

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

ASSOCIATED RISK MANAGEMENT, INC.

Appellant,

vs.

MANUEL IBANEZ

Respondent

No. 80480

Electronically Filed  
Feb 06 2020 01:03 p.m.

DOCKETING STATEMENT  
CIVIL APPEALS Brown  
CIVIL APPEALS Supreme Court

## GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

## WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eight Judicial District Court Department X

County Clark Judge Tierra Jones

District Ct. Case No. A-19-792902-J

**2. Attorney filing this docketing statement:**

Attorney David H. Benavidez Telephone 702-565-9730

Firm Law Office of David H. Benavidez

Address 850 S. Boulder Hwy. #375  
Henderson, Nv 89015

Client(s) Associated Risk Management, Inc

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Javier Arguello, Esq. Telephone (702) 649-2600

Firm Bertolo, Baker, Carter & Smith

Address 7408 W. Sahara Ave.  
Las Vegas, NV 89117

Client(s) Manuel Ibanez

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |  |   |
|--|---|
| <input type="checkbox"/> Judgment after bench trial                | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict               | <input type="checkbox"/> Lack of jurisdiction                           |
| <input type="checkbox"/> Summary judgment                          | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                          | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief         | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction                | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief        | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

This appeal involves a District Court order denying the Petition for Judicial Review of an April 11, 2019 Appeals Officer decision which reversed the Hearing Officer ' s August 28, 2018 decision affirming the Administrator ' s determination denying the claimant ' s request for permanent total disability (PTD).

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

The claimant is not medically stable. To date, the claim remains open for medical care. No physician has found the claimant medically stable. The claimant has not been rated for permanent impairment. Nor has the authorized treatment physician recommended permanent restrictions. The claimant has therefore not met with a vocational counselor. During the administration of the claim, it was determined the claimant is not lawfully in the United States. The Administrator denied temporary total disability (TTD) benefits as the claimant is not entitled to the monetary wage replacement benefits based on his inability to work as a result of being an undocumented alien. *Tarango v. SIIS*, 117 Nev. 444, 25 P.3d 175 (2001).

See page 12 (attached)

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None known.

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☒ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: See Nevada Indus. Comm ' n v. Hildebrand, 100 Nev.47, 675 P.2d 401 (1984), where the treating physician found her at maximum medical improvement, medically stable and Hildebrand had been rated for permanent impairment receiving a 5% award unlike the present claim where the claimant continues to treat, is not stable and continues with light duty restrictions. Hildebrand was offered vocational services where a vocational counselor assessed the job market, unlike this claim.

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is presumptively assigned to the Court of Appeals under NRAP17(b)(10) as it is a Petition for Judicial Review of a final decision of an administrative agency. However, the Supreme Court should retain jurisdiction given that his case presents an issue of first impression which would affect the statewide administration of workers ' compensation insurance.

**14. Trial.** If this action proceeded to trial, how many days did the trial last? \_\_\_\_\_

Was it a bench or jury trial? \_\_\_\_\_

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** \_\_\_\_\_

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

January 21, 2020

**17. Date written notice of entry of judgment or order was served** January 29, 2020

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** January 22, 2020

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a) SUBSTANTIVE APPEALABILITY

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

☐ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☒ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) \_\_\_\_\_

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRS 233B.150 Appeal from final judgment of district court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution. The appeal shall be taken as in other civil cases



**22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Associated Risk Management, Inc.

Manuel Ibanez

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

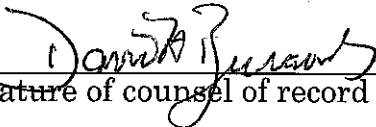
## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Associated Risk Management, Inc  
Name of appellant

David H. Benavidez, Esq.  
Name of counsel of record

February 6, 2020  
Date

  
Signature of counsel of record

Nevada, Clark  
State and county where signed

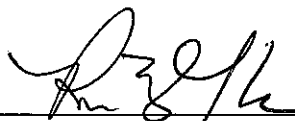
## CERTIFICATE OF SERVICE

I certify that on the 6th day of February, 2020, I served a copy of this completed docketing statement upon all counsel of record:

