

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 CITY OF HENDERSON, and CCMSI,
4 Appellants,

5 v.

6 BRIAN WOLFGRAM,
7 Respondent.
8
9

Supreme Court Case No. 80982
District Court Case No.: A-18-782711-J
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Apr 12 2021 03:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

10 **APPELLANTS' APPENDIX VOLUME 3**

11 DANIEL L. SCHWARTZ, ESQ.
12 JOEL P. REEVES, ESQ.
13 LEWIS BRISBOIS BISGAARD &
SMITH LLP
14 2300 W. Sahara Avenue, Suite 900, Box 28
Las Vegas, Nevada 89102-4375
15 *Attorneys for Appellants*
16 *City of Henderson and*
17 *CCMSI*

JASON MILLS, ESQ.
GGRM
2770 S Maryland Pkwy #100, Las
Vegas, NV 89109
Attorney for Respondent
Brian Wolfgram

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CERTIFICATE OF MAILING

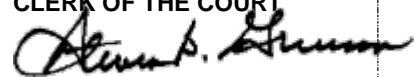
Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the _____ day of April 2021, service of the attached **APPELLANTS’ APPENDIX VOLUME 3** was made this date by depositing a true copy of the same for mailing, first class mail, and/or electronic service as follows:

Jason Mills, Esq.
GGRM
2770 S Maryland Pkwy #100
Las Vegas, NV 89109

City of Henderson
240 South Water Street MSC 122
Henderson, NV 89015

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

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
2300 W. Sahara Ave, Ste. 300
Las Vegas, Nevada 89102
Telephone: 702-893-3383
Facsimile: 702-366-9689
Email: daniel.schwartz@lewisbrisbois.com
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

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


3 21. This Appeals Officer has reviewed the medical reporting from Dr. Colby Young
4 submitted by Claimant and does not find the medical evidence statutorily
5 sufficient, pursuant to NRS 616C.390(1), to support Claimant's request for
6 reopening at this time.
7

8 **ORDER**

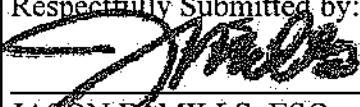
9 THEREFORE, IT IS HEREBY **ORDERED** that the Hearing Officer's Decision and
10 Order 1710311-SE dated May 19, 2017 that Remanded the Insurer to reopen Claimant's claim is
11 hereby **REVERSED** and Claimant's claim shall currently remain closed.
12

13 IT IS FURTHER **ORDERED** that Claimant is entitled to reapply for reopening one year
14 from the date of this Decision and Order as he has shown a legal disablement period pursuant to
15 NRS 616C.390 and accordingly is afforded lifetime reopening rights with regards to this claim.
16

17 Dated this 12th day of September, 2018.

18
19 
20 CHARLES J. YORK, ESQ.
Appeals Officer

21 Respectfully Submitted by:

22 
23 JASON D. MILLS, ESQ.
Nevada Bar No. 7447
24 JASON D. MILLS & ASSOCIATES, LTD.
25 2200 S. Rancho Dr., Ste 140
26 Las Vegas, NV 89102
Attorney for Claimant

27 PURSUANT TO NRS 616C.370 and NRS 233B.130, should any party desire to appeal this
28 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

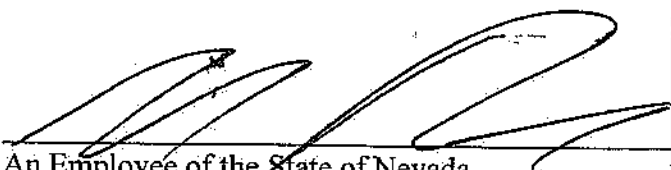
11 Jason D. Mills, Esq.
12 Jason D. Mills & Associates, Ltd.
13 2200 S. Rancho Dr., Ste 140
14 Las Vegas, NV 89102

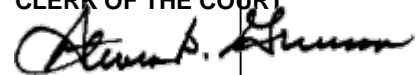
15 City of Henderson
16 Attn: Sally Ihmels
17 240 S. Water St. SMC 122
18 Henderson, NV 89015

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



NOIP

JASON D. MILLS, ESQ.
Nevada Bar No.: 007447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste. 140
Las Vegas, NV 89102
(702) 822-4444
(702) 822-4440 fax
jdm@jasondmills.com
Attorney for Respondent,
BRIAN WOLFGRAM

DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF HENDERSON, AND CCMSI,

Petitioners,

vs.

Case No: A-18-782711-J

Dept. No.: XIX

BRIAN WOLFGRAM, and the STATE NEVADA
DEPARTMENT OF HEARINGS DIVISION,
APPEALS OFFICE, an Agency of the State of
Nevada.

Respondents.

RESPONDENT'S, BRIAN WOLFGRAM, NOTICE OF
INTENT TO PARTICIPATE

The Respondent, BRIAN WOLFGRAM, by and through his attorney, JASON D.
MILLS, ESQ., of JASON D. MILLS & ASSOCIATES, LTD., hereby provides his Notice of

///

///

///

1 Intent to participate in this matter.

2 Dated this 12 day of October, 2018.



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 Respondent,

BRIAN WOLFGRAM

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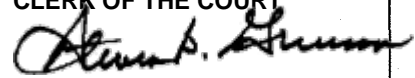
City of Henderson
Sally Ihmels
240 S. Water Str., MSC 122
Henderson, NV 89015

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

Department of Administration
Hearings Division-Appeals Office
Attn: Charles York, Esq.
2200 S. Rancho Dr., Ste. 220
Las Vegas, NV 89102

Daniel L. Schwartz, Esq.
Lewis Brisbois, et al
2300 W. Sahara Ave., Ste. 300 Box 28
Las Vegas, NV 89102

An Employee of Jason D. Mills & Associates, Ltd.



1 **BRF**
2 DANIEL L. SCHWARTZ, ESQ.
3 Nevada Bar No. 005125
4 JOEL P. REEVES, ESQ.
5 Nevada Bar No. 013231
6 LEWIS BRISBOIS BISGAARD & SMITH LLP
7 2300 W. Sahara Ave. Ste. 300
8 Las Vegas, Nevada 89102
9 Telephone: 702-893-3383
10 Facsimile: 702-366-9689
11 Email: daniel.schwartz@lewisbrisbois.com
12 Attorneys for Petitioners
13 *City of Henderson and*
14 *CCMSI*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 CITY OF HENDERSON, and CCMSI,

18 Petitioners,

19 v.

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

24 Respondents.

CASE NO.: A-18-782711-J

DEPT. NO.: 19

25 **PETITIONERS' OPENING BRIEF**

26 DANIEL L. SCHWARTZ, ESQ.
27 LEWIS BRISBOIS BISGAARD & SMITH LLP
28 2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, Nevada 89102-4375
Attorneys for Petitioners
City of Henderson and
CCMSI

JASON MILLS, ESQ.
JASON D. MILLS & ASSOCIATES LTD
2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102
Attorney for Respondent
Brian Wolfgram

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1 COME NOW, Petitioners, CITY OF HENDERSON and CCMSI (hereinafter collectively
2 referred to as "Petitioners"), by and through their attorneys, DANIEL L. SCHWARTZ, ESQ., of
3 LEWIS BRISBOIS BISGAARD & SMITH LLP, and, and file their Opening Brief in the above-
4 referenced matter.

5 DATED this 10 day of January, 2019.

6 Respectfully submitted.

7 LEWIS BRISBOIS BISGAARD & SMITH LLP

8
9 By: 
10 DANIEL L. SCHWARTZ, ESQ.
11 LEWIS BRISBOIS BISGAARD & SMITH, LLP
12 2300 West Sahara Avenue, Suite 300, Box 28
13 Las Vegas, Nevada 89102
14 Attorneys for Petitioners
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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. 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 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 this Court based on the Appeals Officer's arbitrary interpretation of statutory terms ("full wages" and "incapacitated") which constituted legal error.

II.

STATEMENT OF THE ISSUES

1. Whether substantial rights of Petitioners have been prejudiced as set forth in NRS 233B.135(3) because the Appeals Officer's Decision and Order filed on September 12, 2018 was:

(a) in violation of constitutional or statutory provisions;

- 1 (b) in excess of statutory authority of the agency;
2 (c) made upon unlawful procedure;
3 (d) affected by other error of law;
4 (e) clearly erroneous in view of the reliable, probative and substantial evidence
5 on the whole record; or
6 (f) arbitrary or capricious or characterized by abuse of discretion; and
7 2. Whether the Appeals Officer's Decision and Order was based upon substantial
8 evidence as required by NRS 233B.125.

9 III.

10 STATEMENT OF FACTS

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

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

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

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

19 Respondent presented to Concentra on October 20, 2014. The history noted repetitive use
20 of the hand and lifting fire hoses. The assessment noted sprains and strains of elbow and forearm,
21 wrist tenosynovitis, and cervical strain r/o radiculopathy. Wrist braces were given. Restrictions
22 were also given. (ROA pp. 72-74)

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

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

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

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

1 On October 29, 2014, Respondent returned to Concentra reporting upper back pain.
2 Respondent was referred to a hand specialist. (ROA pp. 83-85) Same was approved. (ROA pp.
3 86-89)

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

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

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

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

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

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

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

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

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

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

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

27

28

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

4 On February 6, 2017, Respondent requested reopening of his industrial claim. (ROA p.
5 129)

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

9 On March 9, 2017, Respondent's counsel sent notice of representation. (ROA pp. 131-
10 135)

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

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

15 A hearing was held on May 9, 2017 regarding reopening. In a written Decision and Order
16 dated May 19, 2017, the Hearing Officer reversed the denial of reopening. (ROA pp. 143-144)
17 Employer filed a timely appeal. (ROA p. 145) In addition, the Employer filed a Motion for a Stay
18 of the Hearing Officer's decision, which was granted. (ROA p. 146)

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

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

23 Claimant has met the statutory requirement of minimum duration of
24 incapacity because he was placed on light duty work restrictions
25 from October 20, 2014 to November 3, 2014, due to an industrial
26 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.

27 However, the Appeals Officer also concluded that Respondent had not submitted sufficient
28 evidence to support reopening. Therefore, the Appeals Officer ordered that the claim remain

1 closed, but that Respondent should be afforded lifetime reopening rights given that the Appeals
2 Officer concluded that Respondent had proven the minimum duration of incapacity for entitlement
3 to the same. (ROA pp. 3-7)

4 On October 12, 2018, Petitioners timely filed the instant Petition for Judicial Review to
5 contest the Appeals Officer's September 12, 2018 Decision regarding Respondent's alleged
6 incapacity from earning "full wages."

7 POINTS AND AUTHORITIES

8 IV.

9 JURISDICTION

10 Petitioners have timely petitioned for Judicial Review of the Appeals Officer's Decision
11 dated September 12, 2018.

12 A. STANDARD OF REVIEW

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

14 **NRS 233B.135 Judicial review: Manner of conducting; burden 15 of; standard for review.**

16 1. Judicial review of a final decision of an agency must be:

17 (a) Conducted by the court without a jury; and

18 (b) Confined to the record.

19 In cases concerning alleged irregularities in procedure before an
20 agency that are not shown in the record, the court may receive
evidence concerning the irregularities.

21 2. The final decision of the agency shall be deemed
22 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
23 resisting the decision to show that the final decision is invalid
pursuant to subsection 3.

24 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
25 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
26 because the final decision of the agency is:

27 (a) In violation of constitutional or statutory provisions;

28 (b) In excess of the statutory authority of the agency;

- 1 (c) Made upon unlawful procedure;
2 (d) Affected by other error of law;
3 (e) Clearly erroneous in view of the reliable, probative and
4 substantial evidence on the whole record; or
5 (f) Arbitrary or capricious or characterized by abuse of
6 discretion.

