORTENSEN & SANDERS  
By:

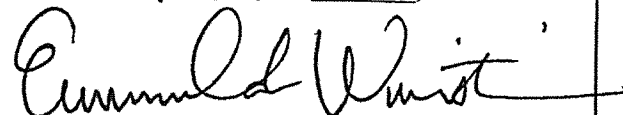
  
DALTON L. HOOKS, JR., ESQ.,

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the date shown below, a true and correct copy of the foregoing SUBSTITUTION OF ATTORNEYS was duly served on the following as indicated:

<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Mail <input type="checkbox"/> Personal Delivery	Brent Bean c/o Lisa Anderson, Esq. Greenman, Goldberg, Raby & Martinez 601 South Ninth Street Las Vegas, NV 89101
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Lisa Anderson, Esq. Greenman, Goldberg, Raby & Martinez 601 South Ninth Street Las Vegas, NV 89101
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Mail <input type="checkbox"/> Personal Delivery	Clark County Risk Management 500 S Grand Central Pkwy 5 <sup>th</sup> Floor Las Vegas, NV 89106
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Leslie Ribadeneira CorVel Corporation PO Box 61228 Las Vegas, NV 89160
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Mail <input type="checkbox"/> Personal Delivery	Alverson, Taylor, Mortensen & Sanders 6605 Grand Montecito Pkwy., Suite 200 Las Vegas, NV 89149

Dated this 15<sup>th</sup> day of March, 2018.



An employee of HOOKS, MENG,  
SCHAAAN & CLEMENT

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS

J. BRUCE ALVERSON  
ERIC TAYLOR  
DAVID J. MORTENSEN  
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KURT R. BONDS  
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ADAM R. KNECHT  
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JACQUELYN J. KELLEY  
MAZYAR MOMENI

OF COUNSEL  
JOHN F. WALES  
JACK C. CHERRY  
(1932 - 2015)

February 27, 2018

VIA EMAIL

Georgianne Bradley, Esq.  
Appeal Officer  
Department of Administration  
2200 S. Rancho Drive, Ste. 220  
Las Vegas, NV 89102

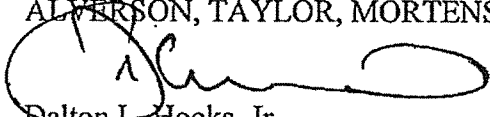
Re:    Claimant:            Brent Bean  
      Employer:          Clark County  
      Claim No.:        0583-WC-15-0000098  
      Hearing No.:       1708666-SE  
      Appeal No.:       1710715-GB  
      Date of Injury:    11/07/14  
      Our File No.:     24492

Dear Ms. Bradley:

I do have one objection to the proposed Decision and Order in the above matter. Under paragraph 6 of the Conclusion of Law it states that the Insurer shall calculate the PPD award based upon the wages the Claimant was earning at the time of his retirement. We object to the inclusion of this paragraph. This is not present as either a finding or conclusion represented in your decision letter dated 01/08/18. Moreover, it is the Self-Insured Employer's position that this instruction is not reflected in any relevant statute. Accordingly, we ask that the Decision and Order be modified to strike this paragraph.

Very truly yours,

ALVERSON, TAYLOR, MORTENSEN & SANDERS

  
Dalton L. Hooks, Jr.  
JAC

cc: Lisa Anderson

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February 12, 2018

Dalton L. Hooks, Jr., Esq.  
ALVERSON TAYLOR MORTENSEN & SANDERS  
6605 Grand Montecito Parkway  
Ste. 200  
Las Vegas, Nevada 89149

Re: Claimant : Brent Bean  
Appeal No. : 1710715-GB  
Claim No. : 0583WC150000098

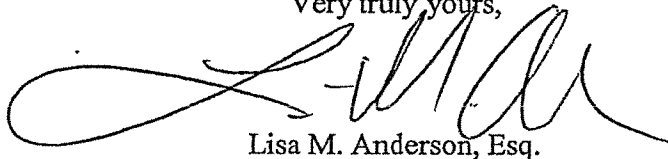
STATE OF NEVADA  
JUDICIAL ADMINISTRATION  
HEARINGS DIVISION  
FEB 12 PM 2:52  
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AND  
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Dear Mr. Hooks:

Enclosed please find the proposed Decision and Order in the above-referenced claim and appeal. Should you have any objections or changes to this document, please notify me within five (5) days, otherwise, I will assume that you have no corrections and will ask the Appeals Officer to sign the Decision and Order.

If you have any questions, please call so that we may discuss the same.

Very truly yours,



Lisa M. Anderson, Esq.

LMA/rw  
Enclosure

cc: Appeals Officer Georganne W. Bradley, Esq. ✓

DOC006

Brian Sandoval  
Governor



Patrick Cates  
Director

Michelle L. Morgando, Esq.  
Acting Senior Appeals Officer

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**STATE OF NEVADA**  
**DEPARTMENT OF ADMINISTRATION**  
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(702) 486-2527 | Fax (702) 486-2555

January 8, 2018

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

**Re: BRENT BEAN**  
**Appeal # 1710715-GB**  
**Employer: Clark County**  
**TPA: Corvel**

Dear Ms. Anderson:

A hearing was scheduled in the above-referenced matter for June 20, 2017. This matter arose from the Claimant's appeal from the TPA's January 24, 2017 notice advising Brent Bean that, despite Dr. Quaglieri's determination that Mr. Bean was entitled to a 40% PPD award, no such award would be offered on the ground that his claim was filed after retirement. The Hearing Officer was bypassed in this case. After carefully considering the written documents admitted into evidence at the hearing<sup>1</sup> and the written briefs submitted by the parties,<sup>2</sup> I have decided that the TPA's determination must be REVERSED.

Brent Bean retired from the Clark County Fire Department effective July 25, 2011. On or about December 22, 2014, Mr. Bean filed a Claim for Compensation under NRS 617. Effective January 13, 2015, the TPA issued its determination accepting the claim for prostate cancer. Following treatment, he was found to have a 40% whole person impairment as a result of his prostate cancer. The TPA declined to offer the award because the claim was made after retirement. The TPA contends that Mr. Bean is only entitled to payment of medical benefits and not any monetary compensation.

<sup>1</sup> Claimant's Exhibit 1 (74 pages) and Employer's Exhibit A (42 pages)

<sup>2</sup> Claimant's Brief, filed September 20, 2017, Self-Insured Employer and Third Party Administrator's Answering Brief, filed October 30, 2017, and Claimant's Reply Brief, filed December 11, 2017

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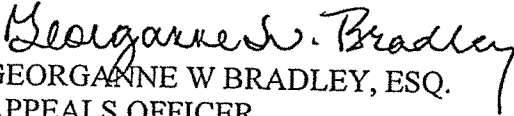
NRS 617.453(4) provides in pertinent part that compensation awarded to a firefighter or his or her dependents for disabling cancer pursuant to this section must include full reimbursement for related expenses incurred for medical treatments, surgery and hospitalization and the compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death. Subsection 5 of the statute makes it clear that the firefighter's retirement prior to submitting a claim does not bar compensation for his claim simply because he has retired. The rebuttable presumption provided by subsection 5 applies to disabling cancer diagnosed after the termination of his employment. Also relevant is NRS 617.430(1), which provides in pertinent part that every employee who is disabled or dies because of an occupational disease, or the dependents of an employee whose death is caused by an occupational disease, is entitled to the compensation provided by NRS 616A-D for temporary disability, permanent disability, or death, as the facts may warrant, subject to the modifications mentioned in Chapter 617.

The Nevada Supreme Court case of *Howard v. City of Las Vegas*, 121 Nev. 691, 120 P.3d 410 (2005), considered the extent to which a firefighter who retires and, thereafter, suffers a heart attack, is entitled to temporary total disability benefits. The Court held that although Nevada law is clear that retired firefighters who sustain a disability post-retirement are entitled to medical benefits, the Legislature's method for calculating compensation precludes an award for temporary total disability benefits when the retired firefighters are not earning wages at the time of the disability. In *Howard*, the specific issue was whether the retired firefighter, who submitted a claim for heart disease, was entitled to TTD benefits.

For the reasons set forth in your opening and <sup>1470</sup>reply briefs, I find and conclude that Mr. Bean is entitled to receive an otherwise proper TTD award despite the fact that he was retired when his claim was filed and permanent disability determined to exist. NRS 617.453(4) provides that a firefighter with a cancer claim is entitled to not only medical benefits but also disability benefits to which is entitled pursuant to NRS 616A-D. Nothing set forth in NRS 616C.490 or the regulations governing permanent partial disability provides that a person is not entitled to PPD benefits once he is no longer working. NRS 616C.390 expressly provides that a retired person, upon reopening, may not receive TTD benefits or vocational rehabilitation benefits. The legislature could have but did not exclude PPD benefits from the benefits to which a claimant is entitled after retirement. Unlike TTD benefits, which are intended to compensate the injured worker during the temporary period in which he is not working, PPD benefits are intended to compensate the injured worker for permanent physical impairment. I therefore decline to extend the Supreme Court's holding in *Howard* to PPD awards. Finding no statute, regulation, or case law that provides that a retired firefighter with an accepted occupational disease claim may be deprived of an otherwise properly determined PPD award, I am reversing the TPA's denial on those grounds. Furthermore, as no other grounds for denial were asserted or argued by the TPA, and as I have reviewed and find Dr. Quaglieri's PPD rating evaluation to be thorough and properly performed, I am remanding this matter with instructions to offer the 40% PPD award to Mr. Bean.

