IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON, and CCMSI,
Appellants,

v.

BRIAN WOLFGRAM,
Respondent.

Supreme Court Case No.: 80982

District Court Case No.: A-18-782711-J

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

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

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

DATED this 12 day of April 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
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I.

STATEMENT OF THE CASE

This is a workers' compensation case. On January 26, 2015, Respondent BRIAN WOLFGRAM's (hereinafter "Respondent") workers' compensation claim closed without a permanent partial disability ("PPD") rating or any lost time benefits. On February 6, 2017, Respondent requested that his claim be reopened for further care. Petitioner CCMSI (hereinafter "Administrator") 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 permanent partial disability ("PPD") award. Respondent appealed.

On September 12, 2018, the Appeals Officer reversed the Administrator, holding as follows:

> Claimant has met the statutory requirement of minimum duration of incapacity because he was placed on light duty work restrictions from October 20, 2014 to November 3, 2014, due to an industrial injury for a period of more than 5 days in 20 and was unable to earn "full wages" during the light duty time period. Claimant earned only base salary for the period of October 20, 2014 to November 3, 2014 and was therefore incapacitated pursuant to NRS 616C.400.

However, the Appeals Officer also concluded that Respondent had not submitted sufficient evidence to support reopening. Therefore, the Appeals Officer ordered that the claim remain closed, but that Respondent should be afforded

lifetime reopening rights given that the Appeals Officer concluded that Respondent had proven the minimum duration of incapacity for entitlement to the same.

Petitioners filed a Petition for Judicial Review with the District Court based on the Appeals Officer's arbitrary interpretation of statutory terms ("full wages" and "incapacitated") which constituted legal error. The District Court denied Petitioners' Petition for Judicial Review. Petitioners filed the instant appeal to this Court challenging the same.

II.

SUMMARY OF THE ARGUMENT

The inquiry in this case is whether Respondent is entitled to request reopening of his workers' compensation claim. Under NRS 616C.390(5), if Respondent did not receive a permanent partial disability ("PPD") award and did not meet the "minimum duration of incapacity as set forth in NRS 616C.400" while his claim was open, he was required to request reopening of his claim within one (1) year of closure or else he would forfeit any and all reopening rights under the statute.

The parties do not dispute that the request for reopening came more than one (1) year after claim closure. Further, the parties do not dispute that Respondent did not receive a PPD award. The question in this case is whether Respondent met the

"minimum duration of incapacity as set forth in NRS 616C.400" while his claim was open. Appellants posit that he did not.

The evidence in this case establishes that Respondent was given work restrictions from October 20, 2014 to November 3, 2014. Appellant Employer CITY OF HENDERSON ("Employer") was able to accommodate those restrictions and Respondent was able to earn his full base wages for the entire period. Indeed, the evidence shows that Respondent did not request any lost time benefits or otherwise allege while his claim was open that this industrial injury impacted his ability to earn a wage. However, as a condition of his accommodations, Respondent did not work any overtime. The evidence reflects overtime work/pay was voluntary on the part of the employee and was in no way a condition of Respondent's employment.

When more than one (1) year after the closure of his claim had passed, Respondent requested reopening. Appellant Third-Party Administrator CCMSI (hereinafter "Administrator") denied the request under NRS 616C.390(5) as Respondent had not received a PPD rating and had no lost time while the claim was open. The Appeals Officer reversed that determination, holding that the preclusion of overtime work was sufficient to establish that Respondent was incapacitated from earning his "full wages" for at least five (5) days in a twenty (20) day period under NRS 616C.400. However, the Appeals Officer's definitions

of "full wages" and "incapacitated" were arbitrary as there was no showing that Respondent actually lost wages.