7 The standard of review is whether there is substantial evidence to support the underlying
8 decision. The reviewing court should limit its review of administrative decisions to determine if
9 they are based upon substantial evidence. North Las Vegas v. Public Service Comm'n., 83 Nev.
10 278, 291, 429 P.2d 66 (1967); McCracken v. Fancy, 98 Nev. 30, 639 P.2d 552 (1982). Substantial
11 evidence is that quantity and quality of evidence which a reasonable man would accept as
12 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).

13 When reviewing administrative court decisions, the Court has held that, on factual
14 determinations, the findings and ultimate decisions of an appeals officer are not to be disturbed
15 unless they are clearly erroneous or otherwise amount to an abuse of discretion. Nevada Industrial
16 Comm'n. v. Reese, 93 Nev. 115, 560 P.2d 1352 (1977). An administrative determination
17 regarding a question of fact will not be set aside unless it is against the manifest weight of the
18 evidence. Nevada Indus. Comm'n. v. Hildebrand, 100 Nev. 47, 51, 675 P.2d 401 (1984). A
19 decision by an appeals officer that is based upon the credibility of Respondent and other witnesses
20 is "not open to appellate review." Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 585, 854 P.2d
21 862, 867 (1993).

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

24 A court may set aside, in whole or in part, a final decision of an administrative agency
25 where substantial rights of the Petitioners have been prejudiced because the final decision is in
26 violation of statutory provisions, affected by other error of law, clearly erroneous in view of the
27 reliable, probative and substantial evidence on the whole record, or arbitrary, capricious or
28 characterized by abuse of discretion. NRS 233B.135(3).

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

4 The Nevada Supreme Court has acknowledged and applied these statutory principles
5 holding, for example, that a reviewing court may set aside an agency decision if the decision was
6 based upon an incorrect conclusion of law or otherwise affected by an error of law. State Indus.
7 Ins. Sys. v. Giles, 110 Nev. 216, 871 P.2d 920 (1994); Jessop v. State Indus. Ins. Sys., 107 Nev.
8 888, 822 P.2d 116 (1991); see, also, NRS 233B.135(3)(d). Further, the Nevada Supreme Court
9 stated that **appellate review on questions of law is de novo**, and that the reviewing court is free
10 to address purely legal questions without deference to the agency's decision. Giles, *supra*; Mirage
11 v. State, Dep't of Admin., 110 Nev. 257, 871 P.2d 317 (1994); American Int'l Vacations v.
12 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).

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

15 In determining whether an administrative decision is supported by substantial evidence, the
16 methodology of the District Court is also well-defined. First, for each issue appealed, the
17 pertinent rule of law is identified. Thereafter, the Record on Appeal is reviewed to determine
18 whether the agency's decision on each issue is supported by substantial factual evidence. State
19 Dep't of Motor Vehicles v. Torres, *supra*. If the decision of the administrative agency on the
20 appealed issue is supported by substantial factual evidence in the Record on Appeal, the District
21 Court must affirm the decision of the agency as to that issue. On the other hand, a decision by an
22 administrative agency that lacks support in the form of substantial evidence is arbitrary or
23 capricious and, thus, an abuse of discretion that warrants reversal. NRS 233B.135(3); Titanium
24 Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983).

25 Substantial evidence has been defined as that quantity and quality of evidence which a
26 reasonable man could accept as adequate to support a conclusion. State Emp't Sec. Dep't v.
27 Hilton Hotels Corp., 102 Nev. 606, 608 at n.1, 729 P.2d 497 (1986). Additionally, substantial
28 evidence is not to be considered in isolation from opposing evidence, but evidence that survives

1 whatever in the record fairly detracts from its weight. Universal Camera Corp. v. NLRB, 340 U.S.
2 474, 477, 488 (1951); Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1546 (9th
3 Cir. 1991). This latter point is clearly the significance of the requirement in NRS 233B.135(3)(e)
4 which states that the reviewing court consider the whole record.

5 Furthermore, a decision that is affected by error of law cannot be found to be supported by
6 substantial evidence. A decision that lacks support in the form of substantial evidence is arbitrary
7 or capricious and, thus, an abuse of discretion that warrants reversal. Titanium Metals, supra. In
8 this case, the Appeals Officer's decision is based on errors of law and not supported by substantial
9 evidence. Although it is anticipated that Respondent's counsel will argue that these are questions
10 of fact, and that the Appeals Officer has the right to weigh the evidence, the Appeals Officer's
11 Decision and Order was clearly legally erroneous.

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

17 V.

18 LEGAL ARGUMENT

19 A. STANDARD BEFORE THE APPEALS OFFICER

20 It is the Respondent (claimant), not Petitioners (Employer/Administrator), who has the
21 burden of proving his case, and that is by a preponderance of all the evidence. State Industrial
22 Insurance System v. Hicks, 100 Nev. 567, 688 P.2d 324 (1984); Holley v. State ex rel. Wyoming
23 Worker's Compensation Div., 798 P.2d 323 (1990); Hagler v. Micron Technology, Inc., 118 Idaho
24 596, 798 P.2d 55 (1990).

25 In attempting to prove his case, Respondent (claimant) has the burden of going beyond
26 speculation and conjecture. That means that the claimant must establish the work connection of
27 his injuries, the causal relationship between the work-related injury and his disability, the extent of
28 his disability, and all facets of the claim by a preponderance of all of the evidence. To prevail, a

claimant must present and prove more evidence than an amount which would make his case and his opponent's "evenly balanced." Maxwell, 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 worker's compensation to be liberally construed because they are remedial in nature.

B. THE APPEALS OFFICER COMMITTED LEGAL ERROR IN HIS INTERPRITATION 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:

1 (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

2 (b) The claimant did not receive benefits for a permanent
partial disability.

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

6
7 Further, NRS 616C.400 states:

8 **Minimum duration of incapacity.**

9 1. Temporary compensation benefits must not be paid under
10 chapters 616A to 616D, inclusive, of NRS for an injury which does
not incapacitate the employee for at least 5 consecutive days, or 5
11 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.

12 2. The period prescribed in this section does not apply to:

13 (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
14 NRS and entitled to those benefits.

15 (b) Compensation paid to the injured employee pursuant to
subsection 1 of NRS 616C.477.

16 The issue faced by the Appeals Officer in the present case was whether this claim fell
17 within NRS 616C.390(1) or NRS 616C.390(5). As noted above in NRS 616C.390(5), if a claimant
18 does “not meet the minimum duration of incapacity as set forth in NRS 616C.400 as a result of the
19 injury” and does not receive a permanent partial disability (hereinafter “PPD”) award, the claimant
20 **must** request reopening within one (1) year of claim closure. If a claimant who falls under NRS
21 616C.390(5) does not request reopening within one (1) year of claim closure, that claimant’s claim
22 is closed forever, i.e. they do not have lifetime reopening rights.

23 All parties agree that Respondent did not receive a PPD award. Therefore, the sole legal
24 question in this case was whether Respondent met the minimum duration of incapacity under NRS
25 616C.400. As noted above, to satisfy the minimum duration of incapacity, the claimant must prove
26 that he/she was prevented from earning “full wages” for at least five (5) consecutive days or five
27 (5) cumulative days within a twenty (20) day period.

1 Here, Respondent conceded that Respondent was paid his full base wages for the entire
2 period of his claim. However, Respondent argued that during a two week period while on light
3 duty Respondent was precluded from working overtime and therefore he was unable to earn his
4 “full wages” for the purposes of NRS 616C.400. The Appeals Officer accepted Respondent’s
5 position and in so doing committed legal error by improperly and arbitrarily interpreting the term
6 “full wages.”

7 **C. THE STANDARD OF THIS COURT IS *DE NOVO* REVIEW**

8 The only issue in this case is one of statutory interpretation: is discretionary overtime pay
9 included within the term “full wages.” Thus the root question of this case revolves around the
10 legal definition of “full wages.” Because this case involves a question of statutory interpretation,
11 this Court has *de novo* review. (“a reviewing court may undertake independent review of the
12 administrative construction of a statute.” Am. Int’l Vacations v. MacBride, 99 Nev. 324, 326, 661
13 P.2d 1301, 1302 (1983))

14 **D. THE APPEALS OFFICER’S DEFINITION OF “FULL WAGES” IS ARBITRARY**

15 The pay period in question is October 20, 2014 through November 3, 2014.¹ (See ROA pp.
16 45-46 and key at pp. 51-52) During this pay period, Respondent was designated as light duty (time
17 code “WC”) and worked a modified schedule. However, he was paid full wages just as he would if
18 he were full duty. Respondent has admitted the same. This case should have been decided right
19 here without any further inquiry. Respondent earned his full wages for the period. There was no
20 reduction in wages which were occasioned by the industrial incident. Respondent failed to meet
21 the minimum duration of incapacity under NRS 616C.400. Therefore, because Respondent does
22 not meet the minimum duration of incapacity and because he did not receive a PPD award, he is
23 precluded from requesting reopening as he did not request the same within one year after his claim
24 closed.

25 However, the Appeals Officer acknowledged that Respondent earned his full base wages
26 but concluded that Respondent was precluded from earning his “full wages” because he did not

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

1 work overtime for the period in question. This conclusion is arbitrary and runs counter to a plain
2 reading of the statute. Indeed, the Appeals Officer committed legal error by failing to interpret the
3 statute according to its plain meaning. See NRS 616A.010(2) *supra*. “Historically, this court
4 liberally construed workers' compensation laws to grant benefits rather than deny them. However,
5 in 1993, the Legislature adopted a new legislative declaration for the industrial insurance statutes
6 that repudiates the application of common law principles and requires statutes governing workers'
7 compensation to be interpreted according to their plain meaning.” Banegas v SIIS, 117 Nev. 222
8 (2001). The Nevada Supreme Court has “long held that statutes should be given their plain
9 meaning.” Alsenz v. Clark Co. School Dist., 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993).
10 Further, “this court has consistently upheld the plain meaning of the statutory scheme in workers'
11 compensation laws.” SIIS v. Prewitt, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997). (See also
12 Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) “It is
13 elementary that statutes . . . must be construed as a whole and not be read in a way that would
14 render words or phrases superfluous or make a provision nugatory,” overruled on other grounds by
15 Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000)).

16 In reaching the conclusion that Respondent was prevented from earning his “full wages”
17 because he did not work any overtime for the period in question, the Appeals Officer took an
18 arbitrary snapshot of the overtime Respondent worked between July 28, 2014 through October 19,
19 2014 to show that Respondent worked ninety-six (96) hours of overtime. (ROA p. 5:10-12) The
20 Appeals Officer concluded that this “significant amount of overtime pay contributed to his ‘full
21 wages.’” However, this conclusion is indeed arbitrary and misleading as to Respondent pay
22 structure.

23 Take for example the month of time which occurred just prior to the injury and light duty
24 restrictions which the Appeals Officer held began on October 20, 2014. From September 24, 2014
25 through October 20, 2017, Respondent worked exactly **zero (0) hours** of overtime. Going one
26 more monthly period beyond that, from August 31, 2014 through September 23, 2014, Respondent
27 worked less than a half shift (9 hours of a 24 hour shift) of overtime. However, in the months of
28 July and August of 2014, Respondent did admittedly work quite a bit overtime (87 hours in total).

1 There is no logic or rubric to support the Appeals Officer's conclusion. Indeed, the
2 Appeals Officer concluded that Respondent's overtime should be included within his "full wages"
3 because Respondent worked ninety-six (96) hours of overtime over an arbitrary period. If the
4 month just prior to light duty were used, Respondent would have zero (0) overtime and then it
5 would not be included in Respondent's "full wages." There is no reason why the time period used
6 by the Appeals Officer is justified other than it included a period where Respondent admittedly
7 worked quite a bit of overtime.

8 This leads into the second point: overtime is voluntary. The Appeals Officer does not
9 reference a single document which states that overtime is to be included in a fireman's full wages.
10 This Court will not find that document even if it looks through the entire Record on Appeal as
11 overtime is simply not required as part of the job duties of a firefighter. This is evident in
12 Respondent's own time card. Weeks will go by without any overtime. However, sometimes
13 Respondent admittedly works quite a bit of overtime. The fact is that Respondent's overtime is
14 strictly voluntary and subject to Respondent's own whims.

