IN THE SUPREME COURT OF THE STATE OF NEVADA

REDDY ICE CORPORATION; AND GALLAGHER BASSETT SERVICES, INC.,

Appellants,

v.

FRED GILL,

Respondent.

Case No.: 82109

RESPONSE TO ORDER TO SHOW CAUSE

DANIEL L. SCHWARTZ, ESQ.
Nevada Bar No. 005125
L. MICHAEL FRIEND, ESQ.
Nevada Bar No. 011131
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. Sahara Ave., Ste. 900, Box 28
Las Vegas, Nevada 89102
Attorneys for Appellants
Reddy Ice Corporation and Gallagher Bassett Services, Inc.

JAMES P. KEMP, ESQ.
Nevada Bar No. 006375
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7435 W. Azure Dr., Ste. 110
Las Vegas, NV 89130
Attorney for Respondent
Fred Gill

Appellants Reddy Ice Corporation and Gallagher Bassett Services, Inc., by and through their counsel of record, hereby submit this Response to Order to Show Case. This response is made and based on the papers and pleadings on file, the exhibits filed contemporaneously, and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This appeal stems from an underlying workers' compensation claim. Appellants denied Fred Gill's (hereinafter "Claimant") industrial insurance claim. Before the appeals officer, Claimant waived his right to testify and submitted on the record. (See Exhibit 1, Affidavit in Support of Reconsideration filed as Exhibit A with Respondents' Motion for Reconsideration.) Thereafter, the appeals officer issued a decision and order affirming claim denial.

Claimant timely petitioned the district court for review of the appeals officer's decision. On August 28, 2020, the district court granted the petition in part, but remanded for further proceedings consistent with its order. (Exhibit 2). The order was entered on September 7, 2020. On September 14, 2020, Appellants filed a motion for reconsideration asking the district court to remand all of the issues to be heard de novo before the appeals officer, as the substantive findings by the district court (reversing findings by the appeals officer) affect the issue on remand.

On October 16, 2020, the district court denied the motion for reconsideration by minute order finding that no new issues of fact or law had been raised, with the order being entered on November 3, 2020. (Exhibit 3.) Appellants appealed that order to this court on November 11, 2020.

II. Argument

The court has held that as "a general rule, an order by a district court remanding a matter to an administrative agency is not an appealable order unless it the order constitutes a final conclusion." Ayala v. Caesar Palace, 119 Nev. 232, 235, 71 P.3d 490, 492 (2003). Having a *general* rule infers that there are specific situations where the general rule does not apply. This is one of those situations.

In this case, the district court reversed conclusions made by the appeals officer, then remanded for the appeals officer to consider an ancillary issue. This is problematic because the conclusions reached by the district court (reversing factual findings by the appeals officer and binding him to them) affect the appeals officer's consideration of the remanded issue. The district court concluded there were four issues before it. In its order, it reversed three of those issues and remanded only one for further proceedings. The three issues decided by the court make substantive decisions, including that the underlying claim is compensable, but for the notice issue.

The fourth issue raised in the court's decision is whether Claimant gave appropriate notice to the employer of his claim per NRS 617.346. Although deferring appellate review until the completion of significant ongoing proceedings is the general rule of this court, the issue on remand in the instant case again differs because it is not "significant." Wells Fargo Bank, N.A. v. O'Brien, 129 Nev. 679, 681, 310 P.3d 581, 583 (2013). The district court made significant substantive decisions regarding the first three issues, all regarding compensability of the claim, that directly affect how the appeals officer views the final notice issue.

Moreover, the district court found with regard to this fourth issue that it was unlawful procedure under NRS 233B.135(3)(c) to "not conduct a hearing into these matters." (Exhibit 2, page 7, lines 2-4.) How can it be unlawful procedure to not conduct a hearing on one issue, but acceptable procedure for three other issues? Furthermore, it was Claimant who waived the right to a hearing and submitted on the record. (see Exhibit A to Exhibit 1.)

The remand asks the appeals officer whether Claimant gave timely notice to the employer, and if not, whether he meets one of the excuse provisions under NRS 317.346. The district court, however, reversed the appeals officer's factual finding and is now requiring the appeals officer to reconsider the issue based on the district court's interpretation of the facts. This is critical because the basis for remand given by the district court is factually inaccurate and should be subject to review.

The district court noted in its order that "[t]here is no evidence in the Record on Appeal that refutes Petitioner's evidence that he reported the occupational disease on June 27, 2018 and that the Employer had him write down the details . . ." (Exhibit 2 at 6, lines 22-25.) This factual finding by the district court is the basis for the remand. This factual finding is patently false based on the evidence in the record on appeal. Specifically, the appeals officer stated in Finding of Fact No. 3 that that the date of injury was reported on August 22, 2018. (Exhibit 4 at 2 (R. at 4.)) This finding is based on the C-3 form, referenced in the appeals officer's decision as "Exhibit 1 at 2." (Exhibit 5.) This finding is then used as the basis for Conclusion of Law No. 6 regarding Claimant's failure to timely report the alleged injury to Employer. (Exhibit 4 at 4-5 (R. at 6-7.)) Therefore, there is in point of fact evidence in the Record on Appeal, directly contradicting the conclusion reached by the district court.

Further, when Appellants moved the district court for reconsideration, Appellants were asking only that the district court remand all issues, rather than piecemeal. This request was made based on new issues of law, specifically the procedure outlined in the district court's order of remand. Until the order was issued, there was no factual or legal basis to raise it.

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This brings us round to the other issue raised in the order to show cause, i.e., whether the order appealed is substantively appealable. An appeal from a district court must affect the rights of the parties growing out of the judgment. See Wilkinson v. Wilkinson, 73 Nev. 143, 145, 311 P.2d 735, 736 (1957). So although orders denying motions to alter judgments or amend findings are not appealable, the issue raised by Appellants is different in that they were not seeking rehearing or re-review of the substantive matters before the court.

Appellants asked the district court to remand the entire proceedings for a de novo hearing, rather than a partial rehearing on an issue affected by error of law. To do otherwise would result in Claimant giving testimony and being cross-examined on one specific issue, without ever giving testimony or being cross-examined on any other issues. How could such a decision stand? This is an odd situation, but Appellants believe the solution proposed in their motion best promotes fair play and judicial economy.

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CONCLUSION

WHEREFORE, Appellants pray the court will take jurisdiction over the review of the administrative agency's decision as outlined herein.

DATED this 18 day of March, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ L. Michael Friend

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2300 West Sahara Avenue, Suite 900, Box 28
Las Vegas, NV 89102
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and that on this 18 day of March, 2022, I electronically filed and served a true and correct copy of the above and foregoing **RESPONSE TO ORDER TO SHOW CAUSE** properly addressed to the following:

James P. Kemp, Esq.
jp@kemp-attorneys.com
KEMP & KEMP
7435 W. Azure Dr., Ste. 110
Las Vegas, Nevada 89130
Attorneys for Respondent
Fred Gill

/s/ L. Michael Friend
An employee of LEWIS, BRISBOIS, BISGAARD & SMITH, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

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Claimant timely petitioned the district court for review of the appeals officer's decision. On August 28, 2020, the district court granted the petition in part, but remanded for further proceedings consistent with its order. (Exhibit 2). The order was entered on September 7, 2020. On September 14, 2020, Appellants filed a motion for reconsideration asking the district court to remand all of the issues to be heard de novo before the appeals officer, as the substantive findings by the district court (reversing findings by the appeals officer) affect the issue on remand.

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Appellants asked the district court to remand the entire proceedings for a de novo hearing, rather than a partial rehearing on an issue affected by error of law. To do otherwise would result in Claimant giving testimony and being cross-examined on one specific issue, without ever giving testimony or being cross-examined on any other issues. How could such a decision stand? This is an odd situation, but Appellants believe the solution proposed in their motion best promotes fair play and judicial economy.

