IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON and CANNON COCHRAN MANAGEMENT SERVICES, INC.,

Appellants,

vs.

JARED SPANGLER

Respondent.

CASE NO.: 76295

RESPONDENT'S OPENING BRIEF

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STATEMENT OF THE ISSUE

This is a workers' compensation appeal. At issue before the Court is whether the District Court's Order Granting Petition for Judicial Review REVERSING the Appeals Officer's Decision and Order that had affirmed Appellant's determination denying liability for the February 9, 2016 claim for the occupationally related aggravation of pre-existing hearing loss is supported by substantial evidence in the record and is devoid of legal error.

II

STATEMENT OF THE CASE

Respondent filed a claim for workers' compensation benefits for occupationally related hearing loss. On March 12, 2016, Appellant notified Respondent that liability was denied for his workers' compensation claim. Respondent timely appealed Appellant's claim denial determination. On July 20, 2017, the Appeals Officer affirmed Appellant's claim denial on the grounds that Respondent's original hearing loss was not related to an employment related risk. Respondent timely filed a Petition for Judicial Review to the District Court. On June 18, 2018, the District Court granted Respondent's Petition for Judicial Review by reversing the Appeals Officer's Decision and Order. In doing so, the District Court found that the Appeals Officer failed to properly consider the repeated

occupationally related exposures Respondent regularly confronted that aggravated, precipitated and accelerated his pre-existing hearing loss as contemplated under NRS 616C.175(1). Appellant timely appealed the Order Granting Petition for Judicial Review to the Nevada Supreme Court.

III

STATEMENT OF THE FACTS

On or about February 9, 2016, Respondent reported the development of occupationally related hearing loss and tinnitus that was sustained and accelerated while in the course and scope of his employment as a police officer for the City of Henderson. On that date, Respondent reported extensive exposure to unprotected loud noises during his career as a police officer. Liability for the claim was erroneously denied. Claim acceptance is the subject of this appeal.

Respondent participated in annual physicals, including hearing tests, as part of his employment as a police officer with Appellant. (Respondent's Appendix pages 94-105)(hereinafter "APP page ____") Respondent demonstrated minor hearing deficits when he was hired as a police officer in 2003. However, Respondent's hearing progressively worsened to a moderate to severe level by the time he filed his claim for workers' compensation benefits in 2016.

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On February 9, 2016, Respondent presented to Amanda Blake, Au.D for an audiology evaluation. At that time, Ms. Blake noted Respondent's employment history as a police officer began in 2003, with eleven (11) years on active patrol. During his employment as a police officer, Ms. Blake opined that Respondent's hearing progressively worsened as a result of being "exposed to sirens, gunfire during range qualifications, and a radio piece in his left ear, and then a lapel microphone on his left side." Ms. Blake was provided with copies of the annual hearing examinations dating back to Respondent's 2003 hire date, and she confirmed that Respondent sustained additional bilateral hearing loss since his hire date, left worse than right. Ms. Blake concluded that Respondent's "standard pure tone testing revealed borderline normal hearing, 0.25-2k Hz, sloping to a moderate high frequency sensorineural hearing loss in the right ear" and a "mild sloping to severe sensorineural hearing loss in the left ear with a notch present at 6k Hz." Ms. Blake confirmed that it was her opinion that Respondent's hearing loss was "not a consequence of the normal aging process for either ear and is suggestive of noise exposure." Ms. Blake completed a C-4 form and opined that Respondent's hearing loss was directly related to his employment as a police officer. Ms. Blake recommended binaural amplification. (APP page 106-110)

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On March 1, 2016, Respondent was evaluated by Roger Theobald, Au.D, who confirmed that he reviewed the prior medical records pertaining to Respondent's annual hearing tests, reporting from Dr. Scott Manthei in 2005, and reporting from Ms. Blake. Mr. Theobald also reported that Respondent's job as a police officer exposed him to loud noises while on the job with the Henderson Police Department. Mr. Theobald verified that Respondent had mild to moderate hearing loss in the left ear and normal to mild high frequency hearing loss in the right ear at the time of his 2003 hiring. In the years following Respondent's 2003 hire date, Mr. Theobald opined that Respondent's "hearing has significantly decreased bilaterally. Hearing decrease is considered significant if a change of 10dB or more occur at three or more hearing thresholds." Mr. Theobald verified that there is a likelihood of a pre-existing underlying condition contributing to Petitioner's hearing loss in the left ear, "however, there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." Testing performed by Mr. Theobald revealed "pure tone hearing threshold show a mild to moderately severe sensorineural hearing loss in the right ear and a moderate to moderately severe sensorineural hearing loss in the left." Mr. Theobald recommended that Respondent be provided with hearing aids and be scheduled to see a neuro-otologist to evaluate for a left sided cochlear pathology. (APP pages 111-114)

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On March 15, 2016, Appellant denied liability for Respondent's claim for occupationally related bilateral hearing loss. (APP pages 133) Respondent appealed that determination to the Hearing Officer. Prior to the hearing, the parties agreed to transfer the matter to the Appeals Officer.