- ☒ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

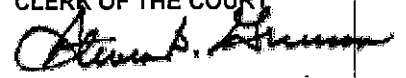
Javier A Arguello, Esq.  
Benson Bertoldo Baker Carter  
7408 W Sahara Ave  
Las Vegas, NV 89122

Dated this 6th day of February, 2020

  
Signature

## 9. Continued

Instead of allowing the claim to play out, the claimant hired a rating physician who found the claimant permanent and totally disabled. The rating physician does not mention the claimant is illegal. , nor does he mention the claim remains open and no physician has found him medically stable



1 NOTC  
2 BERTOLDO, BAKER, CARTER & SMITH  
3 JAVIER A. ARGUELLO, ESQ.  
4 Nevada Bar No. 4908  
5 7408 W. Sahara Ave.  
6 Las Vegas, NV 89117  
7 Phone (702) 649-2600  
8 Fax (702) 657-1107  
9 Attorneys for Respondent  
10 MANUEL IBANEZ

11  
12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 ASSOCIATED RISK MANAGEMENT, INC., ) CASE NO. A-19-792902-J  
15 vs. Petitioner, ) DEPT NO. 10  
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of BERTOLDO, BAKER, CARTER & SMITH and that, on the 29 day of January 2020, I deposited a true and correct copy of the above and foregoing NOTICE OF ENTRY OF ORDER in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first-class postage was fully prepaid, addressed to the following:

DAVID H. BENAVIDEZ, Esq.  
850 S. Boulder Hwy. #375  
Henderson, NV 89015

Richard Staub, Esq.  
PO Box 392  
Carson City, NV 89701

ASSOCIATED RISK MANAGEMENT, INC.  
PO Box 4930  
Carson City, NV 89702-4930

  
An Employee of BERTOLDO, BAKER, CARTER & SMITH

BERTOLDO BAKER CARTER & SMITH  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
702-228-2600 • Fax 702-228-2333

Case Number: A-19-792902-J

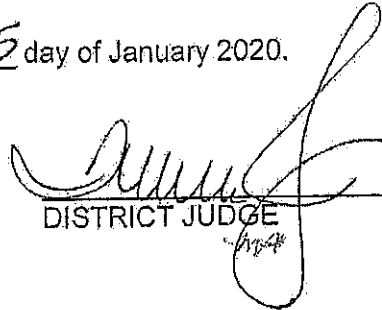
**BERTOLDO BAKER CARTER & SMITH**  
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BERTOLDO BAKER CARTER & SMITH  
7408 West Sahara Avenue  
Las Vegas, Nevada 89117  
702-228-2600 • Fax 702-228-2333

///

IT IS HEREBY ORDERED that Petitioner's Petition for Judicial Review is hereby  
DENIED.

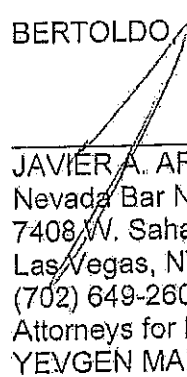
DATED this 15 day of January 2020.


  
DISTRICT JUDGE

Respectfully submitted by:

BERTOLDO BAKER, CARTER & SMITH

DAVID H. BENAVIDEZ

  
JAVIER A. ARGUELLO, ESQ.  
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Attorneys for Petitioner



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of BERTOLDO, BAKER, CARTER & SMITH and that, on the 21 day of January 2020, I deposited a true and correct copy of the above and foregoing **ORDER** in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first-class postage was fully prepaid, addressed to the following:

DAVID H. BENAVIDEZ, Esq.  
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An Employee of BERTOLDO, BAKER, CARTER & SMITH