Indeed, although it is uncontested that Respondent was precluded from working overtime for the subject period, it is also uncontested that overtime work was strictly voluntary and there was no evidence to show that Respondent actually lost wages for the period. It is Administrator's position that for Respondent to prove that he did not earn his "full wages" as defined by NRS 616C.400, there must be some allegation that wages were actually lost, that the wage Respondent received for the subject period was something less than "full." Indeed, Respondent did not request any wage replacement benefits for the subject period nor is he alleging that he should have even been entitled to them. Without a contest from the claimant *while the claim is open* that he did not otherwise receive his full wages as a consequence of his industrial injury, Respondent should be precluded from requesting reopening of his claim by operation of NRS 616C.390(5). The Appeals Officer erred in holding otherwise and Appellants respectfully request that this Court reverse the Appeals Officer and hold that NRS 616C.390(5) precludes Respondent from requesting reopening of this claim.

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III.

STATEMENT OF THE ISSUES FOR REVIEW

1. WHETHER RESPONDENT WAS PREVENTED FROM EARNING "FULL WAGES" WHILE ON LIGHT DUTY WHEN CLAIMANT DID NOT CLAIM ANY LOST WAGES FOR THE SAME PERIOD?

IV.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

On October 18, 2014, Respondent alleged an injury to both arms/hands due to assisting with loading approximately 1000 feet of hose while training. The physician on the C-4 Form diagnosed bilateral wrist tenosynovitis, cervical strain r/o radiculopathy and bilateral elbow tenosynovitis. (Appellants' Appendix p. 68)(hereinafter "APP")

Employer completed a C-3 Form. (APP p. 69)

An Incident Report was completed by Respondent. (APP p. 70)

A Witness Report was completed by Brandon Bowyer. He noted that on two occasions he witnessed Respondent grimace in pain. (APP p. 71)

Respondent presented to Concentra on October 20, 2014. The history noted repetitive use of the hand and lifting fire hoses. The assessment noted sprains and strains of elbow and forearm, wrist tenosynovitis, and cervical strain r/o radiculopathy. Wrist braces were given. Restrictions were also given of no lifting/pushing/pulling over 15 lbs. (APP pp. 72-74)

On October 21, 2014, Employer advised of Respondent's modified duties. (APP p. 75)

On October 21, 2014, Respondent accepted a modified duty position. (APP p. 76)

On October 22, 2014, Respondent returned to Concentra. The assessment remained the same. Restrictions continued. (APP pp. 77-78)

Respondent completed a medical release and prior history noting no prior conditions. (APP pp. 79-82)

On October 29, 2014, Respondent returned to Concentra reporting upper back pain. Respondent was referred to a hand specialist. (APP pp. 83-85) Same was approved. (APP pp. 86-89)

On November 3, 2014, Respondent presented for physical therapy. (APP pp. 90-91) Physical therapy continued. (APP pp. 92-98)

Of particular import to this case, Respondent's pay period for October 20, 2014 through November 3, 2014 is relevant. (See APP pp. 45-46 and key at pp. 51-52) During this pay period, Respondent was designated as light duty (time code "WC") and worked a modified schedule but earned his full base salary.

On November 10, 2014, Respondent presented to Dr. Young. Electrodiagnostic studies were recommended. (APP pp. 99-100)

On November 17, 2014, Respondent presented to Dr. Germin for EMG/nerve conduction studies. The results were negative. (APP pp. 101-107)

On November 19, 2014, Respondent was advised that his claim had been accepted for a cervical strain. (APP p. 108)

On November 20, 2014, Respondent returned to Dr. Young. Respondent reported that his symptoms had dissipated somewhat. Full duty was recommended. (APP pp. 109-112)

On November 25, 2014, Administrator advised Respondent that his claim was amended to include bilateral elbows and hands cubital tunnel syndrome. (APP p. 113)

On December 18, 2014, Respondent returned to Dr. Young. A strengthening program was recommended. (APP pp. 114-118)

On December 23, 2014, Respondent returned to Dr. Young indicating he overdid it the prior day putting the top on his jeep. The assessment noted decreased muscle tightness along the forearm extension. (APP p. 119)

Respondent continued treatment with Dr. Young. (APP pp. 120-122)

