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

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| CITY OF HENDERSON, CANNON COCHRAN MANAGEMENT SERVICES, INC. (CCMSI),<br><br>Appellants,<br><br>v.<br><br>JARED SPANGLER,<br><br>Respondent. | SUPREME COURT NO:<br>76295<br><br>DISTRICT COURT NO:<br>A-17-759871-J |



# APPELLANTS' OPENING BRIEF

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## NRAP 26.1 DISCLOSURE

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

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

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

DATED this 12 day of March, 2019.

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# I.

## STATEMENT OF THE CASE

This is a worker's compensation case. Prior to the subject claim, in 2005, claimant Respondent JARED SPANGLER (hereinafter "Respondent") filed a claim for workers' compensation benefits alleging that he had a hearing loss that was job incurred. This claim was denied as there was evidence that Respondent had hearing loss prior to his employment. Petitioner did not contest this denial.

In the instant claim, on February 9, 2016, Respondent filed a second claim alleging that his non-industrial hearing loss was made worse over time by his employment. This claim was denied. Respondent appealed.

On July 20, 2017, the Appeals Officer affirmed claim denial given that there was no conclusive evidence that his hearing loss was related to his employment. Respondent filed the instant Petition for Judicial Review contesting this July 20, 2017 Decision.

On June 18, 2018, the District Court reversed the Appeals Officer, finding that the Appeals Officer failed to consider NRS 616C.175(1), that the Appeals Officer interpreted the term "accident" too narrowly, and that the Appeals Officer incorrectly placed the entire burden on Petitioner to prove that the claim was compensable.

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## II.

## SUMMARY OF THE ARGUMENT

Respondent argued to the District Court that the aggravation over time of his non-industrial condition should be compensable. However, as will be explained below, the Nevada workers' compensation system does not allow for such a claim. The Appeals Officer's Decision was proper.

Further, the District Court did indeed interpret the term "accident" too broadly, requesting that the Appeals Officer consider each instance of a loud noise to Respondent as a separate accident. Though it may be true that each instance of a loud noise could have potentially been considered an "accident," that is all that they would have been: individual accidents which were self contained. In other words, Respondent could indeed have filed separate claims for each loud noise, but this interpretation has two ramifications: (1) they would each be separate claims and could not be then considered as some sort of cumulative "accident;" and (2) if such an expansive definition of "accident" is used, the fact that the Respondent did not file claims for each loud noise would be a concession that each of those loud noises could not be considered as industrial injury. The District Court erred and sent legally erroneous instructions to the Appeals Officer to interpret on remand. The Appeals Officer's Decision and Order was proper and the District Court should be reversed.

## III.

## STATEMENT OF THE ISSUES FOR REVIEW

1. WHETHER THE APPEALS OFFICER PROPERLY AFFIRMED THE DENIAL OF THIS CLAIM?

2. WHETHER THE DISTRICT COURT IMPROPERLY CONSTRUED THE STATUTORY TERM "ACCIDENT" TOO BRIADLY AND THEREFORE SENT LEGALLY ERRONEOUS INSTRUCTIONS TO THE APPEALS OFFICER TO INTERPRET?

## IV.

## FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

On February 9, 2016, the claimant Respondent, JARED SPANGLER (hereinafter referred to as "Respondent"), alleges that he had hearing loss and ringing in the ears which he attributes to job related exposure to loud noises. The Respondent was seen by Dr. Blake at Anderson Audiology where hearing loss was noted. The Respondent appears to have failed to have reveal his earlier 2005 denied hearing loss claim or that the Respondent apparently has been working a desk job for the last 5-6 years. Further, Respondent also failed to reveal that Employer modified his position after 2005 to avoid loud noises. (Appellants' Appendix p. 35)(hereinafter "APP p. __")

The Employer's Report of Industrial Injury or Occupational Disease notes a nearly one month delay in reporting the hearing loss. (APP p. 36)

