

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CLARK COUNTY,

Appellant,

vs.

BRENT BEAN

Respondent.

CASE NO.:

78443.

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**RESPONDENT'S ANSWERING BRIEF**

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# I

## ARGUMENT

In the present case, the record on appeal supported the Appeals Officer's Decision and Order reversing Petitioner's determination that Respondent was not entitled to permanent partial disability benefits and is a correct interpretation of applicable Nevada statute and case law. Accordingly, the District Court properly affirmed the administrative decision made by the Appeals Officer.

**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 the underlying Decision and Order for the present appeal regarding permanent partial disability, the Appeals Officer applied the correct legal and case law interpretation, as well as statutes, when verifying Respondent's eligibility for permanent partial disability benefits.

Appellant 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. Appellant'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 before the Appeals Officer and the District Court.

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. 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 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 Legislature could have, but did not, exclude permanent partial 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.

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."

Howard is clearly distinguishable from the case at hand because Respondent is not seeking temporary total disability for lost wages. Under Howard, the Court differentiated between workers' compensation benefits related to medical benefits and those benefits associated with disability compensation in the form of lost wages caused by the occupational disease. While the Court made it clear that it intended for the injured worker to be precluded 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.

The Court intended for the injured worker to remain entitled to all medical benefits associated with the physical injury, which includes permanent partial disability caused by permanent physical disfigurement. Permanent partial disability is a medical benefit intended to compensate the injured worker for permanent physical damage caused by the industrial injury or occupational disease and not a form of disability compensation associated with lost wages. In this case, Respondent's prostate was removed due to a compensable occupationally related cancer. Respondent was 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, permanent partial disability is in no way intended to replace lost wages, as was held in Howard.

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

5. Unless the regulations adopted pursuant to NRS 616C.110 provide otherwise, a rating evaluation must include an evaluation of the loss of motion, sensation and strength of an injured employee if the injury is of a type that might have caused such a loss. Except in the case of claims accepted pursuant to NRS 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.



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

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

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

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

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

...  
For the forgoing reasons, we conclude that a retired firefighter's entitlement to occupational disease benefits does not include compensation for temporary total disability benefits when the 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 can look 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 General determined that this calculation method would prevent "an absurd result" of using "a significantly higher, or lower, salary in another (post-retirement) occupation" when calculating disability benefits. (JA pages 526-530)

The Attorney General's 2002 opinion was mirrored in Demaranville v. Employers Insurance Company of Nevada, 135 Nevada Advanced Opinion No. 35, that a surviving spouse of a retired police officer who dies as a result of a compensable claim for occupational heart disease filed before January 1, 2017 qualifies for a monetary benefit based upon the wages her deceased husband was earning at the time of his retirement. Under Demaranville, the Nevada Supreme Court found that an occupational disease occurs for the purposes of an original death benefits claim on the last day of the disease-risk exposure that is causally connected to the disease.

The Court found in Demaranville that:

When a statute is unambiguous, we apply its ordinary meaning. Valdez v. Emp'rs Ins. Co. of Nev., 123 Nev. 170, 174, 162 P.3d 148, 151 (2007). When it may be given more than one reasonable interpretation, it is ambiguous and should be interpreted consistent with the legislature's intent, according with reason and public policy. Id.

...

The legislative intent supported that the employee's death benefit should be related to the wage earned at the time the occupational disease causally connected to the disability occurred.

The Court further found that:

We further conclude that the legislative intent supports that Daniel's death benefit should be related to the wage earned at the time of the occupational disease causally connected to the disability occurred. The Legislature created an entitlement for an employee who is injured or dies because of an occupational disease that arises out of and in the course of employment in Nevada to recover compensation. NRS 617.430(1). The compensation paid to an employee or his or her dependents is based on the value received by the employee for his or her services, NRS 616A.090; NAC 616C.420, in the employment in which the injury or disease occurs, NAC 616C.435(9). The Legislature intended the linkage between an employee's compensable claim and employment to be so great that, in certain cases, the connection is conclusively presumed. See NRS 617.457(1). Thus, the applicable statutory scheme shows a legislative intent to base the amount of Daniel's death benefits claim on the earnings from the employment causally connected to the occupational disease underpinning his claim.

