IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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CLARK COUNTY,

Appellant,

vs.

BRENT BEAN,

Respondent.

Supreme Court Case No.: 78443
District Court Case No.: A773957

APPELLANT'S REPLY BRIEF

HOOKS MENG & CLEMENT

Dalton L. Hooks, Jr., Esq., NSB #8121
John A. Clement, Esq, NSB # 8030
Attorneys for Appellant, CLARK COUNTY
2820 W. Charleston Blvd., Ste. C-23
Las Vegas, NV 89102
Telephone No. (702) 766-4672
Facsimile No. (702) 919-4672

I.
NRAP 26.1 DISCLOSURE

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY, Appellant, vs. BRENT BEAN, Respondent.	Supreme Court Case No.: 78443 District Court Case No.: A773957

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

Clark County, was represented by HOOKS MENG & CLEMENT in the underlying litigation and on appeal.

HOOKS MENG & CLEMENT

Dalton L. Hooks, Esq. NSB # 8121
John A. Clement, Esq. NSB # 8030
Attorneys for Appellant, CLARK COUNTY
2820 W. Charleston Blvd., Ste C-23
Las Vegas, NV 89102
Telephone No. (702) 766-4672
Facsimile No. (702) 919-4672

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ARGUMENT

A. The District Court Erred in Affirming the Decision and Order of the Appeals Officer Finding that Respondent is Not Disqualified From Receiving PPD Benefits.

In Respondent's Answering Brief, he erroneously asserts an entitlement to economic wage replacement in the form of Permanent Partial Disability benefits despite the fact that he had not earned any wages for over three years prior to making a claim for benefits under the Nevada Industrial Insurance Act due to his retirement. *See* Respondent's Answering Brief at pg. 4; *see also* [JA000578]. To this end, Respondent attempts to wrongfully characterize Permanent Partial Disability as a medical benefit, despite NRS 616C.490's mandatory and longstanding requirement that Respondent have earned a wage in order to receive Permanent Partial Disability benefits. *See id.* However, Respondent's argument is simply an attempt to collect benefits in excess of that which he is lawfully entitled under the Nevada Industrial Insurance Act.

1) Respondent's Contention That the Evidence Supports the District Court's Order is Not in Dispute, Irrelevant, and Should be Ignored by this Court.

Respondent argues that "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." *See id.* at pp. 1–2. To the contrary, the issue before this Court is not whether the District Court's Order was supported by substantial evidence but rather whether the District Court's Order constitutes an error of law. Respondent's argument here is yet another attempt to obfuscate the reality that he earned no wages for over three (3) years prior to filing his workers' compensation claim and thus has no entitlement to Permanent Partial Disability benefits under NRS 616C.490. [JA000578].

2) *Howard v. City of Las Vegas* Bars Permanent Partial Disability Benefits in this Case as it Stands for the Proposition that a Retiree Earns No Wages and Thus Has No Average Monthly Wage Pursuant to NRS 616C.420 and NAC 616C.423.

Respondent asserts that *Howard v. City of Las Vegas* is distinguishable from the instant case and thus does not preclude his entitlement to Permanent Partial Disability benefits. *See id.* at pg. 3. However, Respondent's argument rests entirely on developing distinctions without meaning between *Howard* and the instant case.

Respondent argues that *Howard* is distinguishable from the case at bar because the workers' compensation Claimant in *Howard* sought compensation for *Temporary* Total Disability whereas here Respondent seeks compensation for *Permanent* Partial Disability. *See id.* Respondent fails to inform this Court that the *Howard* court never once discussed the temporary nature of the claimant's

disability benefits as a pivotal fact nor distinguished Temporary Total Disability benefits from any other disability benefit available under the Nevada Industrial Insurance Act. *See Howard v. City of Las Vegas*, 121 Nev. 691, 691–95 (2005). Accordingly, respondent's argument that *Howard* only applies to Temporary Total Disability or that the same is somehow distinguishable from any other disability benefit available under the Nevada Industrial Insurance Act is without merit.