On January 15, 2015, Respondent reported 100% improvement in the right upper extremity and 95% in the contralateral left. Tingling had resolved. Respondent was found to have reached maximum medical improvement, stable, not ratable. (APP pp. 123-125)

On January 26, 2015, Respondent was advised that his claim would close without a rating. (APP p. 126)

On January 30, 2017, Respondent returned to Dr. Young. A recurrence of previous symptoms was noted. A request for repeat EMG/NCV studies was made. Reopening was recommended. (APP pp. 127-128)

On February 6, 2017, Respondent requested reopening of his industrial claim. (APP p. 129)

On February 15, 2017, Respondent was advised that the request for reopening was denied, as same needed to be requested within one year of closing, as he did not miss any time from work, nor receive benefits for a permanent partial disability (PPD). (APP p. 130)

On March 9, 2017, Respondent's counsel sent notice of representation. (APP pp. 131-135)

On March 10, 2017, Respondent appealed the February 15, 2017 denial of reopening. (APP p. 136)

On April 10, 2017, Respondent was advised of his average monthly wage (AMW). (APP pp. 137-142)

A hearing was held on May 9, 2017 regarding reopening. In a written Decision and Order dated May 19, 2017, the Hearing Officer reversed the denial of reopening. (APP pp. 143-144) Employer filed a timely appeal. (APP p. 145) In

addition, the Employer filed a Motion for a Stay of the Hearing Officer's decision, which was granted. (APP p. 146)

Employer has filed a copy of the Respondent's time card from January 1, 2014 through January 29, 2015. (APP pp. 45-50)

On September 12, 2018, after receiving written closing arguments from both parties, the Appeals Officer held that:

> Claimant has met the statutory requirement of minimum duration of incapacity because he was placed on light duty work restrictions from October 20, 2014 to November 3, 2014, due to an industrial injury for a period of more than 5 days in 20 and was unable to earn "full wages" during the light duty time period. Claimant earned only base salary for the period of October 20, 2014 to November 3, 2014 and was therefore incapacitated pursuant to NRS 616C.400.

However, the Appeals Officer also concluded that Respondent had not submitted sufficient evidence to support reopening. Therefore, the Appeals Officer ordered that the claim remain closed, but that Respondent should be afforded lifetime reopening rights given that the Appeals Officer concluded that Respondent had proven the minimum duration of incapacity for entitlement to the same. (APP pp. 3-7)

On October 12, 2018, Petitioners timely filed the instant Petition for Judicial Review to contest the Appeals Officer's September 12, 2018 Decision regarding Respondent's alleged incapacity from earning "full wages." (APP pp. 299-307)

On March 11, 2020, after receiving written briefs from the parties, the District Court affirmed the Appeals Officer and denied this Petition for Judicial Review. (APP pp. 380-386) Notice of Entry was filed on March 11, 2020. (APP pp. 387-396)

On April 3, 2020, Appellants filed the subject appeal with this Honorable Court. (APP pp. 397-419)

V.

JURISDICTION

Appellants have timely and properly appealed this Petition for Judicial Review of the Appeals Officer's Decision dated October 12, 2018. NRS 233B.130. Said Petition was timely filed with the District Court on October 12, 2018. On March 11, 2020, the Notice of Entry of Order of the District Court's Decision and Order affirming the Appeals Officer's Decision was filed. Appellants timely and properly filed an appeal of that Decision and Order with this Honorable Court on April 3, 2020. See NRS 233B.150; NRAP Rule 3; NRAP Rule 4. This Court has jurisdiction over the instant appeal.

A. ROUTING STATEMENT

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

B. STANDARD OF REVIEW

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

> **NRS 233B.135 Judicial review: Manner of conducting; burden of; standard for review.**
>
> 1. Judicial review of a final decision of an agency must be:
>
> (a) Conducted by the court without a jury; and
>
> (b) Confined to the record.
>
> In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
>
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.
>
> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
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> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
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> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.