15 The crux of this case comes down to whether Respondent's industrial injury
16 "incapacitated" him from earning his "full wages" for more than five (5) days in a twenty (20) day
17 period. The Appeals Officer concluded that Respondent could not earn his "full wages" because
18 he could not work overtime for more than five (5) days. In making such a finding, the Appeals
19 Officer must use his own arbitrary definition of what constitutes "full wages."

20 Petitioners would submit that something as voluntary and speculative as overtime should
21 never be considered in within the definition of "full wages" unless that time is something that is
22 guaranteed to the employee as a condition of their employment. Here, if he were not injured and
23 had no restrictions, maybe Respondent would have taken overtime during the two weeks he was
24 light duty, maybe he would not have. It is impossible to say. Without having some definite
25 showing that Respondent *actually* lost wages, there is no way to prove that he did not earn his
26 "full wage." (See United Exposition Service Co. v. SIIS, 109 Nev. 421 (1993) "[a]n award of
27 compensation cannot be based solely upon possibilities and speculative testimony.")

1 Indeed, notwithstanding the fact that there is no support for the conclusion that
2 Respondent's overtime is in any way guaranteed to Respondent as part of his full wages, the
3 Appeals Officer engaged in complete speculation by concluding that Respondent was
4 "incapacitated" from earning his full wages because there was the possibility that Respondent
5 could have maybe worked some overtime hours if he felt like it. This is the very definition of
6 speculative as Respondent's overtime pay was strictly voluntary. Absent some definite showing
7 that Respondent *actually* missed time from work and *actually* earned less because of his work
8 restrictions, Respondent was not incapacitated from earning his full wages at any point while his
9 claim was open. As such, in conjunction with the fact that there was no PPD award, NRS
10 616C.390(5) operates to disallow reopening of this claim as Respondent waited more than one
11 year to request the same.

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

15 VI.

16 CONCLUSION

17 Based upon the foregoing, Petitioners, CITY OF HENDERSON and CCMSI respectfully
18 asks this Honorable Court to grant Petitioners' Petition for Judicial Review.

19 Dated this 10 day of January, 2019.

20 Respectfully submitted,

21 **LEWIS, BRISBOIS, BISGAARD & SMITH,**
22 **LLP**

23 
24 DANIEL L. SCHWARTZ, ESQ.
25 2300 W. Sahara Ave. Ste. 300
26 Las Vegas, Nevada 89102
27 Attorney for Petitioners
28

[illegible]

Dated this 10 of January, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By

~~DANIEL L. SCHWARTZ, ESQ. (005125)
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Attorneys for Petitioners~~

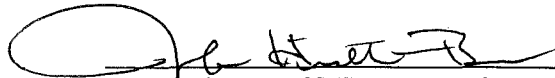
CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 10th day of January 2019, service of the attached **PETITIONERS' OPENING BRIEF** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

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



An employee of LEWIS BRISBOIS BISGAARD &
SMITH LLP



1 **REPL**

2 JASON D. MILLS, ESQ.

3 Nevada Bar No.: 7447

4 JASON D. MILLS & ASSOCIATES, LTD.

5 2200 S. Rancho Dr., Ste. 140

6 Las Vegas, NV 89102-4449

7 (702) 822-4444 – ph

8 (702) 822-4440 – fax

9 Attorney for Respondent,

10 BRIAN WOLFGRAM

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

13 CITY OF HENDERSON, and CCMSI,

Case No: A-18-782711-J

Dept. No.: XIX (19)

14 Petitioner,

15 vs.

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

**ORAL ARGUMENT
REQUESTED**

20 Respondents.

21 **RESPONDENT BRIAN WOLFGRAM'S**
22 **REPLY BRIEF AND**
23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **JASON D. MILLS, ESQ.**

25 Nevada Bar Number 007447

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

27 2200 S. Rancho Dr., Ste 140

28 Las Vegas, Nevada 89102-4449

Counsel for Respondent

BRIAN WOLFGRAM

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I.

STATEMENT OF THE ISSUES

Did the Appeals Officer act within his legal authority when he analyzed the facts of the underlying case and applied the plain meaning to “full wages” and in determining whether Respondent Brian Wolfgram was incapacitated from earning such “full wages” for a period of five (5) or more days allowing Respondent the ability to seek industrial claim reopening rights for life pursuant to NRS 616C.390? Respondent’s position is yes, the Appeals Officer correctly concluded it is and Petitioner’s request to overturn the ruling must be denied.

II.

STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL BACKGROUND

On or about October 18, 2014, BRIAN WOLFGRAM (hereinafter “Respondent”) was injured during the course and scope of employment for the City of Henderson Fire Department (hereinafter “Petitioner” or “Employer”). See Record on Appeal, p. 3, lines 23-24 and p. 68 (hereinafter “ROA”). His claim was accepted by the Employer’s Third Party Administrator, CCMSI (hereinafter “TPA”) and was treated for cervical strain, bilateral elbow injury and cubital tunnel syndrome to his hands, and subsequently released from medical treatment by Dr. Colby Young on January 15, 2015 as stable and not ratable. ROA

1 p. 4, lines 1-5. It is also noted that prior to being released from care, Respondent
2 was treated by both Bernard Hunwick, M.D. and Colby Young, M.D. and that
3 Respondent was placed on modified/light duty restrictions on an industrial basis
4 between October 20, 2014 and November 19, 2014 by those doctors (being
5 released full duty on 11/20/2014). ROA p. 229, 231, 233, 240, 255 and 265. On
6 January 26, 2015, the TPA issued its Notice of Intent to Close Claim and
7 Respondent did not appeal that determination and the claim thereafter closed.
8 ROA p. 4, lines 9-11.

12 On January 30, 2017, Dr. Colby Young indicated that he believed
13 Respondent had a recurrence of his previous symptoms and recommended
14 reopening of his claim for evaluation and possible treatment if necessary. ROA p.
15 4, lines 12-14.

18 On February 6, 2017, Respondent requested reopening of claim to the TPA.
19 ROA p. 4, line 16.

21 On February 15, 2017, the TPA denied Respondent's request for reopening.
22 ROA p. 4, line 17.

24 Respondent timely appealed the TPA's determination denying his request
25 for reopening and on May 19, 2017, a Hearing Officer remanded the TPA to
26 reopen his claim. ROA p. 4, lines 18-19.

1 The Employer timely appealed the Hearing Officer's Decision and Order
2 and a Motion for Stay was granted to the Employer. ROA p. 4, lines 23-24.
3

4 An Appeal took place under case number 1714500-CJY, wherein the
5 Appeals Officer ruled that Respondent did not possess sufficient evidence to
6 reopen his claim under NRS 616C.390(1)(a-c), but also found because Respondent
7 was incapacitated from earning his "full wages" for a period of five (5) or more
8 days, pursuant to NRS 616C.390 and NRS 616C.400, that Respondent nonetheless
9 had proven the legal entitlement to seek reopening under NRS 616C.390 during his
10 lifetime. ROA p. 6, line 13-16
11

12 The Employer and TPA sought a timely Petition for Judicial Review, of this
13 matter under case number A-18-782711-J, with the briefing schedule based upon
14 NRS 233B.133; accordingly, the RESPONDENT BRIAN WOLFGRAM'S
15 REPLY BRIEF AND MEMORANDUM OF POINTS AND AUTHORITIES
16 follows.
17
18
19
20

21 III.

22 **BRIEF SUMMARY OF PETITIONER'S ARGUMENT**

23 Was the Appeals Officer Decision and Order finding that found
24 Respondent's claim was able to be reopened for more than 1 year after claim
25 closure, and 2) whether Respondent supplied adequate documentation to obtain
26 reopening under NRS 616C.390?
27
28

1 As to the first questions, the Appeals Officer correctly found that the
2 Respondent was incapacitated for a period of five (5) or more day from earning
3 “full wages” and as such ruled that the Respondent may seek reopening for his life
4 time pursuant to NRS 616C.390 and NRS 616C.400. As to the second question, the
5 Appeals Officer found that the Respondent had, at the time of the Appeal hearing
6 proffered insufficient medical evidence to meet the reopening burden pursuant to
7 NRS 616C.390(1)(a-c).
8
9
10

11 Here, Petitioners are merely dissatisfied with the outcome of the Appeals
12 Officer’s decision and seek, improperly, to have this Honorable Court supplant the
13 Appeals Officers findings, with its on in violation of NRS 233B.135(3).
14

15 IV.

16 ARGUMENT

17 A. STANDARD OF REVIEW

18 The Nevada Administrative Procedure Act delineates the standard of review
19 which the Court must apply in its review of Administrator’s decision. NRS
20 233B.135, provides, in pertinent part, as follows:
21
22

- 23 1. *Judicial review of a final decision of an agency must be:*
 - 24 (a) *Conducted by the court without a jury; and*
 - 25 (b) *Confined to the record.*
- 26 *In cases concerning alleged irregularities in procedure*
27 *before an agency*
28 *that are not shown in the record, the court may receive*
evidence concerning the irregularities.

1 2. *The final decision of the agency shall be deemed reasonable and*
2 *lawful until reversed or set aside in whole or in part by the court. The*
3 *burden of proof is on the party attacking or resisting the decision to*
4 *show that the final decision is invalid pursuant to subsection 3.*

5 3. *The court shall not substitute its judgment for that of the agency as*
6 *to the weight of evidence on a question of fact. The court may remand*
7 *or affirm the final decision or set it aside in whole or in part if*
8 *substantial rights of the petitioner have been prejudiced because the*
9 *final decision of the agency is:*

10 (i) *In violation of constitutional or statutory provisions;*

11 (ii) *In excess of the statutory authority of the agency;*

12 (iii) *Made upon unlawful procedure;*

13 (iv) *Affected by other error of law;*

14 (v) *Clearly erroneous in view of the reliable, probative and*
15 *substantial*

16 *evidence on the whole record; or*

17 (vi) *Arbitrary or capricious or characterized by abuse of*
18 *discretion.*

19 The Court reviews an administrative decision to determine whether the
20 agency's decision was arbitrary or capricious and thus an abuse of discretion. SHS
21 v. Montoya, 109 Nev. 1028, 1031, 862, P.2d 1197, 1199 (1993), citing Shekatis v.
22 Dep't of Taxation, 108 Nev. 901, 903, 829 P.2d 1315, 1317 (1992), NRS
23 233B.135(3).

24 On factual determinations, the finding and ultimate decisions of an Appeals
25 Officer are not to be disturbed unless they are clearly erroneous or otherwise
26 amount to an abuse of discretion, Nevada Industrial Commission v. Reese, 93 Nev.
27 115, 560 P.2d 1352 (1977).

28 The Nevada Supreme Court has defined substantial evidence as such
 relevant evidence as a reasonable mind might accept as adequate to support a

1 Conclusion. State Employment Security Dept. v. Hilton Hotels, 102 Nev. 606, 729,
2 P.2d 497 (1986).

3
4 Finally, the court's review is confined to the records before the agency.
5 Levinson at 362 citing SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409
6 (1990).

7
8 Here, substantial evidence supports the Decision and Order of the Appeals
9 Officer in this case, therefore the Petition for Judicial Review must be denied.
10

11 **B. IN ORDER TO REOPEN A WORKERS' COMPENSATION**
12 **CLAIM, THE APPEALS OFFICER MUST FIRST DETERMINE**
13 **IF THE CASE MAY BE RE-OPENABLE AT ALL**

14 **1. What are the time limits to reopening workers' compensation**
15 **claims? There are three. Not at all; for a period of one year after**
16 **claim closure; and for life.**

17 The Nevada Industrial Insurance Act (NRS 616A-616D) ("NIIA") allows for
18 some claims to never be reopened, some claims to be reopenable only for a period
19 of one (1) year after claim closure and some claims to be reopenable for life. See
20 NRS 616C.390, which states in full:
21

22 *Except as otherwise provided in NRS 616C.392:*

23
24 *1. If an application to reopen a claim to increase or*
25 *rearrange compensation is made in writing more than 1 year after the*
26 *date on which the claim was closed, the insurer shall reopen the claim*
27 *if:*

28 *(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

1 (c) The application is accompanied by the certificate of a
2 physician or a chiropractor showing a change of circumstances which
3 would warrant an increase or rearrangement of compensation.