Lastly, the Court found that:

Fourth, providing that Daniels dependents could not recover a meaningful death benefit would be contrary to the statutory "purpose of providing economic assistance to persons who suffer disability or death as a result of their employment." See Banegas, 117 Nev. At 231, 19 P.3d at 251; see also NRS 617.430(1) (providing that dependents are entitled to compensation where an employee dies as a result of an occupational disease. And fifth, negating the value of Daniel's death benefit would be inconsistent with the legislative intent evinced by the Legislature expanding

the coverage of this type of occupational disease claim to a conclusive presumption for police officers like Daniel. See NRS 617.457(1); Gallagher, 114 Nev. At 601, 959 P.2d at 522. As Howard and Mirage are distinguishable, the district court erred in concluding that Daniel's death benefit amount was zero because he was not earning wages from the City when he died.

Demaranville makes clear that monetary benefits paid to the surviving widow of a police officer who died as a result of a compensable claim for occupational heart disease should be calculated utilizing Claimant's wages from the period immediately preceding his retirement.

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

Respondent maintains that a commonsense approach must be adopted in order to avoid the "absurd result" identified by the Attorney General. Assigning a zero-dollar (\$0) value for the purpose of calculating a monetary permanent partial

disability award for the forty percent (40%) residual disability is patently unfair and leads to the “absurd result” that is the foundation of this appeal. As noted above, permanent partial disability is a medical benefit that is intended to compensate the injured worker for the permanent physical damage and disfiguration caused by the occupational disease. Ignoring the Attorney General opinion would absolutely result in the “absurd result” that the Attorney General sought to avoid.

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

Based upon the foregoing, Respondent has established that Howard is clearly distinguishable from the current appeal, as the present matter does not involve the recovery of temporary total disability compensation related to lost wages. Howard does not control the methodology for calculating Respondent’s average monthly wage for the purpose placing a monetary value on the calculation of Respondent’s forty percent (40%) permanent partial disability. Since Howard does not impact this

issue, the Appeals Officer correctly found that wages from the date of Respondent's retirement must be utilized for the purpose of calculating the permanent partial disability award.

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

Petitioner disputes Respondent's argument that permanent partial disability is not a medical benefit. Respondent is not attempting to distinguish medical benefits from disability benefits because it is simply a fact that these two (2) benefits are different. Respondent is not asking for wage replacement benefits. Instead, Respondent 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.

Petitioner 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 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." In this instance, Petitioner fails to consider what personal and social demands were contemplated under this

standard. Clearly the functionality of the body is certainly personal and social. It is undeniable that Respondent is altered as a result of this incident. The removal of his prostate and the resulting permanent residual effects is an “alteration” of Respondent’s individual capacity to meet his personal, social and/or occupational demands.

It has been argued that Howard analyzed NRS 617.420 and cited in part that “[T]he limitations in this section do not apply to medical benefits, which must be paid from the date of application for payment of medical benefits.” This is where Respondent argued that NRS 617.455 contemplates that it will be difficult to pinpoint a date of injury/exposure. So, Respondent’s employment is conclusively presumed to be the cause of the disease. Thus, the date of application is the date he last worked for these purposes. The Demaranville court confirmed that the period immediately preceding retirement is the proper period for calculating monetary benefits.

Petitioner further argued that Howard precludes the payment of permanent partial disability compensation if Respondent is not earning any wages when a claim for benefits is filed. While this is true for temporary total disability compensation, Petitioner cannot say that Respondent has lost no use or function of his body for his non work-related activities. Respondent is left disabled, both as to work and as to life in general. The workers’ compensation system contemplates these losses and



provides separately that Respondent is entitled to permanent partial disability for his physical damage. In this case, Respondent had his prostate removed as a result of cancer and has suffered permanent residual sexual dysfunction.

The Appeals Officer ruled under Conclusion of Law 5 that:

There is 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 permanent partial disability award. Furthermore, no other grounds for denial were asserted or argued by the Insurer, this Court finds Dr. Quaglieri's permanent partial disability rating evaluation to be thorough and properly performed.

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

Despite what Petitioner would like for this Court to believe, Howard simply addressed the issue of entitlement to temporary total disability compensation for lost wages when a claimant was retired and not earning wages at the time the claim was filed. Howard was never intended to be applied to issues involving permanent partial disability as that issue does not involve disability compensation related to lost wages.