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

When reviewing administrative court decisions, this Court has held that, on factual determinations, the findings and ultimate decisions of an appeals officer are not to be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial Comm'n. v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977). An administrative determination regarding a question of fact will not be set aside unless it is against the manifest weight of the evidence. Nevada Indus. Comm'n. v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984).

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

This Court may set aside, in whole or in part, a final decision of an administrative agency where substantial rights of the Appellants have been

prejudiced because the final decision is in violation of statutory provisions, affected by other error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or characterized by abuse of discretion. NRS 233B.135(3).

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

This Court has acknowledged and applied these statutory principles holding, for example, that a reviewing court may set aside an agency decision if the decision was based upon an incorrect conclusion of law or otherwise affected by an error of law. State Indus. Ins. Sys. v. Giles, 110 Nev. 216, 871 P.2d 920 (1994); Jessop v. State Indus. Ins. Sys., 107 Nev. 888, 822 P.2d 116 (1991); see, also, NRS 233B.135(3)(d). Further, this Court has stated that appellate review on questions of law is de novo, and that the reviewing court is free to address purely legal questions without deference to the agency's decision. Giles, supra; Mirage v. State, Dep't of Admin., 110 Nev. 257, 871 P.2d 317 (1994); American Int'l Vacations v. MacBride, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983); see, also, State Dep't of Motor Vehicles v. Torres, 105 Nev. 558, 560, 799 P.2d 959, 960-961 (1989).

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

In determining whether an administrative decision is supported by substantial evidence, the methodology for this Court is also well-defined. First, for each issue appealed, the pertinent rule of law is identified. Thereafter, the evidence on appeal is reviewed to determine whether the agency's decision on each issue is supported by substantial factual evidence. Torres, *id.* If the decision of the administrative agency on the appealed issue is supported by substantial factual evidence, this Court must affirm the decision of the agency as to that issue. On the other hand, a decision by an administrative agency that lacks support in the form of substantial evidence is arbitrary or capricious and, thus, an abuse of discretion that warrants reversal. NRS 233B.135(3); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983).

Substantial evidence has been defined as that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion. State Emp't Sec. Dep't v. Hilton Hotels Corp., 102 Nev. 606, 608 at n.1, 729 P.2d 497 (1986). Additionally, substantial evidence is not to be considered in isolation from opposing evidence, but evidence that survives whatever in the record fairly detracts from its weight. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951); Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546 (9th Cir. 1991). This latter point is clearly the significance of the requirement in

NRS 233B.135(3)(e) which states that the reviewing court consider the whole record.

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

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

In this case, the Appeals Officer's decision is not supported by substantial evidence. Further, as District Court affirmed the Appeals Officer's Decision, the errors of the Appeals Officer are also the errors of the District Court. This Honorable Court retains review of the instant Petition for Judicial Review.

VI.

LEGAL ARGUMENT

A. THE APPEALS OFFICER AND THEREFORE THE DISTRICT COURT ERRED AS A MATTER OF LAW

It was the Respondent, not Appellants, who had the burden of proving entitlement to any benefits under any accepted industrial insurance claim by a

preponderance of all the evidence. State Industrial Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Johnson v. State ex rel. Wyoming Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990).

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

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

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

B. THE APPEALS OFFICER COMMITTED LEGAL ERROR IN HIS INTERPRETATION OF "FULL WAGES"

The issue in this case is whether the Respondent is entitled to lifetime reopening rights on his workers' compensation claim. In general, workers' compensation claimants in the state of Nevada are entitled to lifetime reopening

rights after their claim closes, if they meet certain criteria. The practical effect of this right, if the claimant can prove entitlement to the same, is that after a claimant's workers' compensation claim closes, they keep that claim for the rest of their lives and can request that the claim be reopened for medical treatment or other benefits if they meet certain criteria.

