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IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY KLINE,

Appellant,

vs.

CITY OF RENO; AND CANNON COCHRAN MANAGEMENT SERVICES, INC., "CCMSI",

Respondents.

Supreme Court No.: 82608
District Court Case No.:
CV19-01683

DOCKETING STATEMENT CIVIL APPEALS

COMES NOW, Appellant, KIMBERLY KLINE, by and through her counsel of record, and hereby submits her Docketing Statement – Civil Appeals as required by NRAP 14.

Dated this 2nd day of April, 2021.

HERB SANTOS, JR., ESQ.
THE LAW FIRM OF HERB SANTOS, JR.
225 South Arlington Avenue, Suite C
Reno, Nevada 89501
Attorney for Appellant

GENERAL INFORMATION

All appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in a delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman,* 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

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1. **Judicial District** Second Judicial District Court, Washoe County, Nevada
Department: 4 (four)
County: Washoe County
Judge: Honorable Connie Steinheimer
District Ct. Docket No.: CV19-01683

2. **Attorney filing this docket statement**:
Herb Santos, Jr., Esq.
THE LAW FIRM OF HERB SANTOS, JR.
225 South Arlington Avenue, Suite C
Reno, Nevada 89501
Telephone (775) 322-5200
Facsimile (775) 322-5211
Email: herb@santoslawfirm.com

Client: KIMBERLY KLINE.

3. **Attorney(s) representing respondent(s):**
Lisa Wiltshire Alstead, Esq.
MCDONALD CARANO
100 West Liberty Street, Tenth Floor
Reno, Nevada 89501
Telephone: 775-788-2000
Facsimile: 775-788-2020
Email: lwilshire@mcdonaldcarano.com

Clients: CITY OF RENO and CANNON COCHRAN MANAGEMENT SERVICES, INC., "CCMSI"

4. **Nature of disposition:**

Review of agency determination.

5. **Does this appeal raise issues concerning any of the following:**

□ Child custody
□ Venue
□ Termination of parental rights

No.

6. **Pending and prior proceeding in this court. List the case name and docket number of all appeals or original proceeding presently or previously pending before this court which are related to this appeal:**

None.

7. **Pending and prior proceedings in other courts. List the name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal.**

None.

8. **Nature of the action. Briefly describe the nature of the action and the result below:**

This is a workers' compensation case. On or about June 25, 2015 Kimberly Kline was injured when her work vehicle was rear ended by another vehicle, while she was working for City of Reno ("Employer").

The matter came on for Hearing on May 1, 2019 before Appeals Officer Rajinder Nielsen, Esq., with the Nevada Department of Administration.

The issues before the Appeals Officer:

Appeal No. 1900471-RKN. An appeal of the July 19, 2018 decision in Hearing Nos. 1803717-JL and 1803718-JL which reversed CCMSI's May 24, 2018 and June 13, 2018 determination letters. The May 24, 2018 letter notified Kimberly Kline that Dr. Jempsa's PPD rating of 27% was being held in abeyance. The June 13, 2018 letter offered Kimberly Kline a 6% PPD award. The Hearing Officer reversed these decisions finding no medical evidence to justify a 75% apportionment and Kimberly Kline is entitled to the 27% PPD award determined by Dr. Jempsa.

Appeal No. 1902049-RKN. An appeal of the December 27, 2018 decision in Hearing No. 1901522-JL which affirmed and remanded CCMSI's September 20, 2018 determination letter offering the undisputed 6% PPD

award in a lump sum or installments and 21% in monthly installments pursuant to NRS 616C.380.

Appeal No. 1802418-RKN. An appeal of the January 16, 2018 decision in Hearing No. 1801761-JL which remanded CCMSI's December 5, 2017 determination letter awarding a 6% PPD award. The Hearing Officer found a medical question on apportionment and ordered a second PPD evaluation under NRS 616C.330.

The Appeals Officer's Decision and Order was filed on August 20, 2019 and on August 28, 2019, the Petition for Judicial Review was filed.

After receiving written briefs and hearing oral arguments, the District Court issued an Order Denying Petition for Judicial Review on February 10, 2021.

9. **Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):**

Whether the Appeals Officer's Decision and Order which reversed the Hearing Officer's Decision dated July 19, 2018 and affirming the underlying determinations dated May 24, 2018 and June 13, 2018 was the result of reversible error of law?

Whether the Appeals Officer committed reversible error by not following Nevada law?

Whether the Appeals Officer's Decision and Order finding that the Petitioner's PPD award must be apportioned 75% as pre-existing is not supported by the substantial evidence and results in an abuse of discretion?

Whether the Appeals Officer's application of NAC 616C.490 exceeded the statutory authority of NRS 616C.490?

Whether the District Court should have set aside a clearly erroneous decision that constituted an error of law and was arbitrary and capricious?

Whether the District Court should have set aside the Appeals Officer's decision because it was not supported by substantial evidence?

Whether the District Court should have set aside the Appeals Officer's decision that was based on incorrect conclusions of law?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised.

Claire Armstrong v. Treasure Island Hotel & Casino; York Risk Services Group, Inc.; Docket Number 80461
Apportionment of a PPD under NRS 616C.490 and NAC 616C.490.

Argo v. Horton; Docket Number 81568
Apportionment of a PPD under NRS 616C.490 and NAC 616C.490.

Elko City School District v. Raymond; Docket No. 82353
Apportionment of a PPD under NRS 616C.490 and NAC 616C.490.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130.

Not applicable.

12. Other issues: Does this appeal involve any of the following issues?

- ☐ **Reversal of well- settled Nevada precedent (on an attachment, identify the case(s)**
- ☐ **An issue arising under the United States and/or Nevada Constitutions**
- ☐ **A substantial issue of first-impression**
- ☐ **An issue of public policy**
- ☐ **An issue where en banc consideration is necessary to maintain uniformity of this court's decisions**
- ☐ **A ballot question**

The Nevada Supreme Court has not yet decided a case explaining the process of apportionment of a permanent partial disability determination pursuant to NRS 616C.490 and in conjunction with NAC 616C.490.

13. Assignment to the Court of Appeals or retention to the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assigned to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is presumptively assigned to the Court of Appeals under NRAP 17(b)(9) as it is a Petition for Judicial Review of a final decision of an administrative agency. However, consideration of NRAP 17(a)(12) should be considered given that this centers around an issue which is common and raises as a principal issue a question of statewide public importance.

14. Trial: If this action proceeded to trial, how many days did the trial last?

There was no trial. The underlying administrative hearing took less than half a day.

15. Judicial disqualification: Do you intend to file a motion to disqualify or have a justice rescue him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from. If no written judgement or order was filed in the district court, explain the basis for seeking appellate review:

February 10, 2021.

17. Date written notice of entry of judgment or order served:

February 11, 2021.

Was serviced by:

Mail/Electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

Not applicable.

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NOTE: **Motions made pursuant to NRCP 60 or motions for rehearing or reconsidering may toll the time for filing a notice of appeal.**

(b) Date of entry of written order resolving tolling motion:
(c) Date written notice of entry of order resolving motion served:

Was service by:
☐ Mail
☐ Delivery

19. Date notice of appeal was filed. If more than one party has appealed from the judgement or order, list the date of each notice of appeal was filed and identify by name the party filing the notice of appeal:

March 8, 2021.

20. Specify statute or rule governing the time limit for filing the notice of appeal:

NRS 233B.150; NRAP 4(a)(1).

SUBSTANTIVE APPEALIBILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a) NRS 233B.150

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(b)Explain how authority provides a basis for appeal from the judgment or order:

This is a Petition for Judicial Review of a workers' compensation Appeals Officer. Appellant filed her Petition with the District Court pursuant to NRS 233B.130. Therefore, this Court has jurisdiction to hear this appeal under NRS 233B.150.

22. List all parties involved in the action in the district court:

Kimberly Kline, Appellant
City of Reno, Respondent
Cannon Coachran Management Services, Inc., "CCMSI", Respondent

The following were named parties to the action but did not participate in the petition for judicial review:

State of Nevada Department of Administration, Hearings Division, an Agency of the State of Nevada

State of Nevada Department of Administration, Appeals Division, an Agency of the State of Nevada

Michelle Morgando, Esq., Sr. Appeals Officer; Sheila Moore, Esq., Appeals Officer

Attorney General Aaron Ford, Esq.

(a) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

All parties are involved.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (*i.e.*, order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.

Kimberly Kline requests a PPD award of 27% as found by Dr. Jempsa. City of Reno and CCMSI contended that she is not eligible for the 27% PPD award and argue 75% apportionment. The Appeals Officer found in favor of City of Reno and CCMSI.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below:

Yes

25. If you answered "No" to question 24, complete the following:
(a) Specify the claims remaining pending below:
(b) Specify the parties remaining below:
(c) Did the District Court certify the judgement or order appealed from as a final judgment pursuant to NRCP 54(b).
(d) Did the District Court make an express determination pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

26. If you answered "No" to any part of Question 25, explain the basis for seeking appellate review.

27. Attached file stamped copies of the following:

Please see attached Notice of Entry of Order and Order Denying Petition for Judicial Review. Also attached is the underlying Appeals Officers Decision.