CASE NO: A-19-792902-J  
Department 10

PTJR  
DAVID H. BENAVIDEZ, ESQUIRE  
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Davidbenavidez@gmail.com  
(702) 565-9730  
Attorney for Petitioner

DISTRICT COURT  
CLARK COUNTY, NEVADA

ASSOCIATED RISK MANAGEMENT, INC.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No.:
	)	Dept No.:
MANUEL IBANEZ, THE DEPARTMENT OF	)	
ADMINISTRATION, HEARINGS DIVISION,	)	
APPEALS OFFICE, an agency of the State	)	
of Nevada	)	
	)	
Respondents.	)	

PETITION FOR JUDICIAL REVIEW

COMES NOW, the Petitioner Associated Risk Management, Inc.  
(Administrator), by and through its legal counsel David H.  
Benavidez, and petitions this Court for judicial review of the  
decision of the Appeals Officer decision dated April 11, 2019  
attached hereto.

The Petition for Judicial Review is filed pursuant to the  
provisions of NRS 233B.130 and is based upon the grounds in NRS  
233B.135(3). Substantial rights of the Petitioner have been

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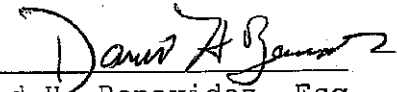
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HENDERSON, NEVADA 89015  
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1 prejudiced because the decision of the Appeals Officer is:

- 2 1. In violation of constitutional or statutory provisions;
- 3 2. In excess of the statutory authority of the Appeals
- 4 Officer;
- 5 3. Made upon unlawful procedures;
- 6 4. Affected by other error of law;
- 7 5. Clearly erroneous in view of the reliable, probative,
- 8 and substantial evidence on the whole record, and
- 9 6. Arbitrary or capricious or characterized by abuse of
- 10 discretion.

11 It is specifically requested that this Court review written  
12 briefs and hear oral arguments.

13 DATED this 12th day of April, 2019.

14 By:   
15 David H. Benavidez, Esq.  
16 Nevada Bar No. 004919  
17 850 S Boulder Hwy #375  
18 Henderson, NV 89015  
19 Attorney for Petitioner  
20  
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CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury, that I am an employee of The Law Office of David H. Benavidez and on the 12th day of April, 2019, I deposited the foregoing **PETITION FOR JUDICIAL REVIEW** in the United States Mail, with first class postage fully prepaid thereon, sent via electronic delivery, or had hand-delivered, copies of the attached document addressed as follows:

Javier Arguello, Esq.  
Bertoldo, Baker, Carter & Smith  
7408 W. Sahara Ave.  
Las Vegas NV 89117

High Point Construction  
5870 Construction Ave.  
Las Vegas, NV 89122

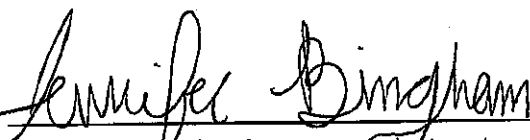
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Department of Administration  
Hearing Division-Appeals Off  
2200 S. Rancho Dr Ste 220  
Las Vegas Nv 89102

  
Jennifer Bingham, Assistant

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LAW OFFICES OF  
BERTOLDO, BAKER, CARTER & SMITH  
JAVIER A. ARGUELLO, ESQ., BAR # 4908  
7408 W SAHARA AVENUE  
LAS VEGAS, NV 89117

FILED  
AUG 11 2019  
APPEALS OFFICE

NEVADA DEPARTMENT OF ADMINISTRATION  
BEFORE THE APPEALS OFFICER

In the Matter of the Contested  
Industrial Insurance Claim of

MANUEL IBANEZ,

Claimant

APPEAL NO.: 1903730-CJY

CLAIM NO.: 5012-1271-2015-0195

DECISION AND ORDER

The above captioned matter originally came on for hearing before Appeals Officer CHARLES J. YORK, ESQ., on March 18, 2019. The Petitioner Claimant, MANUEL IBANEZ, was not present and represented by JAVIER A. ARGUELLO, ESQ., of BERTOLDO, BAKER, CARTER & SMITH. The Respondent Employer, HIGH POINT CONSTRUCTION, (hereinafter referred to as "Employer"), was not present and the Administrator, ASSOCIATED RISK MANAGEMENT, INC., (hereinafter "Administrator") was represented by DAVID H. BENAVIDEZ, ESQ.