The standard governing claimant's rights relative to claim reopening is codified at NRS 616C.390, which states in relevant part as follows:

> **Reopening claim: General requirements and procedure; limitations; applicability.**
> Except as otherwise provided in NRS 616C.392:
> 1. If an application to reopen a claim to increase or rearrange compensation is made in writing more than 1 year after the date on which the claim was closed, the insurer shall reopen the claim if:
> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and
> (c) The application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.
> ...
> 5. An application to reopen a claim must be made in writing within 1 year after the date on which the claim was closed if:
> (a) The claimant did not meet the minimum duration of incapacity as set forth in NRS 616C.400 as a result of the injury; and
> (b) The claimant did not receive benefits for a permanent partial disability.

> If an application to reopen a claim to increase or rearrange compensation is made pursuant to this subsection, the insurer shall reopen the claim if the requirements set forth in paragraphs (a), (b) and (c) of subsection 1 are met....

Further, NRS 616C.400 states as follows:

> **Minimum duration of incapacity.**
> 1. Temporary compensation benefits must not be paid under chapters 616A to 616D, inclusive, of NRS for an injury which does not incapacitate the employee for at least 5 consecutive days, or 5 cumulative days within a 20-day period, from earning full wages, but if the incapacity extends for 5 or more consecutive days, or 5 cumulative days within a 20-day period, compensation must then be computed from the date of the injury.
> 2. The period prescribed in this section does not apply to:
> (a) Accident benefits, whether they are furnished pursuant to NRS 616C.255 or 616C.265, if the injured employee is otherwise covered by the provisions of chapters 616A to 616D, inclusive, of NRS and entitled to those benefits.
> (b) Compensation paid to the injured employee pursuant to subsection 1 of NRS 616C.477.

The issue faced by the Appeals Officer in the present case was whether this claim fell within NRS 616C.390(1) or NRS 616C.390(5). As noted above in NRS 616C.390(5), if a claimant does "not meet the minimum duration of incapacity as set forth in NRS 616C.400 as a result of the injury" and does not receive a permanent partial disability ("PPD") award, the claimant must request reopening within one (1) year of claim closure. If a claimant who falls under NRS

616C.390(5) does not request reopening within one (1) year of claim closure, that claimant's claim is closed forever, i.e. they do not have lifetime reopening rights.

All parties agree that Respondent did not receive a PPD award. Therefore, the sole legal question in this case was whether Respondent met the minimum duration of incapacity under NRS 616C.400. As noted above, to satisfy the minimum duration of incapacity, the claimant must prove that he/she was prevented from earning "full wages" for at least five (5) consecutive days or five (5) cumulative days within a twenty (20) day period.

The pay period in question is October 20, 2014 through November 3, 2014.[1] (See APP pp. 45-46 and key at pp. 51-52) During this pay period, Respondent was designated as light duty (time code "WC") and worked a modified schedule. However, he was paid full wages just as he would if he were full duty. Respondent has admitted the same. This case should have been decided right here without any further inquiry. Respondent earned his full wages for the period. There was no reduction in wages which were occasioned by the industrial incident. Indeed, at no time during the pendency of this claim has Respondent alleged that he actually lost wages as a result of his industrial injury.

Based on the same, Respondent failed to meet the minimum duration of incapacity under NRS 616C.400. Because Respondent does not meet the minimum

[1] Note that the pay periods are offset by seven (7) days, (i.e. the pay period for October 20, 2014 is listed as October 27, 2014).

duration of incapacity and because he did not receive a PPD award, he is precluded from requesting reopening as he did not request the same within one year after his claim closed. The Appeals Officer and District Court committed legal error in concluding otherwise.

C. THIS COURT RETAINS *DE NOVO* REVIEW

This is an issue of statutory interpretation: can a claimant earn his full base salary, concede that he did not lose income as a result of the industrial injury by virtue of the fact that he did not contest the same while his claim was open, and still claim that he did not earn his "full wages" as a result of an industrial injury. Thus the root question of this case revolves around the legal definition of "full wages." Because this case involves a question of statutory interpretation, this Court has de novo review. ("a reviewing court may undertake independent review of the administrative construction of a statute." Am. Int'l Vacations v. MacBride, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983))