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

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AFFIRMATION: Pursuant to NRS 239B.030

The undersigned does hereby certify that the above documents does not contain the social security number of any person.

Dated this 2nd day of April, 2021.

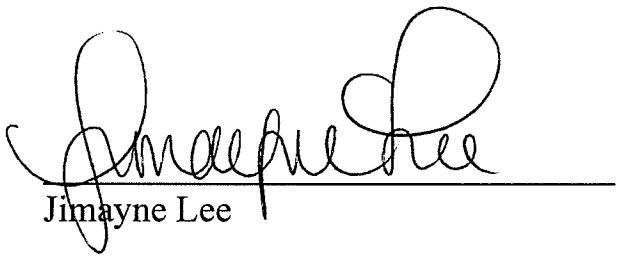
HERB SANTOS, JR., ESQ.
THE LAW FIRM OF HERB SANTOS, JR.
225 South Arlington Avenue, Suite C
Reno, Nevada 89501
Attorney for Appellant

CERTIFICATE OF SERVICE

I certified that on the 2 day of April, 2021, I electronically filed the foregoing document through the Supreme Court Efiling System and also served a copy of this completed **DOCKETING STATEMENT CIVIL APPEALS** upon all counsel of record and the Supreme Court Settlement Judge by mailing it first class mail with sufficient postage prepaid to the following address:

Lisa Wiltshire Alstead, Esq.
MCDONALD CARANO
100 West Liberty Street, Tenth Floor
Reno, Nevada 89501

Jonathan Andrews
14300 Poleline Road
Reno, Nevada 89511



Jimayne Lee

INDEX OF EXHIBITS

EXHIBIT 1 NOTICE OF ENTRY OF ORDER
ORDER DENYING PETITION FOR JUDICIAL REVIEW
DECISION AND ORDER OF THE APPEALS OFFICER

EXHIBIT 1

EXHIBIT 1

2540
Timothy E. Rowe (SBN 1000)
Lisa Wiltshire Alstead (SBN 10470)
MCDONALD CARANO LLP
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lalstead@mcdonaldcarano.com

Attorneys for Respondents
CITY OF RENO AND CANNON
COCHRAN MANAGEMENT SERVICES, INC.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

KIMBERLY KLINE,

Petitioner,

vs.

CITY OF RENO; CANNON COCHRAN MANAGEMENT SERVICES, "CCMSI"; the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, an Agency of the State of Nevada; the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS DIVISION, an Agency of the State of Nevada; MICHELLE MORGANDO, ESQ., Sr. Appeals Officer; RAJINDER NIELSEN, ESQ., Appeals Officer, ATTORNEY GENERAL AARON FORD, ESQ.,

Respondents.

Case No.: CV19-01683

Dept. No.: 4

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on February 10, 2021, the above-entitled Court entered its Order Denying Petition for Judicial Review. A true and correct copy of the Order is attached hereto as **Exhibit 1**.

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AFFIRMATION

The undersigned does hereby affirm that the preceding does not contain the social security number of any person.

DATED this 11th day of February, 2021.

McDONALD CARANO, LLP

By: */s/ Lisa Wiltshire Alstead*
Lisa Wiltshire Alstead, Esq. (NSBN 10470)
100 W. Liberty Street, Tenth Floor
Reno, NV 89501
Attorneys for Respondents

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP, and that on the 11th day of February, 2021, I served the within **NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW** upon all parties registered for electronic service through filing with the Clerk of the Court by using the Court's CM/ECF system.

/s/ Angela Shoults
An Employee of McDonald Carano LLP

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	NO. OF PAGES
1.	Order Denying Petition for Judicial Review	17

4840-5854-3836, v. 1

FILED
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CV19-01683
2021-02-10 09:24:22 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8288432

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

KIMBERLY KLINE,

Petitioner,

vs.

CITY OF RENO; CANNON COCHRAN MANAGEMENT SERBVICES, "CCMSI"; the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION, an Agency of the State of Nevada; the STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS DIVISION, an Agency of the State of Nevada; MICHELLE MORGANDO, ESQ., Sr. Appeals Officer; RAJINDER NIELSEN, ESQ., Appeals Officer, ATTORNEY GENERAL AARON FORD, ESQ.,

Respondents.

CASE NO.: CV19-01683

DEPT. NO.: 4

ORDER DENYING PETITION FOR JUDICIAL REVIEW

On August 28, 2019, Petitioner KIMBERLY KLINE, by and through her attorney, Herb Santos, Jr., Esq. of the Law Firm of Herb Santos, Jr., filed a *Petition for Judicial Review*. On September 9, 2019, Respondent the CITY OF RENO and CANNON COCHRAN MANAGEMENT SERVICES, INC. (hereinafter "CCMSI"), by and through their attorney, Timothy E. Rowe, Esq. and Lisa Wiltshire Alstead, Esq. of McDonald Carano LLP, filed a *Statement of Intent to Participate.*

On September 18, 2019, Rajinder K. Rai-Nielsen, Esq., Appeals Officer, filed a *Certification of Transmittal.* Also, on September 18, 2019, the *Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Chapter 233B of NRS)* and a *Transmittal of Record on Appeal* ("ROA") were filed.

On October 16, 2019, an *Order for Briefing Schedule* was entered setting forth the briefing deadlines pursuant to NRS 233B.130.

On October 28, 2019, Petitioner KIMBERLY KLINE and Respondent CITY OF RENO and CCMSI filed a *Stipulation to Extend Time to File Briefs* wherein the parties stipulated and agreed to extend the deadline to file Petitioner's opening brief to December 15, 2019, and Respondent's answering brief to January 20, 2020.

On November 4, 2019, an *Amended Briefing Schedule Order* was entered extending the briefing deadlines in accordance with the October 28, 2019 stipulation. On November 7, 2019, Petitioner KIMBERLY KLINE filed a *Notice of Entry of Order.*

On December 12, 2019, Petitioner KIMBERLY KLINE and Respondent CITY OF RENO and CCMSI filed a second *Stipulation to Extend Time to File Briefs* wherein the parties stipulated and agreed to extend the deadline to file Petitioner's opening brief to January 14, 2020, and Respondent's answering brief to February 14, 2020.

On December 20, 2019, an *Order* granting stipulation to extend time periods set forth in NRS 233B.133 was entered extending the briefing deadlines in accordance with the December 12, 2019 second stipulation. On January 9, 2020, KIMBERLY KLINE filed *Notice of Entry of Order.*

On January 13, 2020, Petitioner KIMBERLY KLINE and Respondent CITY OF RENO and CCMSI filed a third *Stipulation to Extend Time to File Briefs* wherein the parties stipulated and agreed to extend the deadline to file Petitioner's opening brief to February 24, 2020 and Respondent's answering brief to March 24, 2020.

On January 16, 2020, an *Order Granting Stipulation to Extend Deadlines* was entered extending the briefing deadlines in accordance with the January 13, 2020 third stipulation. On January 21, 2020, Petitioner KIMBERLY KLINE filed a *Notice of Entry of Order.*

On February 24, 2020, KIMBERLY KLINE filed *Petitioner's Opening Brief.*

On March 20, 2020, Petitioner KIMBERLY KLINE and Respondent CITY OF RENO and CCMSI filed a fourth *Stipulation to Extend Briefing Deadlines* wherein the parties stipulated and agreed to extend the deadline for Respondent's answering brief to April 23, 2020 and Petitioner's reply brief to May 23, 2020.

On March 23, 2020, a *Second Amended Briefing Schedule Order* was entered extending the deadline for Respondent's answering brief to April 23, 2020 and Petitioner's reply brief to May 23, 2020 pursuant to the parties' stipulation.

On April 23, 2020, the CITY OF RENO filed *Respondent's Answering Brief.* On May 22, 2020, KIMBERLY KLINE filed *Petitioner's Reply Brief.* Thereafter, the parties' briefs were submitted to the Court for consideration.

Also, on May 22, 2020, Petitioner KIMBERLY KLINE filed a *Request for Oral Argument* on the Petition for Judicial Review. On May 27, 2020, CITY OF RENO also filed *Request for Oral Argument* on KIMBERLY KLINE's Petition for Judicial Review. Therefore, on June 17, 2020, the Court found that it would be an appropriate exercise of discretion by the Court to allow for oral arguments on the Petition for Judicial Review and entered *Order to Set.*

On June 26, 2020, the parties filed *Application for Setting*, wherein the parties agreed to a telephonic hearing to be conducted on September 2, 2020. On September 2, 2020, the parties filed a second *Application for Setting*, wherein the parties agree to vacate the September 2, 2020 hearing and reset the hearing for September 30, 2020. On October 5, 2020, the parties filed a third *Application for Setting*, wherein the parties agreed to reset the oral arguments on the Petition for Judicial review to November 2, 2020. On November 2, 2020, the parties filed a fourth *Application for Setting*, wherein the parties vacated the November 2, 2020 hearing, and reset it for November 19, 2020.

