

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

CITY OF HENDERSON; AND CCMSI,
Appellants,
v.
BRIAN WOLFGRAM,
Respondent

No. 80982
Electronically Filed
Apr 15 2020 03:03 p.m.
DOCKETING Elizabeth N. Brown
CIVIL APPEALS Clerk of 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 Eighth Department 19
County Clark Judge William Kephart
District Ct. Case No. A-18-782711-J

2. Attorney filing this docketing statement:

Attorney Daniel L. Schwartz, Esq. Telephone 702-893-3383
Firm Lewis Brisbois Bisgaard & Smith
Address 2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102

Client(s) City of Henderson and CCMSI

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 Jason Mills, Esq Telephone (702) 822-4444
Firm Jason D. Mills & Associates, Ltd
Address 2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102

Client(s) Brian Wolfgram

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 checked="" type="checkbox"/> Other disposition (specify): <u>Workers' comp</u> |

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:

None

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

This is a workers' compensation case. On January 26, 2015, Respondent's workers' compensation claim closed without a permanent partial disability rating. On February 6, 2017, Respondent requested that his claim be reopened for further care. CCMSI denied his request under NRS 616C.390(5) as Respondent had never been incapacitated from earning his full wages over the course of his claim and because he did not receive a PPD award. Respondent appealed. On September 12, 2018, the Appeals Officer reversed the Administrator, holding Claimant has met the statutory requirement of minimum duration of incapacity because he could not work voluntary overtime from October 20, 2014 to November 3, 2014 due to work restrictions under the claim. However, claimant earned his full base salary for the period. Petitioners filed a Petition for Judicial Review contesting the Appeals Officer's arbitrary interpretation of statutory terms ("full wages" and "incapacitated") which constituted legal error. The District Court affirmed the Appeals Officer.

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

Whether Respondent was precluded from earning his "full wages" for the period in question even though he was able to earn his full salary and overtime is strictly voluntary.

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.

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:

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 NRAP 17(b)(10) as it is a Petition for Judicial Review of a final decision of an administrative agency.

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 Mar 11, 2020

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

17. Date written notice of entry of judgment or order was served Mar 11, 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 Apr 3, 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

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

(a)

- | | |
|--|--|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

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

This is a Petition for Judicial Review of a workers' compensation Appeals Officer. Appellants filed their Petition with the District Court pursuant to NRS 233B.130. The District Court denied Appellants' Petition. As this final judgment of the District Court aggrieved Appellants, this Court has jurisdiction to hear this appeal under NRS 233B.150.

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

(a) Parties:

CITY OF HENDERSON, and CCMSI - Petitioners

BRIAN WOLFGRAM and THE DEPARTMENT OF ADMINISTRATION,
HEARINGS DIVISION, APPEALS OFFICE, an Agency of the State of Nevada -
Respondents.

(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:

The Department of Administration did not participate in the District Court Petition.

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.

CITY OF HENDERSON, and CCMSI- Petition for Judicial Review

BRIAN WOLFGRAM - None

THE DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, APPEALS
OFFICE - None

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.

CITY OF HENDERSON

Name of appellant

Joel P. Reeves, Esq.

Name of counsel of record

Apr 15, 2020

Date

/s/ Joel P. Reeves, Esq.

Signature of counsel of record

Clark County, Nevada

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 15th day of April, 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.)

1. Jason Mills, Esq.
2. City of Henderson
3. CCMSI
4. Nevada Dept. of Administration
5. Laura Freed, Nevada Dept. of Administration
6. Aaron Ford, Esq., Attorney General

Dated this 15th day of April, 2020

Signature

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CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of April 2020, a true and correct copy of this **DOCKETING STATEMENT** completed upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system and via US Mail.

Jason Mills, Esq.
JASON D. MILLS & ASSOCIATES LTD
2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102

Attn: Sally Ihmels
City of Henderson
240 South Water Street MSC 122
Henderson, NV 89015

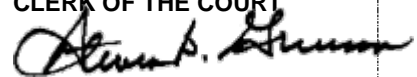
Attn: Susan Riccio
CCMSI
P.O. Box 35350
Las Vegas, NV 89133

Department of Administration
2200 S Rancho Dr., Ste. 220
Las Vegas, NV 89102

Aaron Ford, Esq.
Nevada Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

Laura Freed
Director, Department of Administration
Nevada Dept. Of Administration
515 East Musser Street, Third Floor
Carson City, Nevada 89701-4298

By /s/ Stephanie Jensen
an Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP



PTJR
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
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Attorneys for Petitioners
City of Henderson and
CCMSI

DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF HENDERSON, and CCMSI,

Petitioners,

v.