Please prepare a proposed Decision and Order consistent with this letter and your written briefs and serve it on all parties pursuant to NAC 616C.306. I will look for the proposed decision on or before January 23, 2018.

Very truly yours,

  
GEORGANNE W BRADLEY, ESQ.  
APPEALS OFFICER

GB:xx

cc: DALTON L. HOOKS ESQ

**BEFORE THE APPEALS OFFICER**

In the matter of the Contested ) Appeal No: 1710715-GB  
Industrial Insurance Claim of: )  
BRENT BEAN ) Claim No.: 0583WC150000098  
Claimant )

STATE OF NEW YORK  
DEPT. OF ADMINISTRATION  
HEARINGS DIVISION  
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DEC 11 PM 4:41

**CLAIMANT'S REPLY BRIEF**

COMES NOW, Claimant BRENT BEAN (hereinafter "Claimant"), by and through his attorneys, THADDEUS J. YUREK, III, ESQ., and LISA M. ANDERSON, ESQ., of the law firm of GREENMAN, GOLDBERG, RABY & MARTINEZ, and submits the following brief in support of his position at the hearing in this matter.

**LEGAL ARGUMENT**

**1. CLAIMANT DISTINGUISHES THE DIFFERENCE BETWEEN SEEKING TEMPORARY TOTAL DISABILITY BENEFITS FROM PERMANENT PARTIAL DISABILITY BENEFITS WHEN A CLAIM FOR OCCUPATIONAL CANCER IS FILED AFTER RETIREMENT.**

The Employer/Administrator disputes Claimant's argument that permanent partial disability is not a medical benefit. Claimant is not attempting to distinguish medical benefits from disability benefits because it is simply a fact that these two (2) benefits are different. Claimant is NOT asking for wage replacement benefits. Instead, Claimant is requesting that his entitlement for compensation due to the medical incident that happened to him and the ensuing permanent physical condition that resulted in the removal of his prostate.

The Employer/Administrator argues that medical benefits are intended to mean medical treatment, surgery, hospitalization, physical therapy and prescriptions but not disability awards related to the permanent physical damage caused by the occupational disease. They cite the American Medical Association's *Guides to the Evaluation of Permanent Impairment* that

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1 defines disability as "an alteration of the individual's capacity to meet personal, social or  
2 occupational demands or statutory or regulatory requirements because of an impairment." In  
3 this instance, the Employer/Administrator fails to consider what personal and social demands  
4 were contemplated under this standard. Clearly the functionality of the body is certainly  
5 personal and social. It is undeniable that Claimant's is altered as a result of this incident. The  
6 removal of his prostate and the resulting permanent residual effects is an "alteration" of  
7 Claimant's individual capacity to meet his personal, social and/or occupational demands.  
8

9  
10 It was then argued that Howard v. City of Las Vegas, 120 P.3d 410 (2005) analyzed NRS  
11 617.420 and cited in part that "[T]he limitations in this section do not apply to medical benefits,  
12 which must be paid from the date of application for payment of medical benefits." This is  
13 where Claimant argues that NRS 617.455 contemplates that it will be difficult to pinpoint a date  
14 of injury/exposure. So, Claimant's employment is conclusively presumed to be the cause of the  
15 disease. Thus, the date of application is the date he last worked for these purposes.  
16

17 The Employer/Administrator further argued that Howard precludes the payment of  
18 permanent partial disability compensation if Claimant is not earning any wages when a claim  
19 for benefits is filed. While this is true for temporary total disability compensation, the  
20 Employer/Administrator cannot say that Claimant has lost no use or function of his body for his  
21 non work related activities. Claimant is left disabled, both as to work and as to life in general.  
22 The workers' compensation system contemplates these losses and provides separately that  
23 Claimant is entitled to permanent partial disability for his physical damage. In this case,  
24 Claimant had his prostate removed as a result of cancer and has suffered permanent residual  
25 dysfunction.  
26  
27  
28

1 NRS 617.455 is clearly meant to compensate this Claimant over his lifetime for any lung  
2 or heart disease he suffers after fulfilling his initial length of employment obligation. The intent  
3 is that Claimant be as fully compensated as possible during and after his service. The  
4 Employer/Insurer diminishes this intent by excluding the portion of benefits designed to  
5 compensate for permanent damage. NRS 617.455 is designed to compensate for exposure while  
6 employed and extends coverage after employment.  
7

8 Despite what the Employer/Administrator would like for this Court to believe, Howard  
9 simply addressed the issue of entitlement to temporary total disability compensation for lost  
10 wages when a claimant was retired and not earning wages at the time the claim was filed.  
11 Howard was never intended to be applied to issues involving permanent partial disability as that  
12 issue does not involve disability compensation related to lost wages. As such, there is no  
13 available case law to adequately and fairly compensate Claimant for the permanent physical  
14 damage caused by the removal of his prostate and the resulting dysfunction.  
15  
16

17 In contrast, the Attorney Generals' 2002 opinion clearly addressed the identical issue  
18 presented in this case. Specifically, the Attorney General concluded that a "firefighter's or  
19 police officer's date of separation from service in such capacity and wages earned immediately  
20 prior to such date of separation form the basis upon which disability benefits are to be  
21 calculated." The Attorney General determined that this calculation method would prevent "an  
22 absurd result" of using "a significantly higher, or lower, salary in another (post-retirement)  
23 occupation" when calculating disability benefits. If the Employer/Administrator's position is  
24 allowed to stand, then this case will effectively result in the "absurd" outcomes in the Attorney  
25 General sought to prevent.  
26  
27  
28

1 In conclusion, Claimant's wages at the time of his retirement must be utilize in the  
2 calculation of his permanent partial disability. Arguing that Claimant qualifies for forty percent  
3 (40%) whole person impairment for his occupationally related cancer condition and then  
4 attempting to apply a standard intended solely for the payment of temporary total disability  
5 compensation related to lost wages is clearly inappropriate and insulting to the Claimant, who  
6 has suffered significant permanent impairment, and would result in an absurd outcome that goes  
7 against the clear intentions of the Nevada legislature. For that reason, the  
8 Employer/Administrator must be ordered to calculate Claimant's permanent partial disability  
9 award using the wages from the date of his retirement.  
10

11 Dated this 14<sup>th</sup> day of December, 2017.  
12

13 GREENMAN, GOLDBERG,  
14 RABY & MARTINEZ

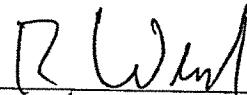
15  
16 By 

17 LISA M. ANDERSON, ESQ.  
18 Nevada Bar No. 004907  
19 601 South Ninth Street  
20 Las Vegas, Nevada 89101  
21 Attorneys for Claimant  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

I do hereby certify that on the 11<sup>th</sup> day of December, 2017, I caused a true and correct copy of the foregoing, **CLAIMANT'S REPLY BRIEF** to be duly mailed, postage prepaid, hand delivered **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, Appeals Office, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102, to the following:

Dalton L. Hooks, Jr., Esq.  
ALVERSON TAYLOR MORTENSEN & SANDERS  
6605 Grand Montecito Parkway  
Suite 200  
Las Vegas, Nevada 89149

  
An Employee of GREENMAN, GOLDBERG,  
RABY & MARTINEZ

ORIGINAL

DALTON L. HOOKS, JR., ESQ., Nevada Bar #8121  
JOHN A. CLEMENT, ESQ., Nevada Bar #8030  
ALVERSON, TAYLOR, MORTENSEN & SANDERS  
6605 Grand Montecito Pkwy., Ste. 200  
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(702) 384-7000  
Attorneys for the Self-Insured Employer Clark County  
And TPA, CorVel

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
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STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
APPEALS OFFICE

In the Matter of the Contested  
Insurance Claim

APPEAL NO.: 1710715-GB  
HEARING NO.: 1708666-SE  
CLAIM NO.: 0583-WC-15-0000098

of

Employer:

BRENT BEAN  
3405 AMISH AVE.  
N. LAS VEGAS, NV 89031

CLARK COUNTY RISK MGMT  
500 S GRAND CENTRAL PKWY 5<sup>TH</sup> FL  
LAS VEGAS NV 89106

**SELF INSURED EMPLOYER AND THIRD PARTY ADMINISTRATOR'S  
ANSWERING BRIEF**

COMES NOW the Self-Insured Employer, CLARK COUNTY ("SIE"), and the Third-  
Party Administrator, CORVEL ("TPA") by and through its attorney, DALTON L. HOOKS, JR.,  
ESQ., and submits its Answering Brief concerning the instant matter.