4 2. After a claim has been closed, the insurer, upon
5 receiving an application and for good cause shown, may authorize the
6 reopening of the claim for medical investigation only. The application
7 must be accompanied by a written request for treatment from the
8 physician or chiropractor treating the claimant, certifying that the
9 treatment is indicated by a change in circumstances and is related to
10 the industrial injury sustained by the claimant.

11 3. If a claimant applies for a claim to be reopened
12 Pursuant to subsection 1 or 2 and a final determination denying the
13 reopening is issued, the claimant shall not reapply to reopen the claim
14 until at least 1 year after the date on which the final determination is
15 issued.

16 4. Except as otherwise provided in subsection 5, if an
17 application to reopen a claim is made in writing within 1 year after
18 the date on which the claim was closed, the insurer shall reopen the
19 claim only if:

20 (a) The application is supported by medical evidence
21 demonstrating an objective change in the medical condition of
22 the claimant; and

23 (b) There is clear and convincing evidence that the primary
24 cause of the change of circumstances is the injury for which the claim
25 was originally made.

26 5. An application to reopen a claim must be made in
27 writing within 1 year after the date on which the claim was closed if:

28 (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.

 6. If an employee's claim is reopened pursuant to this
section, the employee is not entitled to vocational rehabilitation
services or benefits for a temporary total disability if, before the claim
was reopened, the employee:

 (a) Retired; or

1 (b) Otherwise voluntarily removed himself or herself from
2 the workforce,
3 for reasons unrelated to the injury for which the claim was
4 originally made.

5 7. One year after the date on which the claim was closed,
6 an insurer may dispose of the file of a claim authorized to be
7 reopened pursuant to subsection 5, unless an application to reopen
8 the claim has been filed pursuant to that subsection.

9 8. An increase or rearrangement of compensation is not
10 effective before an application for reopening a claim is made unless
11 good cause is shown. The insurer shall, upon good cause shown,
12 allow the cost of emergency treatment the necessity for which has
13 been certified by a physician or a chiropractor.

14 9. A claim that closes pursuant to subsection 2 of NRS
15 616C.235 and is not appealed or is unsuccessfully appealed pursuant
16 to the provisions of NRS 616C.305 and 616C.315 to 616C.385,
17 inclusive, may not be reopened pursuant to this section.

18 10. The provisions of this section apply to any claim for
19 which an application to reopen the claim or to increase or rearrange
20 compensation is made pursuant to this section, regardless of the date
21 of the injury or accident to the claimant. If a claim is reopened
22 pursuant to this section, the amount of any compensation or benefits
23 provided must be determined in accordance with the provisions
24 of NRS 616C.425.

25 11. As used in this section:

26 (a) "Governmental program" means any program or plan
27 under which a person receives payments from a public form of
28 retirement. Such payments from a public form of retirement include,
without limitation:

(1) Social security received as a result of the Social
Security Act, as defined in NRS 287.120;

(2) Payments from the Public Employees'
Retirement System, as established by NRS 286.110;

(3) Payments from the Retirees' Fund, as defined in
NRS 287.04064;

(4) A disability retirement allowance, as defined in
NRS 1A.040 and 286.031;

(5) A retirement allowance, as defined in NRS
218C.080; and

1 (6) *A service retirement allowance, as defined in NRS*
2 *1A.080 and 286.080.*

3 (b) *“Retired” means a person who, on the date he or she*
4 *filed for reopening a claim pursuant to this section:*

5 (1) *Is not employed or earning wages; and*

6 (2) *Receives benefits or payments for retirement from*
7 *a:*

8 (I) *Pension or retirement plan;*

9 (II) *Governmental program; or*

10 (III) *Plan authorized by 26 U.S.C. § 401(a), 401(k),*
11 *403(b), 457 or 3121.*

12 (c) *“Wages” means any remuneration paid by an employer*
13 *to an employee for the personal services of the employee, including,*
14 *without limitation:*

15 (1) *Commissions and bonuses; and*

16 (2) *Remuneration payable in any medium other than*
17 *cash.*

18 Thus, claims pursuant to sub-section 9 of NRS 616C.390, are not reopenable
19 at all; namely cases where medical treatment of less than \$800 was expanded on
20 the industrial claim and there was no permanent partial disability award and where
21 the claimant did not meet the minimum duration on incapacity for a period of five
22 (5) or more days from earning “full wages: and the TPA “specifically delineates:
23 the claim is not reopenable pursuant to sub-section of NRS 616C.235(2-4).

24 Next, claims pursuant to sub-section 5 of NRS 616C.390 are, reopenable for
25 a period of only one (1) year following claim closure if there was no permanent
26 partial disability award and where the claimant did not meet the minimum duration
27 of incapacity for a period of five (5) or more days from earning “full wages”.
28

1
2
3 Finally, claims pursuant to sub-section 1 of NRS 616C.390, are reopenable
4 for life, provided the claim does not fall within the definitions of sub-sections 5 or
5 9, set forth above.

6
7 Here, there is no dispute that Respondent did not receive a permanent partial
8 disability awarded when his claim originally closed back early 2015. ROA p. 4,
9 lines 9-11. And the Employer/TPA did not advance the position at the Appeal
10 hearing that it closed the claim pursuant to NRS 616C.235(2-4) thereby foreclosing
11 the issue of whether the claim is entirely precluded from reopening at all. ROA p.
12 281.

13
14
15 Thus, the dispute by and between the parties was whether the Respondent's
16 claim was required to be reopened within one year and only one year pursuant to
17 sub-section 5 of NRS 616C.390, or not. To put an even finer point on the topic,
18 was the Respondent incapacitated from earning "full wages" for a period of five
19 (5) or more days, or not (pursuant to NRS 616C.390(5)(a) and NRS 616C.400). If
20 the answer to this question was "yes" then the Respondent's claim is reopenable
21 for life. If the answer to this question was "no" then the Respondent's claim was
22 reopenable only for a period of one year after claim closure.
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1
2 And here, the Appeals Officer found, specifically, that the Respondent was
3
4 incapacitated from earning “full wages” for a period of five (5) or more days, and
5 thus his claim is reopenable for life.¹
6

7 **2. “Full wages” not defined in NIIA but NRS 616C.390(11)(c),**
8 **NRS 616C.420, NAC 616C.423, and NAC 616C.435**
9 **overwhelmingly support the Appeals Officer’s decision**
10 **demonstrating his findings were anything but “arbitrary” as**
11 **alleged by Petitioners and are manifestly supported by**
12 **“substantial evidence: as request by NRS 233B.135(3).**

13 In the case at bar, the Appeals Officer was essentially tasked with making a
14 finding of fact as to whether the Respondent was or was not incapacitated from
15 earning “full wages” for a period of five (5) or more days. First by reviewing the
16 records it was demonstrated that the Respondent was placed on light/modified duty
17 for the period between October 20, 2014 and November 19, 2014 (being released
18 full duty on 11/20/2014) by industrial treating physicians Brian Hunwick, M.D.,
19 and Colby Young, M.D ROA p. 229, 231, 233, 240, 255, and 265. Thus,
20 Respondent was on modified/light duty for a period of thirty-one (31) days in a
21 row. And Respondent was offered a modified/light duty job by his employer on
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23
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27 ¹ In the Appeal below, the Appeals Officer found that the medical evidence supplied by the Respondent at the time
28 of the Appeal hearing was insufficient to meet his burden to reopen the claim under NRS 616C.390(1)(a-c) as such
the parties do not dispute the outcome of *that* finding. But the finding by the Appeals Officer as to whether the
Respondent has a claim that may be reopened for a period of only one year following closure, or if that claim may
be sought to be reopened for Respondent’s lifetime, is the dispute between the parties.

1 October 20, 2014 which the Respondent accepted. ROA p. 231. See also ROA p.
2 230. And Respondent's "Telestaff" print out demonstrates Respondent earned no
3 Overtime (OT) for the light duty dates between October 20, 2014 and November
4 19, 2014. ROA p. 83-24.²

5
6 Once it was known that Respondent had five (5) or more days of incapacity
7 (in this case he had 31 days) due to his industrial injury by way of his light duty
8 certifications by his industrial treating doctors, the final determination the Appeals
9 Officer needed to make was whether the Respondent was precluded from earning
10 "full wages" during that period of five (5) or more days.
11
12

13
14 In reviewing the NIIA NRS 616A-616D, and the supporting regulations
15 found in NAC 616A-616D, it is noted the term "full wages" is not specifically
16 defined. According, the Appeals Officer was tasked with determining that phrase's
17 plain meaning.
18

19 First it must be noted that in Nevada on NIIA claims, the legislature
20 empowered the Division of Industrial Relations Administrator ("DIR") to
21 promulgate regulations that define how the "average monthly wage" are calculated
22 on industrial claims. See NRS 616C.420. And the regulations adopted by the DIR
23
24
25
26

27 ² "Telestaff" is the employee hour tracking and coding system used by City of Henderson Firefighters and the coding letters such
28 as "OT" for overtime, are defined in ROA p. 12-20.

1 regarding the “average monthly wage” are set forth by NAC 616C.423 and NAC
2 616C.435.

3
4 Specifically, NAC 616C.423 states:

5 *NAC 616C.423 Items in average monthly wage. (NRS 616A.400,*
6 *616C.420)*

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

- 10 (a) *Wages;*
- 11 (b) *Commissions which are prorated over the period used to*
12 *calculate the average monthly wage;*
- 13 (c) *Incentive pay;*
- 14 (d) *Payment for sick leave;*
- 15 (e) *Bonuses which are prorated over the period used to calculate the*
16 *average monthly wage;*
- 17 (f) *Termination pay;*
- 18 (g) *Tips which are collected and disbursed by the employer which are*
19 *not paid at the discretion of the customer;*
- 20 (h) *Tips reported by the employee pursuant to NRS 616B.227;*
- 21 (i) *Allowance for tools or for the rental of hand and power tools*
22 *not normally provided by the employee;*
- 23 (j) *Salary;*
- 24 (k) *Payment for piecework;*
- 25 (l) *Payment for vacation;*
- 26 (m) *Payment for holidays;*
- 27 (n) **Payment for overtime;**
- 28 (o) *Payment for travel when it is paid to compensate the employee*
for the time spent in travel; and
- (p) *The reasonable market value of either board or room, or both.*
At least \$150 per month will be allowed for board and room, \$5 per
day or \$1.50 per meal for board, and \$50 per month for a room.

2. *Notwithstanding paragraph (p) of subsection 1, the reasonable*
value of a meal furnished by an employer to an employee is the value,
if any, specified in the collective bargaining agreement between the
employee and employer.

3. *The following payments may not be included in the calculation*
of an average monthly wage:

1 (a) Reimbursement to the employee for expenses to enable the
2 employee to perform his or her job, including, without limitation, a
3 per diem allowance and reimbursement for travel expenses;

4 (b) Payment for employment which is not subject to coverage
5 pursuant to chapters 616A to 616D, inclusive, or chapter 617 of NRS;

6 (c) Payment for employment for which coverage is elective, but
7 has not been elected; and

8 (d) Allowances for laundry or uniforms.

9 (Emphasis added).