BRIAN WOLFGRAM and THE
DEPARTMENT OF ADMINISTRATION,
HEARINGS DIVISION, APPEALS OFFICE,
an Agency of the State of Nevada,

Respondents.

CASE NO: A-18-782711-J

DEPT. NO.: Department 19

PETITION FOR JUDICIAL REVIEW

COMES NOW the Petitioners, CITY OF HENDERSON, and CCMSI (hereinafter referred to as the "Petitioners"), by and through their attorneys, DANIEL L. SCHWARTZ, ESQ. and JOEL P. REEVES of LEWIS BRISBOIS BISGAARD & SMITH LLP, in the above-entitled Petition for Judicial Review and petition this Court for judicial review of the Appeals Officer's Decision and Order, filed on September 12, 2018, a copy of which is attached hereto as "Exhibit 1."

...

...

...

1 The instant Petition for Judicial Review is filed pursuant to NRS Chapter 616C.370,
2 which mandates that judicial review shall be the sole and exclusive authorized judicial
3 proceeding in contested industrial insurance claims for compensation for injury or death and
4 pursuant to NRS 233B.130, et seq.

5 The decision of the Appeals Officer was in violation of constitutional or statutory
6 provisions, was in excess of the authority of the Appeals Officer, was based upon errors of law,
7 is arbitrary or capricious in nature, and constitutes an abuse of discretion. The Petitioners CITY
8 OF HENDERSON, and CCMSI specifically request, pursuant to NRS 233B.133, that this Court
9 receive written briefs and hear oral argument.

10 DATED this 12 day of October, 2018.

11 Respectfully submitted,

12 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

13
14 By: _____

15 DANIEL L. SCHWARTZ, ESQ.
16 Nevada Bar No. 005125
17 JOEL P. REEVES, ESQ.
18 Nevada Bar No. 013231
19 2300 W. Sahara Ave. Ste. 300
20 Las Vegas, Nevada 89102
21 Phone: 702-893-3383
22 Fax: 702-366-9689
23 Attorneys for Petitioners
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 12th day of October, 2018, service of the attached **PETITION FOR JUDICIAL REVIEW** was made this date by depositing a true copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed follows:

Jason Mills, Esq.
JASON D. MILLS & ASSOCIATES LTD
2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102

Adam P. Laxalt, Esq.
Nevada Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

Attn: Sally Ihmels
City of Henderson
240 South Water Street MSC 122
Henderson, NV 89015

Patrick Cates
Director, Department of Administration
Nevada Dept. Of Administration
515 East Musser Street, Third Floor
Carson City, Nevada 89701-4298

Attn: Susan Riccio
CCMSI
P.O. Box 35350
Las Vegas, NV 89133

Department of Administration
Hearings Division – Appeals Office
Attn: Appeals Officer Charles York, Esq.
2200 S. Rancho Dr. Ste. 220
Las Vegas, NV 89102
Appeal Nos.: **1714500-CJY**


An employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP

EXHIBIT 1

EXHIBIT 1

ORIGINAL

STATE OF NEVADA

BEFORE THE DEPARTMENT OF ADMINISTRATION

APPEALS OFFICE

SEP 12 2018

In the Matter of the Contested
Industrial Insurance Claim

Claim No.: 14C52E546827

of

Appeal No.: 1714500-CJY

BRIAN WOLFGRAM,

Claimant.

DECISION AND ORDER

The above-entitled matter came on for hearing before Appeals Officer GREGORY A. KROHN, ESQ., on July 18, 2018 at the hour of 08:45 a.m. pursuant to Chapters 616A-D, 617, and 233B of the Nevada Revised Statutes. Claimant, BRIAN WOLFGRAM (hereinafter "Claimant") was represented by JASON D. MILLS, ESQ., of the law firm of JASON D. MILLS & ASSOCIATES, LTD. The Employer, CITY OF HENDERSON (hereinafter "Employer") and was represented by DANIEL L. SCHWARTZ, ESQ., of the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP. Having accepted and reviewed the evidence in the record and argument of counsel the Appeals Officer does hereby find, conclude and order as follows:

FINDINGS OF FACT

1. Claimant, BRIAN WOLFGRAM (hereinafter "Claimant") suffered an injury while in the course and scope of employment for the City of Henderson ("Employer") on October 18, 2014.
2. On November 25, 2014, CCMSI ("TPA") issued a notice of claim acceptance determination for bilateral elbows and hands cubital tunnel syndrome.

