IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

ASSOCIATED RISK MANAGEMENT, INC., Appellant, vs. MANUEL IBANEZ, Respondent.	Supreme Court No. 80480 District Court No. A-19-792902-J

APPELLANT'S OPENING BRIEF

David H. Benavidez, Esquire
850 S. Boulder Highway, #375
Henderson, Nevada 89015
(702)565-9730
Attorney for Appellant
Associated Risk Management, Inc.

Javier Arguello, Esq.
Benson Bertoldo Baker Carter
7408 W. Sahara Ave.
Las Vegas, NV 89117
(702)932-0355
Attorney for Respondent
Manuel Ibanez

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NRAP 26.1 DISCLOSURE

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

Appearing on behalf of Appellant is David H. Benavidez of Law Office of David H. Benavidez, who also appeared on behalf of Appellant in District Court. Counsel for Appellant has no parent corporation and there is so publicly held corporation that owns any stock of Counsel as there is no stock.

DATED this 27th day of March, 2020.

LAW OFFICE OF DAVID H. BENAVIDEZ

By: _____

David H. Benavidez, Esq.
Nevada Bar No. 004919
850 S Boulder Hwy #375
Henderson, NV 89015
Attorney of Record for Appellant
Associated Risk Management, Inc.

I.

STATEMENT OF ISSUES FOR REVIEW

Whether the claimant is entitled to permanent total disability (PTD) benefits when the claimant to date has light duty restrictions, is illegally in the United States, Appeals Officer Pulliam issued a prior decision finding and concluding the claimant cannot work in the United States and Dr. Cestkowski was not informed of the decision?

II.

STATEMENT OF THE CASE

This is a Petition for Supreme Court review of a final decision of the Appeals Officer in a contested workmen's compensation case. The petition involves a legal question regarding the Appeals Officer's order reversing the Administrator's July 9, 2018 determination denying the claimant's request for PTD benefits. Appellant asserts this is an error of law, abuse of discretion and not supported by substantial evidence. Per a prior Appeals Officer decision, the claimant is not legally eligible to work in any capacity in the United States of

America as the claimant lacks citizenship. Furthermore, the claimant is not medically stable and continues to date to receive medical care. The treating physicians in the record thus far find the claimant can work light duty.

Appellant asks this court to review the decision which is the final and binding administrative determination under NRS 616C.370.

III.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

To date, Manuel Ibanez (claimant) is not medically stable and continues to receive medical care from the examining treating physician. He has not been rated for permanent partial disability, nor has he participated in vocational rehabilitation. See the findings below.

On October 16, 2014, the 44 year claimant injured his right shoulder when a piece of 2x4 lumber fell and hit him. The treating physician diagnosed a shoulder contusion, cervical strain, lumbar strain and released the claimant to modified duty. (Joint Appendix vol. 2(a), pp.114-118)(hereinafter "APP p.___")

On October 28, 2014, Dr. Patel diagnosed a lumbar contusion and contusion

of right shoulder. Dr. Patel released the claimant to modified duty. (APP) vol.2 (a), pp.131-134)

By determination dated October 30, 2014, the Administrator accepted a cervical and lumbar spine strain and a right shoulder contusion. (APP vol.2 (a), pp.135-136)

By determination dated October 30, 2014, the Administrator noted the claimant is an undocumented citizen and not legally eligible to work in the United States of America. (APP vol. 2(a), p.137)

On November 4, 2014, Dr. Patel diagnosed a lumbar contusion, contusion of right shoulder, injury of cervical spine and contusion of the neck. (APP vol. 2(a), p. 140)

On November 9, 2014, the claimant noted a prior low back injury. (APP vol. 2(a), pp.144-148)

By determination dated November 26, 2014, the Administrator transferred the claimant to Dr. Rimoldi. (APP vol. 2(a), p.181)

On December 1, 2014, Dr. Rimoldi diagnosed a cervical strain, lumbar

strain and shoulder sprain/strain. Dr. Rimoldi released the claimant to modified duty. (APP vol. 2(a) pp.182-185)