On November 19, 2020, the Court heard oral argument on KIMBERLY KLINE'S Petition for Judicial Review via simultaneous audio-visual transmission pursuant to Supreme Court Rules Part IX due to the courthouse's closure in light of the COVID-19 pandemic. At the hearing, Herb Santos, Jr., Esq. argued on behalf of Petitioner KIMBERLY KLINE, who was present for the hearing via simultaneous audio-visual transmission from Washoe County, Nevada. The opposition was argued by Lisa Alstead, Esq., on behalf of the CITY OF RENO. After the hearing, the transcript of the proceeding was submitted to the Court on December 1, 2020. Thereafter, the matter was taken under advisement by the Court.

KIMBERLY KLINE's Petition for Judicial Review arises from a June 25, 2015 industrial injury KLINE suffered when her work vehicle was rear-ended by another vehicle. (ROA 177-182,

395). The June 25, 2015 accident (subject incident) was her second motor vehicle accident within a month. (ROA 409). The first occurred on June 3, 2015 and KLINE's injuries sustained therein were nearly resolved at the time of the second incident. (Id.). On June 25, 2015, following the subject incident, KLINE went to St. Mary's and received medical treatment for back and neck pain. (ROA 182-185, 409-411). KLINE was diagnosed by Dr. Richard Law with an acute lumbar radiculopathy, sprain of the lumbar spine, and acute pain in the lower back. (ROA 410).

On July 23, 2015, the claim was accepted for cervical strain. (ROA 453). KLINE received medical treatment from Dr. Scott Hall, M.D., in addition to chiropractic care and physical therapy. (See generally ROA 296-341). On October 28, 2015, KLINE was determined to be at maximum medical improvement ("MMI"), stable not ratable, and was released to her full duty with no restrictions. (ROA 490). On November 6, 2015, CITY OF RENO issued a notice of intent to close KLINE's claim. (ROA 295). After an appeal, the Department of Administration concluded that KLINE's industrial claim was closed prematurely. (ROA 239-240).

On January 13, 2016, KLINE saw Dr. Hansen for chiropractic care for her neck pain and Dr. Hansen assessed that KLINE had "cervical disc displacement, unspecified cervical region." (ROA 296-298). Dr. Hansen felt that there was a high probability within a medical degree of certainty that KLINE's injuries were related to the rear-end collision she had recently sustained. (ROA 298, 306, 339). Also, on January 13, 2016, KLINE underwent an MRI, which found disc degeneration with large disc protrusions at the C5-6 and C6-7 levels, resulting in complete effacement of CSF from the ventral and dorsal aspects of the cord with severe canal stenosis without cord compression or abnormal signal intensity in the cord to suggest cord edema or myelomalacia. (ROA 299, 503). On July 5, 2016, upon Dr. Hansen referral, KLINE saw Dr. Sekhon due to KLINE's ongoing complaints. (ROA 241-246).

On January 18, 2017, the Appeals Officer entered a Decision and Order which reversed claim closure without a PPD evaluation or rating and ordered Respondent, CITY OF RENO to rescind claim closure and provide medical treatment recommended by Dr. Sekhon. (ROA 167-176). CITY OF RENO timely appealed the decision to District Court and Petition for Judicial Review ensued. On December 11, 2017, Judge Simons issued an Order denying the Petition for Judicial Review.

(ROA 373-387). Therein, the Court noted that the Appeals Officer gave the opinions of Dr. Hall no weight as it pertained to the scope of the claims, and that Dr. Hall's opinions were inconsistent with the medical evidence. (ROA 384). That decision was not appealed.

While the Petition for Judicial Review was pending at the District Court, on June 12, 2017, KLINE had a cervical spine decompression and fusion surgery. (ROA 244, 252). On September 11, 2017, KLINE was determined to have reached MMI, was ratable, and was released for full duty. (ROA 248-249). A permanent partial disability ("PPD") evaluation was performed by Dr. Russell Anderson and KLINE was found to have a 25% whole person impairment ("WPI") from the cervical spine, with 75% of the impairment apportioned as non-industrial. (ROA 250-256, 563-564). The self-insured Employer's third-party administrator ("TPA") issued a determination letter on December 5, 2017, offering a 6% PPD award. (ROA 362, 568). KLINE appealed, and a second PPD evaluation was ordered and subsequently conducted by Dr. James Jempsa on May 8, 2018. (ROA 605-616). Dr. Jempsa found KLINE to have a 27% WPI with none of the impairment apportioned as non-industrial. (ROA 616-617). Because apportionment was not considered, the TPA sent a follow up request asking Dr. Jempsa to review Dr. Anderson's PPD evaluation and address apportionment. (ROA 1162). On May 18, 2018, Dr. Jempsa provided an Addendum which stated, "You will need to contact Dr. Anderson concerning his rationale for apportionment . . . the Claimant stated that she had no problems with her neck prior to her industrial injury of June 25, 2015. I have not received any medical records prior to the industrial injury . . . it is my opinion that apportionment is not necessary in this case." (ROA 1171).

On May 24, 2018, due to the large discrepancy between the two PPD ratings, a TPA determination letter notified KLINE that the 27% PPD award was to be held in abeyance pending a records review by Dr. Jay Betz. (ROA 1172). Dr. Betz provided his review and agreed with Dr. Anderson's findings on apportionment noting Dr. Anderson's conclusions "are well supported by the medical record, known pathologies, AMA guides, and Nevada Administrative Code." (ROA 1189). After a records review, the TPA sent a determination letter on June 13, 2018, offering KLINE a PPD award of 6% based on an apportionment of 75% of the WPI as non-industrial. (ROA 618). KLINE appealed this determination and on July 19, 2018, after a hearing, a Hearing Officer Decision was

entered reversing the TPA's determination. (ROA 601-603). CITY OF RENO maintained that apportionment is proper in this case and offered the uncontested 6% as a lump sum or in installments, and under NRS 616C.380, stated it will pay the remaining, contested 21% in monthly installments. CITY OF RENO, the employer, appealed and requested a stay. (ROA 007:6-7).

On May 1, 2019, an Appeal Hearing was conducted and on August 20, 2019, the Appeals Officer Decision and Order was filed. KIMBERLY KLINE's August 28, 2019 Petition for Judicial Review seeks reversal of the August 20, 2019 Appeals Officer Decision which addressed the appeals of three separate Hearing Officer Decisions: AO1900471-RKN, AO1902049-RKN, and AO1802418-RKN. KLINE, however, only petitions for judicial review of the issue on appeal in AO1900471-RKN, which was the Hearing Officer Decision, dated July 19, 2018, reversing the TPA's May 24, 2018 and June 13, 2018 determination letters regarding apportionment of KLINE's PPD award. (See Petition, Ex. 1, Decision of the Appeals Officer ("Decision"); ROA 001-022). KLINE argues that the Appeals Officer's August 20, 2019 Decision prejudices substantial rights of the Petitioner; was affected by error of law; was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and was arbitrary and capricious based upon an abuse of discretion by the Appeals Officer.

In this Order, this Court will determine: (1) whether the Appeals Officer's August 20, 2019 Decision which reversed the Hearing Officer's Decision dated July 19, 2018, and affirming the underlying determinations, dated May 24, 2018 and June 13, 2018, was the result of reversible error of law; and (2) whether the Appeals Officer's Decision finding that the Petitioner's PPD award must be apportioned 75% as pre-existing is not supported by substantial evidence and results in an abuse of discretion.

"Judicial review of a final decision of an agency must be: (a) Conducted by the court without a jury; and (b) Confined to the record." *NRS 233B.135(1)*. "In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities." Id. "The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3."

NRS 233B.135(2). "The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." *NRS 233B.135(3).* "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."
>
> *NRS 233B.135(3).*

Under the standard of review for appeals, if factual findings of the agency are supported by evidence, they are conclusive and reviewing the court's jurisdiction is confined to questions of law. *NRS 612.530(4); NRS 233B.135;* Whitney v. State, Dep't of Employment Sec., 105 Nev. 810, 812 (1989), citing Nevada Employment Sec. Dep't v. Nacheff, 104 Nev. 347, 349 (1988). On appeal, the District Court reviews questions of law, including the administrative agency's interpretation of statutes, de novo. City of N. Las Vegas v. Warburton, 127 Nev. 682, 686 (2011). Review of an Appeals Officer's decision is limited to determining whether there was substantial evidence in the record to support the Appeals Officer's decision and that the findings and ultimate decisions of the Appeals Officer are not disturbed unless they were clearly erroneous or otherwise amounted to an abuse of discretion. Nevada Indus. Comm'n v. Reese, 93 Nev. 115, 125 (1977); State Indus. Ins. Sys. v. Snapp, 100 Nev. 290, 294 (1984); Stark v. State Indus. Ins. Sys., 111 Nev. 1273, 1275 (1995); State Indus. Ins. Sys. v. Hicks, 100 Nev. 567, 569 (1984), State Indus. Ins. Sys, v. Swinney, 103 Nev. 17, 20 (1987); State Indus. Ins. Sys. v. Christensen, 106 Nev. 85, 88 (1990); Brown v. State Indus. Ins. Sys., 106 Nev. 878, 880 (1990); Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 331 (1993).