3. Claimant was treated for cervical strain, bilateral elbows and hands cubital tunnel syndrome.
4. Claimant was released from medical treatment by Dr. Colby Young on January 15, 2015 as stable and not ratable.
5. Prior to Dr. Young treating Claimant, Concentra treating physician, Bernard Hunwick, M.D., placed Claimant on light duty restrictions on an industrial basis between October 14, 2014 and November 3, 2014.
6. On January 26, 2015, the TPA issued a notice of intention to close claim determination.
7. On January 30, 2017, Dr. Colby Young indicated that he believed Claimant has recurrence of his previous symptoms and recommends reopening of his claim for evaluation and possible treatment if necessary.
8. On February 6, 2017, Claimant requested reopening of his claim to the TPA.
9. On February 15, 2017, the TPA denied Claimant's request for reopening.
10. Claimant timely appealed the TPA's determination denying his request for reopening and on May 19, 2017.
11. On May 19, 2017, the Hearing Officer's Decision and Order (1710311-SE) remanded the TPA to reopen Claimant's claim.
12. The Employer timely appealed the Hearing Officer's Decision and Order and submitted a Motion for Stay, which was granted. This is Appeal **1714500-CJY**.

CONCLUSIONS OF LAW

The Appeals Officer concludes as follows:

13. The issues presented before this Appeals Officer are: Does Claimant have

- 1 sufficient medical evidence to allow for his October 18, 2014 workers
2 compensation claim to be re-opened pursuant to NRS 616C.390 and did
3 Claimant have a qualifying period of disablement pursuant to NRS 616C.400.
4
5 14. As of January 1, 2016 "off work" is no longer the threshold as to whether a claim
6 may be reopened, as NRS 616C.390(5) was revised by the Nevada legislature.
7
8 15. At the present time, five days (or more) of incapacity from earning full wages
9 entitle a Claimant to lifetime reopening rights.
10
11 16. The record shows Claimant worked 96 hours of overtime in the 84 days prior to
12 his industrial injury, July 28, 2014 through October 19, 2014. Claimant's
13 significant amount of overtime pay contributed to his "full wages".
14
15 17. All of Claimant's earnings, which include his significant amount of overtime and
16 his base salary, constitute his "full wages".
17
18 18. Claimant, while incapacitated due to his injury for the period of October 20, 2014
19 to November 3, 2014, was exclusively precluded by his Employer from working
20 overtime. Claimant only worked his regular shifts, no overtime, during his over
21 two weeks of light duty.
22
23 19. Here, Claimant has met the statutory requirement of minimum duration of
24 incapacity because he was placed on light duty work restrictions from October 20,
25 2014 to November 3, 2014, due to an industrial injury for a period of more than 5
26 days in 20 and was unable to earn "full wages" during the light duty time period.
27 Claimant earned only base salary for the period of October 20, 2014 to November
28 3, 2014 and was therefore incapacitated pursuant to NRS 616C.400.
20. Claimant received no benefits pursuant to NRS 616C.490, as his industrial injury

claim of October 18, 2014 was closed without a Permanent Partial Disability evaluation rating.


21. This Appeals Officer has reviewed the medical reporting from Dr. Colby Young submitted by Claimant and does not find the medical evidence statutorily sufficient, pursuant to NRS 616C.390(1), to support Claimant's request for reopening at this time.

ORDER

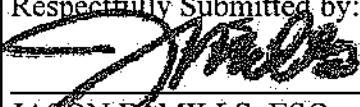
THEREFORE, IT IS HEREBY **ORDERED** that the Hearing Officer's Decision and Order 1710311-SE dated May 19, 2017 that Remanded the Insurer to reopen Claimant's claim is hereby **REVERSED** and Claimant's claim shall currently remain closed.

IT IS FURTHER **ORDERED** that Claimant is entitled to reapply for reopening one year from the date of this Decision and Order as he has shown a legal disablement period pursuant to NRS 616C.390 and accordingly is afforded lifetime reopening rights with regards to this claim.

Dated this 12th day of September, 2018.


CHARLES J. YORK, ESQ.
Appeals Officer

Respectfully Submitted by:


JASON D. MILLS, ESQ.
Nevada Bar No. 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste 140
Las Vegas, NV 89102
Attorney for Claimant

PURSUANT TO NRS 616C.370 and NRS 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court with thirty (30) days after service by mail of this Decision.