In reality, the Nevada Supreme Court's ruling in *Howard* addresses the proper method of calculating average monthly wage, not the minutia between various disability benefits available under the Nevada Industrial Insurance Act. In *Howard*, the Court stated that " the period immediately preceding the heart attack is the date from which we **must** calculate Howard's disability benefits." *See id.* at 695 (emphasis added). The Court ultimately determined that "while he is entitled to medical benefits, we must, however, conclude that this entitlement does not extend to temporary total disability benefits **because of the Legislature's method for calculating the average monthly wage."** *See id.* at 692 (emphasis added).

Thus, the *Howard* Court determined that **any** disability payment must be properly calculated in accord with NRS 616C.420, NAC 616C.423, and NRS 616C.490. *See id.* NRS 616C.420(1) states that "The Administrator shall provide by regulation for a method of determining average monthly wage." Accordingly,

NAC 616C.423(1)(a)–(p) specifically defines sources of income included in the calculation of average monthly wage. Further, NRS 616C.490 articulates the method of calculating Permanent Partial Disability benefits using Respondent's average monthly wage:

> **NRS 616C.490 Permanent partial disability: Compensation. [Effective through December 31, 2019.]**
>
> 7. Each 1 percent of impairment of the whole person must be compensated by a monthly payment:
>
> . . .
>
> (d) Of 0.6 percent of the claimant's **average monthly wage** for injuries sustained on or after January 1, 2000.

See NRS 616C.490 (2017).

As a matter of law, any workers' compensation Claimant **must first** have a calculable average monthly wage to receive disability benefits. Importantly, NAC 616C.423 exhaustively details each and every form of income that that may be included in a calculation of average monthly wage. **Notably, retirement income and pensions are not included among the sources of income listed in NAC 616C.423(1).** As a result, Respondent has no qualifying income with which to compute an average monthly wage and thus his average monthly wage is zero (0). [JA000578].

Critically, in *Howard*, the Nevada Supreme Court held that in the case of retired firefighters seeking compensation for occupational disease, "**the period immediately preceding the heart attack is the date from which we must calculate Howard's disability benefits."** *See Howard*, 121 Nev. at 695 (emphasis added). The Nevada Supreme Court specifically noted that retirement income is not listed among the allowable forms of income when calculating an average monthly wage pursuant to NAC 616C.423. *See id.* at 694. Further, the Court differentiated between disability benefits and medical expenses, the later of which has been expressly defined by the Nevada Legislature in NRS 617.453 and **do not** include payment of Permanent Partial Disability benefits. *See id.* at 692; *see also infra*, Part B-5.

Pursuant to NRS 616C.490, a Permanent Partial Disability benefit **must** be calculated by multiplying the result of the average monthly wage calculation by zero point six (0.6%) for each one percent (1%) of impairment. Due to the fact that Respondent's average monthly wage is zero (0) as defined by the Nevada Legislature, his Permanent Partial Disability benefit is also zero (0) as a matter of law.

In *Howard*, the Nevada Supreme Court discussed the sound public policy behind the Nevada Legislature's decision to not extend Permanent Partial Disability benefits to retirees:

> Thus, under NRS 617.420, 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**. This is so for 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.
>
> **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.**

See id. at 694 (emphasis added).

The Nevada Supreme Court justified this exact same result in *Howard* in terms of "disability compensation" by stating that "a retiree usually has lost no salary due to impairment." *See id.* Accordingly, the Court confirmed that the Nevada Legislature specifically intended disability benefits to replace lost wages and diminished future earning potential. Just as the claimant in *Howard* who was retired lost no salary due to his impairment, so too here the retired Respondent has lost no salary due to his impairment. [JA000578]. Thus, the Appellant's denial of Permanent Partial Disability benefits was proper, in accordance with mandatory Nevada Law, and should be affirmed.

