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**IN THE SUPREME COURT
STATE OF NEVADA
Supreme Court No.: 80982**

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May 12 2021 08:10 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CITY OF HENDERSON, and CCMSI

Appellants,

vs.

BRIAN WOLFGRAM,

Respondent.

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ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
STATE OF NEVADA, CASE NUMBER A-18-782711-J

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RESPONDENT BRIAN WOLFGRAM'S
ANSWERING BRIEF

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18

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel certifies that the following are persons and
3 entities as described in NRAP 26.1(a) and must be disclosed:
4

- 5 1. Respondent, Brian Wolfgram, is a natural person and not a corporation
6 and therefore exempt from the NRAP 26.1(a) disclosure requirements.
7
- 8 2. The undersigned counsel for Respondent Wolfgram further confirms that
9 the only attorneys who have appeared on behalf of Respondent in any
10 court or administrative proceedings related to this matter are Jason D.
11 Mills, Esq., formally of the law firm Jason D. Mills & Associates, Ltd.,
12 and formally of the law firm Neeman & Mills, Ltd., and currently of the
13 GGRM Law Firm.
14
- 15 3. The undersigned counsel for Respondent Wolfgram further
16 acknowledges and understands that these representations are made in
17 order that the justices/judges of this court may evaluate possible
18 disqualifications or recusal.
19
20
21

22 Dated this 12th day of May 2021.

23
24 /s/ Jason D. Mills
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26 Nevada Bar No. 7447
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28 2770 S. Maryland Pkwy., Ste 100
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1 adjudication.

2 **III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

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4 Did the Appeals Officer act within his legal authority when he analyzed the
5 facts of the underlying case and applied the plain meaning to “full wages” when
6 determining whether Respondent Wolfgram was incapacitated from earning such
7 “full wages” for a period of five (5) or more days allowing Respondent Wolfgram
8 the ability to seek industrial claim reopening rights for life pursuant to NRS
9 616C.390?
10
11

12 **IV. STATEMENT OF THE CASE**

13
14 The Appellants seek to reverse the District Court below that affirmed the
15 underlying Appeals Officer’s Decision that found pursuant to NRS 616C.390
16 Respondent Wolfgram had demonstrated the right to seek lifetime reopening
17 rights on his industrial claim after he made a factual showing that he was
18 incapacitated from earning full wages for a period of five or more days during the
19 period of time when his industrial claim was originally open. The Appellants
20 contend the Appeals Officer’s ruling was not supported by substantial evidence
21 and that the plain reading of the meaning “full wages” by the Appeals Officer was
22 tantamount to an abuse of discretion. Respondent Wolfgram agrees with the
23 District Court that the Appeals Officer properly applied the plain meaning of the
24 phrase “full wages” when applying it to Respondent Wolfgram’s industrial
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1 reopening rights under NRS 616C.390 when the Appeals Officer concluded that
2 the claim had lifetime reopening rights affixed thereto.

3
4 **V. STATEMENT OF FACTS**

5
6 On or about October 18, 2014, Respondent Brian Wolfgram (hereinafter
7 “Wolfgram”) was injured during the course and scope of employment for the City
8 of Henderson Fire Department (“Employer”). See Appellants’ Appendix Volume
9 1, p. 3, lines 23-24 and p. 68 (hereinafter “Appellant App. 1”).
10