10 Specifically enumerated in the average monthly wage calculation regulation
11 are “overtime” pay per subsection (n), and further that the list is not exhaustive by
12 its very definition per sub-section 1. Further, the preferred period of time for
13 calculating the “average monthly wage” is also defined in regulation. Namely,
14 NAC 616C.435 which states:

15 *NAC 616C.435 Period used to calculate average monthly*
16 *wage. (NRS 616A.400, 616C.420)*

17 ***1. Except as otherwise provided in this section, a history of***
18 ***earnings for a period of 12 weeks must be used to calculate an***
19 ***average monthly wage.***

20 *2. If a 12-week period of earnings is not representative of the*
21 *average monthly wage of the injured employee, earnings over a*
22 *period of 1 year or the full period of employment, if it is less than 1*
23 *year, may be used. Earnings over 1 year or the full period of*
24 *employment, if it is less than 1 year, must be used if the average*
25 *monthly wage would be increased.*

26 *3. If an injured employee is a member of a labor organization*
27 *and is regularly employed by referrals from the office of that*
28 *organization, wages earned from all employers for a period of 1 year*
may be used. A period of 1 year using all the wages of the injured
employee from all his or her employers must be used if the average
monthly wage would be increased.

4. If information concerning payroll is not available for a period
of 12 weeks, wages may be averaged for the available period, but not
for a period of less than 4 weeks.

1 5. If information concerning payroll is unavailable for a period
2 of at least 4 weeks, average earnings must be projected using the rate
3 of pay on the date of the accident or illness and the projected working
4 schedule of the injured employee.

5 6. If earnings are based on piecework and a history of earnings
6 is unavailable for a period of at least 4 weeks, the wage must be
7 determined as being equal to the average earnings of other employees
8 doing the same work.

9 7. If these methods of determining a period of earnings cannot be
10 applied reasonably and fairly, an average monthly wage must be
11 calculated by the insurer at 100 percent of:

12 (a) The sum which reasonably represents the average monthly
13 wage of the injured employee as defined in NAC
14 616C.420 to 616C.447, inclusive, at the time the injury or illness
15 occurs; or

16 (b) The hourly wage on the day the injury or illness occurs,
17 calculated by using the projected working schedule.

18 8. The period used to calculate the average monthly wage must
19 consist of consecutive days, ending on the date on which the accident
20 or disease occurred, or the last day of the payroll period preceding
21 the accident or disease if this period is representative of the average
22 monthly wage.

23 9. As used in this section, “earnings” means earnings received
24 from the employment in which the injury occurs and in any concurrent
25 employment.

26 (Emphasis added)

27 And according to sub-section 1 of this regulation, the preferred time frame
28 of determining the “average monthly wage” in Nevada is the 12 week period prior
to the industrial accident; i.e. the 84 days prior to the accident. Indeed, in the case
at bar, that 84 day period prior to the accident is precisely the period of time that
the TPA correctly used in calculating Respondent’s pre-accident wages. ROA p.
137, 139 and 142. The TPA did not do this because their decision to do so was
“arbitrary” but they did so because regulation commanded them to do so. Hence, in

1 the 84 days prior to the accident, the Respondent earned \$33,297.77. ROA p. 137,
2 139 and 142. And in that 24 day period, Respondent worked 96 hours of overtime,
3
4 for a total of \$5,108.68 of overtime pay and \$28,189.09 in other pay; including
5 “regular” pay, “vacation” pay, “bonus” pay, “union leave” pay, “fire house
6
7 adjustment” pay, and “holiday” pay. ROA p. 142. Thus, of the entire 84 day wage
8 history before the accident a full 15.34% of his income was derived purely from
9
10 overtime pay. ROA 142. Going further only \$16,566.74 of the \$33,297.77 or
11 49.75% of his 84 day wage history comprised of “regular” pay. ROA 142.

12 Further, NRS 616C.390(11)(c), the very reopening statute that is applicable
13
14 to the case at bar states “wages” is:

15 . . . **any remuneration** paid by an employee for the
16 **personal services of the employee, including, without limitation:**
17 (1) Commissions and bonuses; and
18 (2) Remuneration payable in any medium other than cash.

19 Accordingly, when determining what the “full wages” are that Respondent
20 received, the Appeals Officer’s finding that noted that Respondent was precluded
21 from earning overtime pay and in fact did not earn overtime pay, during the period
22
23 of the time that Respondent was on light/modified duty by his industrial treating
24 physicians was anything but arbitrary. Indeed, it is the Petitioners that seek to have
25
26 this Honorable Court reweigh the evidence for their arbitrary calculus that would
27
28 have this Honorable Court believe that “full wages” is equivalent to only the
“base” pay or the “regular” pay of Respondent. But when examined, the statuses

1 and regulations (and indeed the TPAs actions in calculating the Respondent's
2 average monthly wage) bely the fact that the Petitioners know that "full wages"
3 consist of all the monies earned by Respondent. And the 84 day period is anything,
4 but arbitrary period of time used by the Appeals Officer. The Petitioners know this
5 is the preferred time frame examined in industrial insurance claims when
6 determining the average monthly wages which is precisely why the TPA utilized
7 that calculation in the first place. ROA 139. And yet to claim that the Appeals
8 Officer somehow simply grabbed an arbitrary time frame of 84 days prior to the
9 accident as the primary period he examined from thin air, strains Petitioners
10 argument beyond the breaking point.

15 Moreover, whether such overtime pay is "voluntary" as argued by the
16 Petitioner is of absolutely no legal moment. Indeed, the average monthly wage
17 regulation expressly commands the inclusion of overtime pay. See NAC
18 616C.423(1)(n). And yet, the Petitioners seek to have that pay erased when
19 assessing the "full wages" of the Respondent for the purposes of reopening his
20 claim. Indeed, "wages" expressly includes **any remuneration without limitation**
21 except for cash payment. See NRS 616C.390(11)(c). So "full wages" must
22 contemplate at the very least the definition of "wages" as set forth by the Nevada
23 Industrial Insurance Act.
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IV. CONCLUSION

The Appeals Officer's finding that the "full wages" earned by the Respondent necessarily included his overtime pay was proper and is supported by substantial evidence. Further, the Appeals Officer's finding that Respondent was expressly excluded from earning overtime pay during his modified/light duty time period of thirty-one (31) days is supported by substantial evidence. Indeed, in the 84 day wage history prior to the industrial accident -the preferred time period of wage calculation in Nevada workers' compensation claims- overtime pay accounted for more than fifteen (15%) of Petitioners wages and zero (0%) of his modified/light duty wages. Additionally, the TPA expressly used that overtime income in its wage calculation at the outset of the claim as required by Nevada Law.

Thus, the finding that Respondent's claim was subject to lifetime reopening rights because he was incapacitated from earning "full wages" for a period of more than five (5) days is overwhelmingly supported by the record before this Honorable Court and Nevada Law.

Therefore, the Petition for Judicial Review must be denied, and the Appeals

///

///

1 Officer's Decision and Order of September 12, 2018 must be left undisturbed.

2 Dated this 13th day of February 2019.

3 

4 JASON D. MILLS, ESQ.

5 Nevada Bar No. 7447

6 JASON D. MILLS & ASSOCIATES

7 2200 S. Rancho Dr., Ste. 140

8 Las Vegas, NV 89102-4449

9 Attorney for Respondent

10 BRIAN WOLFGRAM

1 **ATTORNEY’S CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this brief complies with the formatting requirements of
3
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
5 requirements of NRAP 32(a)(6) has been prepared in proportionally spaced
6
7 typeface using Microsoft Word 2010 in 14 font, Times New Roman.

8 I further certify that this brief complies with the page limitations of NRAP
9
10 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c),
11 it does not exceed 30 pages.

12 I further certify that I have read the forgoing brief, and to the best of my
13
14 knowledge, information, and belief, it is not frivolous or interposed for any
15 improper purpose. I further certify that this brief complies with all applicable
16
17 Nevada Rules of Appellate Procedure in particular N.R.A.P 28(e)(1), which
18 requires every assertion in the brief regarding matter in the record to be supported
19
20 by a reference to the page of the transcript or appendix where the matter relied on
21 is to be found.

22 I understand that I may be subjected to sanctions in the event that the
23
24 accompanying brief is not in conformity with the requirements of the Nevada

25 ///

26 ///

1 Rules of Appellate Procedure.

2 Dated this 13th day of February 2019.

3
4
5 

6 JASON D. MILLS, ESQ.
7 Nevada Bar No. 7447
8 JASON D. MILLS & ASSOCIATES
9 2200 S. Rancho Dr., Ste. 140
10 Las Vegas, NV 89102-4449
11 Attorney for Respondent
12 BRIAN WOLFGRAM

13 ///

14 ///

15 ///

1 **CERTIFICATE OF MAILING**

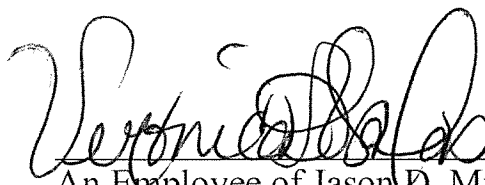
2 Pursuant to CRCP 5 (b), I hereby certify that, on the 13th day of February
3
4 2019, service of the PETITIONER'S OPENING BRIEF AND MEMORANDUM
5 OF POINTS AND AUTHORITIES was made this date by depositing a true copy
6
7 of the same for mailing, first class mail, at Las Vegas, Nevada, addressed as
8 follows:
9

10 City of Henderson
11 Attn: Sally Ihmels
12 240 S. Water Street, MSC 122
Henderson, NV 89015

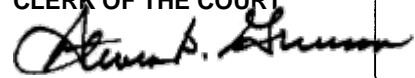
13 CCMSI
14 Attn: Susan Riccio
15 P.O. Box 35350
Las Vegas, NV 89133

16
17 Daniel L. Schwartz, Esq.
18 Lewis Brisbois Bisgaard & Smith LLP
19 2300 W. Sahara Ave., Ste. 300 Box 28
Las Vegas, NV 89102-4375

20
21
22
23
24
25
26
27
28



An Employee of Jason D. Mills & Assoc.



SAO
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Telephone: 702-893-3383
Facsimile: 702-366-9689
Email: daniel.schwartz@lewisbrisbois.com
Attorneys for Petitioners
City of Henderson and
CCMSI

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF HENDERSON, and CCMSI,
Petitioners,

CASE NO.: A-18-782711-J

DEPT. NO.: 19

v.

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

Respondents.

STIPULATION AND ORDER EXTENDING BRIEFING SCHEDULE

It is stipulated and agreed by and between the Petitioners, CITY OF HENDERSON, and CCMSI, by and through their attorneys, DANIEL L. SCHWARTZ, ESQ. and JOEL P. REEVES, ESQ. of the law firm of LEWIS BRISBOIS BISGAARD & SMITH LLP and Respondent BRIAN WOLFGRAM, by and through his attorney of record JASON D. MILLS, ESQ. of

...

...

...

1 JASON D. MILLS & ASSOCIATES, LTD, that Petitioners' Reply Brief in response to
2 Respondent's Answering Brief shall be due no later than Friday, March 22, 2019.

3
4 LEWIS BRISBOIS BISGAARD & SMITH
LLP

JASON D. MILLS & ASSOCIATES LTD

5
6 By: 

7 DANIEL L. SCHWARTZ, ESQ.
8 Nevada Bar No. 005125
9 JOEL P. REEVES, ESQ.
10 Nevada Bar No. 013231
11 2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, NV 89102-4375
Attorneys for Petitioners
City of Henderson and
CCMSI

By: 

JASON D. MILLS, ESQ.
Nevada Bar No. 007447
2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102
Attorney for Respondent
Brian Wolfgram

12 IT IS HEREBY ORDERED that Petitioner's Reply Brief shall be due no later than
13 Friday, March 22, 2019.

14
15 DATED this 17th day of March, 2019.