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CONCLUSION

WHEREFORE, Appellants pray the court will take jurisdiction over the review of the administrative agency's decision as outlined herein.

DATED this 18 day of March, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: /s/ L. Michael Friend

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Las Vegas, NV 89102
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP, and that on this 18 day of March, 2022, I electronically filed and served a true and correct copy of the above and foregoing **RESPONSE TO ORDER TO SHOW CAUSE** properly addressed to the following:

James P. Kemp, Esq.
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7435 W. Azure Dr., Ste. 110
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Attorneys for Respondent
Fred Gill

/s/ L. Michael Friend
An employee of LEWIS, BRISBOIS, BISGAARD & SMITH, LLC

EXHIBIT 1

MOT

DANIEL L. SCHWARTZ, ESQ.
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Attorneys for Respondents
REDDY ICE CORPORATION AND
GALLAGHER BASSETT SERVICES, INC

DISTRICT COURT

CLARK COUNTY, NEVADA

FRED GILL, Petitioner, v. NEVADA DEPARTMENT OF ADMINISTRATION, an Agency of the State of Nevada; REDDY ICE CORPORATION; and GALLAGHER BASSETT SERVICES, INC., Respondents.	CASE NO: A-19-806602-J DEPT. NO.: XXIV HEARING REQUESTED

RESPONDENTS' MOTION FOR RECONSIDERATION, TO ALTER JUDGMENT AND/OR TO AMEND FINDINGS

COME NOW Respondents REDDY ICE CORPORATION and GALLAGHER BASSETT SERVICES, INC., by and through their attorneys of record, DANIEL L. SCHWARTZ, ESQ. and JOEL P. REEVES, ESQ. of LEWIS BRISBOIS BISGGARD & SMITH LLP, and hereby files the instant Motion For Reconsideration, To Alter Judgment and/or To Amend Findings regarding this Court's Order granting Petitioner's Petition for Judicial Review.

This Motion is based upon all papers and pleadings on file herein, the memorandum of points and authorities attached hereto, and any other further argument and evidence as may properly be presented to the court at the hearing on this Motion.

Dated this 14 day of September 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Joel P. Reeves, Esq.
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Las Vegas, Nevada 89102
Attorneys for Respondents

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

This is a workers' compensation case. **Prior to filing the instant claim,** on May 2, 2018, the claimant, FRED GILL (hereinafter referred to as "claimant") presented to St. Rose Dominican Hospital – Siena Campus with complaints of hand pain/swelling. He was diagnosed with cellulitis and discharged with instructions to follow-up with his primary care physician. (ROA pp. 96-111)

On June 7, 2018, Dr. Germin saw claimant for EMG/NCV studies at the request of Dr. Sorelle. The impression lists moderate carpal tunnel syndrome on the left. (ROA p. 112)

On August 13, 2020, Dr. Sorelle placed claimant on light duty for carpal tunnel. It was also noted that claimant had been under Dr. Sorelle's care since May 3, 2018. It was also noted that claimant had surgery pending for August 21, 2018. (ROA p. 41; 113)

Regarding the instant claim, claimant completed the top half of a C-4 form, alleging a date of injury of April 29, 2018 for nerve damage of the left hand/wrist. Claimant alleged that he reported the same to Employer on April 30, 2018. The claimant's portion of the C-4 form is unsigned and undated.[1] Despite the April 29, 2018 date of injury, the physician's portion of the C-4 form was not completed by Dr. Sorelle until August 31, 2018, **some one hundred and twenty four (124) days after the alleged date of injury.** Further, it appears that Dr. Sorelle actually saw claimant on July 27, 2018 and assessed claimant with left DeQuervains and left carpal tunnel with diffuse hand swelling and possible infection which he opined were work related. EMG testing was recommended and modified duty work restrictions were issued. (Record on Appeal p. 36)(hereinafter "ROA p. ___")

On August 22, 2018, Employer completed a C-3 form and doubted the validity of the claim. Employer also noted that claimant did not report this claim until **August 22, 2018** (i.e. one hundred and fifteen (115) days after the alleged date of injury and twenty six (26) days after Dr. Sorelle opined that claimant's condition was work related). (ROA p. 37)

[1] Note that claimant submitted a signed C-4 into evidence that is signed and dated August 22, 2018. (ROA p. 94)

On August 29, 2018, the adjuster noted, "Spoke to claimant and he stated he last worked on 8/13/18. He states his hand became swollen a couple months back and he thought he had been bitten by an insect. He sought treatment and testing was completed , diagnosing him with left hand carpal tunnel. He was scheduled to have surgery at the end of July by Dr. Jonathan Sorelle, however Aetna, cancelled the surgery advising him his surgery was work related." (ROA p. 38)

The claimant's job description as a delivery driver has been provided. (ROA pp. 39-40)

On August 31, 2081, a claim denial determination was issued. (ROA pp. 42-43)

On September 12, 2018, claimant's counsel issued a letter of representation. (ROA p. 44) Also on September 12, 2018, the claimant's counsel issued letters which 1) requested that certain checks be sent directly to the claimant's counsel, and 2) requested that TTD be issued from August 12, 2018 forward. (ROA pp. 45-47)

On September 13, 2018, claimant was notified that the September 12, 2018 requests were denied because the claim was denied. (ROA p. 49)

On September 14, 2018, the claimant appealed the claim denial letter. (ROA p. 48)

Claimant also appealed the September 13, 2018 determination to the Hearing Officer. (ROA p. 50) This appeal was transferred directly to the Appeals Officer. (ROA p. 54)

Following Hearing No. 1904239-JK, the Hearing Officer issued a Decision and Order dated November 1, 2018, which affirmed the August 31, 2018 determination to deny the claim. (ROA pp. 51-52) The claimant appealed. (ROA p. 53)

On December 19, 2018, the claimant's attorney withdrew as the attorney of record. (ROA p. 54; 134-135) NAIW was appointed. (ROA pp. 132-133)

On October 9, 2019, this matter came on for hearing before the Appeals Officer. (ROA pp. 31-32) Note that no actual hearing was held and no testimony was give ***because claimant declined to testify***. ***Claimant was present for the hearing but informed the Appeals Officer that he wished to submit on the record.*** ***IT WAS CLAIMANT'S CHOICE TO FORGO THE HEARING IN THIS MATTER***. ***The Appeals Office informed all parties from the bench that he was ruling against the claimant.*** (See the affidavit of attorney Daniel L. Schwartz, Esq. attached hereto as Exhibit 1).

Also on October 9, 2019, claimant's counsel submitted a written statement from claimant that is signed and dated October 9, 2019 but is not notarized. (ROA pp. 26-36)

On November 5, 2019, Respondents' counsel submitted a proposed decision to the Appeals Officer. (ROA 25)

On November 16, 2019, claimant's NAIW counsel sent an e-mail to Respondent's counsel requesting a minor revision of the proposed Decision and Order and informed that she would provide Respondent's counsel with a proposed draft.

On November 22, 2019, the Appeals Officer signed the subject order affirming claim denial. First, the C-4 form was not executed until one hundred and twenty-four (124) days after the alleged date of injury. Second, there was a delay of more than seven (7) days in reporting the condition given that the industrial diagnosis was given on July 27, 2018 and was not reported until August 22, 2018. Further, no mechanism of injury was ever alleged. (ROA pp. 15-24)

On November 26, 2019, Respondents' counsel submitted an Amended Proposed Decision to the Appeals Officer based on claimant counsel request. (ROA p. 14)

On December 9, 2019, claimant's new private counsel filed the subject Petition for Judicial Review.