The issue before the Appeals Officer involves the Hearing Officer's August 28, 2018 Decision, **affirming** the Administrator's July 9, 2018 determination denying the claimant's request for Permanent Total Disability ("PTD") benefits.

1 After consideration of all the evidence, including the testimony of the parties, the  
2 Appeals Officer finds and decides as follows:

3  
4 **FINDINGS OF FACT**

5 1. On October 16, 2014, the claimant, Manuel Ibana sustained multiple severe  
6 industrial injuries, while working within the course and scope of his employment as a  
7 Carpenter, for High Point Construction.

8 2. According to the C-4, claim for compensation form, filled out on the date of  
9 injury, the claimant was putting block on the stairs, when a 2x4 fell from the second floor  
10 hitting him in the head, right shoulder and low back. The physician diagnosed him with  
11 contusion to the right shoulder, cervical strain and lumbar strain, which he directly  
12 connected to the claimant's injury. Additional medical treatment was recommended and  
13 the claimant was placed on light duty restrictions of no lifting over 10 pounds, no  
14 reaching above shoulders.

15 3. The Employer completed its C-3 form on October 24, 2014. Validity of the  
16 claim was not doubted. The Employer indicated that the claimant was building stairs on  
17 a second floor home when a 2x4 piece of lumbar fell from the roof trusses and dropped  
18 down hitting him on the shoulder.

19 4. The claimant would undergo various modalities of treatment at Concentra  
20 Medical Center and was prescribed medications and physical therapy. The claimant  
21 remained on light duty restrictions consisting of no lifting over 10 pounds and no  
22 reaching above shoulders.

23 5. In a determination dated October 30, 2014, the Administrator advised the  
24 claimant that his claim had been accepted for a cervical and lumbar strain, and right  
25 shoulder contusion.

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2 6. On January 6, 2015, the claimant's care was transferred to Dr. G.M. Elkanich  
3 for his low back and cervical conditions. Dr. Elkanich recommended injections for the low  
4 back and referral to pain management, as well as an orthopedic referral for the right  
5 shoulder. The claimant remained on light duty restrictions consisting of no lifting over 10  
6 pounds and no bending at the waist.

7 7. The claimant would undergo various modalities of treatment including  
8 injections at the L4-5 and L5-S1 levels with Dr. Fischer and ultimately underwent  
9 disectomy and lumbar interbody fusion by Dr. Elkanich on November 11, 2015. The  
10 claimant would be taken off work.

11 8. On February 2, 2015, the claimant's care for his right shoulder was transferred  
12 to Dr. Steven Sanders, and he would ultimately conservative treatment. The claimant  
13 would ultimately undergo a right shoulder surgery on February 4, 2016. The operative  
14 report noted the postoperative diagnosis of right shoulder acromioclavicular joint  
15 posttraumatic arthroplasty, right biceps tendinopathy, and right shoulder posttraumatic  
16 impingement syndrome, which Dr. Sanders opined was all industrially related. A distal  
17 clavicle resection was performed.

18 9. On May 17, 2016, the claimant returned to Dr. Elkanich and he opined the  
19 claimant had reached maximum medical improvement and was stable and rateable for his  
20 lumbar and cervical spine.

21 10. The claimant was examined by Dr. Avi Weiss on July 21, 2016 with a  
22 complaint of hematuria. He noted the claimant presented with a finding of persistent  
23 microscopic hematuria and indicated it was common for orchalgia to be present in such  
24 circumstances after reviewing the Op report from Dr. Elkanich with an L5 discogenic.