The Employer's First Notice of Injury or Occupational Disease notes that the Respondent alleges exposure to excessive loud noises and that he has had tinnitus for several years. (APP p. 37)

The Respondent has previously filed a hearing loss claim in November of 2005. On February 22, 2006, Dr. Manthei noted that the Respondent's family had a positive history of hearing loss. He noted that MRI testing revealed that the Respondent had revealed "a contrast enhancement of the left internal auditory canal suggesting extrinsic compression from a neoplastic process of the brain." It was concluded that the Respondent's symptomatology was most likely due to a nonindustrial component, and that the Respondent's hearing loss should not be considered to be industrial in nature. A claim denial determination for the November 1, 2005, hearing loss claim was issued on March 7, 2006. (APP pp. 38-55) Respondent did not contest this claim denial.

Hearing testing has been performed throughout the Respondent's employment with the City of Henderson. (APP pp. 56-68)

As a result of hearing testing in October of 2015, on February 9, 2016, the Respondent was seen by Dr. Blake at Anderson Audiology. A hearing loss was found which was deemed to be suggestive of loss due to noise exposure. Again, it must be noted that there is no indication that Respondent informed Dr. Blake that he had been working a desk job for 5-6 years prior to this exam and prior to that

had a modified job to avoid loud noises. Furthermore, it does not appear that Dr. Blake had access to Respondent's entire file. (APP pp. 69-72)

A medical release was signed by the Respondent on February 9, 2016. (APP p. 73)

On March 2, 2016, the Respondent was seen by Dr. Theobald who noted that, prior to his employment Respondent had hearing loss in both ears, but that his left was worse than his right, prior to employment with Employer. It was noted that "there is a high likelihood that there is an underlying condition that may be contributing to Mr. Spangler's hearing loss in his left ear" and that the Respondent has a "possible tumor located in the area of the left cochlear nerve." Job noise exposure was also a potential cause of the hearing loss. It was recommended that the Respondent be seen by a neuro-otologist to assess the potential likelihood of left sided cochlear pathology. (APP pp. 74-76)

On March 15, 2016, a claim denial determination was issued. However, it was noted that bills related to Dr. Theobold's evaluation would be paid. (APP p. 77)

On March 28, 2016, the Respondent appealed the claim denial determination. (APP p. 78) This appeal was transferred directly to the Appeals Officer. (APP p. 79)

On July 20, 2017, the Appeals Officer affirmed claim denial given that there was no conclusive evidence that his hearing loss was related to his employment. (APP pp. 3-11) Respondent filed the instant Petition seeking review of the Appeals Officer's July 20, 2017 Decision and Order.

On June 18, 2018, The District Court reversed the Appeals Officer, finding that the Appeals Officer failed to consider NRS 616C.175(1), that the Appeals Officer interpreted the term "accident" too narrowly, and that the Appeals Officer incorrectly placed the entire burden on Respondent to prove that the claim was compensable. (APP pp. 197-200)

Appellants filed an Appeal with the Nevada Supreme Court to contest the District Court's June 18, 2018 Decision. (APP pp. 208-219) Appellants also sought a stay of that Decision pending this appeal, which the District Court granted. (APP pp. 255-256)

## V.

## JURISDICTION

Respondent timely appealed this Petition for Judicial Review of the Appeals Officer's Decision dated July 20, 2017. NRS 233B.130. Said Petition was timely filed with the District Court on August 14, 2017. On June 19, 2018, the Notice of Entry of Order of the District Court's Decision and Order remanding the Appeals Officer's Decision was filed. Appellants timely and properly filed an appeal of that

Decision and Order with this Honorable Court on July 7, 2018. See NRS 233B.150; NRAP Rule 3; NRAP Rule 4. This Court has jurisdiction over the instant appeal.

## A. ROUTING STATEMENT

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

## B. STANDARD OF REVIEW

Judicial review of a final decision of an agency is governed by NRS 233B.135.