1 CERTIFICATE OF MAILING

2 The undersigned, an employee of the State of Nevada, Hearings Division, Department of
3 Administration, does hereby certify that on the date shown below, a true and correct copy of the
4 foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the
5 appropriate addressee runner file at the Department of Administration Hearings Division, 2200
6 S. Rancho, #220, Las Vegas, Nevada, to the following:
7

8 Brian Wolfgram
9 221 Lookout Ave
10 Las Vegas, NV 89002

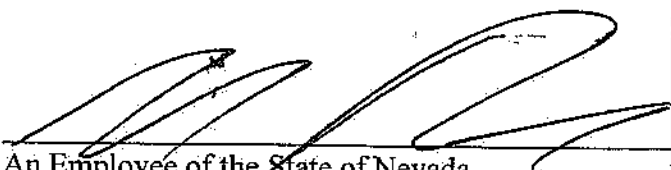
11 Jason D. Mills, Esq.
12 Jason D. Mills & Associates, Ltd.
13 2200 S. Rancho Dr., Ste 140
14 Las Vegas, NV 89102

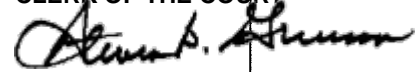
15 City of Henderson
16 Attn: Sally Ihmels
17 240 S. Water St. SMC 122
18 Henderson, NV 89015

19 CCMSI
20 Attn: Susan Riccio
21 P.O. Box 35350
22 Las Vegas, NV 89133

23 Daniel L. Schwartz, Esq.
24 Lewis Brisbois Bisgaard & Smith LLP
25 2300 W. Sahara Ave., Ste. 300 Box 28
26 Las Vegas, NV 89102

27 Dated this 12th day September, 2018.
28


An Employee of the State of Nevada



1 **NOE**

2 **JASON D. MILLS, ESQ.**

3 Nevada Bar Number 7447

4 **JASON D. MILLS & ASSOCIATES, LTD.**

5 2200 S. Rancho Dr., Ste 140

6 Las Vegas, Nevada 89102

7 Telephone (702) 822-4444

8 Facsimile (702) 822-4440

9 jdm@jasondmills.com

10 *Counsel for Respondent*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 CITY OF HENDERSON, and CCMSI,

Case No.: A-18-782711-J

Dept. No: 19

14 Petitioners,

15 vs.

16 BRIAN WOLFGRAM, an individual,
17 DEPARTMENT OF ADMINISTRATION,
18 HEARINGS DIVISION, APPEALS OFFICE,
19 an agency of the State of Nevada,

20 Respondents.

21 **NOTICE OF ENTRY OF ORDER**

22 TO: ALL INTERESTED PERSONS AND PARTIES

23 PLEASE TAKE NOTICE that the attached ORDER DENYING PETITION

24 ///

25 ///

1 FOR JUDICIAL REVIEW was entered on 3/11/2020.

2 Dated this 11th day of March, 2020.

3
4 

5
6 JASON D. MILLS, ESQ.

7 Nevada Bar No. 7447

8 JASON D. MILLS & ASSOCIATES, LTD.

9 2200 S. Rancho Dr., Ste. 140

10 Las Vegas, NV 89102

11 Attorney for Respondent,

12 BRIAN WOLFGRAM

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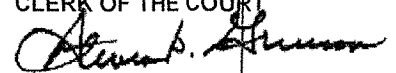
City of Henderson
Sally Ihmels
240 S. Water Str., MSC 122
Henderson, NV 89015

CCMSI
Susan Riccio
P.O. Box 35350
Las Vegas, NV 89133

Daniel L. Schwartz, Esq.
Joel P. Reeves, Esq.
Lewis Brisbois Bisgaard & Smith, LLP
2300 W. Sahara Ave., Ste. 300 Box 28
Las Vegas, NV 89102

Department of Administration
Charles J. York, Esq.
Appeals Division
2200 S. Rancho Dr., Ste. 220
Las Vegas, NV 89102

An employee of JASON D. MILLS & ASSOCIATES, LTD.