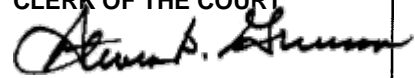
16
17 
18 DISTRICT COURT JUDGE BILL KEPHART

19 Submitted By:

20 LEWIS BRISBOIS BISGAARD & SMITH
21 LLP

22 By: 

23 DANIEL L. SCHWARTZ, ESQ.
24 Nevada Bar No. 005125
25 JOEL P. REEVES, ESQ.
26 Nevada Bar No. 013231
27 2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, NV 89102-4375
Attorneys for Petitioners
City of Henderson and
CCMSI



RPLY
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Telephone: 702-893-3383
Facsimile: 702-366-9689
Email: daniel.schwartz@lewisbrisbois.com
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.: 19

PETITIONERS' REPLY BRIEF

DANIEL L. SCHWARTZ, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Avenue, Suite 300, Box 28
Las Vegas, Nevada 89102-4375
Attorneys for Petitioners
City of Henderson and
CCMSI

JASON MILLS, ESQ.
JASON D. MILLS & ASSOCIATES LTD
2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102
Attorney for Respondent
Brian Wolfgram

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TABLE OF AUTHORITIES

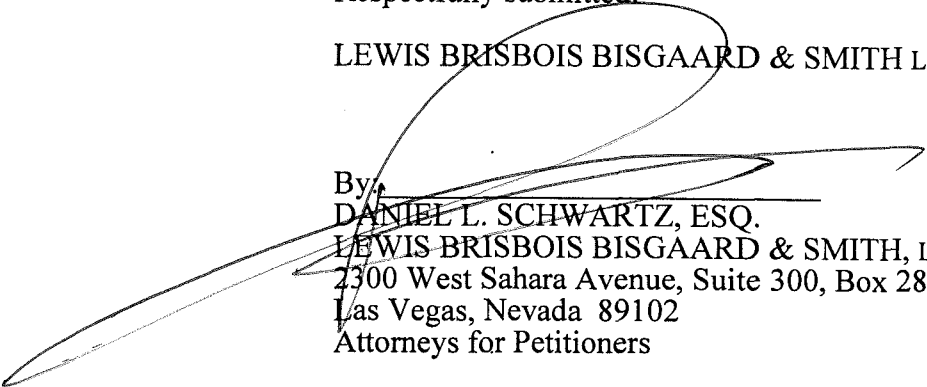
<u>Cases</u>	<u>Page No(s).</u>
<u>American Intl Vacations v. MacBride,</u> 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983).....	1
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<u>Mirage v. Nev. Dep't of Admin.,</u> 110 Nev. 257, 259, 871 P.2d 317, 318 (1994).....	fn 1
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1 COME NOW, Petitioners, CITY OF HENDERSON and CCMSI (hereinafter collectively
2 referred to as "Petitioners"), by and through their attorneys, DANIEL L. SCHWARTZ, ESQ., of
3 LEWIS BRISBOIS BISGAARD & SMITH LLP, and, and file their Reply Brief in the above-
4 referenced matter.

5 DATED this 22 day of March, 2019.

6 Respectfully submitted.

7 LEWIS BRISBOIS BISGAARD & SMITH LLP

8
9 By: 
10 DANIEL L. SCHWARTZ, ESQ.
11 LEWIS BRISBOIS BISGAARD & SMITH, LLP
12 2300 West Sahara Avenue, Suite 300, Box 28
13 Las Vegas, Nevada 89102
14 Attorneys for Petitioners
15
16
17
18
19
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I.

REPLY

There are two major problems with Respondent's Answering Brief. First off, the issue before this Honorable Court is one of statutory interpretation; i.e. did the Appeals Officer properly interpret the phrase "full wages" as contained in 616C.400. Therefore, the standard before this Honorable Court is *de novo* review, not substantial evidence as Respondent has advanced. Respondent admits the phrase "full wages" is not defined by the Nevada Industrial Insurance Act ("NIIA") and there is no case law to apply. Respondent even admits that the Appeals Officer was explicitly tasked with interpreting a statute. Indeed, the Nevada Supreme Court has held that *de novo* review is properly undertaken when there is a question regarding the "construction of a statute." American Int'l Vacations v. MacBride, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983).¹ This Court should review this case *de novo*.

Second, Respondent claims that the term "average monthly wage" (hereinafter "AMW") as defined by NAC 616C.423 and NAC 616C.435 should be used interchangeably with the term "full wages." As a matter of statutory interpretation, AMW and full wages are not interchangeable. If they were, the legislature could have very easily just used one term instead of two. The fact that they did not simply use one term shows that "AMW" and "full wages" are indeed legally distinct concepts which must be analyzed separately. ("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," Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) overruled on other grounds by Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000)).

...

...

¹ E.g. "The issue before this court is a question of law as to the proper period from which to calculate disability benefits in the event of an occupational disease." Mirage v. Nev. Dep't of Admin., 110 Nev. 257, 259, 871 P.2d 317, 318 (1994); See Also Town Of Eureka v. Office Of The State Eng'r Of Nev., 108 Nev. 163, 826 P.2d 948, (1992), legal question regarding whether a certain statute is retroactive.

1 AMW is merely a calculation of the *rate* at which each claimant is entitled to workers'
2 compensation benefits. The concept of determining full wages asks whether a claimant actually
3 lost wages for a period due to the industrial injury; i.e. did the industrial *actually* prevent the
4 claimant from earning what he/she would have earned but for the industrial injury. As was stated
5 in the Opening Brief, without having some definite showing that Respondent *actually lost wages*,
6 there is no way to prove that he did not earn his "full wage." (See United Exposition Service Co.
7 v. SIIS, 109 Nev. 421 (1993) "[a]n award of compensation cannot be based solely upon
8 possibilities and speculative testimony.") The fact that overtime was used to calculate the AMW
9 and that Respondent did not earn overtime for a period while he was on restrictions is a red
10 herring.

11 Indeed, this is the crux of this case – did the industrial injury cause Respondent to be
12 incapacitated from earning his full wages. Respondent says that he was incapacitated from earning
13 his full wages because he did not work overtime for the period in question and claims that
14 overtime was used to calculate his AMW. However, Respondent also worked periods where he
15 was not on restrictions and also did not earn overtime. Yet, there is no allegation that Respondent
16 did not earn his full wages for those periods. The purported equivalency between AMW and "full
17 wages" is legally indefensible.

18 Put simply, at no time during the pendency of his claim did Respondent ever allege that his
19 injury prevented him from earning some portion of his wage. Respondent never contested that he
20 should be entitled to have his wages supplemented by a workers' compensation wage replacement
21 benefit. Indeed, he is not even alleging now that he lost time from work and should be entitled to
22 some sort of retro-active wage replacement benefit.

23 If Respondent could prove that the industrial injury/accident *actually* prevented him from
24 earning his full wages, he would be entitled to wage replacement benefits such as temporary total
25 disability ("TTD") or temporary partial disability ("TPD") which are calculated based on his
26 AMW. (See NRS 616C.475 and NRS 616C.500). However, there is no request for any such
27 benefits in this file. If AMW has any application to this case, it would be to determine how much
28 TPD Respondent would be entitled to. Given that there was never a request for wage replacement

1 benefits, there is no showing that Respondent's industrial injury incapacitated him from earning
2 his full wage.

3 Petitioners would ask this Court how on the one hand, Respondent can effectively admit
4 that he is not entitled to any wage replacement benefits as a result of his industrial injury by virtue
5 of the fact that he is not requesting any, but at the same time claim that the industrial injury
6 prevented him from earning his "full wages." If Respondent is not entitled to any of the benefits
7 which are measured by AMW, he should not be entitled to use AMW as the measure of his "lost
8 wages."

9 This is exactly the point where the Appeals Officer's speculation comes into play. The
10 Appeals Officer and Respondent claim that Respondent should be allowed to speculate that he
11 *would have* been able to earn overtime wages but for the restrictions placed upon him by the
12 industrial injury. However, he did not *actually* request such benefits. Indeed, by failing to request
13 TPD benefits, Respondent conceded that he was not entitled to them. (Reno Sparks Convention
14 Visitors Authority v. Jackson, 112 Nev. 62, 910 P.2d 267 (1996) holding that a failure to file a
15 timely appeal under NRS 616C.315 leaves the administrative judge with no subject matter
16 jurisdiction, reasoning that otherwise workers' compensation controversies "would never be
17 finalized. Failure to follow NRS 616.5412² would throw the claims process into chaos by
18 subjecting work-related injury determinations to continued scrutiny following the statutorily
19 established time for appeals.")

20 If Respondent wished to allege that the industrial accident/injury prevented him earning his
21 full wages, it was incumbent upon him to request wage replacement benefits and prove *at the time*
22 that he had actually lost time from work due to the industrial injury/accident. Without some sort of
23 proof that Respondent *actually lost wages*, assuming that overtime pay would have been tendered
24 is completely speculative.

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28 ² Later amended to NRS 616C.315.

1 The only relevant inquiry in this case is whether Respondent can prove that the industrial
2 injury/accident actually prevented him from earning what he would have earned but for the
3 industrial injury/accident. If Respondent could have proven that the industrial accident actually
4 caused him to lose wages, then he would have a case to claim that he was “incapacitate[ed]...from
5 earning full wages.” NRS 616C.400. The problem for Respondent is that he did not claim that his
6 injury incapacitated him from earning his full wages. If Respondent believed that he did not earn
7 his full wages due to the industrial injury and that he should be compensated for the overtime
8 which he was prevented from working, the time to make such a request was at the time that he
9 believed he was losing wages. There is no such request in the record. Thus, even if AMW were the
10 proper measure of lost wages, Respondent failed to even allege that he was not earning what he
11 was entitled to while the claim was pending. This Court should not permit Respondent from
12 claiming after the fact and despite not working overtime for weeks prior to the industrial accident,
13 that it was actually the industrial accident/injury which prevented him from earning overtime pay.

14 As it stands, the Appeals Officer’s decision effectively allowed Respondent to admit that
15 he was earning all the wages that he was entitled to for the relevant period, but also claim that he
16 was prevented from earning all the wages that he was entitled to. Either Respondent lost wages or
17 he did not. Here, there is no allegation from the Respondent that he actually lost wages. If he had
18 lost wages, he would be entitled to TPD benefits. However, he did not request TPD benefits.
19 There is no proof whatsoever that Respondent actually lost wages. It was pure speculation on the
20 Appeals Officer’s part to conclude that Respondent was prevented from earning wages that are
21 voluntarily earned by the Respondent when it suits him.

22 This Court should reverse the Appeals Officer and find that Respondent is not entitled to
23 make use of the reopening provisions under NRS 616C.390(1). This Court should conclude that
24 Respondent did not meet the minimum duration of incapacity under NRS 616C.400 based on his
25 inability to prove that the industrial injury incapacitated from earning his full wages. Therefore,
26 this Court should hold that if Respondent wished to request reopening, he had to do so within one
27 year of claim closure or be forever estopped from requesting reopening under NRS 616C.390(5).

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II.

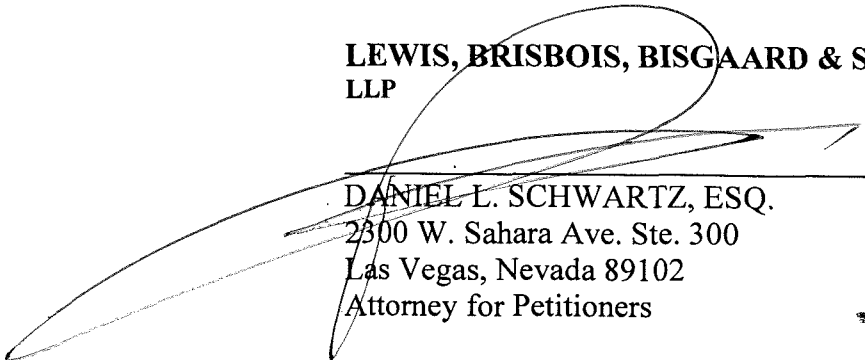
CONCLUSION

Based upon the foregoing, Petitioners, CITY OF HENDERSON and CCMSI respectfully asks this Honorable Court to grant Petitioners' Petition for Judicial Review.

Dated this 22 day of March, 2019.