> **NRS 233B.135 Judicial review: Manner of conducting; burden of; standard for review.**
>
> 1. Judicial review of a final decision of an agency must be:
>
> (a) Conducted by the court without a jury; and
>
> (b) Confined to the record.
>
> In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
>
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
>
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or

> set it aside in whole or in part if substantial rights of the Respondent have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.

The standard of review is whether there is substantial evidence to support the underlying decision. The reviewing court should limit its review of administrative decisions to determine if they are based upon substantial evidence. North Las Vegas v. Public Service Comm'n., 83 Nev. 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). Substantial evidence is that quantity and quality of evidence which a reasonable man would accept as adequate to support a conclusion. See, Maxwell v. SIIS, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993); and Horne v. SIIS, 113 Nev. 532, 537, 936 P.2d 839 (1997).

When reviewing administrative court decisions, this Court has held that, on factual determinations, the findings and ultimate decisions of an appeals officer are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial Comm'n. v. Reese, 93 Nev. 115, 560 P.2d

1352 (1977). An administrative determination regarding a question of fact will not be set aside unless it is against the manifest weight of the evidence. Nevada Indus. Comm'n. v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984).

### C. THIS COURT CAN SET ASIDE A CLEARLY ERRONEOUS DECISION THAT CONSTITUTES AN ERROR OF LAW OR IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

This Court may set aside, in whole or in part, a final decision of an administrative agency where substantial rights of the Appellants have been prejudiced because the final decision is in violation of statutory provisions, affected by other error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NRS 233B.135(3).

#### 1. This Court Can Set Aside a Decision That is Based on Incorrect Conclusions of Law and is Free to Address Purely Legal Questions Without Deference to the Appeals Officer's Decision.

This Court has acknowledged and applied these statutory principles holding, for example, that a reviewing court may set aside an agency decision if the decision was based upon an incorrect conclusion of law or otherwise affected by an error of law. State Indus. Ins. Sys. v. Giles, 110 Nev. 216, 871 P.2d 920 (1994); Jessop v. State Indus. Ins. Sys., 107 Nev. 888, 822 P.2d 116 (1991); see, also, NRS 233B.135(3)(d). Further, this Court has stated that appellate review on questions of law is de novo, and that the reviewing court is free to address purely legal

questions without deference to the agency's decision. Giles, supra; Mirage v. State, Dep't of Admin., 110 Nev. 257, 871 P.2d 317 (1994); American Int'l Vacations v. MacBride, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983); see, also, State Dep't of Motor Vehicles v. Torres, 105 Nev. 558, 560, 799 P.2d 959, 960-961 (1989). (Emphasis added.)

**2. This Court Can Set Aside a Decision That is Not Supported by Substantial Evidence.**

In determining whether an administrative decision is supported by substantial evidence, the methodology for this Court is also well-defined. First, for each issue appealed, the pertinent rule of law is identified. Thereafter, the evidence on appeal is reviewed to determine whether the agency's decision on each issue is supported by substantial factual evidence. State Dep't of Motor Vehicles v. Torres, *supra*. If the decision of the administrative agency on the appealed issue is supported by substantial factual evidence, this Court must affirm the decision of the agency as to that issue. On the other hand, a decision by an administrative agency that lacks support in the form of substantial evidence is arbitrary or capricious and, thus, an abuse of discretion that warrants reversal. NRS 233B.135(3); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983).

Substantial evidence has been defined as that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion.

State Emp't Sec. Dep't v. Hilton Hotels Corp., 102 Nev. 606, 608 at n.1, 729 P.2d 497 (1986). Additionally, substantial evidence is not to be considered in isolation from opposing evidence, but evidence that survives whatever in the record fairly detracts from its weight. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951); Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546 (9th Cir. 1991). This latter point is clearly the significance of the requirement in NRS 233B.135(3)(e) which states that the reviewing court consider the whole record.