The review of the District Court is confined to the record and the court is precluded from substituting its own judgment for that of the agency as to the weight of the evidence on questions of fact. Nevada Indus. Comm'n v. Williams, 91 Nev. 686, 688 (1975); State Indus. Ins. Sys. v. Swinney, 103 Nev. 17, 19-20 (1987); Palmer v. Del Webb's High Sierra, 108 Nev. 673, 686 (1992). The Court's review is limited to a determination of whether the Appeals Officer acted arbitrarily or capriciously, and where there was substantial evidence to support the decision, the Court cannot

substitute its own judgment for that of the Appeals Officer. Construction Indus. Workers' Comp. Group v. Chalue, 119 Nev. 348, 352 (2003); Meridian Gold Co. V. State, 119 Nev. 630, 633 (2003); State v. Public Employees' Ret. Sys., 120 Nev. 19, 23 (2004).

An "agency's fact-based conclusions of law 'are entitled to deference, and will not be disturbed if they are supported by substantial evidence.'" Law Offices of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362 (2008). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion, and [the Court] may not reweigh the evidence or revisit an appeals officer's credibility determination." Id.; *NRS 233B.135(4)*. "While it is true that the district court is free to decide pure legal questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." Jones v. Rosner, 102 Nev. 215, 217 (1986).

CITY OF RENO contends that the appealed issue is a mixed question of law and fact entitled to deference; a question of law as to whether the Appeals Officer correctly interpreted NRS 616C.490(9) and NAC 616C.490 with respect to apportionment, and of fact, as the Appeals Officer was required to apply the facts to the law. CITY OF RENO argues that KLINE is requesting this Court substitute its opinion for that of the Appeals Officer's as to the application of the evidence to the law and contends that to do so is impermissible.

Petitioner, KIMBERLY KLINE argues that reversal of the Appeals Officer's August 20, 2019 Decision is required because the decision is procedurally deficient and the result of reversible error. KLINE argues that the Appeals Officer committed reversible error in two areas: (1) the Appeals Officer relitigated facts which she previously decided in a prior appeal, and (2) the Appeals Officer did not correctly apply NAC 616C.490 and NRS 616C.490. KLINE also argues that the Appeals Officer's Decision is erroneous in view of the reliable, probative, and substantial evidence on the whole record and results in an abuse of discretion.

KLINE argues that the Appeals Officer's Decision relied on the opinions of Dr. Hall which the Appeals Officer previously determined to be not credible, inconsistent with the medical records, and were not stated within a reasonable degree of medical probability. (ROA 174:8-10). KLINE

argues that since the Appeals Officer gave little or no weight to the opinions of Dr. Hall, it is reasonable to conclude that any subsequent opinion by a rating physician should also be bound by those findings. KLINE argues that the Appeals Officer failed to consider her prior findings and conclusions, therefore her August 20, 2019 Decision is based on faulty information.

KLINE also argues that substantial evidence on the record establishes that she did not have a pre-injury impairment under the AMA Guides, 5th Edition. Specifically, KLINE notes the Appeals Officer previously found that Dr. Hansen stated that there was a high probability within a degree of medical certainty that KLINE's injuries were related to the car accident. (ROA 170:23-28). Dr. Hansen opined that the "MRI done at RDC confirms said impression with two large left paracentral disc protrusions at C5-6 and C6-7 causing severe left NFS at each level. These injuries do appear to be directly related to the recent rear-end type motor vehicle collision." (ROA 306). KLINE asserts that the Appeals Officers found that "substantial evidence supports a finding that the industrial accident aggravated the pre-existing condition and that the resulting conditions was the substantial contributing cause of the resulting condition." (ROA 174:6-8). KLINE argues that apportioning the rating by 75% when it had already been determined that the industrial injury was the substantial contributing factor for the resulting condition is inconsistent with the Appeals Officer's prior decision. Therefore, KLINE asserts that the Appeals Officer committed reversible error of law by re-litigating those facts which she previously decided in a prior appeal.

CITY OF RENO, however, argues that KLINE's argument ignores the fact that the question on appeal in the earlier decision was whether claim closure without a PPD rating was proper. (ROA 167:18-23). CITY OF RENO asserts that Dr. Hansen's statement about KLINE's injuries being related to the car accident, and the Appeals Officer's finding that KLINE had "met her burden of proof with substantial evidence that she is not at maximum medical improvement and needs further treatment" required the claim to remain open. (ROA 174:11-12). Thus, the earlier decision, CITY OF RENO contends, makes no findings as to the propriety of apportionment, as the January 18, 2017 Appeals Officer Decision contemplated a possible future PPD evaluation once KLINE had completed treatment and was determined stable. (ROA 174:18-19).

///

CITY OF RENO asserts that in the prior decision the Appeals Officer gave more weight to Dr. Sekhon's and Dr. Hanson's medical opinions, and less weight to Dr. Hall's opinion that KLINE did not suffer a ratable impairment. CITY OF RENO argues that the Appeals Officer's decision to give Dr. Hall's opinion no weight is not binding on future rating physicians, as the prior decision pre-dated the spinal fusion surgery, and the PPD evaluations by Dr. Anderson and Dr. Jempsa, as well as Dr. Betz's records review report and expert testimony, upon which the Appeals Officer specifically relied in reaching the Decision at issue here.

The Appeals Officer also gave Dr. Jempsa's PPD evaluation no weight because there was a large discrepancy in Dr. Jempsa's range of motion findings which made his results questionable as "[i]t is well recognized that patients learn from prior rating experience." (ROA 017:16-17, 018:12-18, 1192). Dr. Jempsa failed to apportion because KLINE stated she had no problems with her neck prior to the industrial injury and because he had received no records prior to the industrial injury on June 25, 2015, which the Appeals Officer found was not required under NAC 616C.490. (ROA 018:3-12). The Appeals Officer concluded that Dr. Jempsa's findings were also questionable because "the medical evidence depicts stenosis, spondylitis, and osteophytes which take years if not decades to form." (ROA 018:12-14).

The Appeals Officer based the decision upholding apportionment primarily on the medical evidence from Dr. Anderson and Dr. Betz, whom she "found to be credible and their opinions given the most weight." (ROA 007:19-20, 013:25-26, 014:1-2). Although Dr. Betz testified that Dr. Hall "was probably correct that the [Claimant] suffered a sprain/strain," and that she did eventually improve "as would be expected with a . . . sprain/strain," Dr. Betz testified that there was not "any significant relationship" between those symptoms and the degenerative disc disease findings on KLINE's MRI results. (ROA 055:11-17, 056:1-2). Dr. Betz testified that the reason it took KLINE seven months to improve from the sprain/strain was because "there was unrecognized underlying multilevel degenerative disc changes." (ROA 055:18-23).

While it is true that Dr. Betz's report notes that Dr. Hall's opinion supports Dr. Anderson's conclusion that KLINE's cervical spine pathologies were primarily degenerative in nature and pre-existing, the Appeals Officer Decision does not rely on Dr. Hall's opinion alone. (ROA 011).

Moreover, regardless of whether Dr. Betz relied on Dr. Hall's opinion, what is at issue here is KLINE's pain and additional treatment related to the pre-existing degenerative condition which began after she had recovered from the industrial sprain/strain and was released by Dr. Hall. Dr. Betz's record review report and extensive expert testimony make clear that he considered all medical reporting and imaging studies in reaching his conclusion that the medical evidence establishes that KLINE had a pre-existing condition. (ROA 011-013).

CITY OF RENO argues that Dr. Betz's opinion incorporating Dr. Hall's opinion and his reliance on Dr. Hall's reporting was not inconsistent with the Appeals Officer's prior decision and that the prior decision does not preclude the Appeals Officer from taking that subsequent medical history and documentation into consideration when reaching decisions. In view of all the medical evidence, much of which did not exist at the time of the prior decision relied on by KLINE, the Appeals Officer properly concluded that KLINE had a pre-existing condition mandating apportionment of impairment under NAC 616C.490. This presents a new question of law not previously addressed by the Appeals Officer and which requires a separate and distinct legal analysis and application of the medical evidence than that performed in the prior decision. Thus, CITY OF RENO argues and the Court finds that the prior decision concluding that the industrial injury aggravated a pre-existing condition under NAC 616C.175(1), makes the present decision upholding apportionment based on substantial medical evidence establishing that KLINE had a pre-existing cervical spine condition consistent with the law of the case. The Court finds the Appeals Officer Decision, dated August 20, 2019, was not the result of reversible error nor an abuse of discretion as the Appeals Officer did not re-litigate facts previously decided in a prior appeal and the Decision is supported by substantial evidence.

KLINE also argues that the Appeals Officer erred by not complying with the mandates of NRS 233B.125. NRS 233B.125 states:

> "A decision or order adverse to a party in a contested case must be in writing or stated in the record. Except as provided in subsection 5 of NRS 233B.121, a final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon a preponderance of the evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with

> agency regulations, a party submitted proposed findings of fact before the commencement of the hearing, the decision must include a ruling upon each proposed finding. Parties must be notified either personally or by certified mail of any decision or order. Upon request a copy of the decision or order must be delivered or mailed forthwith to each party and to the party's attorney of record."

NRS 233B.125.

The Court finds the Appeals Officer decision included findings of fact and conclusions of law, separately stated. In addition, the Court finds the Appeals Officer's findings of fact and decision are based upon a preponderance of evidence, and the Appeals Officer enumerated each of the facts underlying those findings.