In this vein, the Respondent's quest for Permanent Partial Disability benefits serves as nothing more than a demand to this Court to reverse NRS 616C.490 and

NAC 616C.423 via judicial *fiat*. Indeed, an affirmation of the District Court would serve as nothing more than this Honorable Court adding a subsection (1)(q) to NAC 616C.423 to mandate the inclusion of retirement income in the calculation of average monthly wage. As previously discussed, NAC 616C.423 serves only to include income from current employment rather than retirement income and differed compensation because as the Nevada Supreme Court noted in *Howard*, "a retiree usually has lost no salary due to impairment." *See id.* Accordingly, this Court should refrain from amending NRS 616C.490 and NAC 616C.423 via judicial *fiat*.

3) The Nevada Attorney General's August 7, 2002 Opinion Regarding Calculation of Disability Benefits is Inapplicable as it was Superseded by *Howard v. City of Las Vegas*.

Respondent alleges that the Nevada Attorney General's August 7, 2002 opinion supports his position. However, the entire opinion was predicated on the absence of any Nevada Supreme Court case addressing the calculation of wages for the purpose of providing disability benefits where a firefighter suffers an occupational disease in retirement. [JA000529]. Additionally, the Attorney General analyzed that issue in light of the Claimant securing post-retirement employment with a private company which is not the case here. [JA000526].

The Nevada Supreme Court subsequently addressed this exact issue in *Howard v. City of Las Vegas*. *See Howard v. City of Las Vegas*, 121 Nev. 691, 692 (2005). In that case, the Supreme Court denied the Claimant's request for

disability benefits and stated that "while he is entitled to medical benefits, we must, however, conclude that this entitlement does not extend to temporary total disability benefits **because of the Legislature's method for calculating the average monthly wage."** *See id.* The Court ultimately denied disability benefits because the claimant's average monthly wage was zero (0) dollars immediately preceding the heart attack as he was retired. *See id.*

Accordingly, the Attorney General's August 7, 2002 opinion has no bearing whatsoever as the Nevada Supreme Court already analyzed the same issue in a subsequent published decision and came to the opposite conclusion. This non-binding opinion should be completely disregarded as it has been superseded by *Howard v. City of Las Vegas*.

4) **In *DeMaranville v. Emplrs Ins. Co. of Nev.*, the Nevada Supreme Court Distinguished Death Benefits From Disability Benefits When Stating That Only Death Benefits May Impute Respondent's Last Earned Wage.**

Here, Respondent yet again attempts to contort case law to support his agenda by arguing that *DeMaranville v. Emplrs Ins. Co. of Nev.* applies to disability benefits when the Nevada Supreme Court expressly limited its holding to death benefits. *See DeMaranville v. Emplrs Ins. Co. of Nev.*, 448 P.3d 526, 532-33 (Nev. 2019). In doing so, Respondent selectively quotes *DeMaranville* to distinguish it from the case at bar. *See* Respondent's Answering Brief at pg. 8.

Indeed, this attempt fails. In *DeMaranville*, the Nevada Supreme Court *actually* stated that:

> The City and EICON argue that this court's decisions in *Howard* and *Mirage* hold that Daniel's death benefit should be based on his 2012 wages from the City and thus equal zero. We disagree, as those cases are distinguishable on several bases. **First, they addressed disability benefits, not death benefits, as here.** Second, they involved claims by the disabled employee, not an independent claim sought by a surviving dependent, as here. Third, both *Howard* and *Mirage* rested their conclusions that disability benefits were unavailable on the provision in NRS 617.420(1) limiting compensation payable for temporary total disability. That provision plainly does not apply here, as temporary total disability and death benefits are calculated differently, demonstrating the Legislature's intent that the two categories of benefits are distinct. Fourth, providing that Daniel's 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." 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.
> 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.

See id.

First, *DeMaranville* is distinguishable from the case at bar because it addresses death benefits whereas disability benefits are at issue here. *See id.* at 533. Indeed, the Court in *DeMaranville* specifically refused to apply its holding in *Howard v. City of Las Vegas* because that case, like the instant case, addressed disability benefits. *See id.*; *see also* [JA000578].