**I.  
ISSUE PRESENTED**

**Whether A Retiree, Earning No Wage, Is Entitled To A Permanent Partial  
Disability Award In Light Of Existing Case Law And Statutory Authority.**

**II.  
RELEVANT FACTS**

The Claimant, BRENT BEAN, retired from the CLARK COUNT FIRE DEPT.  
("CCFD") effective 07/25/11. See SIE's Production of Related Documents at pg. 4. According to  
the C-4, on or about 11/07/14 the Claimant was diagnosed with prostate cancer, and thereafter

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LAS VEGAS, NV 89149  
(702) 384-7000

1 completed his claim on 12/22/14. *See id* at pg. 1. Effective 01/13/15, the SIE issued its  
2 determination accepting the claim for prostate cancer. *See id* at pg. 37.

3 The Claimant underwent a prostatectomy on 02/25/15. *See id* at pp. 9-21. After  
4 appropriate follow-up, on 06/24/16, Dr. Ludlow released the Claimant as MMI. *See id* at pp. 24.  
5 Thereafter, the Claimant obtained an evaluation with a rating physician off the DIR rotating list.  
6 *See id* at pg. 26. Following an evaluation on 11/02/16 with Dr. Charles E. Quaglieri, the  
7 Claimant was found to have a 40% whole person impairment as a result of his prostate cancer.  
8 *See id* at pp. 27-32. The Claimant, via counsel, requested the SIE offer a 40% permanent partial  
9 disability award as recommended by Dr. Quaglieri. *See id* at pg. 36.

11 The current controversy involves the SIE's 01/24/17 determination which declined to  
12 offer the permanent partial disability award. As specified in that letter, the SIE indicated that  
13 because the claim was made after retirement, and pursuant to NRS 617.453(4)(a), the Claimant  
14 was not entitled to receive any monetary compensation for his occupational disease, other than  
15 payment of medical benefits. *See id* at pg. 39.

17 **III.**  
18 **LEGAL ARGUMENT**

19 **A. Supreme Court Case Law Precludes The Claimant From Receiving Disability**  
20 **Benefits Following Retirement, Therefore The SIE's Determination Declining To**  
21 **Offer The PPD Award Was Proper.**

22 The issue of payment of disability benefits in the case of an occupational disease claimed  
23 post-retirement, has been addressed by the Nevada Supreme Court in *Howard v. City of Las*  
24 *Vegas*, 121 Nev. 691, 120 P.3d 410 (2005). Therein, the Court concludes that "a retired Nevada  
25 claimant, is effectively denied disability benefits because his weekly wage calculation amounts  
26 to zero." *See id*. Although the Claimant seeks to distinguish this decision as applied to the issue  
27 of permanent partial disability benefits, the *Howard* case remains controlling.  
28

In *Howard*, Oscar Howard was a retired firefighter who attempted to assert a claim for disability benefits resulting from a claim for heart disease. The Nevada Supreme Court concluded that when a retired claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive medical benefits but may not receive any disability compensation if the claimant is not earning any wages at the time of his/her application. *Howard v. City of Las Vegas*, 120 P.3d 410, 411.

**1. The Claimant's Argument That Permanent Partial Disability Amounts to A Medical Benefit is Unsupportable.**

Consistent with NRS 617.453, payment of medical treatment expenses is proper when the Claimant has been impacted by a disabling cancer. That statute states in pertinent part:

**NRS 617.453 Cancer as occupational disease of firefighters.**

4. Compensation awarded to the employee or his or her dependents for disabling cancer pursuant to this section must include:

(a) Full reimbursement for related expenses incurred for **medical treatments**, surgery and hospitalization in accordance with the schedule of fees and charges established pursuant to NRS 616C.260 or, if the insurer has contracted with an organization for managed care or with providers of health care pursuant to NRS 616B.527, the amount that is allowed for the treatment or other services under that contract; and

(b) The compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death.

See NRS 617.453(4) (2015). The SIE does not contest its responsibility for payment of the expenses incurred for treatment of the Claimant's prostate cancer, and in fact has already done so.

The Claimant acknowledges that in *Howard*, the Court found that an award of temporary total disability benefits was precluded for retired firefighters. In attempting to distinguish the *Howard* case, the Claimant argues that the Court did not curtail an entitlement to medical benefits, which he asserts, includes a permanent partial disability award for permanent physical disfiguration. See Claimant's Brief at pg. 2. This logical leap is unsupportable for a variety of

1 reasons.

2 The American Medical Association's *Guides to the Evaluation of Permanent*  
3 *Impairment*, Fifth Edition, which has been adopted under NRS 616C.110, defines **disability** as  
4 an alteration of the individual's capacity to meet *personal, social or occupational demands* or  
5 statutory or regulatory requirements because of an impairment. Nowhere in the Nevada  
6 Industrial Insurance Act is a Claimant's permanent partial disability defined as a **medical**  
7 **benefit**. Clearly medical benefit contemplates medical treatments, surgery, hospitalization,  
8 physical therapy and prescriptions, not disability awards. The Claimant's argument is a non  
9 sequitur.

11 The Claimant additionally cites to NRS 490(5) for the fact that permanent partial  
12 disability is separate from temporary total disability, however this provision merely addresses the  
13 methodology of a permanent partial disability evaluation, and does nothing to bolster the  
14 argument that a rating evaluation, or a permanent partial disability award, amounts to a medical  
15 benefit.

17 **2. As A Retiree, the Claimant Has No Wages For Calculation Of Disability**  
18 **Benefits. As Is The Case With TTD Benefits, There Is No PPD Award Which**  
19 **The Claimant Is Entitled To.**

20 Within NRS 617, under the section addressing compensation for disability and death,  
21 NRS 617.430 provides:

22 **NRS 617.430 Eligibility; limitations.**

23 1. Every employee who is disabled or dies because of an occupational disease,  
24 as defined in this chapter, arising out of and in the course of employment in the  
25 State of Nevada, or the dependents, as that term is defined in chapters  
26 616A to 616D, inclusive, of NRS, of an employee whose death is caused by an  
27 occupational disease, are entitled to the compensation provided by those chapters  
28 for temporary disability, permanent disability or death, as the facts may warrant

See NRS 617.430 (2015). This entitlement must be specifically addressed in light of the  
Claimant's status as a retiree.



1 While the issue in *Howard* was the denial of Temporary Total Disability Benefits, the  
2 logic applied in reaching that conclusion is applicable to the instant issue. The *Howard* Court  
3 began its analysis with NRS 617.420 which states:

4 No compensation may be paid under this chapter for disability which does not  
5 incapacitate the employee for at least 5 cumulative days within a 20-day period  
6 from earning full wages, but if the incapacity extends for 5 or more days within a  
7 20-day period, the compensation must then be computed from the date of  
disability. The limitations in this section do not apply to medical benefits, which  
must be paid from the date of application for payment of medical benefits.

8 See NRS 617.420 (2015). The Court held that when a retired claimant becomes eligible for  
9 occupational disease benefits, the claimant is entitled to receive medical benefits but may not  
10 receive any disability compensation if the claimant is not earning any wages. *See Howard*, 120  
11 P.3d at 412. The Court's rationale for this ruling is based on two reasons. First, retirement  
12 benefits are not included in NRS 617.050's definition of "compensation," and no other provision  
13 suggests that retirement benefits should be included within the meaning of wages.<sup>1</sup> Second, a  
14 retiree has usually lost no salary or wages due to the impairment. *Id.*

15  
16 Additional support for this analysis, and the Court's ruling, can be gleaned from NRS  
17 616C.390(6) which denies temporary total disability or vocational rehabilitation benefits where a  
18 claimant has retired. As the Court reasoned in *Howard*, there should be no award for disability  
19 benefits where there are no "wages" lost. In fact, a retired claimant maintains his exact same  
20 income, unaffected by his occupational injury or disease. In the instance of a permanent partial  
21 disability award, going back to the AMA Guides definition, there is no disability to occupational  
22 demands where there is no occupational income lost.

23  
24 The *Howard* Court also comments that the date of disability for Mr. Howard was the date  
25 of his heart attack, and the date immediately preceding the occupational disease is the date from  
26

27  
28 <sup>1</sup> See NAC 616C.423 (describing items included in average monthly wage but omitting  
retirement benefits.)