As such, there is no available case law to adequately and fairly compensate Respondent for the permanent physical damage caused by the removal of his prostate and the resulting dysfunction.

In contrast, the Attorney Generals' 2002 opinion clearly addressed the identical issue presented in this case. Specifically, 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 General determined that this calculation method would prevent "an absurd result" of using "a significantly higher, or lower, salary in another (post-retirement) occupation" when calculating disability benefits. If Petitioner's position is allowed to stand, then this case will effectively result in the "absurd" outcomes in the Attorney General sought to prevent.

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

For the reasons stated in Claimant's written briefs, the Appeals Officer concludes that the permanent partial disability awarded 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.

In conclusion, Respondent’s wages at the time of his retirement must be utilized in the calculation of his permanent partial disability. Arguing that Respondent qualifies for forty percent (40%) whole person impairment for his occupationally related cancer condition and then attempting to apply a standard intended solely for the payment of temporary total disability compensation related to lost wages is clearly inappropriate and insulting to Respondent, who has suffered significant permanent impairment, and would result in an absurd outcome that goes 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.

### **III. Respondent Maintains that NRS 617.453(5) Controls the Methodology for Awarding of Benefits of Retired Firefighters**

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

NRS 617.453(5) clearly contemplated this issue and applies to this matter.

NRS 617.453(5) states:

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

NRS 617.453(5) asserts that the "awarding of benefits" is based upon "a period 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 upon NRS 617.453(5), Respondent's thirty (30) full years of qualifying employment is then multiplied by three (3) months, resulting in ninety (90) months, which far exceeds the sixty (60) month limit.

Respondent retired on July 25, 2011. Respondent was diagnosed with prostate cancer on November 7, 2014 and thereafter filed the necessary documents to perfect

a claim for occupational cancer disease benefits. Thus, Respondent was diagnosed with his disabling cancer approximately forty (40) months after his retirement, which is clearly within the sixty (60) months requirement granted by NRS 617.453(5).

Therefore, pursuant to NRS 617.453(5), Respondent qualifies for the full “awarding of benefits pursuant to this section,” including the calculation of his average monthly wage for the purpose of calculating his permanent partial disability award, based upon his disabling cancer being diagnosed, filed and accepted for workers’ compensation benefits at approximately forty (40) months post retirement. Clearly 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.

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

## II

### CONCLUSION

Based on the foregoing law and argument, Respondent respectfully requests that this Honorable Court's AFFIRM the Order Denying Petition for Judicial Review of the District Court that affirmed the administrative decision of the Appeals Officer that reversed Appellant's determination that Respondent was ineligible for permanent partial disability related to his claim for occupationally related cancer. Thus, the decision of the Appeals Officer was proper as a matter of law and was properly affirmed.

DATED this 24<sup>th</sup> day of February, 2020.

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By 

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## DISCLOSURE STATEMENT

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

There is no corporation as defined in Rule 26.1(a) involved in this matter.

The law firm of Greenman, Goldberg, Raby & Martinez and its partners and associates are the only attorneys for the Respondent.

DATED this 24 day of February, 2020.

GREENMAN GOLDBERG RABY & MARTINEZ

By 

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## CERTIFICATE OF COMPLIANCE

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

I hereby certify that this brief complied with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in proportionally spaced typeface using Word in Times New Roman 14-point font and contains 4953 words.

I further certify that this brief complies with the page- or type-volume limitation of NRAP 32(a)(7) in that it does not exceed thirty (30) pages.

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

DATED this 24<sup>th</sup> day of February, 2020.

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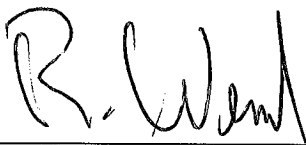
Attorneys for Respondent

BRENT BEAN

**CERTIFICATE OF MAILING**

I hereby certify that on this 24<sup>th</sup> day of February, 2020, I served the foregoing Appellant's Opening Brief, upon the following person(s), by depositing a copy of same in a sealed envelope in the United States Mail, postage pre-paid, to the following and that I also caused the foregoing document entitled RESPONDENT'S ANSWERING BRIEF to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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