1 **ORD**
2 **JASON D. MILLS, ESQ.**
3 Nevada Bar Number 7447
4 **JASON D. MILLS & ASSOCIATES, LTD.**
5 2200 S. Rancho Dr., Ste 140
6 Las Vegas, Nevada 89102
7 Telephone (702) 822-4444
8 Facsimile (702) 822-4440
9 jdm@jasondmills.com
10 *Counsel for Respondent*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 CITY OF HENDERSON, and CCMSI,
14
15 Petitioners,
16
17 vs.

Case No.: A-18-782711-J
Dept. No: 19

18 BRIAN WOLFGRAM, an individual,
19 DEPARTMENT OF ADMINISTRATION,
20 HEARINGS DIVISION, APPEALS OFFICE,
21 an agency of the State of Nevada,

22 Respondents.

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

23 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

24 This matter being duly noticed came on for hearing on February 2, 2020 at
25 09:00 a.m. regarding Petitioner's PETITION FOR JUDICIAL REVIEW in the
26 above-entitled Court. Petitioners, CITY OF HENDERSON and CCMSI,
27 (hereinafter "Petitioners") represented by DANIEL L. SCHWARTZ, ESQ., and
28 JOEL P. REEVES, ESQ., of the law firm LEWIS BRISBOIS BISGAARD &
SMITH, LLP., and Respondent, BRIAN WOLFGRAM (hereinafter

1 “Respondent”) represented by his attorney of record, JASON D. MILLS, ESQ., of
2 the law firm JASON D. MILLS & ASSOCIATES, LTD., and the Court having
3 considered the arguments of counsel in the briefs and being fully advised in the
4 premises, and the substantial evidence in the record on appeal supporting the
5 Appeals Officer’s findings, good cause appearing the Court hereby finds;
6

7
8 Here, the primary issue presented in the underlying Petition it is whether the
9 administrative Appeals Officer acted within his legal authority when he analyzed
10 the facts of the underlying case and applied the plain meaning to “full wages” and
11 in determining whether Respondent Brian Wolfgram was incapacitated from
12 earning such “full wages” for a period of five (5) or more days allowing
13 Respondent the ability to seek industrial claim reopening rights for life pursuant to
14 NRS 616C.390.
15
16
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18 The Court’s roll in reviewing an administrative agency’s decision is to
19 review the agency’s decision for clear error or an arbitrary and capricious abuse of
20 discretion and will overturn the agency’s factual findings only if they are not
21 supported by substantial evidence. *Original Roofing Company, LLC v. Chief*
22 *Administrative Officer of Occupational Safety and Health Administration*, 135
23 Nev. Adv. Op. 18 (June 6, 2019) (citing *Elizondo v. Hood Mach., Inc.*, 129 Nev.
24 780, 784, 312 P.3d 479, 482 (2013). An agency’s fact-based conclusions of law are
25 entitled to deference when supported by substantial evidence; however, purely
26
27
28

1 legal questions are reviewed de novo. *Law Offices of Barry Levinson, P.C. v.*
2 *Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008). “Substantial evidence is
3 that which a reasonable mind might accept as adequate to support a conclusion.”
4 *City Plan Dev., Inc. v. State, Office of Labor Comm’r*, 121 Nev. 419, 426, 117 P.3d
5 182, 187 (2005). Finally, the court’s review is confined to the record before the
6 agency. *Levinson* at 362 citing *SIIS v. Christensen*, 106 Nev. 85, 87-88, 787 P.2d
7 408, 409 (1990). Furthermore, under the Nevada Administrative Procedures Act, a
8 court shall not substitute its judgment for that of the agency as to the weight of
9 evidence on a question of fact. NRS 233B.135(3). “[S]hall not” is expressly
10 defined by Nevada law as creating a “prohibition against acting”. NRS 0.025(1)(f).

11 In reviewing the Nevada Industrial Insurance Act NRS 616A-616D
12 (“NIIA”), and the supporting regulations found in NAC 616A-616D, it is noted the
13 term “full wages” is not specifically defined. Accordingly, the Appeals Officer was
14 tasked with determining that phrase’s plain meaning.