1 which disability benefits are properly calculated. *See Howard*, 120 P.3d at 412. *See also Mirage*  
2 *v. State. Dept. of Administration*, 871 P.2d 317, 319. In other words, disability benefits trigger at  
3 the time of disablement. This has been addressed in NRS 617.060 as well as NRS 617.420 (cited  
4 previously above). NRS 617.060 provides:

5 **617.060 “Disablement” and “total disablement” defined.**

6 “Disablement” and “total disablement” are used interchangeably in this  
7 chapter and mean the event of becoming physically incapacitated by reason of  
8 an occupational disease arising out of and in the course of employment as  
9 defined in this chapter *from engaging, for remuneration or profit, in any*  
10 *occupation for which he or she is or becomes reasonably fitted by education,*  
11 *training or experience.*

12 *See* NRS 617.060 (2015) (emphasis added). The Nevada Supreme Court has considered the issue  
13 of disablement as it relates to occupational diseases and held:

14 [I]n order to become eligible for disability benefits, the employee must be  
15 incapacitated by the occupational disease for a least five cumulative days  
16 within a twenty-day period **earning full wage.**

17 *See Mirage v. State Dept. of Admin.*, 110 Nev. 257, 260, 871 P.2d 317 (1994); *see also Manwill*  
18 *v. Clark County*, 123 Nev. 238, 244 (2007); *Employers Ins. Co. of Nevada v. Daniels*, 122 Nev.  
19 1009, 1014 (2006). Moreover, the Court has stated:

20 An employee is not entitled to compensation from the mere contraction of an  
21 occupational disease. Instead, compensation ... flows from a disablement  
22 resulting from such a disease.

23 *See Daniels*, 122 Nev. at 1027 (internal quotations omitted). Thus, in looking at the standards of  
24 disablement, they are focused on the fact that there must be a loss of ability in earning a wage  
25 from an occupation. The Court has indicated in *Mirage v. State Dept. of Admin.*, that for  
26 occupational disease cases compensation in terms of average monthly wage must be computed  
27 from the date of disability. Only after the employee becomes disabled does it become necessary  
28 to look at NRS Chapter 616 for the method of calculating the employee’s average monthly wage.  
*See Mirage*, 871 P.2d 317, 319.

As in the *Howard* case, the Claimant Mr. Bean, as a retiree, is properly denied an award for permanent partial disability, as he has no wages on which to calculate a disability award. His income consists of retirement benefits from the fire department, and retirement income is not considered "compensation." Nor is there evidence of his alternate employment. Accordingly, Mr. Bean was not earning an actual wage as contemplated under NAC 616C.423, from which any disability benefit could be calculated. Even if the 40% permanent partial disability award were proper, the net result is a \$0 award.

**3. The Attorney General's 2002 Opinion Does Not Represent Binding Authority, And Has Been Superseded By Howard v. City of Las Vegas.**

While the Claimant wants this Appeals Officer to rely on an August 7, 2002 Attorney General Opinion<sup>2</sup> to refute the SIE's denial of a permanent partial disability award, their reliance upon this opinion is flawed. First, the Opinion presumes that a retired police officer or fireman is earning a higher or lower "salary" following retirement. It in fact presumes some form of subsequent employment by the retiree. This is not our facts in this case, as there is no evidence that Mr. Bean is earning a "salary" or wage as contemplated under the NIIA.

Second, the AG Opinion speculates that the Legislature intended that disability benefits for an occupational disease would be based upon wages earned prior to the covered employee's separation from public service as a firefighter or police officer. The AG Opinion acknowledges that, at the time, the Nevada Supreme Court had not been presented with the issue of calculating a disability benefit where a claimant earned significantly lower or higher wages following retirement. The AG Opinion offers a speculative opinion as to what the Nevada Supreme Court would do. However, we now know what the Supreme Court would do. The *Howard* case was

<sup>2</sup> No specific guidance is found in Nevada case law. However, in looking at other 9<sup>th</sup> Circuit Decisions, a formal opinion of the Attorney General represents the carefully considered judgment as to what the law requires in the circumstances presented, but "*has no legal binding effect on the requesting officer.*" Univ. of Utah v. Shurtleff, 252 F. Supp. 2d 1264, 1271 (D. Utah 2003).

1 decided three years after the AG Opinion, and it represents the only mandatory authority for the  
2 Court to follow on the issue at hand. The Court in *Howard* unequivocally states that the period  
3 immediately preceding the occupational disease is the date from which we must calculate  
4 disability benefits. *See Howard*, 120 P.3d at 412, citing *Mirage v. State Dept. of Administration*.  
5 In reaching this conclusion, the Court in *Howard* looked at case law from multiple jurisdictions,  
6 and appropriately noted that “a retired New Hampshire claimant, like a retired Nevada claimant,  
7 is effectively denied disability benefits because his weekly wage calculation amounts to zero.”  
8

9 *Id.*

10 Following this mandatory authority of the *Howard* case and applying the relevant statutes  
11 and regulations, the Claimant’s average monthly wage, as calculated pursuant to NAC  
12 616C.435, amounts to \$0, thereby the permanent partial disability award is also \$0. While the  
13 Claimant seeks to argue that this yields an “absurd result”, the fact remains that the Nevada  
14 Supreme Court has opined that the period for calculating average monthly wage for disability  
15 purposes is based upon the date of disability. The Legislature has made no special provisions for  
16 firefighters or police officers as to the date of calculation. Here the Claimant’s earliest period of  
17 disability was the date of diagnosis on 11/07/14. *See SIE’s Production of Related Documents at*  
18 *pg.1, 5.* At that time, the Claimant was retired and earning no wage. As stated above, the idea of  
19 disability is tied to earning capacity. In this case, though the Claimant has contracted an  
20 occupational disease, he has not been disabled from earning a wage, and therefore just as he is  
21 precluded from earning temporary total disability, he is similarly precluded from any entitlement  
22 to permanent partial disability. To assert that the *Howard* Court never intended this result fails  
23 to properly consider the logic and opinion expressed in the case itself.  
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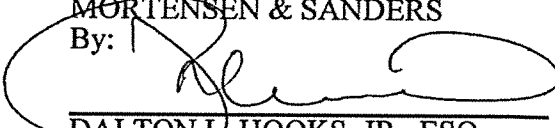
IV.  
CONCLUSION

The Claimant's request to be awarded an amount based upon his rating evaluation with Dr. Quaglieri is properly denied. The *Howard* case, as discussed herein has made it plain that, when a claim is made by a retiree, that claimant is entitled to medical benefits on an accepted claim, but is not otherwise entitled to compensation for disability as they were not earning wages prior to the onset of the claim, and due to this, their Average Monthly Wage calculation is effectively zero.

The Claimant's attempt to suggest that this was not addressed by the *Howard* Court or that the application of the proper legal standards results in an absurd result is unsupportable, as it the assertion that a permanent partial disability award amounts to a medical benefit. The very nature of a permanent partial disability award contemplates the award of a benefit based upon a loss of future earning potential. The actuarial tables used in calculating the value of the award are further proof of this. The fact that the Claimant has no wage recognized by the NIAA, justifies that no earning potential is lost, regardless of his percentage of impairment. Recognizing the logic of this, the result is not "absurd" but is proper under the interpretive statutes and case law, and in view of the foregoing, the SIE's determination dated 01/24/17, should be affirmed and the Claimant be given no benefits under his application.

Dated this 30<sup>th</sup> day of October, 2017.

Respectfully submitted,

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS  
By: 

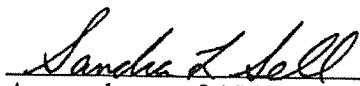
DALTON L. HOOKS, JR., ESQ.  
6605 Grand Montecito Pkwy., Ste. 200  
Las Vegas, NV 89149  
Attorney for Self-Insured Employer Clark County  
and TPA, CorVel

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the date shown below, a true and correct copy of the foregoing **SELF INSURED EMPLOYER AND THIRD PARTY ADMINISTRATOR 'S ANSWERING BRIEF** was duly served on the following as indicated:

<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Brent Bean c/o Lisa Anderson, Esq. Greenman, Goldberg, Raby & Martinez 601 South Ninth Street Las Vegas, NV 89101
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Lisa Anderson, Esq. Greenman, Goldberg, Raby & Martinez 601 South Ninth Street Las Vegas, NV 89101
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Kimberly Buchanan/Jennifer Gaither Clark County Risk Management 500 S. Grand Central Parkway 5 <sup>th</sup> Floor Las Vegas NV 89106
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Leslie Ribadeneira CorVel Corporation PO Box 61228 Las Vegas, NV 89160

Dated this 30<sup>th</sup> day of October, 2017

  
An employee of ALVERSON, TAYLOR,  
MORTENSEN & SANDERS

STATE OF NEVADA  
DEPT. OF ADMINISTRATION  
**BEFORE THE APPEALS OFFICER** LOS DIVISION

In the matter of the Contested  
Industrial Insurance Claim of:

) Appeal No: 1710715-GB 20 PH 3:21

BRENT BEAN

) Claim No.: 0583WC150000098  
RECEIVED  
AND  
FILED

Claimant

**CLAIMANT'S BRIEF**

COMES NOW, Claimant BRENT BEAN (hereinafter "Claimant"), by and through his attorneys, THADDEUS J. YUREK, III, ESQ., and LISA M. ANDERSON, ESQ., of the law firm of GREENMAN, GOLDBERG, RABY & MARTINEZ, and submits the following brief in support of his position at the hearing in this matter.