In addition, KLINE argues that the Appeals Officer committed reversible error by not correctly apply NRS 616C.490 and NAC 616C.490. KLINE argues that NRS 616C.490 requires that there be evidence that a ratable impairment, as defined by the AMA Guides, existed on the date of the industrial injury for apportionment to occur. KLINE argues there is no prior medical records confirming that there was a ratable impairment, prior residual impairment, and proof of a residual impairment which existed on the date of the industrial injury and that Dr. Jempsa, after reviewing numerous prior records predating KLINE's industrial injury, found apportionment was not appropriate. (ROA 617). KLINE asserts that Dr. Betz conceded that there is no documentation concerning the scope and nature of the impairment which existed before the industrial injury. (ROA 087, 088, 094). Thus, KLINE contends that at the time of the industrial injury, she had a 0% impairment due to any pre-existing condition that she may have had, and therefore, the impairment may not be apportioned.

NRS 616C.490 states: "Except as otherwise provided in subsection 10, if there is a previous disability, . . . the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting there from the percentage of the previous disability as it existed at the time of the subsequent injury." *NRS 616C.490(9)* [effective through December 31, 2019]; Pub. Agency Comp. Tr. (PACT) v. Blake, 127 Nev. 863, 867 (2011) (holding calculations for prior and subsequent injuries when impairment ratings for those injuries were based on different editions of the applicable guide, be reconciled by first using the current edition of the AMA Guides to determine both the percentage of the entire disability and of the previous disability).

The Nevada Administrative Code provides the procedure for completing apportionment. *See NAC 616C.490.* The Administrative Code requires a precise apportionment to be completed "if a prior evaluation of the percentage of impairment is available and recorded for the pre-existing impairment." *NAC 616C.490(3).* However, the Administrative Code specifically contemplates the situation here, where there is no prior rating evaluation of the pre-existing condition. In such a case, the Administrative Code provides in pertinent part that:

> 4. Except as otherwise provided in subsection 5, . . . if no previous rating evaluation was performed, the percentage of impairment for the previous injury or disease and the present industrial injury or occupational disease must be recalculated by using the *Guides*, as adopted by reference pursuant to NAC 616C.002. The apportionment must be determined by subtracting the percentage of impairment established for the previous injury or disease from the percentage of impairment established for the present industrial injury or occupational disease.
>
> 5. If precise information is not available, and the rating physician or chiropractor is unable to determine an apportionment using the *Guides* as set forth in subsection 4, an apportionment may be allowed if at least 50 percent of the total present impairment is due to a preexisting or intervening injury, disease or condition. The rating physician or chiropractor may base the apportionment upon X-rays, historical records and diagnoses made by physicians or chiropractors or records of treatment which confirm the prior impairment.

NAC 616C.490(4)-(5).

"If there are preexisting conditions . . . the apportionment must be supported by documentation concerning the scope and the nature of the impairment which existed before the industrial injury or the onset of disease." *NAC 616C.490(6).* CITY OF RENO argues that NAC 616C.490 does not require that the documentation of a pre-existing condition predate the industrial injury. In Ransier v. State Industrial Insurance Systems, the Nevada Supreme Court stated that "the clause 'which existed before the industrial injury or the onset of the disease' refers to the impairment and not the document." Ransier v. State Indus. Ins. Sys., 104 Nev. 742, 744 at fn. 1 (1988). Although the reference to this regulation is from the prior version, NAC 616.650(6), the language has remained the same. The Ransier Court held that the Nevada Administrative Code "does not require historical documentation, only 'documentation concerning the scope and nature of the impairment,' which can come, as here, from examination at the time of the second injury." Id. (affirming apportionment was proper where no records or documents existed concerning claimant's prior injury, but where both treating physicians found claimant's two injuries to be distinguishable).

CITY OF RENO also argues that the Appeals Officer correctly interpreted NRS 616C.490 and NAC 616C.490 in finding apportionment does not require that the pre-existing condition be a ratable impairment. Rather, CITY OF RENO argues that the rating physician must look for a prior impairment, shown by medical records post-dating the industrial injury. CITY OF RENO argues that KLINE incorrectly insists that apportionment for a pre-existing disease or condition requires a "ratable" impairment to have existed on the date of the industrial accident. "[W]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." Nev. Dep't of Corr. v. York Claims Servs., Inc., 131 Nev. 199, 203 (2015). CITY OF RENO argues that the plain language of NAC 616C.490 simply requires an "impairment" with no requirement that the pre-existing condition or disease be previously rated.

"A rating physician or chiropractor shall always explain the underlying basis of the apportionment as specifically as possible by citing pertinent data in the health care records or other records." *NAC 616C.490(7)*. Here, the Appeals Officer found "Dr. Betz to be a credible witness and his testimony is given great weight. Dr. Betz's testimony was uncontroverted at [the] hearing and no opposing or contradicting expert witness testimony was provided." (ROA 007:19-21). Based on the records from Dr. Sekhon, who performed KLINE's spinal fusion surgery, in addition to MRI, x-ray records, and historical records and diagnoses, demonstrating the scope and nature of the impairment, Dr. Betz testified that the present impairment was at least fifty percent (50%) due to KLINE's pre-existing impairment. (ROA 15:24-27, 16:1-10). The Appeals Officer concluded that Dr. Betz and Dr. Anderson established the underlying basis for apportionment as required by NAC 616C.490(5)-(7). (ROA 16:10-15). CITY OF RENO argues and the Court finds that KLINE's contention that apportionment is improper due to a lack of prior documentation of the pre-existing, ratable condition is unpersuasive where the Appeals Officer found Dr. Betz has expressly identified the x-rays, historical records, and diagnoses confirming KLINE's prior impairment as required by NAC 616C.490(5).

Following review of the Appeals Officer's Decision, the Court finds the Appeals Officer did not commit any clear error of law nor arbitrary or capricious abuse of discretion. As discussed supra, the Court finds the Appeals Officer correctly applied NRS 616C.490 and NAC 616C.490. In

addition, the Court finds the Decision is supported by substantial evidence and the Appeals Officer's findings of fact and conclusions of law in the Decision complied with the requirements set forth in NRS 233B.125. KLINE was properly awarded 6% PPD award, which apportioned 25% WPI of the cervical spine as 75% non-industrial and 25% industrial. Therefore, the Court finds there is no basis to grant review and the Petition should be denied.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that KIMBERLY KLINE's Petition for Judicial Review is DENIED and the decision of the Appeals Officer, dated August 20, 2019, is AFFIRMED.

DATED this 10 day of February, 2021.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV19-01683

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 10 day of February, 2021, I filed the **ORDER DENYING PETITION FOR JUDICIAL REVIEW** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____**Personal delivery to the following: [NONE]**

XX **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

TIMOTHY ROWE, ESQ. for CANNON COCHRAN MANAGEMENT SERVICES, CITY OF RENO

LISA ALSTEAD, ESQ. for CANNON COCHRAN MANAGEMENT SERVICES, CITY OF RENO

HERBERT SANTOS, JR., ESQ. for KIMBERLY M KLINE

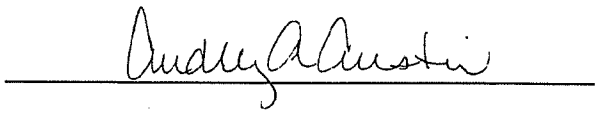
_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**Placed a true copy in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 10 day of February, 2021.



STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
APPEALS DIVISION

In the Matter of the Contested Industrial Insurance Claim of:

Claim No.: 15853E839641

Hearing Nos.: 1803718-JL
1803717-JL
1901522-JL

KIMBERLY KLINE,

Appeal Nos. 1900471-RKN
1902049-RKN
1802418-RKN

Claimant.

_____/

APPEALS OFFICER DECISION

An appeal hearing was conducted on May 1, 2019. Claimant Kimberly Kline ("Claimant") was represented by Herb Santos, Jr. of the Law Firm of Herb Santos, Jr. The self-insured employer City of Reno ("Employer") was represented by Lisa Wiltshire Alstead of the law firm McDonald Carano, LLP. The hearing was conducted pursuant to Chapters 616A through 617 and 233B of the Nevada Revised Statutes.

The issues presented in this appeal include:

1. **AO1900471-RKN** – The Employer's appeal of the July 19, 2018 Hearing Officer Decision reversing the Employer's third-party administrator's May 24, 2018 and June 13, 2018 determination letters. The May 24, 2018 determination letter notified Claimant that Dr. Jempsa's permanent partial disability ("PPD") rating of 27% was being held in abeyance. The June 13, 2018 determination letter offered Claimant a 6% PPD award based on Dr. Betz's reporting agreeing with Dr. Anderson's reporting as to appointment and offering a 6% PPD award. The Hearing Officer Decision reversed these decisions finding no medical evidence to justify a 75% apportionment.

2. **AO1902049-RKN** – Claimant's appeal of the December 27, 2018 Hearing Officer Decision affirming and remanding Employer's third-party administrator's September 20,

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2018 determination letter offering the undisputed 6% PPD award in lump sum or installments and 21% in monthly installments pursuant to NRS 616C.380.

3. **AO1802418-RKN** – The Employer's appeal of the January 16, 2018 Hearing Officer Decision remanding the December 5, 2017 determination letter awarding a 6% PPD award. The Hearing Officer found a medical question on apportionment and ordering a second PPD evaluation under NRS 616C.330.