On January 6, 2015, Dr. Elkanich released the claimant to light duty. (APP vol. 2(a), pp.206-207)

On January 27, 2015, Dr. Fisher noted the claimant was not working as the claimant's work permit had expired. Dr. Fisher diagnosed ongoing lumbar pain, lumbar sprain/strain, a right shoulder contusion with SLAP tear and released the claimant to light duty. (APP vol. 2(a), pp.212-215)

On February 2, 2015, the claimant was seen by Dr. Sanders for the right shoulder. The doctor administered a cortizone injection to the EC joint. The doctor released the claimant to temporary restricted modified duty. (APP vol. 2(a), pp.216-219)

On February 16, 2015, the claimant was seen by Dr. Sanders for the right shoulder. The doctor recommended an MRI for the right shoulder and cervical spine. The doctor released the claimant to temporary restricted modified duty.

(APP vol.2 (a), 226-228)

On March 10, 2015, Dr. Fisher noted the claimant was released to light duty, but not working as the claimant's work permit had expired. Dr. Fisher diagnosed ongoing lumbar pain, lumbar sprain/strain and a right shoulder contusion with SLAP tear. (APP vol. 2(a), pp.240-244)

On March 16, 2015, the claimant was seen by Dr. Sanders for the right shoulder. The doctor reviewed the MRIs and recommended an arthroscopy of the shoulder and possible decompression and evaluation of the distal clavicle. The doctor released the claimant to temporary restricted modified duty. (APP vol. 2(a), pp.248-250)

On March 23, 2015, Dr. Fisher performed a L3-4, L4-5, and L5-S1 discogram. (APP vol. 2(a), pp.256-257).

On April 10, 2015, the Administrator approved arthroscopic surgery for the shoulder on a rule out basis. (APP vol. 2(a), pp. 269-270)

By determination dated April 14, 2015, the Administrator noted the

claimant was using the social security number of a deceased individual and was not legally eligible to work in the United States of America. The Administrator denied TTD compensation benefits. (APP vol. 2(a), p.271)

By determination dated June 23, 2015, the Administrator scheduled the claimant for an independent medical evaluation. (APP vol. 2(a), p.287)

On October 27, 2015, Dr. Elkanich recommended an L4-5/L5-S1 anterior posterior reconstruction decompression. (APP vol. 2(b), pp.328-329)

On November 12, 2015 Dr. Elkanich performed the L4-5 and L5-S1 bilateral posterolateral lumbar arthodesis. (APP vol. 2(b), pp.331-332)

On November 24, 2015, Dr. Elkanich noted the claimant was temporarily disabled. (APP vol. 2(b), p.335)

On December 22, 2015 Dr. Elkanich released the claimant to modified duty. (APP vol. 2(b), p.336)

By determination dated December 22, 2015, the Administrator denied TTD benefits noting the claimant was undocumented and not eligible to work in the

United States of America. (APP vol. 2(b), p.337)

On February 1, 2016, the claimant was seen by Dr. Sanders for the right shoulder. The doctor recommended right shoulder arthroscopy. The doctor released the claimant to temporary modified duty. (APP vol. 2(b), pp.340-342)

On February 4, 2016, Dr. Sanders performed the right shoulder arthroscopy. (APP vol. 2(b), pp.343-346)

On February 8, 2016 and March 11, 2016, the claimant was seen by Dr. Sanders. The doctor released the claimant to temporary modified duty. (APP vol. 2(b), pp.347-348,351-353)

On April 4, 2016, the claimant was seen by Dr. Sanders. The doctor released the claimant to modified duty and advised that he would release him to full duty in three weeks. (APP vol. 2(b), pp.354-356)

On May 20, 2016, Dr. Sanders released the claimant to full duty for the shoulder. (APP vol. 2(b), pp.357-359)

On August 8, 2016, the claimant was seen by Dr. Sanders. The claimant

advised he had been released from spine care and had not been working. The doctor opined the claimant was stable and rateable and at maximum medical improvement(MMI) and released the claimant from care relating to the shoulder. (APP vol. 2(b), pp.361-363)