**LEGAL ARGUMENT**

1. **CLAIMANT CONTENDS THAT, FOR THE PURPOSE OF CALCULATING PERMANENT PARTIAL DISABILITY, HIS AVERAGE MONTHLY WAGE MUST BE CALCULATED USING THE WAGES FROM THE DATE OF HIS RETIREMENT.**

The crux of the issue to be determined in this brief is whether Howard v. City of Las Vegas, 120 P.3d 410 (2005) controls the methodology for wage calculation for the purpose of calculating permanent partial disability.

In Howard, the Court considered whether a firefighter who retires and, thereafter, suffers a heart attack, is entitled to temporary total disability benefits. The Court confirmed that retired firefighters are entitled to all medical benefits for their occupationally related condition, however, the "method for calculating compensation precludes an award for temporary total disability benefits when the retired firefighters are not earning wages at the time of the disability."

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1        Howard is clearly distinguishable from the case at hand because CLAIMANT IS NOT  
2 SEEKING TEMPORARY TOTAL DISABILITY FOR LOST WAGES. Under Howard, the  
3 Court differentiated between workers' compensation benefits related to medical benefits and  
4 those benefits associated with disability compensation in the form of lost wages caused by the  
5 occupational disease. While the Court made it clear that it intended for the injured worker to be  
6 precluded from obtaining temporary total disability compensation if the claim for disability was  
7 filed AFTER retirement, the Court further made it clear that it did not intend for the decision to  
8 affect medical benefits in any way.  
9

10        The Court intended for the injured worker to remain entitled to all medical benefits  
11 associated with the physical injury, which includes permanent partial disability caused by  
12 permanent physical disfiguration. Permanent partial disability is a medical benefit intended to  
13 compensate the injured worker for permanent physical damage caused by the industrial injury  
14 or occupational disease and NOT a form of disability compensation associated with lost wages.  
15 In this case, Claimant's prostate was removed due to a compensable occupationally related  
16 cancer. Claimant was found to have sustained forty percent (40%) whole person impairment  
17 related to his occupational disease. Permanent partial disability is a medical benefit directly  
18 related to the removal of the prostate and its residual effects. Thus, permanent partial disability  
19 is in no way intended to replace lost wages, as was held in Howard.  
20

21        NRS 616C.490(5) states in part:  
22

23                5. Unless the regulations adopted pursuant to NRS  
24                616C.110 provide otherwise, a rating evaluation must include an  
25                evaluation of the loss of motion, sensation and strength of an  
26                injured employee if the injury is of a type that might have  
27                caused such a loss. Except in the case of claims accepted pursuant  
28                to NRS 616C.180, no factors other than the degree of physical  
                 impairment of the whole person may be considered in



1 calculating the entitlement to compensation for a permanent  
2 partial disability.

3 NRS 616C.490 establishes that permanent partial disability is NOT associated with  
4 temporary total disability compensation associated with lost wages. Instead, permanent partial  
5 disability is a medical benefit directly related to the permanent loss of physical function, such  
6 as loss of range of motion, loss of sensation, and loss of strength, and is intended to compensate  
7 the injured worker for the physical damage caused by the occupational disease. Nothing in  
8 Howard sought to eliminate compensation related to permanent partial disability because  
9 permanent partial disability is NOT intended to compensate the injured worker for lost wages.

10 The Court specifically stated that the issue on appeal in Howard involved eligibility for  
11 temporary total disability compensation when the injured worker was retired and not earning  
12 wages at the time the claim was filed. The Court solely considered whether an injured worker  
13 is entitled to temporary total disability compensation related lost time caused by the  
14 occupationally related heart condition. Nevertheless, the Court reiterated that "when a retired  
15 claimant becomes eligible for occupational disease benefits, **the claimant is entitled to receive**  
16 **medical benefits** but may not receive any disability compensation if the claimant is not earning  
17 any wages."  
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21 In further distinguishing Howard from the present matter, the Court outlined that:

22 Second, a retiree usually has lost no salary due to the impairment.  
23 However, **the claimant may lose money in the form of medical**  
24 **expenses attributable to the work-related disability; for these**  
25 **expenses, NRS 617.420 provides no prohibition.** As we held in  
26 *Gallagher*, retired claimants will still be able to claim medical  
27 expenses, despite not being entitled to receive **compensation**  
28 **based on lost wages.**

...

1 Because Howard was retired and not earning an actual wage at the  
2 time of his disability, from which a lost wage may be calculated,  
3 **he is not entitled to disability compensation in the form of lost**  
4 **wages.**

5 For the forgoing reasons, we conclude that a retired firefighter's  
6 **entitlement to occupational disease benefits does not include**  
7 **compensation for temporary total disability benefits when the**  
8 **firefighter is not earning any wages.** Accordingly, we affirm  
9 the order of the district court.

10 In every instance, the Court specifically cited that its decision related solely to temporary  
11 total disability compensation related to lost wages. Since Howard had no intention of limiting  
12 compensation related to the recovery of permanent partial disability, we must look to the  
13 Attorney General's opinion on how to calculate a permanent partial disability award when the  
14 injured worker is retired at the time claim was filed.

15 On August 7, 2002, the Attorney General issued an official opinion regarding this exact  
16 issue. In its opinion, the Attorney General concluded that a "firefighter's or police officer's date  
17 of separation from service in such capacity and wages earned immediately prior to such date of  
18 separation form the basis upon which disability benefits are to be calculated." The Attorney  
19 General determined that this calculation method would prevent "an absurd result" of using "a  
20 significantly higher, or lower, salary in another (post-retirement) occupation" when calculating  
21 disability benefits. SEE CLAIMANT'S PAGES 63-67.

22 In this case, there is no dispute that Claimant qualifies for forty percent (40%) whole  
23 person related to his occupationally related and accepted prostate cancer condition. However,  
24 the Insurer is of the position that Claimant has a zero dollar (\$0) wage base for the purpose of  
25 calculating the value of the permanent partial disability because he was retired at the time of the  
26 claim. Although Claimant is not seeking temporary total disability related to lost wages, he is  
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1 seeking compensation for the medical portion of his case due to a permanent disability sustained  
2 when his prostate was removed due to occupationally related cancer.

3 Claimant maintains that a common sense approach must be adopted in order to avoid the  
4 "absurd result" identified by the Attorney General. Assigning a zero dollar (\$0) value for the  
5 purpose of calculating a monetary award for the forty percent (40%) permanent partial disability  
6 is patently unfair and leads to the "absurd result" that is the foundation of this appeal. As noted  
7 above, permanent partial disability is a medical benefit that is intended to compensate the injured  
8 worker for the permanent physical damage and disfigurement caused by the occupational disease.  
9 Ignoring the Attorney General opinion would absolutely result in the "absurd result" that the  
10 Attorney General sought to avoid.


11 Pursuant to the Attorney General's opinion, Claimant's wages, for the purpose of  
12 calculating his permanent partial disability award, should be his July 24, 2011 or July 25, 2011  
13 retirement date. Utilizing the last wage Claimant actually earned prior to his retirement avoids  
14 the "absurd" result contemplated by the Attorney General. The Insurer must therefore be  
15 ordered to calculate Claimant's wages based upon his earnings at the time of retirement. The  
16 Insurer must then be ordered to calculate the permanent partial disability award and offer it to  
17 Claimant.

18 Based upon the foregoing, Claimant has established that Howard is clearly  
19 distinguishable from the current appeal, as the present matter does not involve the recovery of  
20 temporary total disability compensation related to lost wages. Howard does not control the  
21 methodology for calculating Claimant's average monthly wage for the purpose placing a  
22 monetary value on the calculation of Claimant's forty percent (40%) permanent partial disability.  
23 Since Howard does not impact this issue, we must defer to the Attorney General's opinion that  
24  
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1 recommended wages from the date of his retirement be utilized for the purpose of calculating  
2 the permanent partial disability award.

3 Dated this 20th day of September, 2017.

5 GREENMAN, GOLDBERG,  
6 RABY & MARTINEZ

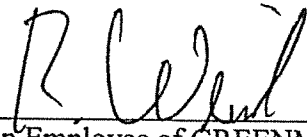
7  
8 By   
9 LISA M. ANDERSON, ESQ.  
10 Nevada Bar No. 004907  
11 601 South Ninth Street  
12 Las Vegas, Nevada 89101  
13 Attorneys for Claimant  
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Greenman Goldberg Raby Martinez /  
ACCIDENT INJURY ATTORNEYS

CERTIFICATE OF SERVICE

I do hereby certify that on the 20<sup>th</sup> day of September, 2017, I caused a true and correct copy of the foregoing, **CLAIMANT'S BRIEF** to be duly mailed, postage prepaid, hand delivered **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, Appeals Office, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102, to the following:

Dalton L. Hooks, Jr., Esq.  
ALVERSON TAYLOR MORTENSEN & SANDERS  
6605 Grand Montecito Parkway  
Suite 200  
Las Vegas, Nevada 89149

  
An Employee of GREENMAN, GOLDBERG,  
RABY & MARTINEZ

FILED

AUG 31 2017

APPEALS OFFICE

BEFORE THE APPEALS OFFICER

In the Matter of the Contested  
Industrial Insurance Claim of:

Claim No: 0583WC150000098

BEAN, BRENT,

Appeal No: 1710715-GB

Claimant.