On November 23, 2016, Respondent sent a letter to Dr. Steven Becker asking him whether Respondent's hearing loss was work related and, if not, whether Respondent's exposure to work related noise contributed to the hearing loss and tinnitus. On December 23, 2016, Dr. Becker opined that Respondent's hearing loss was not entirely work related, however, Dr. Becker confirmed that it was his opinion that Respondent's work related noise exposure "contributed" to the extent of the present hearing loss and tinnitus. Dr. Becker based his opinion on the "original hearing test (performed in) 2003 revealed losses bilaterally, worse in the left and hearing has steadily worsened" since that time." (APP pages 26-30)

On July 20, 2017, the Appeals Officer affirmed Appellant's March 15, 2017 claim denial determination. The Appeals Officer concluded that Respondent failed to establish that his occupational hearing loss qualified for benefits as an industrial injury or occupational disease. The Appeals Officer ruled that the origin of Respondent's hearing loss was not related to an employment related risk. Appellant also argued that Respondent was assigned to a desk job during his career as a police officer. (ROA pages 4-12)

It is from the Appeals Officer's Decision and Order dated July 20, 2015 that Respondent appealed. Upon reviewing the briefs submitted by the parties, the District Court Granted Respondent's Petition for Judicial Review. The District Court found that the Appeals Officer erred as a matter of law when it applied NRS 616B.612 in affirming claim denial instead of applying NRS 616C.175(1) which permits compensation for certain pre-existing conditions where the origin of the injury did not arise out of and in the course of employment, but the aggravation did. Additionally, the District Court found that the Appeals Officer "wrongly concluded that the aggravation of the pre-existing injury did not arise by an accident, by interpreting the term accident too narrowly." The District Court found that "each incident of a loud noise, which destroys those parts of the human body responsible for hearing, is a separate accident. Such destruction each occasion is sudden and violent." For this reason, the District Court concluded that "such accidents that destroy hearing are objective at the time in that the harm done to the ear is capable of objective, as opposed to subjective, evaluation. The term accident does not require that some person discovered the objective evidence at the time of the accident, only that such objective indicia of the injury arose at the time." For these reason, the District Court remanded the matter "back to the Appeals Officer to conduct a further hearing and apply the law as set for herein."

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Appellant filed a Notice of Appeal to the Nevada Supreme Court on or about July 2, 2018 and filed a Motion for Stay on or about July 3, 2018. On August 20, 2018, the District Court granted Appellant's Motion fro Stay.

IV

ARGUMENT

A. Standard of Review

In contested workers' compensation claims, judicial review first requires an identification of whether the issue to be resolved is a factual or legal issue. While questions of law may be reviewed de novo by this Court, a more deferential standard must be employed when reviewing the factual findings of an administrative adjudicator. NRS 233B.135, which governs judicial review of a final decision of an administrative agency, provides, in pertinent part, the following:

> 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 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.

Relating to the standard of review of administrative decisions, this Court has consistently held that the factual findings made by administrative adjudicators may not be disturbed on appeal unless they lack the support of substantial evidence. SIIS v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); SIIS v. Thomas, 101 Nev. 293, 701 P.2d 1012 (1985); SIIS v. Swinney, 103 Nev. 17, 731 P.2d 359 (1987); SIIS v. Christensen, 106 Nev. 85, 787 P.2d 408 (1990). Thus, "the central inquiry is whether substantial evidence in the record supports the agency decision." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 583, 854 P.2d 862, 865 (1993). Substantial evidence is that "quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion." Employment Security Dept. v. Cline, 109 Nev. 74, 847 P.2d 736 (1993); State Emp. Security v. Hilton Hotels, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986). Therefore, if the agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary and capricious. Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 547, 2 P.3d 850, 854 (2000).