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

NRS 616A.010(2) and (4) are clear that Nevada no longer has liberal construction. Issues must be decided on their merits, and not according to the common law principle that requires statutes governing workers' compensation to be liberally construed. That means workers' compensation statutes must not be interpreted or construed broadly or liberally in favor of any party.

In this case, the Appeals Officer's decision is not supported by substantial evidence. Further, as District Court affirmed the Appeals Officer's Decision, the

errors of the Appeals Officer are also the errors of the District Court. This Honorable Court retains review of the instant Petition for Judicial Review.

## VI.

## LEGAL ARGUMENT

### A. STANDARD AT THE APPEALS OFFICER LEVEL

It was the Respondent, not Appellants, who had the burden of proving entitlement to any benefits under any accepted industrial insurance claim by a preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Johnson v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

In attempting to prove his or her case, the Respondent has the burden of going beyond speculation and conjecture. That means that the Respondent must establish all facets of the claim by a preponderance of all the evidence. To prevail, a Respondent must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell v. SIIS, Id.; SIIS v. Khweiss, 108 Nev. 123, 825 P.2d 218 (1992); SIIS v. Kelly, 99 Nev. 774, 671 P.2d 29 (1983); 3, A. Larson, the Law of Workmen's Compensation, § 80.33(a).

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

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

## B. THE DENIAL OF THIS CLAIM WAS LEGAL AND PROPER

Here, Respondent argued to the District Court that he has a non-occupational hearing loss that was exacerbated over time by his employment. However, workers' compensation does not recognize such a claim. To provide context for this analysis, there are essentially two types of claims that can be made under the Nevada workers' compensation system: acute injury claims which are governed by NRS 616C; and occupational disease claims which are governed by NRS 617.

Acute injury claims arise when an employee is able to establish "by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment." NRS 616C.150. To sustain that burden, the employee must prove a statutory "accident" and "injury." NRS 616A.030 defines an accident as ". . . an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Furthermore, NRS 616A.265 defines an injury as ". . . a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence . . ."

Occupational disease claims on the other hand have no requirement to establish an "accident" or "injury." Instead, making out a claim for an occupational disease is governed by NRS 617.440 as follows:

> **NRS 617.440 Requirements for occupational disease to be deemed to arise out of and in course of employment; applicability.**
>
> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
> (a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
> (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
> (c) It can be fairly traced to the employment as the proximate cause; and
> (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.
> 2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.
> 3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.
> 4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.
> 5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

Here, Respondent is not alleging that he has either an acute injury claim or an occupational disease claim. Rather, Respondent argued that he has a non-occupational disease that was made worse over time by his employment. Because an acute injury is not being alleged, the provisions of NRS 616C do not come into play. If anything, this matter would be governed exclusively by NRS 617. Therein lies the problem with Respondent's argument.

Respondent argued that this claim should have been analyzed under NRS 616C.175(1) which allows a claimant the mechanism to prove that an ***acute injury*** has aggravated a non-industrial condition. That statute provides in pertinent part as follows:

> 1. The resulting condition of an employee who:
> (a) Has a preexisting condition from a cause or origin that did not arise out of or in the course of the employee's current or past employment; and
> (b) Subsequently sustains an ***injury by accident*** arising out of and in the course of his or her employment which aggravates, precipitates or accelerates the preexisting condition,
> Ê shall be deemed to be an ***injury by accident*** that is compensable pursuant to the provisions of ***chapters 616A to 616D, inclusive, of NRS***, unless the insurer can prove by a preponderance of the evidence that the subsequent injury is not a substantial contributing cause of the resulting condition.

(emphasis added)

As the highlighted portions of the above statute make clear, NRS 616C.175(1) only applies to acute injuries. Chapter 617 is even explicitly carved

out of the statue. It would have been very simple for the statute above to reach from chapter 616A to 617. Yet it does not. This is the main problem with Petitioners argument; there is no mechanism which would allow a claim for a non-occupational disease which has gotten worse over time, allegedly due to work conditions. Even if the medical evidence supported such a scenario, which the Appeals Officer concluded that it did not, Respondent's argument that the Appeals Officer committed legal error for failing to consider NRS 616.175 is demonstrably incorrect.