ORDER FOR IN COURT STATUS CHECK

TO ALL PARTIES-IN-INTEREST:

PLEASE TAKE NOTICE that pursuant to NAC 616C.278, the above-captioned matter will be heard in front of the Appeals Officer for an IN COURT STATUS CHECK on:

DATE: September 19, 2017

TIME: 10:45AM

PLEASE TAKE FURTHER NOTICE THAT ALL COUNSEL MUST  
APPEAR AT THE ABOVE REFERENCED DATE AND TIME.

Previously scheduled hearing dates in this matter, if any, are hereby vacated and reset to the above referenced date and time.

\*\*\*

CONTINUANCE OF THIS SCHEDULED HEARING DATE SHALL  
ONLY BE CONSIDERED ON WRITTEN APPLICATION SUPPORTED  
BY AFFIDAVITS.

\*\*\*

IT IS SO ORDERED this 31st day of August, 2017.

*Georganne W. Bradley*

Georganne W Bradley, Esq.  
APPEALS OFFICER

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ORIGINAL

DALTON L. HOOKS, JR., ESQ., Nevada Bar #8121  
JOHN A. CLEMENT, ESQ., Nevada Bar #8030  
ALVERSON, TAYLOR, MORTENSEN & SANDERS  
7401 W. Charleston Boulevard  
Las Vegas, NV 89117  
(702) 384-7000  
Attorneys for the Self-Insured Employer Clark County  
And TPA, CorVel

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
RECEIVED  
AND  
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JUN 13 PM 4:04

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
APPEALS OFFICE

In the Matter of the Contested  
Insurance Claim

APPEAL NO.: 1710715-GB  
HEARING NO.: 1708666-SE  
CLAIM NO.: 0583-WC-15-0000098

of

Employer:

BRENT BEAN  
3405 AMISH AVE.  
N. LAS VEGAS, NV 89031

ATTN: SANDRA W/C COORD  
CLARK COUNTY RISK MGMT  
500 S GRAND CENTRAL PKWY 5<sup>TH</sup> FL  
LAS VEGAS NV 89106

**SELF INSURED EMPLOYER AND THIRD PARTY ADMINISTRATOR'S  
PREHEARING STATEMENT**

COMES NOW the Self-Insured Employer, CLARK COUNTY ("SIE"), and the Third-  
Party Administrator, CORVEL ("TPA") by and through its attorney, DALTON L. HOOKS, JR.,  
ESQ., and submits its Prehearing Statement concerning the instant matter to be heard on  
**Tuesday, June 20, 2017 at 11:00 AM.** This Prehearing Statement is filed pursuant to NAC  
616C.297.

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ALVERSON, TAYLOR, MORTENSEN & SANDERS  
LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

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I.  
ISSUE PRESENTED

Whether the TPA's Determination Declining To Offer A PPD Award Was Proper?

II.  
STATEMENT OF FACTS

On 12/07/14, the Claimant, BRENT BEAN ("Claimant"), a CLARK COUNTY firefighter alleged an occupational disease following his retirement. *See* exhibits attached to SIE/TPA's Production of Related Documents at pg. 1, 4. The Claimant retired from the CLARK COUNTY FIRE DEPT. effective 07/25/11. *See id* at pg. 4. According to the C-4, or about 11/07/14, the Claimant was diagnosed with prostate cancer, and thereafter completed his claim on 12/22/14. *See id* at pg. 1. CLARK COUNTY subsequently completed a C-3, which noted they initially doubted the validity of the claim due to late reporting. *See id* at pg. 2. A C-1 was completed on 12/24/14 and signed by both the Claimant and employer on that date. *See id* at pg. 3.

Prior to the instant claim, on 11/07/14, the Claimant presented to Urology Specialists for follow-up on an elevated PSA which had begun approximately three (3) months prior. *See id* at pg. 5-8. The Claimant was diagnosed with prostate cancer. *See id*. Effective 01/13/15, the SIE issued its determination accepting the claim for prostate cancer. *See id* at pg. 37. The Claimant went forward with treatment for prostate cancer with Dr. David Ludlow, who recommended the Claimant for a prostatectomy. *See id* at pp. 5-8. The Claimant underwent said prostatectomy on 02/25/15. *See id* at pp. 9-21. After appropriate follow-up, on 06/24/16, Dr. Ludlow released the Claimant as MMI, indicating "from my standpoint he is cured from disease." *See id* at pp. 24. The acceptance of the prostate cancer and the medical treatment received for this condition are not in dispute.

**ALVIERSON, TAYLOR, MORTENSEN & SANDERS**  
LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

Thereafter, the Claimant obtained an evaluation with a rating physician off the DIR rotating list. *See id* at pg. 26. Following an evaluation on 11/02/16 with Dr. Charles E. Quaglieri, the Claimant was found to have a 40% whole person impairment as a result of his prostate cancer. *See id* at pp. 27-32. The Claimant, via counsel, requested the SIE award the 40% PPD as recommended by Dr. Quaglieri. *See id* at pg. 36.

The current controversy involves the SIE's 01/24/17 determination which declined to offer the PPD award. As specified in that letter, the SIE indicated that because the claim was made after retirement, and pursuant to NRS 617.453(4)(a), the Claimant was not entitled to receive any monetary compensation for his occupational disease, other than payment of medical benefits. *See id* at pg. 39. On or about 01/26/17, the Claimant filed a request for hearing regarding the SIE's determination. *See id* at pg. 40. The matter was subsequently bypassed directly to the Appeals Office. *See id* at pp. 41-42. The SIE now submit this Prehearing Statement.

### III. ARGUMENT

**Supreme Court Case Law Precludes The Claimant From Receiving Disability Benefits Following Retirement, Therefore The SIE's Determination Declining To Offer The PPD Award Was Proper.**

The Claimant, not the SIE, bears the burden of proving his or her case by a preponderance of all the evidence. *See State Industrial Insurance System v. Hicks*, 100 Nev. 567, 68 P. 2d 324 (1984). In proving his case, the Claimant has the burden of establishing the work relatedness of his injuries, the causal relationship between the work related injury and his claim, and all other facets of the claim by a preponderance of the evidence. To prevail, the Claimant must present and prove *more* evidence than an amount which would make his claim and his opponent's claim "evenly balanced." *See Maxwell v. SIIS*, 109 Nev. 327, 849 P. 2d 267 (1993); *SIIS v. Khweiss*, 108 Nev. 123, 825 P.2d 218 (1992); *SIIS v. Kelly*, 99 Nev. 774, 671 P.2d 29

(1983).

In analyzing whether Mr. Bean is entitled to additional benefits, the Appeals Officer must look to express terms of the applicable statute and must not interpret it “broadly or liberally in favor of an injured or disabled employee.” *See* NRS 616A.010(4) (2015). The statute at issue in the instant appeal is NRS 617.453(4), which provides in relevant part:

**NRS 617.453 Cancer as occupational disease of firefighters.**

4. Compensation awarded to the employee or his or her dependents for disabling cancer pursuant to this section must include:

(a) Full reimbursement for related expenses incurred for medical treatments, surgery and hospitalization in accordance with the schedule of fees and charges established pursuant to NRS 616C.260 or, if the insurer has contracted with an organization for managed care or with providers of health care pursuant to NRS 616B.527, the amount that is allowed for the treatment or other services under that contract; and

(b) The compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death.

*See* NRS 617.453(4) (2015).

The SIE does not contest its responsibility for payment of the expenses incurred for treatment of the Claimant’s prostate cancer. The issue of payment of disability benefits in the case of an occupational disease claimed post-retirement, has been addressed by the Nevada Supreme Court in *Howard v. City of Las Vegas*, 121 Nev. 691, 120 P.3d 410 (2005). Therein, the Court concludes that “a retired Nevada claimant, is effectively denied disability benefits because his weekly wage calculation amounts to zero.” *See id.*

In *Howard*, Oscar Howard was a retired firefighter who attempted to assert a claim for disability benefits resulting from a claim for heart disease. The Nevada Supreme Court concluded that when a retired claimant becomes eligible for occupational disease benefits, the claimant is entitled to receive medical benefits but may not receive any disability compensation if the claimant is not earning any wages at the time of his/her application. *Howard v. City of Las Vegas*, 120 P.3d 410, 411.