On January 10, 2017, Appeals Officer Pullium concluded the claimant is not entitled for TTD benefits as a matter of law as the claimant is not legally eligible to work in the United States citing Tarango v. SIIS, 117 Nev. 444 (2001). (APP vol. 2(b), pp.364-376)

On March 24, 2017, claimant's counsel requested transfer of care to Dr. Perry. (APP p.377) On April 4, 2017, the Administrator scheduled the claimant with Dr. Perry. (APP vol. 2(b), p.378)

On April 24, 2017, Dr. Perry referred to pain management and physical therapy and released the claimant to modified work restrictions. (APP vol. 2(b), p.379-388)

On July 17, 2017, Dr. Perry released the claimant to modified light duty

employment. (APP vol. 2(b), p.395)

On August 14, 2017, Dr. Perry recommended an anterior cervical decompression and fusion at C5-6 and removal for posterior instrumentation. (APP vol. 2(b), pp.396-401)

On September 18, 2017, Dr. Oliver released the claimant to restricted/modified duty per Dr. Perry. (APP vol. 2(b), p.410)

On September 28, 2017, claimant's counsel requested TTD from September 12, 2017 until returned to gainful employment. (APP vol. 2(b), p.412)

On September 28, 2017, Dr. Perry took the claimant off work from September 28, 2017 through October 28, 2017. (APP vol. 2(b), p.413)

On October 16, 2017, Dr. Perry put the claimant off work from October 16, 2017 through November 16, 2017. (APP vol. 2(b), p.414)

On November 13, 2017, Dr. Perry put the claimant off work from November 13, 2017 through December 13, 2017. (APP vol. 2(b), p.425)

On December 26, 2017, the Administrator scheduled the claimant with Dr.

Hanson. (APP vol. 2(b), p.449)

On January 11, 2018, Dr. Perry released the claimant to work with temporary work restrictions. (APP vol. 2(b), p.456)

On February 1, 2018, Dr. Hanson released the claimant from care and returned him to work with no restrictions. (APP vol. 2(b), pp.476-480)

On February 13, 2018, the Administrator denied TTD benefits noting the release to light duty work and the claimant is undocumented and not eligible to work in the United States of America and therefore not eligible for compensation benefits. (APP vol. 2(b), p.493)

By decision dated May 29, 2018, the Hearing Officer affirmed citing to the prior Appeal Officer decision in 1522493/1522661/1702370-GP. (APP vol. 2(b), pp.494-496)

By determination dated July 9, 2018, the Administrator noted the claimant is not eligible for TTD as the claimant's physical limitations are temporary. The Administrator also noted the claimant is undocumented and not eligible for certain

benefits. (APP vol. 2(b), pp.45-46)

On July 16, 2018, the Administrator scheduled the claimant with Dr. Hanson for a second opinion. (APP vol. 2(b), p.501)

On August 21, 2018, at the claimant's request and unbeknownst to the Administrator, the claimant was seen by Dr. Cestkowski for a PTD evaluation to assess whether the claimant qualifies for PTD benefits under the "Odd Lot Doctrine". The doctor opined the claimant is PTD. The doctor was not provided Appeal Officer Pullium's decision, nor does the doctor note the claimant is an undocumented alien and unable to work in the United States or America. The doctor noted the claimant's injury, his 10 pound lifting restriction, his ninth grade education, his work history in labor and opined he is unemployable. Dr. Cestkowski refers to no labor market surveys or job search. (APP vol. 3, pp.713-723)

On November 19, 2018 and December 17, 2018, Dr. Oliver released the claimant to restricted/modified duty per Dr. Perry. (APP vol. 1, pp.59-77)

By decision dated April 11, 2019, the Appeals Officer reversed the Hearing Officer's August 28, 2018 decision affirming the Administrator's July 9, 2018 determination denying the claimant's request for PTD. (APP vol. 1, pp.27-37)

IV.