In addition, this Court has held that its "role in reviewing an administrative decision is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or

capricious and was thus an abuse of the agency's discretion." Clements v. Airport Auth., 111 Nev. 717, 722, 896 P.2d 458, 461(1995). Thus, in reviewing the Appeals Officer's Decision and Order, a reviewing court should refrain from retrying the case and is confined to reviewing the record on appeal to determine whether substantial evidence exists to support the Appeals Officer's decision.

While a reviewing court defers to an agency's findings of fact as long as those findings are supported by substantial evidence, purely legal questions may be determined without deference to an agency determination, upon de novo review. SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218 (1992). See NRS 233B.135(3)(f). Furthermore, the construction of a statute is considered a question of law, subject to de novo review. See State Dep't of Motor Vehicles v. Lovett, 110 Nev. 473, 476, 874 P.2d 1274, 1249 (1994).

In the present case, the record on appeal did not support the Appeals Officer's decision affirming claim denial and is an incorrect interpretation and application of Nevada law. Accordingly, the District Court properly reversed the administrative decision made by the Appeals Officer.

B. The Appeals Officer Committed Reversible Error when Applying the Wrong Standard when Considering the Compensability for Respondent's February 6, 2016 Claim for the Occupationally Related Aggravation of Pre-Existing Hearing Loss.

In the underlying Decision and Order for the present appeal regarding claim denial, the Appeals Officer applied the incorrect statute when assessing claim

compensability.

Appellant argues that it will prevail upon the merits of the appeal because the District Court's decision contains several improper legal conclusions. Appellant notes that Respondent suffered from minor hearing loss at the time of his hire as a police officer. Appellant also notes that Respondent did not experience a single episode of noise exposure that caused his hearing loss. Lastly, Appellant point out that Respondent was assigned to desk duty after approximately a decade of active police duty. Appellant's arguments lack merit, are a clear attempt to reweigh the evidence and reconsider the arguments previously submitted in their briefs, and do not refute the basis for the District Court's Order Granting Petition for Judicial Review.

Respondent's maintains that his employment as a police officer directly contributed to the extent of hearing loss and tinnitus present when the February 9, 2016 claim for workers' compensation was filed. Respondent maintains that his particular profession, that of a law enforcement officer, exposes his to various noise hazards that the average citizen does not experience. The medical evidence establishes that Respondent's occupational hazards aggravated, precipitated and accelerated the hearing loss identified when he was hired by Appellant as a police officer.

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NRS 617.440 states:

> 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;
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> (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.
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> 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.
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> 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.

The medical reporting from the audiologists, who examined, tested and reviewed all prior hearing studies, verifies that the extent of Respondent's hearing loss and tinnitus is directly related to occupational exposures. These exposures consist of, but are not limited to, fire arm use, sirens, radio and various tactical

maneuvers. Police officers are trained to be prepared to be in loud, chaotic environments. Ms. Blake and Mr. Theobald note Respondent's prior hearing exposure but directly relate the ensuring severity of the hearing loss to employment related exposures. Further, Dr. Becker verified that Respondent's hearing loss did not originate with his employment, but opined that the work related exposures contributed to the steady decline in hearing capabilities. Thus the totality of the reporting establishes a "direct causal connection" between the extent of Respondent's hearing loss and tinnitus and his job as a police officer. Respondent is not placed in this type of situation outside of his employment. Since there was not a singular moment when Respondent sustained hearing damage, the reporting clearly establishes that his repeated occupational exposures contributed to Respondent's level of hearing damage, which is a natural incident of his employment and qualifies for coverage as an occupational disease. It is clear that Respondent's work conditions and work environment directly contributed to the February 9, 2016 claim for occupational hearing loss.

Although Respondent started his career as a police officer with a minor hearing deficit, it was Petitioner's job in law enforcement that significantly accelerated his hearing loss and produced the tinnitus. NRS 616C.175 addresses the issue of when industrial factors aggravate or accelerate a pre-existing condition.

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NRS 616C.175 states:

> 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.

Appellant denied liability for Respondent's bilateral hearing loss and tinnitus. Appellant based its denial on the fact that Respondent had some hearing deficit at the time of his 2003 hire date. Respondent has acknowledged the hearing deficit from 2003, however, he maintains that the severity of the ensuing hearing loss and tinnitus is associated with employment related noise exposures. Thus it was Respondent's occupational exposures that accelerated his future hearing losses.

The reporting from the audiologists, Ms. Blake and Mr. Theobald, establishes that Respondent had some hearing loss at the time of his 2003 hire as a police officer. However, these audiologists verified that Respondent's hearing loss progressively worsened due to employment related noise exposures.