The Court's rationale for this ruling is based on two reasons. First, retirement benefits are not included in NRS 617.050's definition of "compensation," and no other provision suggests that retirement benefits should be included within the meaning of wages.<sup>1</sup> Second, a retiree has usually lost no salary or wages due to the impairment. *See id* at 412.

Additional support for this analysis, and the Court's ruling, can be gleaned from NRS 616C.390(6) which denies a TTD or vocational rehabilitation benefits where a claimant has retired. As the Court reasoned in *Howard*, there should be no award for disability benefits where there are no "wages" lost. In fact, a retired claimant maintains his exact same income, unaffected by his occupational injury or disease.

While the Claimant will attempt to rely on an August 7, 2002 Attorney General Opinion to refute the SIE's denial of a PPD award, their reliance upon this opinion is flawed. First, the Opinion presumes that a retired police officer or fireman is earning a higher or lower "salary" following retirement. It in fact presumes some form of subsequent employment by the retiree. This is not our facts in this case, as there is no evidence that Mr. Bean is earning a "salary" or wage as contemplated under the NIIA. Second, the Opinion itself acknowledges that, at the time, the Nevada Supreme Court had not been presented with the issue of calculating a disability benefit where a claimant earned significantly lower or higher wages following retirement. The AG Opinion speculates as to what the Nevada Supreme Court would do. However, we now know what the Supreme Court would do. The *Howard* case was decided three years after the AG Opinion, and it represents the only mandatory authority for the Court to follow on the issue at hand.

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<sup>1</sup> See NAC 616C.423 (describing items included in average monthly wage but omitting retirement benefits.)

As in the *Howard* case above, Mr. Bean, as a retiree, is properly denied an award for PPD, as he has no wages on which to calculate a disability award. His income consists of retirement benefits from the fire department, and retirement income is not considered "compensation." Accordingly, Mr. Bean was not earning an actual wage as contemplated under NAC 616C.423, from which any disability benefit could be calculated.

Under these facts, the Claimant has failed to establish an entitlement to a PPD award based on the evidence, and application of Nevada case law. As such, the TPA made the only determination available to it under Nevada law.

#### IV. CONCLUSION

The Claimant's request to be awarded an amount based upon his rating evaluation with Dr. Quaglieri is properly denied. The *Howard* case, as discussed herein has made it plain that, when a claim is made by a retiree, that claimant is entitled to medical benefits on an accepted claim, but is not otherwise entitled to compensation for disability as they were not earning wages prior to the onset of the claim, and due to this, their Average Monthly Wage calculation is effectively zero. In view of the foregoing, the SIE's determination dated 01/24/17, should be affirmed and the Claimant be given no benefits under his application.

Wherefore, the SIE, Clark County, and the TPA, CorVel, respectfully request that the Appeals Officer provide the following relief:

1. That the Appeals Officer AFFIRM the SIE/TPA's determination letter dated 01/24/17, which informs the Claimant his request to be awarded a 40% PPD due to his occupational disease claim was denied.

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...

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V.  
LIST OF WITNESSES

1. **MR. BRENT BEAN**  
c/o Lisa M. Anderson, Esq.  
Greenman Goldberg Raby & Martinez  
601 S 9<sup>th</sup> St  
Las Vegas, NV 89101
2. **PERSON(S) MOST KNOWLEDGEABLE**  
Clark County  
500/S. Grand Central Pkwy., 1<sup>st</sup> Floor  
Las Vegas, NV 89106
3. Any and all witnesses called by other parties to this litigation.

VI.  
LIST OF EXHIBITS TO BE RELIED UPON<sup>2</sup>

C-4 .....	1
C-3 .....	2
C-1 .....	3
Employer record evidencing retirement (07/25/11) .....	4
Claimant's Medical Records .....	5-25
Completed DIR form D-35 .....	26
PPD Report by Dr. Charles Quaglieri, dated 11/02/16 .....	27-31
Addendum to PPD report, dated 01/04/17 .....	32
Correspondence from Claimant's counsel to Dr. Ludlow .....	33-34
Correspondence from Claimant's counsel to TPA .....	35-36
Correspondence from TPA to Claimant .....	37-39
Claimant's Request for Hearing filed on 01/26/17 .....	40
Order Transferring Hearing To Appeals Office, dated 03/21/17 .....	41-42

<sup>2</sup> Unless otherwise indicated, the exhibits referenced to herein are those attached to the SIE's Production of Related Documents

ALVERSON, TAYLOR, MORTENSEN & SANDERS  
LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000

VII.  
ESTIMATED TIME

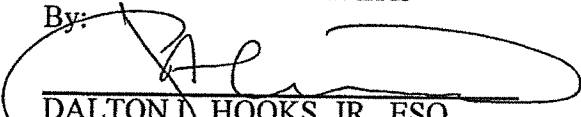
The SIE estimates that one (1) hour will be required to present this case.

Dated this 13 day of June, 2017.

Respectfully submitted,

ALVERSON, TAYLOR,  
MORTENSEN & SANDERS

By:

  
DALTON D. HOOKS, JR., ESQ.

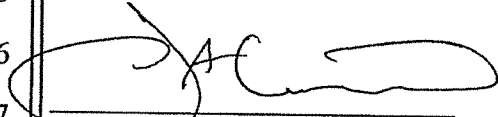
7401 W. Charleston Blvd.

Las Vegas, NV 89117

Attorney for Self-Insured Employer Clark County  
and TPA, CorVel

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding pleading filed concerning  
Department of Administration Case No.: 1710715-GB does not contain the social security  
number of any person.



6-13-17

DATED

DALTON L. HOOKS, JR., ESQ.

JOHN A. CLEMENT, ESQ.

ALVERSON, TAYLOR,

MORTENSEN & SANDERS

7401 W. Charleston Blvd.

Las Vegas, NV 89117

Attorney for Self-Insured Employer CLARK COUNTY

And Third-Party Administrator CORVEL

ALVERSON, TAYLOR, MORTENSEN & SANDERS

LAWYERS  
7401 WEST CHARLESTON BOULEVARD  
LAS VEGAS, NEVADA 89117-1401  
(702) 384-7000



**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the date shown below, a true and correct copy of the foregoing **SELF INSURED EMPLOYER AND THIRD PARTY ADMINISTRATOR'S PREHEARING STATEMENT** was duly served on the following as indicated:

<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Brent Bean c/o Lisa Anderson, Esq. Greenman, Goldberg, Raby & Martinez 601 South Ninth Street Las Vegas, NV 89101
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Lisa Anderson, Esq. Greenman, Goldberg, Raby & Martinez 601 South Ninth Street Las Vegas, NV 89101
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Kimberly Buchanan/Jennifer Gaither Clark County Risk Management 500 S. Grand Central Parkway 5 <sup>th</sup> Floor Las Vegas NV 89106
<input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> E-Mail <input type="checkbox"/> Personal Delivery	Leslie Ribadeneira CorVel Corporation PO Box 61228 Las Vegas, NV 89160

Dated this 13<sup>th</sup> day of June, 2017

  
An employee of ALVERSON, TAYLOR,  
MORTENSEN & SANDERS

FILED

MAY 01 2017

BEFORE THE APPEALS OFFICER

APPEALS OFFICE

In the Matter of the Contested  
Industrial Insurance Claim of:

BRENT BEAN,

Claimant.

Claim No: 0583WC150000098

Appeal No: 1710715-GB

**NOTICE OF RESETTING**

**TO ALL PARTIES-IN-INTEREST:**

**PLEASE TAKE NOTICE** that the above-captioned matter will now be heard in front of  
the Appeals Officer for a 1 hour **HEARING** on:

**DATE: June 20, 2017**

**TIME: 11:00AM**

**PLACE: DEPARTMENT OF ADMINISTRATION  
2200 SOUTH RANCHO DRIVE #220  
LAS VEGAS, NV 89102**

**PLEASE TAKE FURTHER NOTICE** that previously scheduled hearing dates in this  
matter, if any, are hereby vacated and reset to the above referenced date and time.

###

**CONTINUANCE OF THIS SCHEDULED HEARING DATE SHALL ONLY BE  
CONSIDERED ON WRITTEN APPLICATION SUPPORTED BY AFFIDAVITS.**

###

IT IS SO ORDERED this 1st day of May, 2017.