The evidence presented at hearing consisted of 14 separate multipage exhibits identified as Exhibits 1 through 4 (previously admitted in Appeal No. 1802418-RKN) and Exhibits A through J marked and entered into evidence at the time of hearing. Witness testimony was provided by Claimant. Jay Betz, M.D. was qualified as an expert and provided expert testimony. Having reviewed the documentary evidence submitted by the parties, considered the witness and expert testimony at the appeal hearing, and considered the arguments of counsel, the Appeals Officer makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Claimant worked as a parking enforcement officer for the City. On June 25, 2015, the Claimant was injured when her work vehicle was rear ended by another vehicle. (Ex. 2, pp. 4-6.) This was her second motor vehicle accident within a month, the first of which occurred on or around June 3, 2015. (Ex. 2, p. 16.) Claimant's prior injury from the first accident was nearly resolved at the time of the second injury. [1] (Ex .2, p. 16.)

The Claimant was treated at St. Mary's Regional Medical Center for back and neck pain. (Ex. 2, pp. 16-18.) She was diagnosed by Dr. Richard Law with an acute lumbar radiculopathy, sprain of the lumbar spine, and acute pain the lower back. (Ex. 2, p. 17.) On July 23, 2015, the claim was accepted for cervical strain. (Ex. 2, p. 60.) The Claimant received medical treatment with Scott Hall, M.D. in addition to chiropractic care and physical therapy. (*See generally* Ex. 2.)

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[1] In AO 56832-RKN, this Court found that the Claimant's industrial claim was closed prematurely. (Ex. 1, pp. 161-170.)

On October 28, 2015, Dr. Hall found the Claimant's condition at maximum medical improvement, stable not ratable, and released her to full duty with no restrictions. (Ex. 2, p. 97.)

On January 13, 2016, the Claimant underwent an MRI, which found disc degeneration with large disc protrusions at the C5-C6 levels resulting in complete effacement of CSF from the ventral and dorsal aspects of the cord with severe canal stenosis. (Ex. 2, p. 110.) In AO 56832-RKN, this Court specifically found that Dr. Hansen specifically opined that the "MRI done at RDC confirms said impression with two large left paracentral disc protrusions at C5-6 and C6-7 causing severe left NFS at each level. These injuries do appear to be directly related to the recent rear-end type motor vehicle collision." (Ex. 1, p. 167.)

On March 16, 2016, Dr. Hall noted that there was no evidence of neurologic involvement after the June 25, 2015 accident, specifically stating that the new onset of severe symptoms started quite suddenly and it is uncertain if there is any relation to the industrial injury, also noting that the Claimant sought treatment from an orthopedist prior to the June 2015 injury. (Ex. 2, pp. 151-152.) Finally, Dr. Hall noted that all indications were that the Claimant had completely recovered from the industrial injury by the end of October, 2015. (*Id.*)

On July 5, 2016, the Claimant saw Lali Sekhon, M.D. who recommended a C4-C5 to C6-7 decompression and fusion surgery. (Ex. 1, pp. 78-83.) On June 12, 2017, Dr. Sekhon performed a C4-5, C5-6, and C6-7 anterior cervical decompression, interbody fusion. (Ex. I, p. 126.) On September 11, 2017, Dr. Sekhon determined that Claimant reached maximum medical improvement, released her to full duty, and she was ratable. (Ex. A, p. 148.)

On November 10, 2017, Dr. Russell Anderson conducted a PPD evaluation. (Ex. 2, pp. 165-171.) Dr. Anderson concluded that the Claimant has a 25% whole person impairment from the cervical spine. (*Id.* at 171.) Dr. Anderson's report further stated the Claimant had underlying cervical spine issues that pre-date this work-related car accident and injury, specifically addressing an MRI on January 3, 2016, and radiograph reports which show cervical spine degenerative discs with large protrusions at C5-6, C6-7, effacement of the CSF and severe canal stenosis. (*Id.*) Dr. Anderson stated, "It is not logical to believe that these findings are related to the car accident she

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was involved in 6 months earlier." (*Id.* at 170.) Thus, 75% of the impairment was apportioned as non-industrial. (*Id.* at 180-171.)

The 25% of the Claimant's impairment that was apportioned as industrial was concluded as such because: (i) the Claimant had no documented cervical spine injury or pain immediately after the accident (symptoms began June 30, 2015), after that, the cervical strain could be described as slight; (ii) the findings of cervical spine spondylosis, stenosis, and disc bulges cannot be logically attributable to this car accident/ work injury. These findings provided the indication for fusion surgery in the cervical spine; and (iii) the Claimant had responded well to physical therapy and medical treatment and had nearly completely resolved her cervical spine complaints prior to December, 2015, and she had no upper extremity symptoms at the time of release from care. (*Id.* at 170.)

Finally, Dr. Anderson's report acknowledges that the Claimant denies any prior upper extremity symptoms before this injury, however, this work injury likely played some role in the onset of symptoms that led to surgery, but was not the primary cause. (*Id.*) Based on Dr. Anderson's review, 75% of the impairment was apportioned as non-industrial. (*Id.*) As such, he concluded that Claimant has a 6% whole person impairment related to the June 25, 2015 industrial injury. (*Id.*) Dr. Anderson is found to be credible and his reporting reliable.

On December 5, 2017, the third-party administrator issued a determination letter awarding a 6% PPD award based on Dr. Anderson's PPD evaluation. (Ex. 2, p. 175.) The Claimant appealed this determination and a hearing was conducted by the Hearing Officer on January 10, 2018. On January 16, 2018, the Hearing Officer entered a Decision and Order remanding the determination finding a medical question regarding Dr. Anderson's 75% apportionment and ordering a second PPD evaluation. The Employer appealed this determination and requested a stay.

A stay was initially entered. It was subsequently lifted and a second evaluation ordered. (Order, 3/27/18, Appeal No. 1802418-RKN.) James Jempsa, M.D. conducted the second PPD evaluation on May 8, 2018. (Ex. G, p. 13.) Dr. Jempsa found a 27% whole person impairment and failed to address apportionment. (Ex G, p. 13.) Because apportionment was not addressed,

the third-party administrator sent a follow up request that Dr. Jempsa review Dr. Anderson's PPD evaluation and address apportionment. (*See* Ex. G, p. 26.) On May 18, 2018, Dr. Jempsa provided an Addendum which stated, "You will need to contact Dr. Anderson concerning his rationale for apportionment. . . the Claimant stated that she had no problems with her neck prior to her industrial injury of June 25, 2015. I have not received any medical records prior to the industrial injury. . . it is my opinion that apportionment is not necessary in this case." (*See id.*) Dr. Jempsa is found to not be credible and his report is not given any weight. Dr. Jempsa failed to consider Claimant's preexisting conditions as evidenced in the medical reporting.

Subsequently, the third-party administrator sought a records review by Jay Betz, M.D. On May 24, 2018, third-party administrator sent notice out to the Claimant that it is holding the PPD award in abeyance pending Dr. Betz's review. The Claimant appealed this determination and it is the subject of this appeal.

On June 4, 2018, Dr. Betz provided his review. (Ex. H, pp. 6.) Dr. Betz noted that both Dr. Anderson and Dr. Jempsa agreed there is 12% whole person impairment utilizing Table 15-7 and that there was a 1% whole person impairment for sensory deficit in the left C6 distribution. (Ex. G at p. 4.) However, there was a large discrepancy between the active range of motion findings. Dr. Betz continued on stating that Dr. Jempsa provided no discussion or explanation for the substantial variation, and it is well recognized that patients learn from prior rating experiences, particularly when findings are "under the influence of the individual," such as active range of motion. (Ex. G. at p. 4.) Dr. Betz states that, absent an objective basis for the variation, Dr. Anderson's range of motion findings should have priority. (Ex. G. at p. 5.)

Dr. Betz's records review report specifies the medical evidence confirming Claimant had a preexisting condition:

> Dr. Anderson correctly points out that the patient's cervical pathologies were primarily degenerative in nature and preexisting. This conclusion is further supported by Dr. Hall's opinion on March 16, 2016, in which he noted Ms. Kline's cervical symptoms were initially consistent with a sprain strain and that she recovered completely from the industrial injury with conservative treatments by the end of October 2015. He goes on to conclude that there is no objective evidence to connect the patient's significant MRI findings of January 13, 2016 with the

> industrial injury. It is also informative that Ms. Kline had no symptoms or examination findings of neck injury at time of her initial presentation to the ER and was not found to have acute injury related pathologies on MRI.
>
> If the occupational incident had significantly aggravated the patient's preexisting pathologies, the development of radiculopathy symptoms and findings would be expected in the first few days or weeks and not 5 months later. Consequently, it is likely that the patient's radicular symptoms were the result of a natural progression of her significant multilevel degenerative changes rather than the [industrial] injury.

(Ex. G at p. 5.)