Without the benefit of NRS 616C.175, Respondent cannot prove an acute injury and is left trying to prove that he has an occupational disease under NRS 617. As the Appeals Officer properly found, Respondent fails in carrying that burden.

To begin with, Respondent is making a claim for hearing loss. As noted above, Respondent's prior claim for hearing loss was denied. Respondent failed to contest that claim denial. Based on that failure to appeal, it was conclusively proven that Respondent's hearing loss was not work related. That claim denial stands and Respondent is barred from making any new claims for the same condition. (See Reno Sparks Convention Visitors Authority v. Jackson, 112 Nev. 62, 910 P.2d 267 (1996))

The fact that Respondent is now arguing that the same non-occupational hearing loss is now worse is of no consequence. The hearing loss is non-industrial. It does not matter how bad it gets, it will always be non-industrial per the 2005 determination.

Indeed, NRS 617.440 requires a "direct causal connection between the conditions under which the work is performed and the occupational disease." The alleged occupational disease in this case is hearing loss. However, Respondent is not alleging that his job caused his hearing loss; Respondent is alleging that his job made his non-industrial hearing loss worse. This type of situation is not covered by NRS 617.440.

Even if Respondent could somehow make a showing that the worsening of a non-industrial condition over time could be deemed compensable under Nevada industrial insurance, Respondent would not be able to carry his burden before the Appeals Officer and certainly cannot carry his burden before this Court. At the Appeals Officer level, Respondent needed to prove by a preponderance of the evidence that his claimed condition was work related. The only evidence which was presented to the Appeals Officer were the reports of Dr. Blake and Dr. Theobold.

Though Dr. Blake "checks the box" on the C-4 form that she believed Respondent's hearing loss was industrial, her reporting is flawed as it is obviously

incomplete. She did not have Respondent's whole file and apparently did not know about Respondent's actual work situation given that Employer modified his position after the 2005 claim so that Respondent would not be exposed to loud noises and that he had been working a primarily desk job for the last several years.

As for Dr. Theobold, his reporting is inconclusive as he explains that Respondent's hearing loss could be either from his employment or from some underlying neurological condition. Put simply, there was not enough evidence to prove to the Appeals Officer by a preponderance that Respondent's non-occupational hearing loss was worsened over time by his employment.

However, the standard at this Court on questions of fact is whether the Appeals Officer's decision was afflicted by clear error. There is no clear error here. Though Appellants will concede that there is support for both sides on the question of whether Respondent's non-industrial occupational disease was worsened over time by his job, that question is not for this Court to decide. This Court must decide whether the Appeals Officer *could* have come to the conclusion that she did. (Hilton Hotels Corp., Id.) Even if this Court would have decided this case differently, as a court of appeal, this Court is simply not permitted to substitute its judgment for the administrative officer that ultimately decided this case. (NRS 233B.135(3); Titanium Metals Corp., Id.)

In summation, Respondent's entire argument rests on establishing an exacerbation claim under NRS 616C.175. However, that statute only applies to *acute* exacerbations of non-industrial conditions. Petitioner is alleging an exacerbation over time to a non-industrial condition which is simply not contemplated by NRS 616C.175 or any other statutory mechanism which Appellants are aware of. Without a legal framework to establish a claim, Respondent's arguments must fail. The Appeals Officer's Decision was legally proper and supported by substantial evidence. The District Court should be reversed and the Appeals Officer affirmed.

### C. THE DISTRICT COURT MADE SEVERAL IMPROPER LEGAL CONCLUSIONS

To be clear, this case is about a claimant who has a pre-existing, non-industrial hearing loss which all parties agree is not compensable. However, Respondent is alleging that his employment, over time, caused his pre-existing hearing loss to worsen. Administrator denied this claim as the state of Nevada does not recognize a claim that a pre-existing non-industrial condition was worsened over time by industrial causes. Further, Respondent failed to establish that any one specific noise caused his hearing loss, especially considering that he has been working a desk job for 5-6 years prior to filing his claim. Without an allegation that his hearing loss was caused by a specific event, there is simply no way to

render Respondent's claim compensable. The Appeals Officer recognized this when she affirmed claim denial.