*Georganne W. Bradley*  
GEORGANNE W BRADLEY, ESQ.  
APPEALS OFFICER

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CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing NOTICE OF RESETTING was duly mailed, postage prepaid OR placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 2200 S. Rancho Drive, #220, Las Vegas, Nevada, to the following:

BRENT BEAN  
3405 AMISH AVE  
N LAS VEGAS NV 89031

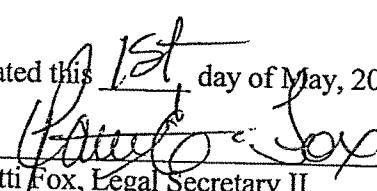
LISA M ANDERSON ESQ  
GREENMAN GOLDBERG RABY & MARTINEZ  
601 S NINTH ST  
LAS VEGAS NV 89101

CLARK COUNTY RISK MGMT  
ATTN SANDRA SWICKARD  
500 S GRAND CENTRAL PKWY 5TH FL  
LAS VEGAS NV 89106

CORVEL CORPORATION  
P O BOX 61228  
LAS VEGAS NV 89160-1228

DALTON HOOKS JR ESQ  
ALVERSON TAYLOR MORTENSEN & SANDERS  
7401 W CHARLESTON BLVD  
LAS VEGAS NV 89117-1401

Dated this 1st day of May, 2017.

  
Patti Fox, Legal Secretary II  
Employee of the State of Nevada

BEFORE THE APPEALS OFFICER

In the matter of the Contested  
Industrial Insurance Claim of:

BRENT BEAN

Claimant

Appeal No. : 1710715-GB  
Claim No. : 0583WC150000098

STATE OF NEVADA  
DEPT. OF ADMINISTRATION  
HEARING DIVISION  
RECEIVED  
AND  
FILED  
APR 26 PM 1:11

CLAIMANT'S HEARING MEMORANDUM

COMES NOW, Claimant, BRENT BEAN (hereinafter "Claimant"), by and through his attorneys, GABRIEL A. MARTINEZ, ESQ., and LISA M. ANDERSON, ESQ., of the law firm of GREENMAN, GOLDBERG, RABY & MARTINEZ, and submits the following memorandum in support of his position at the hearing in this matter.

ISSUE

Whether the Insurer's January 24, 2016 determination declining to offer a permanent partial disability award based upon Dr. Charles Quaglieri's disability findings was proper?

STATEMENT OF THE CASE

On or about November 7, 2015, the Claimant, BRENT BEAN, reported the onset of an occupational disease that was contracted while in the course and scope of his employment as a firefighter with the Clark County Fire Department. Claimant was diagnosed with prostate cancer. Liability for the claim was appropriately accepted and Claimant received various modalities of medical care, including a prostatectomy. The Insurer's refusal to offer a permanent partial disability award based upon Dr. Charles Quaglieri's disability findings is the subject of this appeal.

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DOCO14  
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**STATEMENT OF THE FACTS**

Claimant retired as a firefighter with the Clark County Fire Department on July 24, 2011 or July 25, 2011.

On October 15, 2014, Claimant completed blood work that revealed elevated prostate specific antigen (PSA) levels. **SEE CLAIMANT'S PAGE 7.** Claimant came under the care of Dr. David Ludlow for his prostate condition. Claimant was diagnosed with malignant neoplasm of prostate and underwent a prostatectomy on February 24, 2015. Claimant was subsequently declared medically stable and ratable. Dr. Ludlow opined that Claimant would require ongoing medication for erectile dysfunction following claim closure. Dr. Ludlow confirmed that the medication was needed as a direct result of the prostate cancer. **SEE CLAIMANT'S PAGES 8-42.**

On November 2, 2016, Dr. Quaglieri evaluated Claimant for permanent partial disability evaluation. Dr. Quaglieri concluded that Claimant qualified for thirty-nine percent (39%) whole person impairment as a result of the occupationally related prostate cancer condition. Claimant was granted sixteen percent (16%) whole person impairment for the prostatectomy, ten percent (10%) whole person impairment for incontinence and twenty percent (20%) whole person impairment for loss of sexual function. **SEE CLAIMANT'S PAGES 43-47.**

On November 30, 2016, the Insurer was notified that Dr. Quaglieri miscalculated Claimant's impairment and that the correct whole person impairment sum should have been forty percent (40%). For that reason, the Insurer was asked to offer Claimant the forty percent (40%) whole person impairment award. **SEE CLAIMANT'S PAGES 48-53.**

On November 30, 2016, the Insurer was asked to authorize ongoing erectile dysfunction medication following claim closure. **SEE CLAIMANT'S PAGES 54-56.**

1 On December 1, 2016, the Insurer notified Claimant that there appeared to be a  
2 calculation error in Dr. Quaglieri's disability report and was seeking clarification. SEE  
3 CLAIMANT'S PAGES 57-62.

4 On January 4, 2017, Dr. Quaglieri issued a statement verifying his calculation error and  
5 outlined that Claimant's whole person impairment was forty percent (40%). SEE  
6 CLAIMANT'S PAGE 63.

7 On January 9, 2017, an electronic mail communication was sent to the Insurer outlining  
8 that the Attorney General Opinion 2002-28 established that firefighter's "date of separation from  
9 service in such capacity and wages earned immediately prior to such date of separate form the  
10 basis upon which disability benefits are to be calculated." SEE CLAIMANT'S PAGES 64-72.

11 On January 24, 2017, the Insurer notified Claimant that they were declining to offer a  
12 permanent partial disability award because the claim for occupational disease was filed after his  
13 retirement. The Insurer concluded that Claimant was therefore not entitled to receive any  
14 compensation, including permanent partial disability, for his industrial injury. SEE  
15 CLAIMANT'S PAGES 73-74. Claimant appealed that determination to the Hearing Officer.  
16 The parties subsequently agreed to transfer the matter directly to the Appeals Officer for final  
17 administrative decision.  
18

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21 ARGUMENT

22 The Insurer advised Claimant that he is not entitled to a permanent partial disability  
23 award because he was retired at the time he filed his claim for occupationally related prostate  
24 cancer. The Insurer cited NRS 617.453(4) in support of its determination. Claimant disagrees  
25 with the Insurer's conclusion.  
26  
27  
28

1 The Insurer arranged for Claimant to be evaluated for permanent partial disability by Dr.  
2 Quaglieri. The fact that the Insurer scheduled the permanent partial disability evaluation  
3 suggests that they felt that Claimant was entitled to a disability award at that time. The Insurer's  
4 citation of NRS 617.453(4) in support of its conclusion is curious in light of the fact that nowhere  
5 in this status does it address the issue of disability benefits or average monthly wage for the  
6 purpose of calculating a disability award in the event of a firefighter being retired at the time he  
7 filed his claim for occupational disease. Moreover, there is no statute or regulation that supports  
8 the Insurer's conclusion that Claimant is not entitled to a disability award simply because he  
9 was retired at the time he was diagnosed with an occupationally related cancer.

12 On August 7, 2002, the Attorney General issued an official opinion regarding this exact  
13 issue. In its opinion, the Attorney General concluded that a "firefighter's or police officer's date  
14 of separation from service in such capacity and wages earned immediately prior to such date of  
15 separation form the basis upon which disability benefits are to be calculated." The Attorney  
16 General concluded that this calculation method would prevent "an absurd result" of using "a  
17 significantly higher, or lower, salary in another (post-retirement) occupation" when calculating  
18 disability benefits. SEE CLAIMANT'S PAGES 63-67.

20 Pursuant to this opinion, Claimant's wages, for the purpose of calculating his permanent  
21 partial disability award, should be his July 24, 2011 or July 25, 2011 retirement date. The Insurer  
22 must therefore be ordered to calculate Claimant's wages based upon his earnings at the time of  
23 his retirement. The Insurer must then be ordered to calculate the permanent partial disability  
24 award and offer it to Claimant.

26 ///

27 ///

CONCLUSION

Accordingly, Claimant, BRENT BEAN, respectfully requests that the Appeals Officer REVERSE the Insurer's January 24, 2017 determination and ORDER the Insurer to calculate Claimant's permanent partial disability award based upon the wage calculation method outlined in the Attorney General's August 7, 2002 official opinion.

WITNESSES

Claimant may be called to testify at the time of the hearing. Claimant reserves the right to cross-examine any witness called by the Insurer/Employer and to offer rebuttal testimony as may be necessary.

Dated this 26<sup>th</sup> day of April, 2017.

GREENMAN, GOLDBERG,  
RABY & MARTINEZ

By 

LISA M. ANDERSON, ESQ.  
Nevada Bar No. 004907  
601 South Ninth Street  
Las Vegas, Nevada 89101  
Attorneys for Claimant

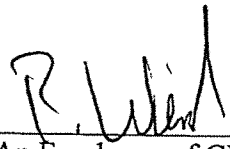


Greenman Goldberg Raby Martinez /  
ACCIDENT INJURY ATTORNEYS

CERTIFICATE OF SERVICE

I do hereby certify that on the 24<sup>th</sup> day of April, 2017, I caused a true and correct copy of the foregoing, CLAIMANT'S HEARING MEMORANDUM to be duly mailed, postage prepaid, hand delivered OR placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, Appeals Office, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102, to the following:

Dalton L. Hooks, Jr., Esq.  
ALVERSON TAYLOR MORTENSEN & SANDERS  
7401 West Charleston Boulevard  
Las Vegas, Nevada 89117

  
An Employee of GREENMAN, GOLDBERG,  
RABY & MARTINEZ