25 11. As a result of continued symptomology in the lumbar and cervical spine, the  
26 claimant began treating with Dr. Ryan Workman, a pain management physician, on  
27 December 22, 2016. He would undergo various modalities of treatment.

12. On April 24, 2017, the claimant would begin treating with Dr. Archie Perry. Following additional injection therapy in the lumbar and cervical spine by Dr. Schifini, the claimant underwent a second lumbar surgery on September 12, 2017. Dr. Perry performed a removal of segmental pedicle screw instrumentation at L4, L5, and S1, and exploration of posterior final fusion at L4-5 and L5-S1.

13. The claimant underwent surgical intervention to the cervical spine by Dr. Perry on September 26, 2017, consisting of a C5-6 fusion. The claimant was seen post-operatively by Dr. Stacy Oliver on October 16, 2017. She noted he was now having significant right shoulder pain and recommended medication management.

14. On November 13, 2017, the claimant returned to Dr. Perry for a follow up evaluation. He noted despite the surgical interventions, the claimant was continuing to have significant low back, neck and right shoulder pain. His impression was status post C5-6 fusion and post removal of lumbar instrumentation. Dr. Perry recommended additional treatment, including a dorsal column stimulator, and took the claimant off work.

15. The claimant continued to undergo various modalities of treatment for his low back, neck and right shoulder with various physicians from December 7, 2017 through January 11, 2018. In his reporting dated January 11, 2018, Dr. Perry released the claimant with light duty restrictions consisting of no lifting over 10 pounds and no bending/twisting at the waist.

16. On January 28, 2018, the claimant was evaluated by Dr. Elizabeth Munoz for a psychological clearance for the dorsal column stimulator. Dr. Munoz noted the claimant was suffering from severe depression, anxiety, and post traumatic stress and several medical issues as a result of his job accident in 2014. She recommended treatment for these conditions.

...



1           17. The claimant returned to Dr. Perry for follow up on February 12, 2018 and  
2 he continued to recommend approval of the dorsal column stimulator trial. He continued  
3 to recommend work restrictions consisting of no lifting over 10 pounds and no  
4 bending/twisting at the waist.

5           18. The claimant continued to undergo various modalities of treatment for his  
6 multiple industrial injuries. According to Dr. Oliver's April 5, 2018 reporting, the claimant  
7 was continuing to have significant issues with his industrial injuries. She continued to  
8 prescribe various medications including Hydrocodone, celebrex and tizandine to support  
9 the claimant's pain, additional injections, as well the SCS trial lumbar stimulator  
10 recommended by Dr. Perry. Dr. Oliver recommended the claimant maintain the same  
11 work restrictions given by Dr. Perry. Similar reporting was issue through July 26, 2018.

12           19. Due to the claimant's severe industrial injuries, ongoing need for medical  
13 treatment, including opiate medication, his lack of education and work experience, the  
14 claimant requested acceptance for permanent total disability (PTD) status on June 25,  
15 2018.

16           20. On July 9, 2018, the Administrator issued a determination denying the  
17 claimant's request for Permanent Total Disability ("PTD") benefits based on the fact he  
18 was not documented to work in the United States. The claimant would appeal this  
19 determination to the Hearing Officer.

20           21. In a Decision dated August 28, 2018, the Hearing Officer **affirmed** the  
21 Administrator's July 9, 2018 determination denying the claimant's request for Permanent  
22 Total Disability ("PTD") benefits. The claimant would appeal this Decision to this Court.

23           22. On August 1, 2018, the claimant, via counsel, scheduled an appointment  
24 with Dr. Richard Cestkowski for a permanent total disability assessment and sent him all  
25 of the claimant's records.  
26  
27  
28

1           23.     The claimant was was evaluated by Dr. Richard Cestkowski for a PTD  
2     assessment.   In his report dated August 21, 2018, after examining the claimant and  
3     reviewing the records, Dr. Cestkowski opined to a reasonable degree of medical  
4     probability that the claimant was permanently and totally disabled as a result of his  
5     industrial injury of October 16, 2014 involving the significant impairments he had to the  
6     low back, cervical spine, and right shoulder as a result of multiple surgeries.   Dr.  
7     Cestkowski indicated he had no significant educational background and his employment  
8     history is significant for working in the construction field as well as a restaurant helper.