Dr. Betz's record review also confirms that Claimant had a non-industrial car accident several months prior to the car accident that is subject to this industrial injury. (Ex. G at p. 1.) An MRI taken a month prior to the industrial injury confirmed the herniated disc at L3-4 and L4-5 had nearly resolved in the intervening period. (Ex. G at p. 2.) Claimant's symptoms reported after her the June 25, 2015 second auto accident were complaining of neck, upper back and low back pain. (Ex. G at p. 2.) He also reported that Claimant's January 13, 2016 MRI scan of her cervical spine was remarkable for disc degeneration with large disc protrusions at C5-6 and C6-7. (*Id.*) Dr. Betz reported that Claimant's neurosurgical consultation with Dr. Sekhon indicated the Claimant had preexisting spondylosis C4 through C7 with cord compression C5-6 and C6-7, mobile spondylolisthesis at C4-5 and failed conservative therapy. (*Id.*) Further, the accident exacerbated her underlying stenosis. (*Id.*) Dr. Betz reviewed the April 21, 2017 x-rays showing "mild disc space narrowing and facet degenerative changes of the lower cervical spine with development of retrolisthesis of 2 millimeters C4 on 5 and 1 millimeters C6 on 7." (Ex. G at p. 3.) An MRI on the same day showed moderate posterior disc osteophyte complex through C4 through C6 resulting in mass effect upon the ventral spine cord and moderate to severe central canal stenosis." (*Id.*)

Ultimately, Dr. Betz agreed with Dr. Anderson's findings of apportionment noting Dr. Anderson's conclusions "are well supported by the medical record, known pathologies, AMA guides and Nevada Administrative Code." (Ex. G at p. 5.) Based on Dr. Betz's assessment, on June 13, 2018 third-party administrator issued a determination offering the Claimant a 6% PPD

award consistent with Dr. Betz and Dr. Anderson's findings. The Claimant appealed this determination as well and it is also the subject of this appeal. (Ex. D, p. 10.)

A hearing was conducted before a Hearings Officer on July 12, 2018 addressing both the third-party administrator's May 24, 2018 and June 13, 2018 determinations. (Ex. D, p. 1.) The Hearing Officer found that no evidence has been presented to justify 75% apportionment and the Claimant is entitled to the 27% PPD award determined by Dr. Jempsa. (*Id.*) The Employer appealed this decision.

At the appeal hearing on May 1, 2019, witness testimony was provided by Claimant. Dr. Betz was found to be a qualified and admitted as an expert. Dr. Betz testified that Claimant had cervical pathologies were primarily degenerative in nature and preexisting including the Claimant's spondylitis and stenosis. Dr. Betz explained that Claimant's MRI revealed moderate posterior disc osteophyte complex through C4 through C6. He testified that osteophytes take years if not decades to develop. Dr. Betz opined that neither the first car accident several months before the industrial injury, nor the second car accident causing the industrial injury could have caused osteophytes which take years to develop. Dr. Betz further testified that if the car accident was the cause of Claimant's resulting conditions, as opposed to aggravation of a preexisting condition, the symptoms would have been immediate as to a gradual onset. Dr. Betz also testified as to each historical record, diagnosis, x-ray, and MRI that he relied upon to determine apportionment.

The Appeals Officer finds Dr. Betz to be a credible witness and his testimony is given great weight. Dr. Betz's testimony was uncontroverted at hearing and no opposing or contradicting expert witness testimony was provided.

Any finding of facts if appropriate shall be construed as conclusions of law, and any conclusions of law if appropriate shall be construed as findings of fact.

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CONCLUSIONS OF LAW

I. Employer's Appeal Regarding a Second PPD Evaluation Has Been Resolved.

Appeal No. 1802418-RKN involves the Employer's appeal of the January 16, 2018 Hearing Officer Decision regarding the December 5, 2017 determination letter awarding Claimant a 6% PPD award. In this decision, the Hearing Officer remanded the determination letter finding a medical question on apportionment and ordering that a second PPD evaluation be conducted pursuant to NRS 616C.330. (Ex. 2, p. 1.)

NRS 616C.330(3) provides:

> If necessary to resolve a medical question concerning an injured employee's condition or to determine the necessity of treatment for which authorization for payment has been denied, the hearing officer may order an independent medical examination, which must not involve treatment, and refer the employee to a physician or chiropractor of his or her choice who has demonstrated special competence to treat the particular medical condition of the employee, whether or not the physician or chiropractor is on the insurer's panel of providers of health care. If the medical question concerns the rating of a permanent disability, the hearing officer may refer the employee to a rating physician or chiropractor. The rating physician or chiropractor must be selected in rotation from the list of qualified physicians and chiropractors maintained by the Administrator pursuant to subsection 2 of NRS 616C.490, unless the insurer and injured employee otherwise agree to a rating physician or chiropractor. The insurer shall pay the costs of any medical examination requested by the hearing officer.

The Employer argued that the applicable statute where a claimant wants a second PPD evaluation and disagrees with the first PPD evaluation is NRS 616C.100. This statute provides:

> If an injured employee disagrees with the percentage of disability determined by a physician or chiropractor, the injured employee may obtain a second determination of the percentage of disability. If the employee wishes to obtain such a determination, the employee must select the next physician or chiropractor in rotation from the list of qualified physicians or chiropractors maintained by the Administrator pursuant to subsection 2 of NRS 616C.490. If a second determination is obtained, the injured employee shall pay for the determination. If the physician or chiropractor selected to make the second determination finds a higher percentage of disability than the first physician or chiropractor, the injured employee may request a hearing officer or appeals officer to order the insurer to reimburse the employee pursuant to the provisions of NRS 616C.330 or 616C.360.

The Employer appealed this decision and sought a stay, challenging the Hearing Officer's statement that he "finds a medical question regarding Dr. Anderson's 75% apportionment." The Claimant submitted no medical evidence in support of her appeal from the determination letter.

With no conflicting medical evidence to contradict the records reviewed and relied upon by Dr. Anderson or the findings in his PPD evaluation, the Employer argued it was improper to order a second PPD evaluation pursuant to NRS 616C.330(3) as no medical question was established by the Claimant. Rather, the Claimant simply disagreed with the percentage of disability as determined by the rating physician. NRS 616C.100 provides for exactly this scenario. "If the injured employee disagrees with the percentage of disability determined by a physician or chiropractor, the injured employee may obtain a second determination of the percentage of disability." NRS 616C.100(1) (emphasis added). A stay pending the appeal hearing was entered.

Subsequently, the stay was lifted by the Appeals Officer. Pursuant to an order dated March 27, 2018, the Employer was ordered to schedule a second PPD evaluation. (Order, 3/27/18, Appeal No. 1802418-RKN.) Dr. Jempsa was chosen off the rotation list. (*See* Ex. 3, p. 1.) On May 8, 2018, Dr. Jempsa performed his PPD evaluation. (Ex. G at pp. 2-13.) His PPD evaluation report was issued on May 14, 2018. (*Id.*) With this second PPD evaluation having been ordered by the Appeals Officer, the issue on appeal in Appeal No. 1802418-RKN has been rendered moot. The Appeals Officer concludes that this appeal has been resolved by interim order requiring the Employer to schedule and pay for a second PPD evaluation with Dr. Jempsa. Therefore, there are no additional issues for this appeal to be resolved at hearing and the appeal is rendered moot with the completion of the evaluation by Dr. Jempsa.

II. Claimant's Appeal Regarding the Award of The Undisputed 6% PPD Award has Been Resolved.

Appeal No. 1902049-RKN involves the Claimant's appeal of the December 27, 2018 Hearing Officer Decision affirming and remanding Employer's third-party administrator's September 20, 2018 determination letter offering the undisputed amount of the PPD award, 6%, in lump sum or installments and the remaining disputed amount of the PPD award, 21%, in installments pursuant to NRS 616C.380.

NRS 616C.380(1) provides, "[i]f a hearing officer, appeals officer or district court renders a decision on a claim for compensation and the insurer or employer appeals that decision, but is unable to obtain a stay of the decision: (a) Payment of that portion of an award for a permanent

partial disability which is contested must be made in installment payments until the claim reaches final resolution."

On January 24, 2019, following entry of the Hearing Officer Decision, the parties discussed the proper calculation of the lump sum and installment payments pursuant to NRS 616C.380. (Ex. F, p. 1.) The parties reached an agreement as to the calculation and a new determination letter was entered wherein Employer's third-party administrator was to initiate installment payments on the 27% due to Claimant's affirmation that she would not be electing a lump sum payment. (*Id.*) This determination letter resolved the issue presented by the December 27, 2018 Hearing Officer Decision and underlying determination letter. Claimant did not appeal the January 24, 2019 determination letter reflecting the parties' agreement on payment of installments pending litigation pursuant to NRS 616C.380. As such, the Appeals Officer concludes that Appeal No. 1902049-RKN is rendered moot by the subsequent determination letter dated January 24, 2019. With no appeal having been filed, a final determination has been entered and Employer, through its third-party administrator, properly commencing payment of the 27% PPD award in dispute upon Claimant's election to not seek a lump sum payment, this payment is proper and consistent with NRS 616C.380.

III. The Claim Was Properly Closed With a 6% PPD Award and Apportionment.

Appeal No. 1900471-RKN is the Employer's appeal of the Hearing Officer Decision dated July 19, 2018, reversing its third-party administrators May 24, 2018 and June 13, 2018 determination letters. (Ex. D, p.1.) The May 24, 2018 determination letter notified Claimant that Dr. Jempsa's PPD evaluation with a 27% WPI was being held in abeyance. (Ex. D, p. 9.) The June 13, 2018 determination letter notified Claimant that Dr. Betz, in his records review report, agreed with Dr. Anderson that PPD should be apportioned and offered the 6% PPD award. (Ex. D, p. 10.) The disputed Hearing Officer Decision reversed these two determinations finding no medical evidence to justify 75% apportionment.