On December 18, 2019, the Appeals Officer filed the Amended Decision and Order. (ROA pp. 3-13)

On July 23, 2020, this Petition for Judicial Review came on for hearing. Your Honor reversed the Appeals Officer's Decision finding that this claim was not timely filed and the finding that there was no mechanism of injury. Your Honor remanded the issue as to whether claimant had established a valid excuse on untimely reporting as there was no discussion of whether the claimant's failure to timely report was based on mistake or ignorance of law.

On August 21, 2020, Petitioner's counsel submitted an Order to the undersigned purporting to commemorate the July 23, 2020 rulings from this Court. However, in this Order, Petitioner's counsel included a finding that the lack of an actual hearing in this matter was a legal error. Further, the Order essentially adopts the unverified written statement that claimant submitted on the day of the hearing in lieu of testimony. The undersigned provided Petitioners counsel with a revised draft of the order and

explained the changes. Petitioners counsel refused to apply any of the changes and submitted the order to this Court unrevised.

On August 28, 2020, the Order was filed. The Notice of Entry of Order was filed on September 7, 2020.

II.

LEGAL ARGUMENT

1. Jurisdiction

NRCP 52(b) provides as follows:

> On a party's motion filed no later than 28 days after service of written notice of entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The time for filing the motion cannot be extended under Rule 6(b). The motion may accompany a motion for a new trial under Rule 59.

NRCP 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after service of written notice of entry of judgment." Finally, NRCP 60(b) provides as follows:

> Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

The timing for filing a motion under NRCP 60(b) is "within a reasonable time--and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later."

This Motion is timely and warranted, as will be explained below.

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2. Petitioner Created The Unlawful Procedure That He Is Now Capitalizing On

Respondents have been taken for a ride. The way that this Petition for Judicial Review has been orchestrated by Petitioner is "gotcha" litigation at its finest. As noted above, this matter was set to be heard by the Appeals Officer on October 9, 2019. Petitioner ***and his counsel*** were present. Attorney Daniel Schwartz, Esq. was also present with a representative from Employer. All parties were ready willing and able to proceed with this matter on the record in a hearing where all parties could give testimony. And yet, ***Petitioner chose not to give testimony. Petitioner AND HIS ATTORNEY requested that this matter be submitted on the record without testimony OR ARGUMENT***. The Appeals Officer ruled from the bench and affirmed claim denial. (See Affidavit from Daniel L. Schwartz, Esq. Attached hereto as Exhibit 1)

Note that this was Petitioner's appeal. Respondent denied this claim and Petitioner appealed. This matter was initially heard by a Hearing Officer. Although Petitioner's attorney was present at the Hearing Officer hearing, Petitioner did not attend. With no testimony from the Petitioner, the Hearing Officer affirmed claim denial. Petitioner appealed to the Appeals Officer, this time with a new attorney from NAIW. When it was time for that hearing, Petitioner elected not to give testimony there either, DECLINED TO PRESENT ANY ARGUMENT, and asked for the matter to be submitted.

It was Petitioner's burden to prove his case and ***he decided*** to forgo testimony/argument and instead submitted a written statement that no party would have any opportunity to contest and ***asked*** for this matter to be decided without argument. Then, when a Decision and Order was issued that did not take the written statement into account ***because Petitioner could not be cross-examined based on his choice to forgo testimony***, Petitioner appealed alleging that he had been railroaded by the failure to conduct a hearing. Now, the Order from this Court states that there was a legal error ***of Petitioner's own making*** and that Petitioner gets to use his written statement as uncontested fact without a hearing having ever been done.

And what were Respondents supposed to do in this situation? Force Petitioner to give testimony at his own appeal? Force Petitioner's counsel to make an argument? Apparently that is what employers will have to do from this point forward as now there is a Decision and Order entered in this Court that has adopted an unverified written statement, purportedly made by claimant, and

Respondents had no opportunity to cross-examine him, put up their own witnesses to defend their case, or even argue against it. Respondents were tricked into allowing Petitioner to forgo testimony and argument on his own case. Well those days are no more if this Order allowed to stand. The undersigned will not be fooled twice.

From this point forward, if the subject order is allowed to stand, the undersigned will have no choice but to demand testimony and argument from every single claimant in every single case. If not, respondents will continue to be tricked into allowing a claimant to forgo testimony/argument only for that claimant to later allege that it was legally improper for the claimant to forgo his/her testimony/argument.

As a compromise and as a way to ameliorate the trickery from Petitioner, Respondents request that this matter simply be remanded for a hearing to be had *de novo*. If it is Petitioner's position that he was "prevented" from testifying, then Respondents have no opposition to correcting this alleged legal error that Petitioner created and allow him to give testimony. However, all parties should have a blank slate and should not be bound by how this Court would decide the case. If it was legal error to fail to conduct a hearing, then so be it. But Petitioner should not get to benefit from a legal error that he created.

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II.

CONCLUSION

Based on the foregoing, Respondents respectfully request that Your Honor issue an Amended Order clarifying the aforementioned finding.

DATED this _14__ day of September 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By____/s/ Joel P. Reeves, Esq._____
Daniel L. Schwartz, Esq.
Nevada Bar No. 5125
Joel P. Reeves, Esq.
Nevada Bar No. 13231
2300 W. Sahara Ave. Ste. 300
Las Vegas, NV 89102
Attorneys for Respondents

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that I did cause a true copy of **RESPONDENTS' MOTION TO ALTER JUDGMENT AND/OR TO AMEND FINDINGS AND MOTION FOR ORDER SHORTENING TIME** to be placed in the United States Mail, with first class postage prepaid to:

JAMES KEMP, ESQ.
KEMP & KEMP
7435 W. AZURE DRIVE, SUITE 110
LAS VEGAS, NV 89130

REDDY ICE CORPORATION
ATTN: LEE HATCH
5720 LYNDON B. JOHNSON FWY., STE. 200
DALLAS, TX 75240

GALLAGHER BASSETT SERVICES, INC.
ATTN: YVETTE D. PHILLIPS
P.O. BOX 2934
CLINTON, IA 52733

DATED this 14th day of September 2020.

/s/ H. Platt
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion:

■ Does not contain the Social Security number of any person.

- OR -

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

A. A specific state or federal law, to wit:

(State specific law.)

- or -

B. For the administration of a public program or for an application for a federal or state grant.

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

/s/ Joel P. Reeves, Esq.
Joel P. Reeves, Esq.
Attorney for Respondents

09/14/2020
Date

EXHIBIT A

AFFIDAVIT IN SUPPORT OF RECONSIDERATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, DANIEL L. SCHWARTZ, ESQ., do herby swear under penalty of perjury that the assertion of this affidavit are true, that:

1. Affiant is an attorney authorized and duly licensed to practice law in the State of Nevada and is one of the attorneys of record for Respondents REDDY ICE CORPORATION and GALLAGHER BASSETT SERVICES, INC in District Court Case No. A-19-806602-J.

2. This affidavit is made in support of a Respondents' Motion for Reconsideration of this Court's August 28, 2020 Order.

3. Affiant has personal knowledge of all matters set forth herein, except those matters stated on information and belief, and is competent to testify thereto.

4. That the issue in the present appeal is whether Petitioner FRED GILL's claim for workers' compensation benefits was properly denied.

5. That on August 31, 2018, Respondent GALLAGHER BASSETT SERVICES, INC denied Petitioner's claim.

6. That on September 14, 2018, the Petitioner appealed the August 31, 2018 claim denial letter.

7. That on October 16, 2018, this matter came on for hearing before a Hearing Officer. PETITIONER WAS NOT PRESENT but was represented by an attorney who conducted the hearing on Petitioner's behalf.