LEGAL ARGUMENT

I. THE APPEALS OFFICER ERRED AS A MATTER OF LAW

Where the decision concerns a question of law, the reviewing court may undertake independent appellate review, as opposed to the more deferential standard of review. ***Maxwell v SIIS,*** 109 Nev. 327, 849 P.2d 481 (1993).

No physician to date has found the claimant medically stable. See NRS 616C.490(2) noting that once a physician finds an injured worker medically stable and rateable, a permanent partial disability evaluation is scheduled.

To date the claimant has temporary work restrictions issued every two weeks by the authorized treating physicians. No authorized treating physician opines the claimant cannot work. See NRS 616C.475(7)(c). The Administrator discovered the claimant is not a valid citizen of the United States of America leading to the denial

of TTD benefits.

A prior Appeals Officer found and concluded the claimant is not entitled to TTD benefits. Appeals Officer Pullium made the following conclusions regarding the claimant's eligibility to work in the United States of America:

> Generally IRCA is a federal law which is designed to provide Congress the ability to establish procedures to make it more arduous to employ unauthorized aliens, and to punish those employers who knowingly offer jobs to unauthorized aliens. (See 8 U.S.C. sec. 1324a(h)(3)).
>
> Additionally, IRCA precludes employers not only from hiring unauthorized aliens, but also from continuing to employ those workers once the employer becomes aware of the employee's illegal status. (See 8 U.S.C. sec. 1324a(a)(2)).
>
> In this context an unauthorized alien is an individual who is not lawfully admitted for permanent residence or authorized to be employed in the United States.
>
> Third, one must consider the Nevada Supreme Court case of ***Tarango v. SIIS***,

117 Nev. 444 (2001).

In *Tarango* the Court was addressing a similar situation but was primarily focused on whether the Claimant should receive vocational rehabilitation benefits as a result of his illegal status. However, the Court also addressed the employability of an illegal alien.

The Court held as follows:

We conclude that because *Tarango* could not substantiate his legal right to work with an *Immigration and Naturalization Form I-9*, he squarely fell into Congress' definition of an "unauthorized alien." As a result, Champion Drywall could no longer continue to employ *Tarango*-once *Tarango*'s undocumented status was determined-without violating the *IRCA* and incurring federal penalties.

In addition, there was an issue of whether the IRCA could preempt the state workers compensation statues. In that regard the *Tarango* Court held as follows:

We conclude that the IRCA preempts Nevada's compensation scheme insofar

> as it provides undocumented aliens with employment within the boundaries of the United States. Further, the legislature's priority scheme under *NRS 616C.530,* and the Equal Protection Clause, preclude *SIIS* from awarding formal vocational training to undocumented workers. As a result of these conclusions, we affirm the order of the district court awarding appellant permanent partial disability, but denying appellant vocational rehabilitation benefits.

Here the issue is straightforward. The evidence is clear that the claimant is an illegal alien and ineligible to work in the United States. Further, the *Tarango* case is clear that the IRCA does preempt the Nevada workers compensation statutes when an illegal alien is involved. Additionally, the claimant here was medically eligible for light duty as is set forth in his treatment records. Tarango is on point with the instant case because the *Tarango* Court determined the claimant in that case was unemployable based on his illegal status. The same situation is in place in the instant case because here the claimant has been determined to have illegal status in the United States and therefore unemployable in any fashion; light duty, modified duty or full duty.

Consequently, once the Employer determined that the claimant could not work legally in the United States based on his illegal status; the Employer could not offer

the light duty without violating the *IRCA*; the claimant's benefits in that area must cease.

Since the Claimant was eligible for light duty, in accordance with *NRS 616C.475*, the claimant is no longer eligible for TTD or PTD benefits. Since the claimant cannot be offered light duty by the Employer without violating the IRCA; the claimant's benefits in that area must cease. Appeals Officer Pullium decision is the law of the case regarding TTD while in a light duty capacity. Even though the claimant continues to treat to date, no physician finds the claimant medically stable and all authorized treating physicians opine the claimant can work light duty.