Second, *DeMaranville* involved a claim for compensation made by the Claimant's survivors whereas here Respondent filed his own claim. *See id.*; *see also* [JA000578]. This fact was of consequence to the *DeMaranville* court in distinguishing the case from *Howard.* *See id.* Thus, as Respondent has filed his own claim, it does not follow that public policy favors special protections in this case to protect survivors.

Third, Permanent Partial Disability is a different class of benefit than the death benefit in *DeMaranville*. *See id.* at 534. The *DeMaranville* Court noted that the Legislature intended that disability and death benefits must be calculated differently because they are different classes of benefits. *See id.* Thus, it does not follow that Respondent's average monthly wage should be extrapolated from his active employment because he was retired when his disease developed. Thus, *DeMaranville* only is applicable to death benefits and Appellant properly calculated Respondent's average monthly wage.

5) Respondent's Argument that Permanent Partial Disability is a Medical Benefit is Not Supported by Nevada Law.

Respondent's attempt to insert his personal opinion regarding the nature of Permanent Partial Disability benefits is equally without merit. Without citing any authority, Respondent declares that:

> 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 disfiguration. Permanent partial disability is a medical benefit intended to compensate the injured worker for permanent physical damaged caused by the industrial injury or occupational disease and not a form of disability compensation associated with lost wages.
> . . .
>
> 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.

See Respondent's Answering Brief at pg. 4.

First, *Howard* did not address Permanent Partial Disability benefits whatsoever. *See Howard v. City of Las Vegas*, 121 Nev. 691, 692–95 (2005). Nor is "Permanent Partial Disability" ever mentioned by the Court anywhere in *Howard*. *See id.* Thus, Respondent's argument that the Nevada Supreme Court in *Howard* declared Permanent Partial Disability a "medical" benefit is patently false, unsupported by *Howard* and NRS 616C.490, and should be ignored. Second, NRS 617.453 comprehensively defines medical benefits in the context of retired firefighters who file a workers' compensation claim after retirement. NRS 617.453 states in relevant part that:

> **NRS 617.453 Cancer as occupational disease of firefighters and other persons employed in occupations related to fire.**

> 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
> > . . .

See NRS 617.453(4) (2017).

Under NRS 617.453(4), medical benefits *only* include "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." While Respondent's argument that Permanent Partial Disability is a medical benefit should be summarily disregarded because the Nevada Legislature did not include it in NRS 617.453(4)'s list of medical benefits, his argument is fatally defective for three additional reasons.

First, NRS 617.453(4) only permits "reimbursement" for expenses pursuant to NRS 616C.260's fee schedule or the amount allowed under the Appellant's contract with medical providers. Permanent Partial Disability benefits are not addressed whatsoever under NRS 616C.260's fee schedule or Appellant's contract with medical providers. To the contrary, Permanent Partial Disability benefits are

addressed in NRS 616C.490, which is an entirely different statute and thus not allowed under NRS 617.453's two specific mechanisms of reimbursement. Thus, as Permanent Partial Disability benefits are not included in NRS 617.453's two specific medical benefit mechanisms, Permanent Partial Disability benefits cannot be considered a medical benefit.

Second, Permanent Partial Disability's method of calculation refutes Respondent's contention that the benefit is intended to compensate him for an inability to meet "personal and social demands" because the award is entirely dependent on his income. *See* Respondent's Answering Brief at pg. 11. Respondent's argument leads to the absurd conclusion that two different Claimants with the exact same inability to meet "personal and social demands" would receive different compensation provided each had a different average monthly wage.[1] Thus, Permanent Partial Disability cannot be considered a medical benefit as the basic premise of Respondent's argument leads to disparate and arbitrary outcomes.