8. That on November 1, 2018, the Hearing Officer affirmed claim denial.

9. That on November 8, 2018, Petitioner appealed to the Appeals Officer.

10. That on December 13, 2018, Petitioner's private counsel withdrew. Shortly thereafter, Petitioner was appointed new counsel from the Nevada Attorney for Injured Workers ("NAIW").

11. That on October 9, 2019, this matter was scheduled for hearing before the Appeals Officer.

12. That on October 9, 2019, Affiant was present at the Appeals Office with a representative from Employer REDDY ICE CORPORATION and was ready to conduct a hearing on the issue of claim denial

13. That Petitioner and his attorney were also present at the Appeals Office on October 9, 2019.

14. That Affiant was told by Petitioner's counsel that he did not wish to have a hearing and wished to "submit on the record". At no point did the Appeals Officer prevent the Petitioner from testifying. In fact, in the presence of the Petitioner, his then counsel told the Appeals Officer that Affiant should write the proposed Decision and Order affirming claim denial.

15. That Affiant was not present during the conversations between Petitioner and his then counsel, but it is not unusual for a party to decide he or she does not wish to go forward and instead "submits on the record".

16. That no evidence was formally entered into the record, as no hearing occurred. Neither party was provide the opportunity to object to evidence, invoke the right to cross examine the authors of statements or make any argument. This was because of the Petitioner's decision not to go forward.

17. That Affiant does no other form of legal work other than workers' compensation administrative hearings. If one party wishes to "submit on the record", but that means potential detriment to the non submitted party, this process can no longer occur.

Further Affiant sayeth naught.

DATED this 11 day of September 2020.

DANIEL L. SCHWARTZ, ESQ.

SUBSCRIBED AND SWORN to before me this 11 day of September 2020.

NOTARY PUBLIC in and for said County and State

STEPHANIE JENSEN
Notary Public, State of Nevada
Appointment No. 16-3801-1
My Appt. Expires Sept. 27, 2020

EXHIBIT 2

JAMES P. KEMP, ESQ.
Nevada Bar No. 6375
KEMP & KEMP
7435 W. Azure Drive, Suite 110
Las Vegas, Nevada 89130
(702) 258-1183
jp@kemp-attorneys.com
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

FRED GILL,
Petitioner

vs.

NEVADA DEPARTMENT OF ADMINISTRATION, an agency of the State of Nevada; REDDY ICE CORPORATION; and GALLAGHER BASSETT SERVICES, INC.,
Respondents.

Case No.: A-19-806602-J

Dept. No. 24

Hearing Date: July 23, 2020

Hearing Time: 9:00 a.m.

ORDER GRANTING IN PART PETITION FOR JUDICIAL REVIEW AND REMANDING FOR FURTHER PROCEEDINGS

THIS MATTER came on for hearing before the court on July 23, 2020 at 9:00 a.m. on the Petitioner's Petition for Judicial Review of a Nevada Department of Administration workers' compensation Appeals Officer decision. The Petitioner was represented by JAMES P. KEMP, ESQ., Respondents REDDY ICE CORPORATION and GALLAGHER BASSETT SERVICES, INC. were represented by JOEL P. REEVES, ESQ. No other person, party, or agency filed a timely Notice of Intent to Participate pursuant to NRS 233B.130(3).

The court has carefully considered the Record on Appeal, the papers and pleadings on file herein, the briefs filed by the parties and considered the arguments of counsel. The crucial issues in this appeal are as follows:

1) Whether this matter is an Occupation Disease workers' compensation claim governed by NRS Chapter 617, the Nevada Occupational Disease Act, rather than an Injury Claim governed solely by NRS Chapters 616A-616D of the Nevada Industrial Insurance Act;

2) Whether the Appeals Officer's Decision and Order rests on a legal error or an abuse of discretion with respect to its finding that there was no evidence to support medical causation of an occupational disease claim despite Dr. Sorrelle having checked the "yes" box on the C-4 form to the question, "From information given by the employee, together with medical evidence, can you directly connect this injury or occupational disease as job incurred?" and the lack of any contradictory medical evidence and in light of the provisions of NRS 616C.098;

3) Whether the Appeals Officer's Decision and Order rests on a legal error or an abuse of discretion with respect to its finding that Petitioner failed to timely file his workers' compensation claim by the C-4 form dated August 21, 2018, in compliance with NRS 617.344 when the C-4 form was filed less than 90 days after Dr. Leo Germin confirmed the diagnosis of carpal tunnel syndrome on June 7, 2018 through nerve studies performed that date;

4) Whether the Appeals Officer's Decision and Order rests on a legal error or an abuse of discretion with respect to its finding that Petitioner failed to timely give written notice of his occupational disease to his employer as required by NRS 617.342(1) where the evidence provided shows that Petitioner did provide written notice, albeit not on a C-1 form because no C-1 form appears to have been provided by the employer as required by implication of NRS 616.342(4)'s requirement that employers keep a sufficient supply of blank C-1 forms on hand, and the Appeals Officer appears to have failed to consider whether or not the failure to file a C-1 notice of occupational disease in strict accordance with NRS 617.342 should be excused under the provisions of NRS 617.346(2).

For the reasons set forth herein the court finds that the Appeals Officer committed legal error or abused his discretion on issues 1), 2), and 3) above and the court will GRANT the Petition

for Judicial Review on those three issues pursuant to NRS 233B.135. The court finds that substantial rights of the Petitioner have been prejudiced by legal error, clear error on the evidence and facts, unlawful procedure in failing to appropriately consider NRS 617.346(2), and arbitrary or capricious or characterized by an abuse of discretion.

As to issue 4) above, the court finds that the record was not sufficiently developed as to whether Petitioner complied with the substance of NRS 617.342 and/or if he provided sufficient evidence to require that he be excused from compliance with NRS 617.342 under the provisions of NRS 617.346(2). The court will, therefore, remand this matter for further proceedings and a new hearing at which the Appeals Officer will take evidence on whether or not the Petitioner gave sufficient written notice to his employer and, if not, whether or not the failure is excused under the provisions of NRS 617.346(2). The Appeals Officer will issue a new Decision and Order and, if he finds in favor of Petitioner on these issues, order that the claim be accepted for all appropriate workers' compensation benefits.

NRS 233B.135 (3) states as follows:

> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) Arbitrary or capricious or characterized by abuse of discretion.
>
> 4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

The court does not substitute its own judgment for that of the agency on questions of fact. NRS 233B.135(3). This court's role in reviewing an administrative decision is to "review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary

or capricious and was thus an abuse of the agency's discretion." Langman v. Nevada Administrators, Inc., 114 Nev. 203, 207, 955 P.2d 188 (1998). If substantial evidence does not exist to support the Appeals Officer's findings of fact, then his decision should be reversed. Bullock v. Pinnacle Risk Mgmt., 113 Nev. 1385, 1388, 951 P.2d. 1036 (1997). Substantial evidence is "that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267, 270 (1993) (internal quotation marks and citations omitted). Where the findings of the Appeals Officer are against the manifest weight of the evidence, the findings should be set aside. Id.

Independent review, rather than a deferential approach, is appropriate where the issue is a question of law, such as the construction of a statute or regulation. Langman v. Nevada Administrators, Inc., 114 Nev. 203, 207, 955 P.2d 188 (1998). Accordingly, questions of law are reviewed *de novo*. Bullock v. Pinnacle Risk Mgmt., 113 Nev. 1385, 1388, 951 P.2d. 1036 (1997). If the agency's decision is clearly erroneous, it should be reversed. Id; State, Emp. Sec. v. Reliable Health Care, 115 Nev. 253, 257 (1999).