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Ms. Blake confirmed that it was her opinion that Respondent's hearing loss was "not a consequence of the normal aging process for either ear and is suggestive of noise exposure." Ms. Blake noted that during his eleven (11) years on active patrol, Respondent's hearing has progressively worsened as a result of being "exposed to sirens, gunfire during range qualifications, and a radio piece in his left ear, and then a lapel microphone on his left side."

Mr. Theobald verified that there is a likelihood of a pre-existing underlying condition contributing to Respondent's hearing loss in the left ear, "however, there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." In the years following Respondent's 2003 hire date, Mr. Theobald opined that Respondent's "hearing has significantly decreased bilaterally. Hearing decrease is considered significant if a change of 10dB or more occur at three or more hearing thresholds."

Furthermore, Dr. Becker confirmed that, while Respondent's job did not cause the hearing loss, his job was absolutely a "contributing factor" in the loss that developed after his 2003 hire date as a police officer.

NRS 616C.175 addresses the issue of when an industrial injury "aggravates, precipitates or accelerates" a pre-existing condition. This statute mandates that an insurer is responsible for treatment related to a pre-existing condition if the industrial injury "aggravates, precipitates or accelerates" the pre-existing condition.

Moreover, if the insurer denies responsibility for treatment related to a pre-existing condition, this statute requires the insurer to "prove by a preponderance of the evidence that the subsequent (industrial) injury is not a substantial contributing cause of the resulting condition."

In this case, Appellant has completely failed to meet its statutory obligation of proving by "a preponderance of the evidence" that Respondent's occupationally related noise exposure is "not a substantial contributing cause of the resulting condition." Respondent began experiencing increased hearing loss and the development of tinnitus symptoms after his 2003 hire date as a police officer. This fact was documented in Ms. Blake, Mr. Theobald and Dr. Becker's reporting. Respondent's job as a police officer regularly exposed him to extremely loud sirens, unprotected sounds of gunfire, a radio piece in the left ear and a lapel radio in close proximity to this left ear. It was during these activities that resulted in the acceleration of hearing loss following his 2003 hire date.

Respondent experienced minimal hearing deficit at the time of his 2003 hire date. During the subsequent years of active patrol duty, Respondent was exposed to wide-ranging sources of loud noise without protection. In fact, the reporting verified that Respondent's increased hearing loss in the left ear compared to the right ear was related to the use of the ear piece in the left ear and the lapel radio on the left side. These exposures were a "contributing factor" in Respondent's accelerated hearing

loss and the development of tinnitus. The current level of hearing loss has been directly related to his occupation as a police officer.

Therefore, Respondent's job as a police officer is clearly the primary contributing cause of the current level of hearing loss and the development of tinnitus. The reporting from Ms. Blake, Mr. Theobald and Dr. Becker confirms that Respondent's occupation noise exposure was the primary contributing cause of the current hearing loss and tinnitus. Although there was a pre-employment finding of mild hearing loss at the time of his 2003 hiring as a police officer, the subsequent level of deterioration of his hearing abilities and current need for hearing aids is directly related to his employment as a police officer. Therefore, based upon the extensive nature of the industrial noise exposures, Respondent's worsening hearing loss and tinnitus is industrially related.

Thus, the Appeals Officer incorrectly applied NRS 616C.150 and NRS 617.440 when finding that Petitioner's hearing loss condition did not qualify for benefits as an industrial injury or occupational disease. Petitioner's hearing loss absolutely qualifies for benefits under NRS 616C.440. Moreover, the available reporting demonstrates that Claimant's mild pre-existing hearing loss at the time of his hire as a police officer was aggravated and accelerated by the ensuring years of occupational noise exposures and must be accepted in accordance with NRS 616C.175.

V

CONCLUSION

Based on the foregoing law and argument, Respondent respectfully requests that this Honorable Court's AFFIRM the Order Granting Petition for Judicial Review of the District Court that reversed the administrative decision of the Appeals Officer that uphold Appellant's claim denial determination because Respondent's eligibility for workers' compensation benefits were not properly contemplated under NRS 616C.175(1). Thus, the decision of the Appeals Officer is erroneous as a matter of law and was properly reversed.

DATED this 25th day of April, 2019.

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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 25th day of April, 2019.

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 4641 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 25th day of April, 2019.

GREENMAN, GOLDBERG, RABY & MARTINEZ

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CERTIFICATE OF MAILING

I hereby certify that on this 24th day of April, 2019, 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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