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

Supreme Court Case No.: 80982

Electronically Filed
Jun 25 2021 03:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

9
APPELLANTS' REPLY BRIEF
10

11 DANIEL L. SCHWARTZ, ESQ.
12 JOEL P. REEVES, ESQ.
LEWIS BRISBOIS BISGAARD &
13 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*
CCMSI

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

17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....iii

NRAP 26.1 DISCLOSURE....vi

I. REPLY....1

II. CONCLUSION....7

CERTIFICATE OF COMPLIANCE....8

CERTIFICATE OF MAILING....10

1
TABLE OF AUTHORITIES

2
Cases **Page No(s).**

3
American Intl Vacations v. MacBride,
4
99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983) 1

5
Charlie Brown Constr. Co. v. Boulder City,
6
106 Nev. 497, 502, 797 P.2d 946, 949 (1990) 2

7
Mirage v. Nev. Dep't of Admin.,
8
110 Nev. 257, 259, 871 P.2d 317, 318 (1994) ..... fn 1

9
Reno Sparks Convention Visitors Authority v. Jackson,
10
112 Nev. 62, 910 P.2d 267 (1996) 4

11
Town Of Eureka v. Office Of The State Eng'r Of Nev.,
12
108 Nev. 163, 826 P.2d 948, (1992) ..... fn 1

13
United Exposition Service Co. v. SIIS,
14
109 Nev. 421 (1993) 2

15
STATUTES

16

17 NAC 616C.423 1

18 NAC 616C.435 1

19 NRS 616.5412 3

20 NRS 616C.315 ..... fn 2

21 NRS 616C.390 7

22

23 NRS 616C.400 ..... 1, 5, 6

24 NRS 616C.475 3

25 NRS 616C.500 3

26

27

28

NRAP 26.1 DISCLOSURE

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

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

...

...

...

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

DATED this 25 day of June 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: ______________________
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
2300 W. Sahara Ave., Ste. 900, Box 28
Las Vegas, NV 89102
Attorneys for the Appellants

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

[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.

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)).

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

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

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

If Respondent could prove that the industrial injury/accident *actually* prevented him from earning his full wages, he would be entitled to wage replacement benefits such as temporary total disability ("TTD") or temporary partial disability ("TPD") which are calculated based on his AMW. (See NRS 616C.475 and NRS 616C.500). However, there is no request for any such benefits in this file. If AMW has any application to this case, it would be to determine how

much TPD Respondent would be entitled to. Given that there was never a request for wage replacement benefits, there is no showing that Respondent's industrial injury incapacitated him from earning his full wage.

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

This is exactly the point where the Appeals Officer's speculation comes into play. The Appeals Officer and Respondent claim that Respondent should be allowed to speculate that he *would have* been able to earn overtime wages but for the restrictions placed upon him by the industrial injury. However, he did not *actually* request such benefits. Indeed, by failing to request TPD benefits, Respondent conceded that he was not entitled to them. (Reno Sparks Convention Visitors Authority v. Jackson, 112 Nev. 62, 910 P.2d 267 (1996) holding that a failure to file a timely appeal under NRS 616C.315 leaves the administrative judge with no subject matter jurisdiction, reasoning that otherwise workers' compensation controversies "would never be finalized. Failure to follow NRS

616.5412[2] would throw the claims process into chaos by subjecting work-related injury determinations to continued scrutiny following the statutorily established time for appeals.")

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

The only relevant inquiry in this case is whether Respondent can prove that the industrial injury/accident actually prevented him from earning what he would have earned but for the industrial injury/accident. If Respondent could have proven that the industrial accident actually caused him to lose wages, then he would have a case to claim that he was "incapacitate[ed]...from earning full wages." NRS 616C.400. The problem for Respondent is that he did not claim that his injury incapacitated him from earning his full wages. If Respondent believed that he did not earn his full wages due to the industrial injury and that he should be compensated for the overtime which he was prevented from working, the time to make such a request was at the time that he believed he was losing wages. There is

[2] Later amended to NRS 616C.315.

no such request in the record. Thus, even if AMW were the proper measure of lost wages, Respondent failed to even allege that he was not earning what he was entitled to while the claim was pending. This Court should not permit Respondent from claiming after the fact and despite not working overtime for weeks prior to the industrial accident, that it was actually the industrial accident/injury which prevented him from earning overtime pay.

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

This Court should reverse the Appeals Officer and find that Respondent is not entitled to make use of the reopening provisions under NRS 616C.390(1). This Court should conclude that Respondent did not meet the minimum duration of incapacity under NRS 616C.400 based on his inability to prove that the industrial injury incapacitated from earning his full wages. Therefore, this Court should hold

that if Respondent wished to request reopening, he had to do so within one year of claim closure or be forever estopped from requesting reopening under NRS 616C.390(5).

II.

CONCLUSION

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

Dated this 25 day of June 2021.

Respectfully submitted,

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
JOEL P. REEVES, ESQ.
Nevada Bar No. 013231
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Avenue, Suite 900, Box 28
Las Vegas, Nevada 89102-4375
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,545 words and 128 lines of text.

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

...

...

...

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

Respectfully submitted,
LEWIS, BRISBOIS, BISGAARD & SMITH, LLP

DANIEL L. SCHWARTZ, ESQ(005125)
JOEL P. REEVES, ESQ.(013231)
2300 W. Sahara Avenue, Suite 900, Box 28
Las Vegas, Nevada 89102-4375
Attorneys for Appellants

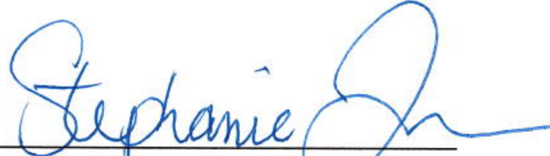
CERTIFICATE OF MAILING

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 25 day of June 2021, service of the attached **APPELLANTS' REPLY BRIEF** 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