As to Issue 1), in this case the Appeals Officer erred as a matter of law in not conclusively determining that Petitioner's carpal tunnel syndrome and DeQuervain's tendonitis conditions were repetitive use occupational diseases making the claim a claim for an occupational disease under NRS Chapter 617. This is important because it determines which statutes govern claim filing time limits which in this case is under NRS 617.342 and NRS 617.344. Repetitive motions engaged in over time in employment that cause conditions like carpal tunnel syndrome or other degenerative conditions are properly considered as occupational diseases under NRS Chapter 617. See Desert Inn Casino & Hotel v. Moran, 106 Nev. 334, 336-337, 792 P.2d 400 (1990) (masseuse who suffered aggravation of degenerative joint condition in hands by repetitive motions performed at work had compensable occupational disease). Here the Petitioner was found by his doctor to suffer from

carpal tunnel syndrome and DeQuervain's tendonitis by virtue of his long history of repetitive motions in delivering ice and moving the ice around in the machines. This is an occupational disease claim under NRS Chapter 617 and the Appeals Officer's seeming to find that it was an injury by accident claim under NRS Chapter 616C was legal error or clearly erroneous under the facts of the case. Any finding that states or implies that this was an injury by accident case instead of an occupational disease case is REVERSED on judicial review.

As to Issue 2), the Appeals Officer committed clear error of law or an abuse of discretion in finding that Petitioner did not meet his burden of establishing medical causation of his occupational disease. All of the elements of a valid occupational disease claim under NRS 617.440 were present and established in this case. This is evidenced by the *prima facie* evidence of a compensable occupational disease set forth in the C-4 form which is the claim form to file the workers' compensation claim. In the August 21, 2018 C-4 form Dr. Sorrelle checked the "yes" box to the question, "From information given by the employee, together with medical evidence, can you directly connect this injury or occupational disease as job incurred?" This is the equivalent of stating that the occupational diseases diagnosed on the form are, to a reasonable degree of medical probability, caused by the Petitioner's work for the employer under the provisions of NRS 616C.098. Accordingly, the Petitioner made out his case of industrial medical causation and all of the other requirements under NRS 617.440. The court has searched the Record on Appeal and found no medical evidence to contradict the findings of Dr. Sorrelle. Accordingly, the Appeals Officer's decision, to the extent that it finds no evidence to support medical causation of the carpal tunnel syndrome and DeQuervain's tendonitis is not supported by substantial evidence on the record taken as a whole and therefore rests on an abuse of discretion and must be reversed on judicial review.

As to Issue 3) the Appeals Officer's Decision and Order rests on a legal error or an abuse of

discretion with respect to its finding that Petitioner failed to timely file his workers' compensation claim. The C-4 form dated August 21, 2018 was filed in compliance with the time limits set forth in NRS 617.344 when the C-4 form was filed less than 90 days after Dr. Leo Germin confirmed the diagnosis of carpal tunnel syndrome on June 7, 2018 through nerve studies performed that date. NRS 617.344 requires that a claim be filed within 90 days of the date on which the Petitioner knew of the causal connection between his work and his occupational disease. Until Dr. Germin confirmed the diagnosis by the nerve studies on June 7, 2018 there was no way for the Petitioner to know about the diagnosis and its relation to his work. Petitioner contends that he did not actually find out about this connection until he saw Dr. Sorrelle on June 27, 2018; however, it is irrelevant to the NRS 617.344 claim filing time limit issue because the period between June 7, 2018 and August 21, 2018 when the claim was filed is less than 90 days. As a matter of law the claim was timely filed. The argument that there was a "date of injury" on April 29, 2018 is immaterial because this is an occupational disease claim where there is no "date of injury" to trigger the claim filing 90-day clock. Because of this clear legal error the Appeals Officer's findings that the claim was not timely filed must be set aside and reversed on judicial review under NRS 233B.135(3).

As to Issue 4), the court finds that the record was not sufficiently or adequately developed and that the Appeals Officer did not adequately consider whether or not the Petitioner actually provided sufficient written notice under NRS 617.342, OR if any delay or failure to provide written notice (typically done with a C-1 form) to the Employer should be excused for one of the reasons set forth in NRS 617.346(2). There is no evidence in the Record on Appeal that refutes the Petitioner's evidence that he reported the occupational disease on June 27, 2018 and that the Employer had him write down the details on a blank sheet of paper that he then turned into the Employer's management personnel. The evidence points to the Employer failing to provide a C-1 form for the Petitioner to fill out which appears to be a possible violation of the Employer's legal

duties under NRS 617.342(4) and (5). These matters must be fleshed out in further proceedings before the Appeals Officer. The Appeals Officer did not conduct a hearing into these matters and the court finds this to be an unlawful procedure under NRS 233B.135(3)(c). Accordingly, pursuant to the authority granted the court by NRS 233B.135(3), the court orders this matter remanded to the Appeals Officer for a new hearing solely on the issues of whether or not the Petitioner did in fact provide adequate written notice within seven (7) days of his learning of the connection between his occupational diseases of carpal tunnel syndrome and DeQuervain's tendonitis and his job duties for the Employer, and/or if any failure to comply with NRS 617.342 should be excused under the provisions of NRS 617.346(2). The Appeals Officer shall take new evidence and entertain further arguments of the parties and render a new Decision and Order solely on these issues being remanded as this is the only obstacle potentially standing in the way of the Petitioner's claim being accepted for all appropriate workers' compensation benefits. The new Decision and Order of the Appeals Officer, if it finds the issues in Petitioner's favor, must order that the claim be accepted in light of this court's reversal of the all the other issues in this judicial review matter in favor of the Petitioner. The court notes that it also finds good cause to order this remand for the taking of additional evidence and a new decision by the Appeals Officer under NRS 233B.131(2) and (3).

Based on the legal error and the abuse of discretion, the Appeals Officer's Decision and Order should be REVERSED IN PART and REMANDED for further proceedings before the Appeals Officer and a new Decision and Order as set forth herein.

Therefore, with good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that pursuant to NRS 233B.135(3)(a)(c)(d)(e) and (f) the Petitioner's Petition for Judicial Review should be and hereby is GRANTED IN PART and REMANDED. This workers' compensation claim is an occupational disease claim under NRS Chapter 617; the C-4 form provides *prima facie* evidence of medical

causation that is unrefuted by any other evidence in the Record on Appeal; and the claim was timely filed within 90 days of the date on which the Petitioner learned of the connection between his occupational diseases and his job duties under NRS 617.344. The decisions of the Insurer and the Appeals Officer are REVERSED and set aside with respect to Issues 1), 2), and 3) set forth herein. With respect to Issue 4), timely written notification to the Employer under NRS 617.342, the court finds that there was unlawful procedure and a lack of sufficient or adequate development of the record to determine if the Petitioner adequately complied with NRS 617.342 by writing down the notice on a blank piece of paper and giving it to the Employer rather than on a C-1 form, and/or if the facts of this case provide reason to excuse any lack of compliance with NRS 617.342 for any of the reasons designated under NRS 617.346(2). This matter is remanded for a new hearing before the Appeals Officer solely addressing the notice requirements of NRS 617.342 and the excuse provisions of NRS 617.346(2) as set forth in this Order. The Appeals Officer shall render a new Decision and Order addressing these issues and if the matters are decided in Petitioner's favor, the Appeals Officer shall order that the Petitioner's claim be accepted and that Petitioner be provided all appropriate workers' compensation benefits.