11 His claim was accepted by the Employer’s third-party administrator, CCMSI
12 (“TPA”) and was treated for cervical strain, bilateral elbow injury and cubital
13 tunnel syndrome to his hands, and subsequently released from medical treatment
14 by Dr. Colby Young on January 15, 2015 as stable and not ratable. Appellant App.
15 1, p. 4, lines 1-5. It is also noted that prior to being released from care, Wolfgram
16 was treated by both Bernard Hunwick, M.D. and Colby Young, M.D. and that
17 Wolfgram was placed on modified/light duty restrictions (i.e. precluding him from
18 full duty work) on an industrial basis between October 20, 2014 and November 19,
19 2014 by those doctors; and eventually released back to full duty work on
20 11/20/2014. Appellants’ Appendix Volume 2, p. 229, 231, 233, 240, 255 and 265
21 (hereinafter “Appellant App. 2”). On January 26, 2015, the TPA issued its Notice
22 of Intent to Close Claim and Wolfgram did not appeal that determination and the
23 claim thereafter closed. Appellant App. 1, p. 4, lines 9-11.
24
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1 On January 30, 2017, Dr. Colby Young indicated that he believed Wolfgram
2 had a recurrence of his previous symptoms and recommended reopening of his
3 claim for evaluation and possible treatment if necessary. Appellant App. 1, p. 4,
4 lines 12-14.
5

6 On February 6, 2017, Wolfgram requested reopening of claim to the TPA
7 under NRS 616C.390. Appellant App. 1, p. 4, line 16.
8

9 On February 15, 2017, the TPA denied Wolfgram's request for reopening.
10 Appellant App. 1, p. 4, line 17.
11

12 Wolfgram timely appealed the TPA's determination denying his request for
13 reopening and on May 19, 2017, a Hearing Officer remanded the TPA to reopen
14 his claim. Appellant App. 1, p. 4, lines 18-19.
15

16 The Employer timely appealed the Hearing Officer's Decision and Order
17 and a Motion for Stay was granted to the Employer. Appellant App. 1, p. 4, lines
18 23-24.
19

20 An Appeal took place under case number 1714500-CJY, wherein the
21 Appeals Officer ruled that Wolfgram did not possess sufficient evidence to reopen
22 his claim under NRS 616C.390(1)(a-c), but however also found that Wolfgram was
23 incapacitated from earning his "full wages" for a period of five (5) or more days,
24 pursuant to NRS 616C.390 and NRS 616C.400, that he had proven the legal
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1 entitlement to seek reopening under NRS 616C.390 during his lifetime. Appellant
2 App. 1, p. 6, line 13-16
3

4 The Employer and TPA (collectively the “Appellants”) sought a timely
5 Petition for Judicial Review of this matter under case number A-18-782711-J
6 which was denied by the District Court and with Notice of Entry of Order file on
7 March 11, 2020. Appellants’ Appendix Volume 3, p. 387-396 (hereinafter
8 “Appellant App. 3”). Appellants thereafter timely appealed the District Court’s
9 Order to the Nevada Supreme Court on April 3, 2020. Appellant App. 3, p. 402-
10 416.
11
12

13 **VI. STANDARD OF REVIEW**

14
15 The Court’s roll in reviewing an administrative agency’s decision is
16 identical to that of the District Court—to review the agency’s decision for clear
17 error and will overturn the agency’s factual findings only if they are not supported
18 by substantial evidence. See NRS 233B.135(3)(e). See also *Original Roofing*
19 *Company, LLC v. Chief Administrative Officer of Occupational Safety and Health*
20 *Administration*, 135 Nev. Adv. Op. 18 (June 6, 2019) (citing *Elizondo v. Hood*
21 *Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). An agency’s fact-based
22 conclusions of law are entitled to deference when supported by substantial
23 evidence; however, purely legal questions are reviewed de novo. *Law Offices of*
24 *Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008).
25
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28

1 “Substantial evidence is that which a reasonable mind might accept as adequate to
2 support a conclusion.” *City Plan Dev., Inc. v. State, Office of Labor Comm’r*, 121
3 Nev. 419, 426, 117 P.3d 182, 187 (2005).
4

5 **VII. ARGUMENT**

6 7 **A. IN ORDER TO REOPEN A WORKERS’ COMPENSATION** 8 **CLAIM, THE UNDERLYING APPEALS OFFICER WAS FIRST** 9 **TASKED WITH DETERMINING IF THE CASE MAY BE RE-** 10 **OPENABLE AT ALL, WHICH THE APPEALS OFFICER FOUND** 11 **THAT IT WAS AND WAS INDEED REOPENABLE FOR LIFE**