15 Noteworthy is that “average monthly wage” is defined in reviewing the
16 regulations in force at the time of the Appeals Officer’s decision,
17

18 Specifically, NAC 616C.423 states:

19 *NAC 616C.423 Items in average monthly wage. (NRS 616A.400,*
20 *616C.420)*

21 *1. Money, goods and service which are paid within the period*
22 *used to calculate the average monthly wage include, but are*
23 *not limited to:*

24 *(a) Wages:*

- 1 (b) Commissions which are prorated over the period used to
2 calculate the average monthly wage;
- 3 (c) Incentive pay;
- 4 (d) Payment for sick leave;
- 5 (e) Bonuses which are prorated over the period used to calculate the
6 average monthly wage;
- 7 (f) Termination pay;
- 8 (g) Tips which are collected and disbursed by the employer which are
9 not paid at the discretion of the customer;
- 10 (h) Tips reported by the employee pursuant to NRS 616B.227;
- 11 (i) Allowance for tools or for the rental of hand and power tools
12 not normally provided by the employee;
- 13 (j) Salary;
- 14 (k) Payment for piecework;
- 15 (l) Payment for vacation;
- 16 (m) Payment for holidays;
- 17 (n) Payment for overtime;
- 18 (o) Payment for travel when it is paid to compensate the employee
19 for the time spent in travel; and
- 20 (p) The reasonable market value of either board or room, or both.
21 At least \$150 per month will be allowed for board and room, \$5 per
22 day or \$1.50 per meal for board, and \$50 per month for a room.
- 23 2. Notwithstanding paragraph (p) of subsection 1, the reasonable
24 value of a meal furnished by an employer to an employee is the value,
25 if any, specified in the collective bargaining agreement between the
26 employee and employer.
- 27 3. The following payments may not be included in the calculation
28 of an average monthly wage:
- (a) Reimbursement to the employee for expenses to enable the
employee to perform his or her job, including, without limitation, a
per diem allowance and reimbursement for travel expenses;
- (b) Payment for employment which is not subject to coverage
pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;
- (c) Payment for employment for which coverage is elective, but
has not been elected; and
- (d) Allowances for laundry or uniforms.

Thus, overtime is clearly part of the average monthly wage calculation. And as the
record demonstrated overtime pay was more than 15% of the Respondent's income

1 in the 12-week period prior to the industrial accident, and as such was not
2 speculative in nature. Further, NRS 616C.390(11)(c), the specific reopening statute
3 the Appeals Officer was tasked with applying when ruling on reopening states
4 “wages” is:
5

6
7 *. . . any remuneration paid by an employee for the*
8 *personal services of the employee, including, without limitation:*
9 *(1) Commissions and bonuses; and*
10 *(2) Remuneration payable in any medium other than cash.*

11 Additionally, whether such overtime pay is “voluntary” as argued by the
12 Petitioners is of absolutely no legal moment. Petitioners openly concede that
13 Respondent, while on modified duty is expressly precluded from earning any
14 overtime at all, even if he so desired. Thus, in agreement with the Appeals Officer
15 this Court finds that “full wages” must contemplate at the very least the definition
16 of “wages” as set forth by the NIIA which is certainly something more than “base
17 pay” or “regular pay” as advanced by the Petitioner.
18
19

20 The Appeals Officer’s ruling that Respondent’s claim was subject to lifetime
21 reopening rights (NRS 616C.390) because he was incapacitated from earning “full
22 wages” for a period of more than five (5) days (NRS 616C.400) is overwhelmingly
23 supported by the record before this Honorable Court and existing Nevada Law.
24
25

26 ///

1 Case No.: A-18-782711-J

2 Dept. No: 19


3 **ORDER**

4
5 **THE COURT HEREBY ORDERS** that the Petition for Judicial Review
6 is **DENIED**.

7 Dated this 24th day of February, 2020.

10 
11 DISTRICT COURT JUDGE

12
13 RESPECTFULLY SUBMITTED BY:

14 
15
16 JASON D. MILLS, ESQ.
17 JASON D. MILLS & ASSOCIATES, LTD.
18 Nevada Bar No: 7447
19 2200 S. Rancho Dr., Ste. 140
20 Las Vegas, NV 89102
21 Attorney for Respondent,
22 BRIAN WOLFGRAM

23 ///

24 ///

25 ///

1 **CERTIFICATION PURSUANT TO COURT GUIDELINES**

2 Counsel submitting this document certifies as follows (check one):

3
4 _____ The court has waived the requirements set forth in the Guidelines;

5
6 _____ No party appeared at the hearing or filed an objection to the motion;

7
8
9 X I have delivered a copy of this proposed order to all counsel who appeared
10 at the hearing, and each has approved or disapproved the order, or failed to respond
11 as indicated below:

12 [] Approved [] Disapproved ☒ Failed to Respond
13
14

15 _____
16 DANIEL L. SCHWARTZ, ESQ., Attorney for Petitioners,
17 CITY OF HENDERSON and CCMSI
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