IT IS SO ORDERED

DATED _____

Dated this 28th day of August, 2020

Kerry S Earley

DISTRICT COURT JUDGE
499 822 A7D0 280C
Kerry Earley
District Court Judge

Respectfully Submitted by:

/s/ James P. Kemp
JAMES P. KEMP, ESQ.
Attorney for Petitioner

Approved as to Form and Content:

Declined to sign/disagrees
JOEL P. REEVES, ESQ.
Attorney for Petitioner

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Fred Gill, Petitioner(s) vs. Nevada Department of Administration, Respondent(s)	CASE NO: A-19-806602-J DEPT. NO. Department 4

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/28/2020

James Kemp	jp@kemp-attorneys.com
Barbara Valdez	bvaldez@kemp-attorneys.com
Daniel Schwartz	daniel.schwartz@lewisbrisbois.com
Joel Reeves	joel.reeves@lewisbrisbois.com
Stephanie Jensen	stephanie.jensen@lewisbrisbois.com

EXHIBIT 3

DISTRICT COURT
CLARK COUNTY, NEVADA

Worker's Compensation Appeal **COURT MINUTES** **October 16, 2020**

A-19-806602-J Fred Gill, Petitioner(s)
vs.
Nevada Department of Administration, Respondent(s)

October 16, 2020 03:00 AM Minute Order

HEARD BY: Earley, Kerry COURTROOM: Chambers

COURT CLERK: Packer, Nylasia

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

THIS MATTER came before the Court on Respondent s Motion for Reconsideration, to Alter Judgment, and/or to Amend Findings, filed on September 14, 2020; and Petitioner s Opposition thereto, filed on September 21, 2020.

A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

THE COURT FINDS that Respondent has not raised any new issues of fact or law, has not introduced substantially different evidence, and this Court s prior decision is not clearly erroneous. Therefore, there is no legal basis to grant Respondent s Motion for Reconsideration and the motion is DENIED.

The hearing set for November 10, 2020, is hereby VACATED.

Counsel for Respondent shall prepare the Order in accordance with EDCR 7.21 and Administrative Order 20-17.

CLERK S NOTE: Counsel are to ensure a copy of the forgoing minute order is distributed to all interested parties; additionally, a copy of the foregoing minute order was distributed to the registered service recipients via Odyssey eFileNV E-Service (10-20-20 np)

EXHIBIT 4

NEVADA DEPARTMENT OF ADMINISTRATION

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim of FRED GILL 344 KEATING ST. HENDERSON, NV 89074, Claimant.	Claim No.: 001589-006383-WC-01 Hearing Nos.: 1904239-JK 1905021-JK Appeal Nos : 1906897-KWA 1906901-KWA Employer: REDDY ICE CORPORATION 5720 LYNDON B JOHNSON FWY., STE. 200 DALLAS, TX 75240

AMENDED DECISION AND ORDER

The above-captioned appeals came on for hearing before Appeals Officer KARL W. ARMSTRONG, ESQ, on October 9, 2019. The claimant, FRED GILL, (hereinafter referred to as "claimant"), was represented by JILL A. KOLOSKE, ESQ., of NEVADA ATTORNEY FOR INJURED WORKERS. The Employer, REDDY ICE CORPORATION, (hereinafter referred to as "Employer"), was represented by DANIEL L. SCHWARTZ, ESQ., of LEWIS BRISBOIS BISGAARD & SMITH LLP.

On August 31, 2018, the Administrator issued a determination denying the claim. Claimant appealed and in a Decision and Order dated November 1, 2018, the Hearing Officer affirmed claim denial. Claimant appealed to this Court, generating Appeal No. 1906897-KWA.

On September 13, 2018, the Administrator denied claimant's request for benefits. Claimant appealed and the parties agreed to bypass the Hearing Officer and proceed to this Court, generating Appeal No. 1906901-KWA.

The appeals were consolidated and this hearing followed.

After reviewing the documentary evidence and considering the arguments presented by counsel, the Appeals Officer decides as follows:

///

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FILED
DEC 18 2019
APPEALS OFFICE

FINDINGS OF FACT

1. Prior to the instant claim, claimant alleged a January 11, 2011 right hand claim. Claimant presented for a permanent partial disability and a zero percent impairment was found. (Exhibit 2 at 1-20)

2. The claimant, FRED GILL, alleged a date of injury of April 12, 2018, for left hand and wrist nerve damage. However, no C-4 form was executed by any medical provider until August 31, 2018, some one hundred and twenty four (124) days after the alleged date of injury. On the C-4 form, the claimant provides no description of mechanism of injury. It should also be noted that the C-4 form shows that the claimant was seen on July 27, 2018, some eighty nine (89) days after the alleged date of injury, at the Minimally Invasive Hand Institute by Dr. Jonathan Sorelle. The claimant was assessed with left DeQuervains and left carpal tunnel with diffuse hand swelling and possible infection. EMG testing was recommended and modified duty work restrictions were issued. The top half of the available C-4 form was never executed by the claimant. (Exhibit 1 at 1)

3. The Employer's Report of Industrial Injury or Occupational Disease notes that an August 22, 2018 date of injury that was reported on August 22, 2018. Validity of the claim was doubted. (Exhibit 1 at 2)

4. On August 29, 2018, the adjuster noted, "Spoke to claimant and he stated he last worked on 8/13/18. He states his hand became swollen a couple months back and he thought he had been bitten by an insect. Mr. Gill initially treated under AETNA. He sought treatment and testing was completed , diagnosing him with left hand carpal tunnel. He was scheduled to have surgery at the end of July by Dr. Jonathan Sorelle. However Aetna, cancelled the surgery and directed Mr. Gill to file a claim under workers compensation to determine whether the claim was industrial. (Exhibit 1 at 3)

5. The claimant's job description as a delivery driver has been provided. (Exhibit 1 at 4-5)

6. A work release was completed by Dr. Sorelle on August 13, 2018, giving light duty work restrictions from August 13-21, 2018. It was noted that the claimant was scheduled to undergo surgery on August 21, 2018. (Exhibit 1 at 6)

7. On August 31, 2081, a claim denial determination was issued. (Exhibit 1 at 7-8)

8. On September 12, 2018, the adjuster issued a letter of representation. (Exhibit 1 at 9) Also on September 12, 2018, the claimant's counsel issued letters which 1) requested that certain checks be sent directly to the claimant's counsel, and 2) requested that TTD be issued from August 12, 2018 forward. (Exhibit 1 at 10-12)

9. On September 13, 2018, claimant was notified that the September 12, 2018 requests were denied because the claim was denied. (Exhibit 1 at 14)

10. On September 14, 2018, the claimant appealed the claim denial letter. (Exhibit 1 at 13)

11. Claimant appealed the September 13, 2018 determination to the Hearing Officer. (Exhibit 1 at 15) This appeal was transferred directly to the Appeals Officer. (Exhibit 1 at 19)

12. Following Hearing No. 1904239-JK, the Hearing Officer issued a Decision and Order dated November 1, 2018, which affirmed the August 31, 2018 determination to deny the claim. (Exhibit 1 at 16-17) The claimant appealed. (Exhibit 1 at 18)

13. The claimant's former attorney withdrew as the attorney of record. (Exhibit 1 at 20)

14. Claimant provided thirty-six (36) pages of evidence which was reviewed and duly considered. (Exhibits A-B)

15. These Findings of Fact are based upon substantial evidence within the record.

16. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be so deemed, and vice versa.

CONCLUSIONS OF LAW

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

2. In attempting to prove his case, the claimant has the burden of going beyond speculation and conjecture. That means that the claimant must establish the work connection of his injuries, the causal relationship between the work-related injury and his disability, the extent of 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 v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993); 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).

3. 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.

4. Based upon the present information, the evidence supports the Employer's position that the claimant has failed to meet his burden of establishing a compensable claim, arising out of and in the course and scope of his employment.