Respectfully submitted,

**LEWIS, BRISBOIS, BISGAARD & SMITH,
LLP**



DANIEL L. SCHWARTZ, ESQ.
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Attorney for Petitioners

1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that I have read this appellate brief and, to the best of my knowledge,
3 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify
4 that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular
5 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be
6 supported by appropriate references to the record on appeal. I understand that I may be subject to
7 sanctions in the event that the accompanying brief is not in conformity with the requirements of
8 the Nevada Rules of Appellate procedure.

9 Dated this 22 of March, 2019.

10 Respectfully submitted,

11 LEWIS BRISBOIS BISGAARD & SMITH LLP

12
13 By

14 DANIEL L. SCHWARTZ, ESQ. (005125)
15 2300 W. Sahara Ave. Ste. 300
16 Las Vegas, Nevada 89102
17 Attorneys for Petitioners
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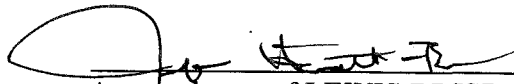
CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 22nd day of March 2019, service of the attached **PETITIONERS' REPLY BRIEF** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

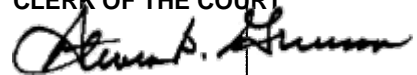
Jason Mills, Esq.
JASON D. MILLS & ASSOCIATES LTD
2200 South Rancho Drive, Ste. 140
Las Vegas, NV 89102

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



An employee of LEWIS BRISBOIS BISGAARD &
SMITH LLP



1 REQT
2 JASON D. MILLS, ESQ.
3 Nevada Bar No. 007447
4 JASON D. MILLS & ASSOCIATES
5 2200 S. Rancho Dr., Ste. 140
6 Las Vegas, NV 89102
7 (702) 822-4444 – phone
8 (702) 822-4440 – fax
9 jdm@jasondmills.com
10 Attorney for Respondent,
11 BRIAN WOLFGRAM

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

CITY OF HENDERSON, and CCMSI,

Petitioner,

vs.

Case No: A-18-782711-J

Dept. No.: XIX (19)

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

Respondents.

**RESPONDENT'S, BRIAN WOLFGRAM,
REQUEST FOR DECISION ON THE MERITS
PURSUANT TO NRS 233B.133(4)**

COMES NOW, the Respondent, BRIAN WOLFGRAM, by and through his
attorney of record, JASON D. MILLS, ESQ. of the Law Firm of JASON D.
MILLS & ASSOCIATES, LTD. and requests that this matter be submitted for
///

000371

decision pursuant to NRS 233B.133(4), which states:

Within 7 days after the expiration of the time within which the petitioner is required to reply, any party may request a hearing. Unless a request for hearing has been filed, the matter shall be deemed submitted.

The Petitioner's Opening Brief was filed on January 10, 2019, the Respondent's Answering Brief was filed on February 13, 2019, and Petitioner's Reply Brief was filed on March 22, 2019. As more than the 7 day time period has passed since the Petitioner was to file its Reply Brief, and no party having made a request for hearing, this matter has been duly submitted for this Honorable Court to issue its determination on the merits on the underlying petition.

Dated this 11 day of July, 2019.

JASON D. MILLS, ESQ.
Nevada Bar No.: 007447
JASON D. MILLS & ASSOCIATES
2200 S. Rancho Dr., Ste. 140
Las Vegas, NV 89102
Attorney for Respondent,
BRIAN WOLFGAM

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Pursuant to NRCP 5 (b), I hereby certify that, on the 16 day of July, 2019

service of the RESPONDENT'S, BRIAN WOLFGRAM, REQUEST FOR

DECISION ON THE MERITS PURSUANT TO NRS 233B.133(4) was made this

date by depositing a true copy of the same for mailing, first class mail, at Las

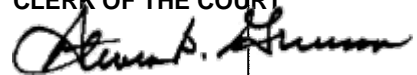
Vegas, Nevada, addressed as follows:

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.
Lewis Brisbois, et al
2300 W. Sahara Ave., Ste. 300 Box 28
Las Vegas, NV 89102


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



NOH
JASON D. MILLS, ESQ.
Nevada Bar No. 007447
JASON D. MILLS & ASSOCIATES
2200 S. Rancho Dr., Ste. 140
Las Vegas, NV 89102
(702) 822-4444 – phone
(702) 822-4440 – fax
jdm@jasondmills.com
Attorney for Respondent,
BRIAN WOLFGRAM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CITY OF HENDERSON, and CCMSI,

Petitioner,

vs.

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.: XIX (19)
HEARING REQUESTED

NOTICE OF HEARING


TO: DANIEL L. SCHWARTZ, ESQ., attorney for City of Henderson and
CCMSI, Petitioners;

Please take notice that the undersigned has requested a hearing on the above
referenced Petition for Judicial Review pursuant to NRS 233B.133(4).

000374

1 This hearing will be held before the above entitled Court on the ____ day
2 of _____, 2019, at ____ a.m./p.m. in the above department, or as soon
3 thereafter as counsel can be heard.
4

5 DATED this 1st day of November, 2019.
6

7 By: 
8 JASON D. MILLS, ESQ.
9 Nevada Bar No.: 007447
10 JASON D. MILLS & ASSOCIATES
11 2200 S. Rancho Dr., Ste. 140
12 Las Vegas, NV 89102
13 Attorney for Respondent,
14 BRIAN WOLFGRAM
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Pursuant to NRCP 5 (b), I hereby certify that, on the 1 day of November,

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

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

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**Worker's Compensation
Appeal**

COURT MINUTES

December 05, 2019

A-18-782711-J City of Henderson, Petitioner(s)
vs.
Brian Wolfgram, Respondent(s)

December 05, 2019 3:00 AM Petition for Judicial Review

HEARD BY: Kephart, William D. **COURTROOM:** No Location

COURT CLERK: Tia Everett

RECORDER:

REPORTER:

PARTIES No parties present
PRESENT:

JOURNAL ENTRIES

- COURT ORDERED, Petitioner s Notice of Hearing on Petition for Judicial Review is CONTINUED to 1/28/2020 at 9:00 AM.

CLERK'S NOTE: The above minute order has been distributed to:

Jennifer Hiatt-Bryan jennifer.hiatt-bryan@lewisbrisbois.com
Joel P. Reeves joel.reeves@lewisbrisbois.com
Daniel L. Schwartz daniel.schwartz@lewisbrisbois.com
Jason D Mills jdm@jasondmills.com
Veronica A Salas vas@jasondmills.com

A-18-782711-J City of Henderson, Petitioner(s)
vs.
Brian Wolfgram, Respondent(s)

January 28, 2020 09:00 AM Petitioner's Notice of Hearing

HEARD BY: Kephart, William D. COURTROOM: RJC Courtroom 16B

COURT CLERK: Everett, Tia

RECORDER: Erickson, Christine

REPORTER:

PARTIES PRESENT:

Joel Reeves

Attorney for Petitioner

JOURNAL ENTRIES

Prior to hearing, Mr. Reeves informed the Court that counsel for Respondent had the incorrect date and requested to continue the matter. COURT ORDERED, matter CONTINUED.

CONTINUED TO: 2/04/2020 9:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Worker's Compensation Appeal

COURT MINUTES

February 04, 2020

A-18-782711-J City of Henderson, Petitioner(s)
vs.
Brian Wolfgram, Respondent(s)

February 04, 2020 09:00 AM Petitioner's Notice of Hearing

HEARD BY: Kephart, William D. **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Everett, Tia

RECORDER: Erickson, Christine

REPORTER:

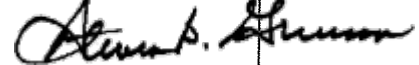
PARTIES PRESENT:

Jason D. Mills Attorney for Respondent

Joel Reeves Attorney for Petitioner

JOURNAL ENTRIES

Following arguments by counsel, COURT ORDERED, Petition for Judicial Review DENIED and the Appeal Officer's Decision shall STAND.



ORD
JASON D. MILLS, ESQ.
Nevada Bar Number 7447
JASON D. MILLS & ASSOCIATES, LTD.
2200 S. Rancho Dr., Ste 140
Las Vegas, Nevada 89102
Telephone (702) 822-4444
Facsimile (702) 822-4440
jdm@jasondmills.com
Counsel for Respondent

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CITY OF HENDERSON, and CCMSI,

Petitioners,

vs.

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

Respondents.

Case No.: A-18-782711-J

Dept. No: 19

<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

ORDER DENYING PETITION FOR JUDICIAL REVIEW

This matter being duly noticed came on for hearing on February 2, 2020 at 09:00 a.m. regarding Petitioner's PETITION FOR JUDICIAL REVIEW in the above-entitled Court. Petitioners, CITY OF HENDERSON and CCMSI, (hereinafter "Petitioners") represented by DANIEL L. SCHWARTZ, ESQ., and 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
17

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
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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:*

- (b) *Commissions which are prorated over the period used to calculate the average monthly wage;*
- (c) *Incentive pay;*
- (d) *Payment for sick leave;*
- (e) *Bonuses which are prorated over the period used to calculate the average monthly wage;*
- (f) *Termination pay;*
- (g) *Tips which are collected and disbursed by the employer which are not paid at the discretion of the customer;*
- (h) *Tips reported by the employee pursuant to NRS 616B.227;*
- (i) *Allowance for tools or for the rental of hand and power tools not normally provided by the employee;*
- (j) *Salary;*
- (k) *Payment for piecework;*
- (l) *Payment for vacation;*
- (m) *Payment for holidays;*
- (n) *Payment for overtime;*
- (o) *Payment for travel when it is paid to compensate the employee for the time spent in travel; and*
- (p) *The reasonable market value of either board or room, or both. At least \$150 per month will be allowed for board and room, \$5 per day or \$1.50 per meal for board, and \$50 per month for a room.*
2. *Notwithstanding paragraph (p) of subsection 1, the reasonable value of a meal furnished by an employer to an employee is the value, if any, specified in the collective bargaining agreement between the employee and employer.*
3. *The following payments may not be included in the calculation 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 ///
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28

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


ORDER

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

Dated this 24th day of February, 2020.


DISTRICT COURT JUDGE

RESPECTFULLY SUBMITTED BY:


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

///

///

///

1 **CERTIFICATION PURSUANT TO COURT GUIDELINES**

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

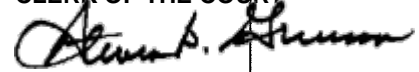
3
4 _____ The court has waived the requirements set forth in the Guidelines;

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
18
19
20
21
22
23
24
25
26
27
28



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

1 **CERTIFICATE OF MAILING**

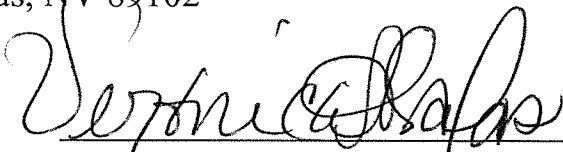
2 Pursuant to NRCF 5(b), I hereby certify that on the 11 day of March,
3
4 2020, I duly deposited for mailing, first class mail, postage prepaid thereon, in the
5 United States Mail at Las Vegas, Nevada, a true and correct copy of the above
6
7 Notice of Entry of Order, in the above-entitled matter, addressed to the following:

8 City of Henderson
9 Sally Ihmels
10 240 S. Water Str., MSC 122
11 Henderson, NV 89015

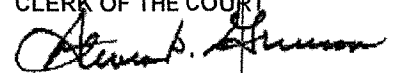
12 CCMSI
13 Susan Riccio
14 P.O. Box 35350
Las Vegas, NV 89133

15 Daniel L. Schwartz, Esq.
16 Joel P. Reeves, Esq.
17 Lewis Brisbois Bisgaard & Smith, LLP
18 2300 W. Sahara Ave., Ste. 300 Box 28
Las Vegas, NV 89102

19 Department of Administration
20 Charles J. York, Esq.
21 Appeals Division
22 2200 S. Rancho Dr., Ste. 220
Las Vegas, NV 89102

23 
24

25 An employee of JASON D. MILLS & ASSOCIATES, LTD.
26
27
28



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,
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17 vs.