The claimant hired Dr. Cestkowski to assess PTD. Dr. Cestkowski is not a vocational counselor familiar with the labor market. He therefore failed to assess the labor market. Dr. Ceskowski fails to mention the claimant is not a valid citizen of the United States of America and is ineligible to work in any capacity. Instead the doctor discusses the claimant's 9th grade education, his surgeries and concludes the claimant is totally disabled from any work.

NRS 616C.435 Injuries deemed total and permanent.

1. In cases of the following specified injuries, in the absence of proof to the contrary, the disability caused thereby shall be deemed total and permanent:

(a) The total and permanent loss of sight of both eyes.

(b) The loss by separation of both legs at or above the knee.

(c) The loss by separation of both arms at or above the elbow.

(d) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms, or one leg and one arm.

(e) An injury to the skull resulting in incurable imbecility or insanity.

(f) The loss by separation of one arm at or above the elbow, and one leg by separation at or above the knee.

2. The enumeration in subsection 1 is not exclusive, and in all other cases permanent total disability must be determined by the insurer in accordance with the facts presented.

In this claim, the Appeals Officer relied upon the odd lot doctrine citing ***Nevada Indus. Comm'n v. Hildebrand***, 100 Nev.47, 675 P.2d 401 (1984). Hildebrand's 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 the labor market was assessed. In this claim, the labor market has not been assessed. Hildebrand was 62 years old and already retired from the workforce. In this claim the claimant was 49 years old when assessed by Dr. Cestkowski. Hildebrand was not granted PTD benefits.

The claimant is not medically stable. One authorized treating physician released him to full duty. The other authorized treating physicians in the record have opined the claimant can work light duty. The overwhelming weight of evidence does not support Dr. Cestkowski's one time unauthorized visit. Dr. Cestkowski was not told, or at least he does not mention the claimant is illegally in the United States of America and cannot work in any capacity. Dr. Cestkowski did not assess the labor market.

Bottom line the PTD assessment from Dr. Cestkowski is premature as the claimant is not medically stable, is based on inaccurate information as his analysis

does not include the fact the claimant cannot work in the United States of America per Federal law, and his analysis is not supported by substantial evidence as the authorized treating physicians in the record support the claimant can work.

Nothing has changed since Appeal Officer Pullium's decision relying on Tarango. The claimant is still using the social security card of a deceased American and cannot work as a matter of Federal law. Dr. Cestkowski was not made aware of the fact the claimant cannot work in any capacity in the United State of America. The claimant does not qualify under the Odd Lot Doctrine. It is not his disability that prevents him from working, but his ineligibility to work in any capacity in the United States of America. Furthermore, the labor market was not assessed.

V.

JURISDICTION

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 proof; 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 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.

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 Industral 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.

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

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VI.

CONCLUSION

Based on the foregoing, Appellant requests the decision of the District Court be reversed and that the Administrator's determination to deny PTD be affirmed.

DATED this 27th day of March , 2020.

LAW OFFICE OF DAVID H. BENAVIDEZ

David H. Benavidez, Esquire

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 monospaced typeface using Courier New with font size 14.

2. I further certify that this brief complies with the type- volume limitations of NRAP 32(a)(7)(a)(i) 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 according to the Word "word count" contains 4,603 words.

3. Finally, I hereby certify that I have read this Open 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 23(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.

CERTIFICATE OF MAILING

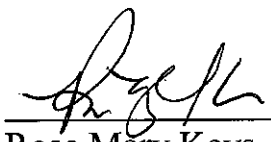
I, the undersigned, declare under penalty of perjury, that

I am an employee of the Law Office of David H. Benavidez, and on the 27th day of March, 2020, I deposited the foregoing APPELLANT"S OPENING BRIEF in the United States Mail, with first class postage fully prepaid thereon of had hand-delivered, copies of the attached document addressed as follows:

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

Associated Risk Mgmt, Inc.
Po Box 4930
Carson City NV 89702-4930

Richard Staub, Esq.
Po Box 392
Carson City NV 89702



Rose Mary Keys, Paralegal