5. As noted above, no C-4 form was fully executed by the claimant. The C-4 form executed by the Dr. Sorelle was not completed until August 31, 2018, which is one hundred and twenty four days after the stated date of injury of April 29, 2018. Further, the claimant never stated or described any mechanism of injury. In addition, there is a delay of more than seven days in reporting the alleged industrial injury or occupational disease. CTS/DeQuervains appears to have been assessed on July 27, 2018. Therefore, based upon the above facts, the determination to deny the claim is proper.

6. Given the facts of the case, the determination to deny this claim was proper under NRS 617.342 and NRS 617.344 due to the claimant's failure to timely report the alleged injury to the Employer. Those statutes state:

> NRS 617.342 Notice of occupational disease: Requirements; availability of form; retention.
>
> 1. An employee or, in the event of the employee's death, one of the dependents of the employee, shall provide written notice of an

occupational disease for which compensation is payable under this chapter to the employer of the employee as soon as practicable, but within 7 days after the employee or dependent has knowledge of the disability and its relationship to the employee's employment.

2. The notice required by subsection 1 must:

(a) Be on a form prescribed by the Administrator. The form must allow the employee or the dependent of the employee to describe briefly the circumstances which caused the disease or death.

(b) Be signed by the employee or by a person on behalf of the employee, or in the event of the employee's death, by one of the dependents of the employee or by a person acting on behalf of the dependent.

(c) Include an explanation of the procedure for filing a claim for compensation.

(d) Be prepared in duplicate so that the employee or the dependent of the employee and the employer can retain a copy of the notice.

3. Upon receipt of the notice required by subsection 1, the employer, the employee's supervisor or the agent of the employer who was in charge of the type of work performed by the employee shall sign the notice. The signature of the employer, the supervisor or the employer's agent is an acknowledgment of the receipt of the notice and shall not be deemed to be a waiver of any of the employer's defenses or rights.

4. An employer shall maintain a sufficient supply of the forms required to file the notice required by subsection 1 for use by his or her employees.

5. An employer shall retain any notice provided pursuant to subsection 1 for 3 years after the date of the receipt of the notice. An employer insured by a private carrier shall not file a notice of injury with the private carrier.

NRS 617.344 Claim for compensation: Requirements for diseased employee, dependent or representative to file claim; form.

1. Except as otherwise provided in subsection 2, an employee who has incurred an occupational disease, or a person acting on behalf of the employee, shall file a claim for compensation with the insurer within 90 days after the employee has knowledge of the disability and its relationship to his or her employment.

2. In the event of the death of the employee resulting from the occupational disease, a dependent of the employee, or a person acting on his or her behalf, shall file a claim for compensation with the insurer within 1 year after the death of the employee.

3. The claim for compensation must be filed on a form prescribed by the Administrator.

7. Further, even if the claimant reported the incident and the claim timely he still could not establish a compensable claim as there is no specific mechanism of injury or acute trauma alleged and the claimant has not met the requirements for a compensable occupational disease under NRS 617.440. It is unclear what mechanism of injury is or if there is some sort of industrial repetitive motion being alleged. There is simply no established industrial hazard or risk upon which to base this claim. Therefore, claim denial is legal and proper.

8. Under NRS 616C.150(1), the claimant has the burden of proof to show that the injury arose out of and in the course and scope of his employment. The claimant must satisfy this burden by a preponderance of the factual and medical evidence. Further, NRS 616B.612 mandates that an employee is only entitled to compensation if he is injured in the course and scope of his employment. In this case, given the facts set forth above, the claimant does not have the proper medical evidence to establish a compensable industrial injury claim.

9. NRS 616A.030 defines an accident as ". . . an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Additionally, NRS 616A.265 defines an injury as ". . . a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence . . ." In this case, given the facts set forth above, especially the lack of any acute trauma or specific mechanism of injury, there is no statutory accident or injury.

10. Here, the Nevada Supreme Court has held that:

> An award of compensation cannot be based solely upon possibilities and speculative testimony. A testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury.

United Exposition Services Co. v. SIIS, 109 Nev. 421, 851 P.2d 423 (1993).

11. This holding has been affirmed and bolstered in the Horne v. SIIS, 113 Nev. 532, 936 P.2d 839 (1997) case, which held that "mere speculation and belief does not rise to the level of reasonable medical certainty." Claim denial is proper given the facts set forth above.

12. Furthermore, the Court has held that:

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work ... the injured party must establish a link between the workplace conditions and how those conditions caused the injury ... a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment.

Rio Suite Hotel v. Gorsky, 113 Nev. 600, 939 P.2d 1043(1997).

13. The same Court further stated that the "Nevada Industrial Insurance Act is not a mechanism which makes employers absolutely liable for injuries suffered by employees who are on the job." (Id.)

14. Further, the Nevada Supreme Court held in Mitchell v. Clark County School District, 121 Nev. 179, 111 P.3d 1104 (2005):

> An accident or injury is said to arise out of employment when there is a causal connection between the injury and the employee's work. In other words, the injured party must establish a link between the workplace conditions and how those conditions caused the injury. Further, a claimant must demonstrate that the origin of the injury is related to some risk involved within the scope of employment. However, if an accident is not fairly traceable to the nature of employment or the workplace environment, then the injury cannot be said to arise out of the claimant's employment. Finally, resolving whether an injury arose out of employment is examined by a totality of the circumstances.

15. The Court in Rio All Suite Hotel and Casino v. Phillips, 126 Nev. 346, 240 P.3d 2 (2010) clarified Mitchell. It indicated that:

> "The appeals officer found that Phillips' case was 'distinguishable' from Mitchell because Phillips' injury did not result from an 'unexplained fall.' Without elaborating, the appeals officer also stated that '[t]he Mitchell [c]ourt mentions the inherent dangerousness of stairways.' . . . [The Court in Rio further discussed Mitchell: "The employee argued that because she did not have a health affliction that caused her to fall and 'because staircases are inherently dangerous,' her injury "arose out of her employment." . . . The appeals officer determined that the employee's fall did not arise out of her employment, and the district court denied her petition for judicial review.". . . [Our finding in Mitchell was that] "[T]he employee must show that 'the origin of the injury is related to some

> risk involved within the scope of employment . . . thus, because the [Mitchell] employee could not explain how the conditions of her employment caused her to fall . . . we determined that the appeals officer correctly concluded that she failed to demonstrate the requisite 'causal connection.'

16. There is no showing that there is any origin of injury related to some hazard or risk within the expected course and scope of employment, given the lack of any specified mechanism of injury, including any alleged repetitive motion injury.

17. Finally, the claimant failed to meet the requirements for a compensable occupational disease under NRS 617.440. That provision states:

> NRS 617.440 Requirements for occupational disease to be deemed to arise out of and in course of employment; applicability.
>
> 1. An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
>
> (a) There is a direct causal connection between the conditions under which the work is performed and the occupational disease;
>
> (b) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
>
> (c) It can be fairly traced to the employment as the proximate cause; and
>
> (d) It does not come from a hazard to which workers would have been equally exposed outside of the employment.
>
> 2. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee.
>
> 3. The disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.
>
> 4. In cases of disability resulting from radium poisoning or exposure to radioactive properties or substances, or to roentgen rays (X-rays) or ionizing radiation, the poisoning or illness resulting in disability must have been contracted in the State of Nevada.
>
> 5. The requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453, 617.455, 617.457, 617.485 or 617.487.

18. Claimant does not have the requisite medical reporting to establish a compensable occupational disease. Therefore, the claim also fails in this regard. This decision is based upon the timing of the claim for compensation being filed, the lack of a mechanism of injury / occupational disease and the lack of causal medical reporting. It is not based upon the claimant's credibility.