12 **1. What are the time limits to reopening workers’ compensation** 13 **claims? There are three: (1) No reopening at all (2) for a period of** 14 **one year after claim closure and (3) for life.**

15 The Nevada Industrial Insurance Act (NRS 616A-616D) (“NIIA” or the
16 “Act”) allows for some claims to never be reopened, some claims to be reopened
17 only for a period of one (1) year after claim closure and finally that some claims
18 can be reopened for life. See NRS 616C.390.
19

20 Thus, claims pursuant to sub-section 9 of NRS 616C.390, are not reopenable
21 at all; namely cases where medical treatment of less than \$800 was expanded on
22 the industrial claim and there was no permanent partial disability award and where
23 the claimant did not meet the minimum duration on incapacity for a period of five
24 (5) or more days from earning “full wages” and where the insurer specifically
25 delineates in its closure notice that the claim is not reopenable pursuant to sub-
26 section of NRS 616C.235(2-4).
27
28

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

6 Finally, claims pursuant to sub-section 1 of NRS 616C.390, are reopenable
7 for life, provided the claim does not fall within the definitions of sub-sections 5 or
8 9, set forth above.
9

10 Here, there is no dispute that Wolfgram did not receive a permanent partial
11 disability award when his claim originally closed back early 2015. Appellant App.
12 1, p. 4, lines 9-11. And the Appellants did not advance the position at the Appeal
13 hearing that it closed the claim pursuant to NRS 616C.235(2-4) thereby foreclosing
14 the issue of whether the claim is entirely precluded from reopening at all.
15

16 Appellant App. 2, p. 281.
17

18 Thus, the dispute by and between the parties was whether Wolfgram’s claim
19 was required to be reopened within one year and only one year pursuant to sub-
20 section 5 of NRS 616C.390, or not. To put an even finer point on the topic, was
21 Wolfgram incapacitated from earning “full wages” for a period of five (5) or more
22 days, or not (pursuant to NRS 616C.390(5)(a) and NRS 616C.400)? If the answer
23 to this question was “yes” then Wolfgram’s claim is reopenable for life. If the
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1 answer to this question was “no” then Wolfgram’s claim was reopenable only for a
2 period of one year after claim closure.
3

4 Here, the Appeals Officer below found, specifically, that Wolfgram was
5 incapacitated from earning “full wages” for a period of five (5) or more days, and
6 thus, his claim is reopenable for life.¹. And the District Court found no lawful basis
7 to disturb the Appeals Officer’s order.
8

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

16 In the case at bar, the Appeals Officer was essentially tasked with making a
17 finding of fact as to whether Wolfgram was or was not incapacitated from
18 earning “full wages” for a period of five (5) or more days. First it was
19 demonstrated that Wolfgram was placed on light/modified duty for the period
20 between October 14, 2014 and November 3, 2014 (being released full duty on
21

22
23 ¹ In the Appeal below, the Appeals Officer found that the medical evidence
24 supplied by Wolfgram at the time of the Appeal hearing was insufficient to meet
25 his burden to reopen the claim under NRS 616C.390(1)(a-c) as such the parties do
26 not dispute the outcome of *that* finding. But the finding by the Appeals Officer as
27 to whether Wolfgram has a claim that may be reopened for a period of only one
28 year following closure, or if that claim may be sought to be reopened for
Wolfgram’s lifetime, is the crux of the dispute between the parties.