However, the District Court reversed the Appeals Officer and remanded for an analysis of NRS 616C.175(1) with an expanded definition of "accident" to include the consideration that each loud noise which causes damage to the hearing as a separate accident. However, this holding does not match up with the relief that Respondent is asking for and does not provide Respondent with a mechanism to prove that his *cumulative* alleged hearing loss is industrial. Indeed, Respondent has not alleged any one single event that caused his hearing loss. He has alleged that over time his hearing has worsened.

Considering the District Court's instructions, even if Respondent could create a timeline of all the loud noises from the time of his hire through the time that he filed the claim (notwithstanding the fact that he did attempt to file a claim in 2005, was denied, and never contested the denial), if after each noise occurred a potential claim arose, Petitioner waived any right to have such claims considered as industrial by not filing a claim. Per NRS 616C.015, injured employees **must** provide written notice of an injury within seven (7) days. Per NRS 616C.020, injured employees **must** file a claim within ninety (90) days after an accident. If written notice is not timely provided and a claim is not timely filed, the injured

employee is foreclosed from claiming the injury/accident under industrial insurance.

The Nevada Supreme Court, in Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 2 P.3d 850 (2000), held that *mandatory* compliance with both NRS 616C.015 and NRS 616C.020 is a prerequisite for a compensable industrial insurance claim. This Court specifically held:

> After a careful review of NRS Chapter 616C, we conclude that the legislature established a comprehensive statutory scheme for workers' compensation claims that begins with a two-step process. First, **under NRS 616C.015, an injured employee must provide written notice of a work related injury to the employer within seven days of the injury.** Second, under NRS 616C.020(1), the employee must file a claim for compensation for the injury within ninety days of the accident. In accordance with NRS 616C.015(l) and NRS 616C.020(1), NRS 616C.025(1) expressly provides that an injured employee is barred from receiving compensation if the employee fails to file a notice of injury or fails to file a claim for compensation. Id., at 545. (emphasis added)

Therefore, even if the parties were to conduct the analysis requested by the District Court, every time a loud noise occurred and allegedly caused a hearing loss, Respondent conceded that such alleged hearing loss was non-industrial by failing to file a claim. Appeal rights cannot be regenerated. (See Reno Sparks Convention Visitors Auth. v. Jackson, 112 Nev. 62, 910 P.2d 267, (1996)). In other words, Respondent could not make out a claim for all of the cumulative hearing

loss which occurred prior to the most recent loud noise. He would only be able to claim the loss from the singular loud noise. And again, that is not even what Respondent is asking for. He is asking for this claim to be accepted for his *cumulative* hearing loss, not the hearing loss from a specific accident.

As was conceded by Respondent in his briefing to the District Court, this case simply does not fit into the acute accident constructs of NRS 616C. It was error for the District Court to remand for further consideration of this case under NRS 616C. The District Court should be reversed and the Appeals Officer affirmed.

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## VII.

## CONCLUSION

Based upon the foregoing, Appellants requests that this Court reverse the District Court, affirm the Appeals Officer, and hold that this claim was properly denied.

Dated this 12 day of March, 2019.

Respectfully submitted,

**LEWIS, BRISBOIS, BISGAARD & SMITH, LLP**

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## CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 4,898 words and 508 lines of text.

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

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

Respectfully submitted,
**LEWIS, BRISBOIS, BISGAARD & SMITH, LLP**

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## CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 12th day of March, 2019, service of the attached **APPELLANTS' OPENING BRIEF** was made this date by depositing a true copy of the same for mailing, first class mail, and/or electronic service as follows:

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