9           24.     Regarding the claimant's current employability, Dr. Cestkowski opined it  
10    would be very difficult for the claimant to sell his employment services, in a competitive  
11    market.   He considered the patients pain and limitations in multiple activities of daily life,  
12    along with his requirement for opiate medication would make it clearly impracticable to  
13    find employment on a sedentary basis.

14           25.     The claimant continued to treat at MONOS Health with Dr. Oliver in  
15    December of 2018, and she noted the SCS trial occurred on 9/15/18, but the claimant did  
16    not get adequate pain relief to justify implant.   She continued to prescribe opiate  
17    medication and continued to release the claimant with the sedentary 10 pounds of Dr.  
18    Perry.   The claimant would continue to undergo various modalities of treatment with Dr.  
19    Patek at the same facility beginning in March of 2019.

20           26.     The Appeals Officer finds that as a result of his severe Industrial injury,  
21    which included multiple surgeries by various physicians for the claimant's low back,  
22    cervical spine, and right shoulder, the significant physical impairment as documented by  
23    Dr. Cestkowski in his IME report, and his sedentary 10 pound lifting restrictions imposed  
24    by Dr. Perry and Dr. Oliver, the claimant qualifies for PTD status.

25    ...

26    ...

1           27. The Appeals Officer finds that based on the credible reporting from the  
2 claimant's treating physicians, as well as the credible IME reporting from Dr. Cestkowski,  
3 the Claimant has established that the Insurer's determination to deny his request for  
4 permanent total disability benefits was improper.

5           28. The Appeals Officer finds the claimant qualifies for permanent total disability  
6 benefits. NRS 616C.435 is the applicable statute and the Appeals Officer finds the  
7 claimant would fall under the "odd lot doctrine" as explained in the Nevada Supreme  
8 Court case of Nevada Indus. Comm'n v. Hildebrand, 100 Nev. 47 (1984).

9           29. The Court stated as follows: "On the other hand, a worker may qualify for  
10 permanent total disability benefits under the odd-lot doctrine even if the worker's injury is  
11 not found in the statutory schedule. The doctrine is generally recognized by use of a  
12 residuary catch-all clause following the list of scheduled injuries. In Nevada, odd-lot  
13 situations are recognized by NRS 616.575 (2)[3] which provides that \*404 the list of  
14 scheduled injuries is not exclusive, and that in all other cases permanent total disability  
15 must be determined by the insurer in accordance with the facts presented."

16           30. In determining whether a worker with a nonscheduled injury qualifies for  
17 permanent total disability benefits under the odd-lot doctrine factors in addition to the  
18 physical impairment of the worker must be taken into account. This is because, as  
19 Professor Larson has stated, the odd-lot doctrine permits: [T]otal disability [to] be found  
20 in the case of workers who, while not altogether incapacitated for work, are so  
21 handicapped that they will not be employable regularly in any way well-known branch of  
22 the labor market. The essence of the test is the probable dependability with which  
23 claimant can sell his services in a competitive labor market....2 A. Larson, the Law of  
24 Workmen's Compensation, section 57.51 (1981).

25           ...

26           ...