1 11/20/2014) by industrial treating physicians Brian Hunwick, M.D., and Colby
2 Young, M.D Appellant App. 2, p. 229, 231, 233, 240, 255, and 265. Thus,
3
4 Wolfgram was on modified/light duty for a period of thirty-one (31) days in a row.
5
6 Wolfgram was offered a modified/light duty job by his employer on October 20,
7 2014 which Wolfgram accepted. Appellant App. 2, p. 231. See also Appellant
8 App. 1, p. 230. Further, Wolfgram’s “Telestaff” print out demonstrates Wolfgram
9 earned no overtime (OT) for the light duty dates between October 20, 2014 and
10
11 November 19, 2014. Appellant App. 1, p. 83-24.²

12 Once it was known that Wolfgram had five (5) or more days of incapacity
13
14 due to his industrial injury by way of his modified/light duty certifications by his
15 industrial treating doctors, the final determination the Appeals Officer needed to
16
17 make was whether the Wolfgram was precluded from earning “full wages” during
18
19 that period of five (5) or more days.

20 In reviewing the Act, namely NRS 616A-616D and the supporting
21
22 regulations found in NAC 616A-616D, it must be noted the phrase “full wages” is
23
24 not specifically defined. Accordingly, the Appeals Officer was tasked with
25
26 determining that phrase’s plain meaning.

27 ² “Telestaff” is the employee hour tracking and coding system used by City of
28 Henderson Firefighters and the coding letters such as “OT” for overtime, are
defined in Appellant App. 1, p. 12-20.

1 Regarding NIIA claims, the legislature empowered the Division of Industrial
2 Relations Administrator (“DIR”) to promulgate regulations that define how the
3 “average monthly wage” are calculated on industrial claims. See NRS 616C.420³.
4 And the regulations adopted by the DIR regarding the “average monthly wage” are
5 set forth by NAC 616C.423 and NAC 616C.435. Specifically enumerated in the
6 average monthly wage calculation regulation NAC 616C.423 is “overtime” pay per
7 subsection (n), and further that the list is not exhaustive by its very definition per
8 subsection 1. Further, the preferred period of time for calculating the “average
9 monthly wage” is also defined in regulation, per NAC 616C.435. According to
10 subsection 1 of this regulation, the preferred time frame of determining the
11 “average monthly wage” in Nevada is the 12-week period prior to the industrial
12 accident; i.e. the 84 days prior to the accident. Indeed, in the case at bar, that 84-
13 day period prior to the accident is precisely the period of time that the TPA
14 correctly used in calculating Wolfgram’s pre-accident wages. Appellant App. 1, p.
15 137, 139 and 142. The TPA did not do this because their decision to do so was
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23
24 ³ NRS 616C.420 was amended by the Nevada Legislature in the 80th Legislative
25 session vis-à-vis SB 492. Among those amendments was the codification of NAC
26 616C.435 into statute which became effective on July 1, 2019. However, the
27 matter before this Honorable Court was adjudicated prior to those amendments,
28 and in any event the change codified the language of NAC 61C.435 word-for-word
as NRS 616C.420(2). Accordingly, references in this brief will be to the statutes
and regulations that were in force at the time when the Appeals Officer and District
Court ruled upon the merits.

1 “arbitrary” or “speculative” rather they did so because Nevada law commanded
2 them to do so. Hence, in the 84 days prior to the accident, the Wolfgram earned
3 \$33,297.77. Appellant App. 1, p. 137, 139 and 142. And in that 84-day period,
4 Wolfgram worked 96 hours of overtime, for a total of \$5,108.68 of overtime pay
5 and \$28,189.09 in other pay; including “regular” pay, “vacation” pay, “bonus” pay,
6 “union leave” pay, “fire house adjustment” pay, and “holiday” pay. Appellant App.
7 1, p. 142. Thus, of the entire 84-day wage history before the accident a full 15.34%
8 of his income was derived purely from overtime pay. Appellant App. 1, p. 142.
9
10 Going further only \$16,566.74 of the \$33,297.77 or 49.75% of his 84-day wage
11 history comprised of “regular” pay; more than half being comprised of a
12 combination of overtime, vacation, bonus, union leave, holiday, and fire house
13 adjustment pay. Appellant App. 1, p. 142.
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18 Further, NRS 616C.390(11)(c), the very reopening statute that is applicable
19 to the case at bar states “wages” are defined as:

20
21 . . . ***any remuneration*** paid by an employee for the
22 ***personal services of the employee, including, without limitation:***
23 ***(1) Commissions and bonuses; and***
24 ***(2) Remuneration payable in any medium other than cash.***

25 (Emphasis added).