The Appeals Officer acknowledged that Respondent earned his full base wages but concluded that Respondent was precluded from earning his "full wages" because he did not work overtime for the period in question. This conclusion is arbitrary and runs counter to a plain reading of the statute. Indeed, the Appeals Officer committed legal error by failing to interpret the statute according to its plain meaning. See NRS 616A.010(2), id. "Historically, this court liberally

construed workers' compensation laws to grant benefits rather than deny them. However, in 1993, the Legislature adopted a new legislative declaration for the industrial insurance statutes that repudiates the application of common law principles and requires statutes governing workers' compensation to be interpreted according to their plain meaning." Banegas v SIIS, 117 Nev. 222 (2001). The Nevada Supreme Court has "long held that statutes should be given their plain meaning." Alsenz v. Clark Co. School Dist., 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993). Further, "this court has consistently upheld the plain meaning of the statutory scheme in workers' compensation laws." SIIS v. Prewitt, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997). (See also Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) "It is elementary that statutes . . . must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory," overruled on other grounds by Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000)).

D. RESPONDENT HAS CONCEDED THAT HE DID NOT ACTUALLY LOSE ANY WAGES FOR THE PERIOD

Overtime pay in this context should not be used in a "full wages" determination as it is voluntary and Respondent did not even allege that he lost wages as a result of said preclusion. If he did wish to allege that he *actually* lost wages, the time to do so was when his claim was open. However, he did not do so because overtime pay is voluntary and not part of his full wages.

Petitioners would submit that something as voluntary and speculative as overtime should never be considered in within the definition of "full wages" unless that time is something that is guaranteed to the employee as a condition of their employment and they can prove that they actually lost remuneration by failing to work overtime. And indeed, claimants should be required to prove, when their claim is open, that they actually lost wages. Otherwise, it is indeed speculative. (See Reno Sparks Convention Visitors Auth. v. Jackson 112 Nev. 62, 67, 910 P.2d 267, 270 (1996) "the time period for perfecting an appeal is generally considered to be mandatory, not procedural. Based on this language, we conclude that [the claimant] failed properly to request a hearing within the specified time frame and therefore lost his appeal rights.")

Here, if he were not injured and had no restrictions, maybe Respondent would have taken overtime during the time he was light duty, maybe he would not have. It is impossible to say. Without having some definite showing that Respondent *actually* lost wages, there is no way to prove that he did not earn his "full wage." (See United Exposition Service Co. v. SIIS, 109 Nev. 421 (1993) "[a]n award of compensation cannot be based solely upon possibilities and speculative testimony.")

Indeed, notwithstanding the fact that there is no support for the conclusion that Respondent's overtime is in any way guaranteed to Respondent as part of his

full wages or that he *actually* lost wages at all, the Appeals Officer engaged in complete speculation by concluding that Respondent was "incapacitated" from earning his full wages because there was the possibility that Respondent could have worked overtime hours if he felt like it but was precluded by his work restrictions. This is the very definition of speculative as Respondent's overtime pay was strictly voluntary and Respondent did not even allege that he lost wages while his claim was open. Absent some definite showing that Respondent *actually* missed time from work and *actually* earned less because of his work restrictions, Respondent was not incapacitated from earning his full wages at any point while his claim was open. As such, in conjunction with the fact that there was no PPD award, NRS 616C.390(5) operates to disallow reopening of this claim as Respondent waited more than one year to request the same.

The Appeals Officer committed legal error by arbitrarily concluding that this case is exempted from NRS 616C.390(5). The portion of the subject Decision and Order which holds the same should be reversed.

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VII.

CONCLUSION

Based upon the foregoing, Appellants request that this Court reverse the Appeals Officer and find that the Respondent has failed to prove that he is entitled to request claim reopening given that NRS 616C.390(5) should have controlled this case.

Dated this 12 day of April 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 5,176 words and 534 lines of text.

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

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

Respectfully submitted,
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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 12 day of April 2021, service of the attached **APPELLANTS' OPENING BRIEF** was made this date by depositing a true copy of the same for mailing, first class mail, and/or electronic service as follows:

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