Third, Respondent's argument leads to the absurd result that he can somehow treat his occupational disease with the Permanent Partial Disability

[1] To illustrate: Claimant A and Claimant B suffer the exact same inability to meet a personal demand in that they are no longer able to vacuum their house as a result of their industrial injury. However, Claimant A has an average monthly wage of $10,000 and Claimant B has an average monthly wage of $1,000. Pursuant to NRS 616C.490, Claimant A will receive a Permanent Partial Disability Benefit greatly in excess of Claimant B *solely* because Claimant A had a higher average monthly wage even though both suffered the same damages.

award. Quite apart from the fact that Respondent's treating physician has determined that he is "cured from disease" and thus has no additional medical treatment expenses, Appellant has never disputed reimbursing medical costs under this claim. [JA000563]. Thus, this argument fails as a cash payment is not medical treatment.

6) NRS 617.453(5) Does NOT Grant Respondent the Right to Unlimited Benefits Under the Nevada Industrial Insurance Act; Rather, the Rebuttable Presumption Only Establishes Industrial Causation.

Respondent wants this Court to believe that NRS 617.453(5) grants him unlimited benefits under the Nevada Industrial Insurance Act simply because he is a firefighter who developed cancer. [JA000540]. However, the rebuttable presumption that "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" only pertains to Respondent's threshold burden of proof in demonstrating a causal connection between his condition and his employment with Appellant.

Accordingly, this rebuttable presumption only effects the "awarding of benefits" pursuant to NRS 617.453 insofar as Respondent has demonstrated that he suffered an occupational disease as a result of his employment with Appellant. This rebuttable presumption of causation does not negate NAC 616C.423(1)(a)–(p)'s sources of income to be included in Respondent's average monthly wage

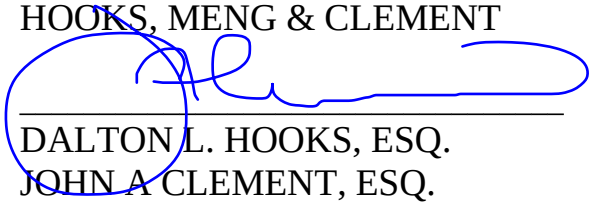
calculation nor does it somehow excuse Respondent from meeting NRS 616C.490's minimum requirements to receive Permanent Partial Disability benefits.[2]

IV.
CONCLUSION

For the reasons as stated herein, Appellant requests that this Court reverse the Order Denying Petition for Judicial Review and further requests that the matter be remanded for further proceedings in accordance with this Court's determination.

Dated this 25 day of March, 2020

HOOKS, MENG & CLEMENT



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

[2] The weight of authority supports the contention that this presumption only applies to causation, not the administration of benefits. *See, e.g., City of Phila. Fire Dep't v. Workers' Comp. Appeal Bd. (Sladek)*, 195 A.3d 197, 208-10 (Pa. 2018); *Indus. Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151, 152 (Colo. 2016); *City of S. S.F. v. Workers' Comp. Appeals Bd. (Johnson)*, 20 Cal. App. 5th 881, 892 (2018) (stating that the workers' compensation statutory scheme requires proof of proximate causation before liability may be imposed).

V.
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(1)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Time New Roman 14 point font. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 3,395 words.

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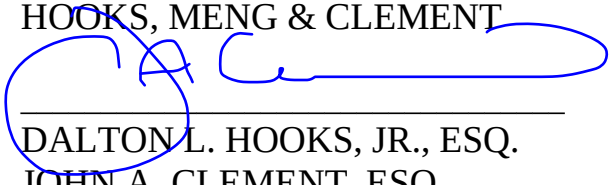
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Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), 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.

Dated this 25 day of March, 2020.

HOOKS, MENG & CLEMENT



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

VI.
CERTIFICATE OF SERVICE

The undersigned, an employee of HOOKS, MENG & CLEMENT hereby certifies that on the 25th day of March, 2020, a true and correct copy of **APPELLANT'S OPENING BRIEF,** was served on the party set forth below by Notice of Electronic Filing via the CM/ECF system as maintained by the Court Clerk's Office as follows:

Lisa Anderson, Esq.
GREENMAN, GOLDBERG,
RABY & MARTINEZ
2207 S. Maryland Pkwy., Ste. 100
Las Vegas, NV 89109

Chelsea Radley

An employee of
Hooks, Meng & Clement