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

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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
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28 JOEL P. REEVES, ESQ., of the law firm LEWIS BRISBOIS BISGAARD &
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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
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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
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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
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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.
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7 408, 409 (1990). Furthermore, under the Nevada Administrative Procedures Act, a
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23 *not limited to:*

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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
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- 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
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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
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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
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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.
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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 **THE COURT HEREBY ORDERS** that the Petition for Judicial Review
5
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):

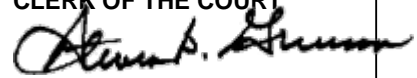
3
4 _____ The court has waived the requirements set forth in the Guidelines;

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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ASTA
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Telephone: 702-893-3383
Facsimile: 702-366-9689
Email: daniel.schwartz@lewisbrisbois.com
Attorneys for Petitioners
City of Henderson and
CCMSI

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CITY OF HENDERSON, and CCMSI,

Petitioners,

v.

CASE NO.: A-18-782711-J
DEPT. NO.: 19

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

Respondents.

CASE APPEAL STATEMENT

1. Name of Petitioners filing this case appeal statement:

City of Henderson and CCMSI

2. Identify the Judge issuing the decision, judgment, or order appealed from:

Hon. Bill Kephart, District Court Judge

3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited):

City of Henderson, CCMSI, and Brian Wolfgram

4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited):

City of Henderson, CCMSI, and Brian Wolfgram

1 5. Set forth the name, law firm, address, and telephone number of all counsel on
2 appeal and identify the party or parties whom they represent:

3 **DANIEL L. SCHWARTZ, ESQ.**
4 **JOEL P. REEVES, ESQ.**
5 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
6 **2300 W. Sahara Avenue, Suite 300, Box 28**
7 **Las Vegas, Nevada 89102-4375**
8 *Attorneys for Petitioners*
9 *City of Henderson and*
10 *CCMSI*

11 **JASON MILLS, ESQ.**
12 **JASON D. MILLS & ASSOCIATES LTD**
13 **2200 South Rancho Drive, Ste. 140**
14 **Las Vegas, NV 89102**
15 **Attorney for Respondent**
16 *Brian Wolfgram*

17 6. Indicate whether Petitioners were represented by appointed or retained counsel in
18 the district court:

19 **Petitioners were represented by retained counsel in the District Court.**

20 7. Indicate whether Respondent was represented by appointed or retained counsel in
21 the district court:

22 **Respondent was represented by retained counsel in the District Court.**

23 8. Indicate whether Petitioners are represented by appointed or retained counsel on
24 appeal:

25 **Petitioners are represented by retained counsel on appeal.**

26 9. Indicate whether Respondent is represented by appointed or retained counsel on
27 appeal:

28 **Respondent is represented by retained counsel on appeal.**

 10. Indicate whether Petitioners were granted leave to proceed in forma pauperis, and
the date of entry of the district court order granting such leave:

Petitioners were not granted leave to proceed in forma pauperis.

1 11. Indicate whether Respondent was granted leave to proceed in forma pauperis, and
2 the date of entry of the district court order granting such leave:

3 **Respondent was not granted leave to proceed in forma pauperis.**

4 12. Indicate the date the proceedings commenced in the district court (e.g., date
5 complaint, indictment, information, or petition was filed):
6

7 **The Petition for Judicial Review of the Appeals Officer's Decision of September 16,**
8 **2018, was filed on October 12, 2018.**

9 13. Provide a brief description of the nature of the action and result in the district court,
10 including the type of judgment or order being appealed and the relief granted by the district court:

11 **This is a workers' compensation case. On January 26, 2015, Respondent BRIAN**
12 **WOLFGRAM's (hereinafter "Respondent") workers' compensation claim closed without a**
13 **permanent partial disability ("PPD") rating. On February 6, 2017, Respondent requested**
14 **that his claim be reopened for further care. Petitioner CCMSI (hereinafter**
15 **"Administrator") denied his request under NRS 616C.390(5) as Respondent had never been**
16 **incapacitated from earning his full wages over the course of his claim and because he did not**
17 **receive a PPD award. Respondent appealed.**

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

20 **Claimant has met the statutory requirement of minimum**
21 **duration of incapacity because he was placed on light duty work**
22 **restrictions from October 20, 2014 to November 3, 2014, due to**
23 **an industrial injury for a period of more than 5 days in 20 and**
24 **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.

25 **However, the Appeals Officer also concluded that Respondent had not submitted**
26 **sufficient evidence to support reopening. Therefore, the Appeals Officer ordered that the**
27 **claim remain closed, but that Respondent should be afforded lifetime reopening rights given**
28 **that the Appeals Officer concluded that Respondent had proven the minimum duration of**

1 incapacity for entitlement to the same.

2 Petitioners filed a Petition for Judicial Review with the District Court based on the
3 Appeals Officer's arbitrary interpretation of statutory terms ("full wages" and
4 "incapacitated") which constituted legal error. The District Court affirmed the Appeals
5 Officer. Petitioners now seek review with the Supreme Court.

6 14. Indicate whether the case has previously been the subject of an appeal to or original
7 writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of
8 the prior proceeding:

9 **No.**

10 15. Indicate whether this appeal involves child custody or visitation:

11 **No.**

12 16. If this is a civil case, indicate whether this appeal involves the possibility of
13 settlement:

14 **No.**

15 DATED this 3 day of April, 2020.

16 Respectfully submitted,

17 LEWIS BRISBOIS BISGAARD & SMITH LLP

18
19
20
21 By: /s/ Joel P. Reeves
22 DANIEL L. SCHWARTZ, ESQ.
23 JOEL P. REEVES, ESQ.
24 LEWIS BRISBOIS BISGAARD & SMITH, LLP
25 2300 West Sahara Avenue, Suite 300, Box 28
26 Las Vegas, Nevada 89102
27 Attorneys for Petitioners

DISTRICT COURT
CLARK COUNTY, NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

CASE APPEAL STATEMENT

filed in case number: A-18-782711-J :

☐ Document does not contain the Social Security number of any person.

- OR -

☐ Document contains the Social Security number of a person as required by:

☐ A specific state or federal law, to wit:

- or -

☐ For the administration of a public program

- or -

☐ For an application for a federal or state grant

- or -

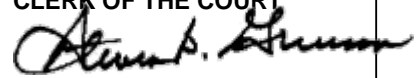
☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 4/3/2020

/s/ Joel P. Reeves for
(Signature)

DANIEL L. SCHWARTZ, ESQ.
(Print Name)

PETITIONERS
(Attorney for)



NOAS
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Telephone: 702-893-3383
Facsimile: 702-366-9689
Email: daniel.schwartz@lewisbrisbois.com
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.: 19

NOTICE OF APPEAL

TO: BRIAN WOLFGRAM, Respondent

TO: JASON MILLS, ESQ., Respondent's Attorney

NOTICE IS HEREBY GIVEN that Petitioners, CITY OF HENDERSON and CCMSI,
(hereinafter referred to as "Petitioners"), in the above-entitled action, hereby appeal to the Supreme
Court of the State of Nevada from the attached "Order" entered in this action on or

...

...

...

1 about March 11, 2020 which denied Petitioners' Petition for Judicial Review and the "Notice of Entry
2 of Order" filed on or about March 11, 2020.

3 DATED this 3 day of April, 2020.

4 Respectfully submitted,

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6

7
8 By: /s/ Joel P. Reeves
9 DANIEL L. SCHWARTZ, ESQ.
10 JOEL P. REEVES, ESQ.
11 LEWIS BRISBOIS BISGAARD & SMITH, LLP
12 2300 West Sahara Avenue, Suite 300, Box 28
13 Las Vegas, Nevada 89102
14 Attorneys for Petitioners
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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 3rd day of April, 2020, service of the foregoing **NOTICE OF APPEAL** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

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

/s/ Stephanie Jensen
An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

NOTICE OF APPEAL

filed in case number: A-18-782711-J

☐ Document does not contain the Social Security number of any person.

- OR -

☐ Document contains the Social Security number of a person as required by:

☐ A specific state or federal law, to wit:

- or -

☐ For the administration of a public program

- or -

☐ For an application for a federal or state grant

- or -

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 4/3/2020

/s/ Joel P. Reeves, Esq/
(Signature)

DANIEL L. SCHWARTZ, ESQ.
(Print Name)

PETITIONERS
(Attorney for)

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EXHIBIT 1



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 WOLFGAM, 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
13
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CERTIFICATE OF MAILING

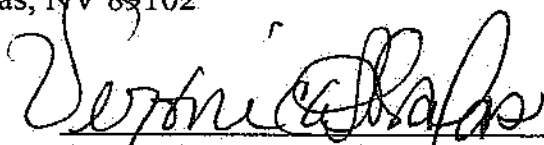
Pursuant to NRCP 5(b), I hereby certify that on the 11 day of March, 2020, I duly deposited for mailing, first class mail, postage prepaid thereon, in the United States Mail at Las Vegas, Nevada, a true and correct copy of the above Notice of Entry of Order, in the above-entitled matter, addressed to the following:

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.

Steven D. Grierson

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,**

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.**

<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

21 **ORDER DENYING PETITION FOR JUDICIAL REVIEW**

22 This matter being duly noticed came on for hearing on February 2, 2020 at
23 09:00 a.m. regarding Petitioner's PETITION FOR JUDICIAL REVIEW in the
24 above-entitled Court. Petitioners, CITY OF HENDERSON and CCMSI,
25 (hereinafter "Petitioners") represented by DANIEL L. SCHWARTZ, ESQ., and
26 JOEL P. REEVES, ESQ., of the law firm LEWIS BRISBOIS BISGAARD &
27 SMITH, LLP., and Respondent, BRIAN WOLFGRAM (hereinafter
28

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
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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 ("NILA"), 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 Specifically, NAC 616C.423 states:

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

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

23 (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 NILA which is certainly something more than “base
17 pay” or “regular pay” as advanced by the Petitioner.
18
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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
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26 ///

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

2 Dept. No: 19

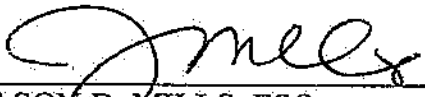
3 **ORDER**

4 **THE COURT HEREBY ORDERS** that the Petition for Judicial Review
5
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):

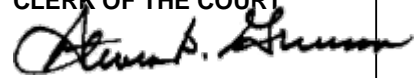
3
4 _____ The court has waived the requirements set forth in the Guidelines;

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

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 X Failed to Respond
13

14
15 _____
16 DANIEL L. SCHWARTZ, ESQ., Attorney for Petitioners,
17 CITY OF HENDERSON and CCMSI
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NOCB
DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Ave. Ste. 300
Las Vegas, Nevada 89102
Telephone: 702-893-3383
Facsimile: 702-366-9689
Email: daniel.schwartz@lewisbrisbois.com
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.: 19

NOTICE OF FILING BOND

NOTICE IS HEREBY GIVEN that Petitioners, CITY OF HENDERSON, and CCMSI, by
and through their attorneys, DANIEL L. SCHWARTZ, ESQ. of LEWIS BRISBOIS BISGAARD
& SMITH LLP, deposited with the Clerk of this Court, in compliance with the NRAP Rule 7, a

...

...

...

1 check in the amount of \$500.00 for security, which was hand delivered to the Eight Judicial
2 District Court.

3 DATED this 3 day of April, 2020.

4 Respectfully submitted,

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6
7

8 By: /s/ Joel P. Reeves, Esq.
9 DANIEL L. SCHWARTZ, ESQ.
10 JOEL P. REEVES, ESQ.
11 LEWIS BRISBOIS BISGAARD & SMITH, LLP
12 2300 West Sahara Avenue, Suite 300, Box 28
13 Las Vegas, Nevada 89102
14 Attorneys for Petitioners
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CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 3 day of April, 2020, service of the foregoing **NOTICE OF FILING BOND** was made this date by depositing a true copy of the same for mailing, first class mail, as follows:

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

/s/ Stephanie Jensen
An employee of LEWIS BRISBOIS BISGAARD & SMITH LLP