1           31. Larson has also stated that the worker need not be in a state of utter and  
2     abject helplessness to be considered permanently and totally disabled under the odd-lot  
3     doctrine. *Id.*

4           32. As noted above, consideration of factors other than physical impairment is  
5     necessary to determine wheather a nonscheduled injury qualifies the worker for  
6     permanent total disability benefits under the odd-lot doctrine. Such factors may include,  
7     among others, the worker's age, experince, training and education. See E.R. Moore Co. v.  
8     Industrial Com'n, 71 Ill. 2d 353, 17 Ill.Dec. 207, 211, 376 N.E.2d 206, 210 (Ill.  
9     1978); Lyons v. Industrial Special Indem. Fund, 98 Idaho 403, 565 P.2d 1360 (1977); see  
10    generally 2 A. Larson, *supra*, at sec. 57.51. The focus of the analysis, in considering the  
11    various factors, is on the degree to which the worker's physical disability impairs the  
12    worker's earning capacity or ability to work. See E.R. Moore Co., 17 Ill.Dec. at 211, 376  
13    N.E.2d at 210.

14           33. As a result and based on the totality of the evidence, including the credible  
15    reporting of Dr. Perry, Dr. Oliver, and Dr. Cestkowski, the Appeals Officer finds that the  
16    claimant has demonstrated an entitlement to permanent total disability status.

17           34. The Appeals Officer finds the Administrator's argument that because the  
18    claimant did not possess a valid work visa he was not entitled to PTD status not credible  
19    or persuasive and not relevant to the inquiry of Permanent and Total Disability eligibility.  
20    Furthermore, there is no requirment in the statute that the claimant be at maximum,  
21    medical improvement to qualify for Permanent Total Disability status.

22           35. The Appeals Officer finds that the totality of the evidence, including the  
23    credible reporting of Dr. Cestkowski makes it clear, that the claimant fall under the "odd  
24    lot doctrine" as explained in the Nevada Supreme Court case of Nevada Indus. Comm'n  
25    v. Hildebrand, 100 Nev. 47 (1984).

26     ...

1 36. Any finding of fact more appropriately considered to be a conclusion of law,  
2 and vice versa, shall be so deemed.  
3

4  
5 **CONCLUSIONS OF LAW**

6 1. The Appeals Officer concludes that the claimant has established by a  
7 preponderance of the evidence, including the credible reporting of Dr. Cestkowski, as well  
8 as the record before this Court, that he is entitled to Permanent and Total disability  
9 benefits. NRS 616C.150; NRS 616C.435. Nevada Indus. Comm'n v. Hildebrand, 100  
10 Nev. 47 (1984). See also Fancher v. Overhead Doors, Inc., 425 So. 2d 965, 966 (La. App  
11 1983).

12 **ORDER**

13 IT IS HEREBY ORDERED, ADJUDGED and DECREED Hearing Officer's August 28,  
14 2018 Decision, **affirming** the Administrator's July 9, 2018 determination denying the  
15 claimant's request for Permanent Total Disability ("PTD") benefits, is hereby **reversed**.  
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27 ...

BERTOLDO BAKER CARTER & SMITH  
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Las Vegas, Nevada 89117  
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1 The matter shall be remanded to the Administrator to declare the claimant  
2 Permanent and Totally Disabled and to pay benefits under his Permanent and Total  
3 disability status retroactive to his request on June 25, 2018, and ongoing, with interest,  
4 pursuant to NRS 616C.335.  
5

6  
7 Dated this 11<sup>th</sup> day of April, 2019.  
8

9  
10   
11 APPEALS OFFICER  
12 CHARLES J. YORK, ESQ.  
13  
14  
15  
16  
17

18 Respectfully submitted,

19 BERTOLDO, BAKER, CARTER & SMITH  
20

21 By:   
22 JAVIER A. ARGUELLO, ESQ.  
23 Nevada Bar No. 004908  
24 7408 W Sahara Avenue  
25 Las Vegas, Nevada 89117  
26 Attorneys for the Claimant  
27

28 NOTICE: Pursuant to NRS 616C.370, should any party desire to appeal this final decision  
of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court  
within thirty (30) days after service of this Order.

**CERTIFICATE OF MAILING**

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the appropriate addressee runner file maintained by the Division, 2200 S Rancho Dr, Suite 200, Las Vegas, Nevada, to the following:

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DATED THIS 11<sup>th</sup> DAY OF April, 2019.

  
An Employee of THE STATE OF NEVADA

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