DECISION AND ORDER

The claimant, FRED GILL, has failed to meet his burden of establishing a compensable workers' compensation claim.

IT IS HEREBY ORDERED that the Hearing Officer's Decision and Order dated November 1, 2018, which affirmed the August 31, 2018 claim denial determination, is AFFIRMED.

IT IS ALSO HEREBY ORDERED that the August 31, 2018 determination denying the claim is AFFIRMED.

IT IS ALSO HEREBY ORDERED that the September 13, 2018 determination denying claimant's request for benefits is AFFIRMED.

IT IS SO ORDERED.

DATED this 9th day of December, 2019.

KARL W. ARMSTRONG, ESQ.
APPEALS OFFICER

NOTICE: Pursuant to NRS 616C.370, should any party desire to appeal this final decision of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within thirty (30) days after service of this Order.

Submitted by,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
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REDDY ICE CORPORATION

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **DECISION AND ORDER** was duly mailed, postage prepaid OR placed in the appropriate addressee file maintained by the Division, 2200 South Rancho Drive, Second Floor, Las Vegas, Nevada, to the following:

FRED GILL
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HENDERSON, NV 89074

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GALLAGHER BASSETT SERVICES, INC.
ATTN.: YVETTE D. PHILLIPS
P.O. BOX 2934
CLINTON, IA 52733

DANIEL L. SCHWARTZ, ESQ.
LEWIS BRISBOIS BISGAARD & SMITH LLP
2300 W. SAHARA AVE., STE. 300, BOX 28
LAS VEGAS, NV 89102

DATED this 13th day of December, 2019.

An employee of the STATE OF NEVADA

EXHIBIT 5

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001584-006383

TO AVOID PENALTY, THIS REPORT MUST BE COMPLETED AND MAILED TO THE INSURER WITHIN 6 WORKING DAYS OF RECEIPT OF THE C-4 FORM

Please Type or Print

EMPLOYER'S REPORT OF INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE

EMPLOYER

Employer's Name	Nature of Business (mfg., etc.)	FEIN	OSHA Log #
Reddy Ice (001589) - 104	Ice Manufacturing	62-1721?0	UNK

Office Mail Address	Location ... if different from mailing address	Telephone
1201 SEARLES AVENUE	Employer Address	(702) 649-8002

City	State	Zip	INSURER	THIRD-PARTY ADMINISTRATOR
LAS VEGAS	NV	89101	New Hampshire Ins	Gallagher Bassett

EMPLOYEE

First Name	M.I.	Last Name	Social Security	Birthdate	Age	Primary Language Spoken
FRED		GILL		04/03/1953	65	Eng

Home Address (Number and Street)	Sex	Marital Status
344 KEATING ST	☑ Male ☐ Female	☐ Single ☑ Married ☐ Divorced ☐ Widowed

City	State	Zip	Was the employee paid for the day of injury? (if applicable)	How long has this person been employed by you in Nevada?
HENDERSON	NV	89074	☑ Yes ☐ No	15 yr 11 mo

In which state was employee hired?	Employee's occupation (job title) when hired or disabled	Department in which regularly employed:
NV	DRIVER	DRIVER

Telephone	If the injured employee a corporate officer? ... sole proprietor? ... partner?	Was employee in your employ when injured or disabled by occupational disease (O/D)?
(702) 234-8449	☐ Yes ☑ No ☐ Yes ☑ No ☐ Yes ☑ No	☑ Yes ☐ No

ACCIDENT OR DISEASE

Date of injury (if applicable)	Time of injury (Hours; Minute AM/PM) (if applicable)	Date employer notified of injury or O/D	Supervisor to whom injury or O/D reported
08/22/2018	09:00 AM	08/22/2018	Brad Pearson

Address or location of accident (Also provide city, county, state) (if applicable)	Accident on employer's premises? (if applicable)
UNK - UNK - UNK -	☐ Yes ☒ No

What was this employee doing when the accident occurred (loading truck, walking down stairs, etc.)? (if applicable)

UNKNOWN

How did this injury or occupational disease occur? Include time employee began work. Be specific and answer in detail. Use additional sheet if necessary.

EE sustained carpal tunnel in his right wrist.

INJURY OR DISEASE

Specify machine, tool, substance, or object most closely connected with the accident (if applicable)	Witness	Was there more than one person injured in this accident? (if applicable)
	ND	☐ Yes ☒ No

Part of body injured or affected	If fatal, give date of death	Witness
UPPER EXTREMITIES ~ WRIST	ND	

Nature of Injury or Occupational Disease (scratch, cut, bruise, strain, etc.)	Witness
OCCUPATIONAL DISEASE OR CUMULATIVE INJURY ~ CARPAL TUNNEL SYNDROME	

	Did employee return to next scheduled shift after accident? (if applicable)	Will you have light duty work available if necessary?
	☐ Yes ☒ No	☐ Yes ☒ No

If validity of claim is doubted, state reason	Location of Initial Treatment
YES	MININUALLY INVASION HAND INSTITUTE- 9080 W.

Treating physician/chiropractor name	Emergency Room	Hospitalized
JONATHAN R. SORELLE	☐ Yes ☒ No	☐ Yes ☒ No

IMPORTANT	How many days per week does employee work?	From	To	Last day wages were earned
	40	4AM ☐ am ☐ pm	4PM ☐ am ☐ pm	8/13

Scheduled days off	S	M	T	W	T	F	S	Rotating	Are you paying injured or disabled employee's wages during disability?
	☐	☐	☒	☒	☒	☐	☐	☐	☑ Yes ☐ No

IMPORTANT LOST TIME INFO

Date employee was hired	Last day of work after injury or disability	Date of return to work	Number of work days lost
09/13/2002	08/22/2018 8/13	UNK	0

Was the employee hired to work 40 hours per week?	If not, for how many hours a week was the employee hired?	Did the employee receive unemployment compensation any time during the last 12 months?
☐ Yes ☐ No		☐ Yes ☒ No ☐ Do not know

For the purpose of calculation of the average monthly wage, indicate the employee's gross earnings by pay period for 12 weeks prior to the date of injury or disability. If the injured employee is expected to be off work 5 days or more, attach wage verification form (D-8). Gross earnings will include overtime, bonuses, and other remuneration, but will not include reimbursement for expenses. If the employee was employed by you for less than 12 weeks, provide gross earnings from the date of hire to the date of injury or disability.

Pay period ends on:	Employee is paid:	On the date of injury or disability the employee's wage was:
☐ SUN ☐ TUE ☐ THUR ☒ SAT ☐ MON ☐ WED ☐ FRI	☐ WEEKLY ☐ MONTHLY ☐ OTHER ☐ BI-WKLY ☐ SEMI-MONTHLY	$ 21.70 per ☑ Hr ☐ Day ☐ Wk ☐ Mo

For assistance with Workers' Compensation Issues you may contact the Office of the Governor Consumer Health Assistance Toll Free: 1-888-333-1597 Web site: http://govcha.state.nv.us E-mail cha@govcha.state.nv.us

★ I affirm that the information provided above regarding the accident and injury or occupational disease is correct to the best of my knowledge. I further affirm the wage information provided is true and correct as taken from the payroll records of the employee in question. I also understand that providing false information is a violation of Nevada law.

Employer's Signature and Title	Date
BRIAN PEARSON PLANT MANAGER via phone	08/22/2018

Insurer Use Only

Claim is: ☐ Accepted ☐ Denied ☐ Deferred ☐ 3rd Party	Deemed Wage	Account No.	Class Code

Claims Examiner's Signature	Date	Status Clerk	Date

Form C-3 (rev.11/05) ORIGINAL – EMPLOYER PAGE 2 – INSURER/TPA PAGE 3 – EMPLOYEE

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