26 Thus, when determining what the “full wages” are that Wolfgram received
27 was not an arbitrary decision by the Appeals Officer when he made a factual
28 finding was Wolfgram did not earn overtime pay during that period and further

1 was expressly precluded from even being allowed to earn overtime pay during the
2 period of the time that Wolfgram was on light/modified duty. Appellant App. 1, p.
3
4 5 lines 16-19. Indeed, it is the Appellants that seek to have this Honorable Court
5
6 reweigh the evidence for their arbitrary calculus that would have this Honorable
7
8 Court contort the phrase of “full wages” to be the mere equivalent to only “base”
9
10 pay or the “regular” pay. Therefore the 84-day period is anything but an arbitrary
11
12 period of time used by the Appeals Officer. Appellant App. 1, 139.

11 Moreover, whether such overtime pay is “voluntary” as argued by the
12
13 Appellant is of absolutely no legal moment. Appellants Opening Brief, p. 21, lines
14
15 22-24. Indeed, the average monthly wage regulation expressly commands the
16
17 inclusion of overtime pay. See NAC 616C.423(1)(n). And as previously noted, and
18
19 found by the Appeals Officer, the **Appellants expressly forbade the earning of**
20
21 **any overtime wages by Wolfgram while on modified duty, despite the fact that**
22
23 **more than 15% of his pre-accident wages were comprised of overtime pay.**

21 Appellant App. 1, p. 5 lines 16-19 and Appellant App. 1, p. 142. In the context of
22
23 the Act, the word “wages” is defined in law, and expressly includes any
24
25 remuneration without limitation except for cash payment. See NRS
26
27 616C.390(11)(c). Axiomatically, then so “full wages” must contemplate inclusion,
28
29 at the very least, the definition of “wages” (which is defined in the Act) when such
30
31 a phrase “full wages” is given its plain meaning.

1 IV. CONCLUSION

2 The Appeals Officer’s finding that the “full wages” earned by the Wolfgram
3 necessarily included his overtime pay was proper and is supported by substantial
4 evidence. Further, the Appeals Officer’s finding that Wolfgram was expressly
5 excluded from earning overtime pay during his modified/light duty time period of
6 thirty-one (31) days is supported by substantial evidence. Indeed, in the 84-day
7 wage history prior to the industrial accident -the preferred time period of wage
8 calculation in Nevada workers’ compensation claims- overtime pay accounted for
9 more than fifteen (15%) of Wolfgram’s wages and zero (0%) of his modified/light
10 duty wages (as he was expressly precluded by his employer from performing any
11 overtime duties while on modified/light duty, and therefore axiomatically unable to
12 earn any overtime pay). Additionally, the TPA expressly used that overtime
13 income in its wage calculation at the outset of the claim as required by Nevada
14 Law.

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

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1 Rules of Appellate Procedure.

2 Dated this 12th day of May 2021.

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/s/ Jason D. Mills
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Attorney for Respondent
BRIAN WOLFGRAM

///
///
///

1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5 (b), I hereby certify that, on the 12th day of May 2021,
3
4 service of the RESPONDENT BRIAN WOLFGRAM'S ANSWERING BRIEF
5 was made this date by depositing a true copy of the same for mailing, first class
6
7 mail, at Las Vegas, Nevada, addressed as follows:

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

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

16 Daniel L. Schwartz, Esq.
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23 An Employee of the GGRM LAW FIRM
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28