A. <u>The Medical Evidence Established a Preexisting Condition.</u>

NAC 616C.490 provides regarding apportionment:

> 1. If any permanent impairment from which an employee is suffering following an accidental injury or the onset of an occupational disease is due in part to the injury or disease, and in part to a preexisting or intervening injury, disease or condition, the rating physician or chiropractor, except as otherwise provided in subsection 8, ***shall determine the portion of the impairment which is reasonably attributable to the injury or occupational disease and the portion which is reasonably attributable to the preexisting or intervening injury, disease or condition.*** The injured employee may receive compensation for that portion of his or her impairment which is reasonably attributable to the present industrial injury or occupational disease and may not receive compensation for that portion which is reasonably attributable to the preexisting or intervening injury, disease or condition. The injured employee is not entitled to receive compensation for his or her impairment if the percentage of impairment established for his or her preexisting or intervening injury, disease or condition is equal to or greater than the percentage of impairment established for the present industrial injury or occupational disease.
>
> 2. Except as otherwise provided in subsection 8, ***the rating of a permanent partial disability must be apportioned if there is a preexisting permanent impairment or intervening injury,*** disease or condition, whether it resulted from an industrial or nonindustrial injury, disease or condition.

Emphasis added.

Here, the medical evidence establishes that the Claimant had a preexisting condition which mandates the rating physician to apportion under NAC 616C.490(1). As identified by Dr. Anderson and Dr. Betz, the medical reporting in this case reflects the Claimant's history of preexisting cervical problems including the January 13, 2016 MRI and radiographic reports showing cervical spine degenerative discs with large protrusions at C5-6, C6-7, effacement of the CSF, and severe stenosis. (Ex. 1, p. 41.) Dr. Betz confirms that Dr. Anderson correctly points out that the "patient's cervical pathologies were primarily degenerative in nature and preexisting. This conclusion is further supported by Dr. Hall's opinion on March 16, 2016, in which he noted Ms. Kline's cervical symptoms were initially consistent with a sprain strain and that she recovered completely from the industrial injury with conservative treatments by the end of October 2015. He goes on to conclude that there is no objective evidence to connect the patient's significant MRI findings of January 13, 2016 with the industrial injury. It is also informative that Ms. Kline had no symptoms or examination findings of neck injury at time of her initial presentation to the ER and was not found to have acute injury related pathologies on MRI." (Ex. G at p. 5.)

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Dr. Betz also opined that '[i]f the occupational incident had significantly aggravated the patient's preexisting pathologies, the development of radiculopathy symptoms and findings would be expected in the first few days or weeks and not 5 months later. Consequently, it is likely that the patient's radicular symptoms were the result of a natural progression of her significant multilevel degenerative changes rather than the [industrial] injury." (Ex. G at p. 5.)

Additionally, Dr. Betz reported that there is "no objective evidence to connect the significant MRI findings of January 13, 2016 with the industrial injury." (Ex. I, p. 181.) He indicates that "[r]epeat x-rays on April 21, 2017 show mild disc space narrowing and facet degenerative changes of the lower cervical spine with development of retrolisthesis of 2 millimeters C4 on 5 and 1 millimeters C6 on 7." He also notes the Claimant showed improvement and physical therapy was recommended. Dr. Betz reported that Claimant's neurosurgical consultation with Dr. Sekhon indicated the Claimant had preexisting spondylosis C4 through C7 with cord compression C5-6 and C6-7, mobile spondylolisthesis at C4-5 and failed conservative therapy. (*Id.*) Further, the accident exacerbated her underlying stenosis. (*Id.*) Dr. Betz reviewed the April 21, 2017 x-rays showing "mild disc space narrowing and facet degenerative changes of the lower cervical spine with development of retrolisthesis of 2 millimeters C4 on 5 and 1 millimeters C6 on 7." (Ex. G at p. 3.) An MRI on the same day showed moderate posterior disc osteophyte complex through C4 through C6 resulting in mass effect upon the ventral spine cord and moderate to severe central canal stenosis." (*Id.*)

Dr. Betz's record review also confirms that Claimant had a non-industrial car accident several months prior to the car accident that is subject to this industrial injury. (Ex. G, p. 1.) An MRI taken a month prior to the industrial injury confirmed the herniated disc at L3-4 and L4-5 had nearly resolved in the intervening period. (Ex. G, p. 2.) Claimant's symptoms reported after her the June 25, 2015 second auto accident were complaining of neck, upper back and low back pain. (Ex. G, p. 2.)

Dr. Betz testified as an expert at the hearing and further expanded upon his medical opinion. He explained that if the occupational incident had significantly aggravated the patient's

preexisting pathologies the development of radiculopathy symptoms and findings would be expected in the first few days or weeks, not five months later. Dr. Betz concludes that the Claimant's need for surgery was primarily the result of preexisting pathologies. Absent those preexisting pathologies the patient would not have been a candidate for multilevel cervical discectomy and fusion. It is the fusion that now forms the basis for the patient's substantial permanent partial impairment. He testified that the level of fusion had by Claimant is the most common performed for degenerative conditions. He also testified that a neck fusion is not done for a cervical strain but rather only for significant cervical issues.

Dr. Betz further testified that Claimant's April 21, 2017 MRI revealed osteophytes. He explained that osteophytes take years if not decades to develop. Therefore, this condition was not caused by either car accident but rather is a preexisting condition that developed over time.

Dr. Betz confirmed in his report and in his testimony that he reviewed all medical reporting including Dr. Men-Muir's reporting from June 25, 2015, Dr. Hall's reporting from June 30, 2015 and reporting releasing Claimant on October 30, 2015. He testified he reviewed the January 13, 2016 MRI which showed remarkable disc degeneration with large disc protrusions at C5-6 and C6-7. He testified that Claimant had advanced degenerative spondylosis at multiple levels and underlying stenosis. He testified that he reviewed Dr. Sekhon's reporting including the July 5, 2016 report addressing Claimant's preexisting spondylosis at C4 through C7 and underlying stenosis.

Dr. Betz testified that he reviewed the April 21, 2017 repeat MRI and x-rays which revealed moderate posterior disc osteophyte complex at C4 through C6 resulting in mass effect upon the ventral spinal cord and moderate to severe central canal stenosis. He further reviewed the reporting from Dr. Sekhon's June 12, 2017 surgical report for the anterior cervical decompression C4 through C7 followed by interbody fusion.

Based on the medical reporting of Dr. Betz and Dr. Anderson, along with the expert testimony of Dr. Betz, the Appeals Officer concludes that the medical evidence establish Claimant

had a preexisting condition. Dr. Betz and Dr. Anderson are found to be credible and their opinions given the most weight.

No expert testimony was provided at hearing to contradict Dr. Betz. Further, while Claimant relies on Dr. Jempsa's reporting, the reporting is flawed. Dr. Jempsa reports that there are no prior records or ratings of the Claimant establishing a preexisting condition. As explained by Dr. Betz, this opinion is misplaced. Prior records or ratings are not necessary to establish a preexisting condition. He identified that page 2 of Chapter 1 of the AMA Guides, Fifth Edition, defines "impairment" as the loss of use or derangement of body part. There is no requirement that there be a "ratable impairment". NAC 616C.490 further confirms it is impairment, not ratable impairment, that is evaluated. In addition, the case *Ransier v. SIIS*, 104 Nev. 742, 744, 766 P. 2d 274, 275 (1988) also confirms it is appropriate to use medical records arising after the industrial injury to establish a preexisting condition when no records prior to the injury exist. *Id.* (finding that although no documents existed concerning Ransier's prior injury, both treating physicians found Ransier's two injuries to be distinguishable with a twisted knee differing greatly from osteoarthritic degeneration; competent evidence supported the physician's decision to apportion the two injuries). For this reason, Dr. Jempsa's PPD evaluation and addendum are flawed. Dr. Jempsa is not credible. He failed to consider the medical evidence establishing a preexisting condition.

Thus, based on all the medical evidence presented, and additionally the medical evidence reviewed and identified by Dr. Betz and Dr. Anderson establishing a preexisting condition, the Appeals Officer concludes that apportionment was required in this case pursuant to NAC 616C.490(1). NAC 616C.490(1) mandated that the rating physician "shall determine the portion of the impairment which is reasonably attributable to the injury or occupational disease and the portion which is reasonably attributable to the preexisting or intervening injury, disease or condition." NAC 616C.490(2) requires that "the rating of a permanent partial disability must be apportioned if there is a preexisting permanent impairment or intervening injury." Claimant was

no entitled to compensation for the portion of impairment "which is reasonably attributable to the preexisting or intervening injury, disease or condition." NAC 616C.490(1).

B. <u>It was Proper to Determine Apportionment Based on the Medical Records.</u>

NAC 616C.490(5)-(6) provides:

> 5. If precise information is not available, and the rating physician or chiropractor is unable to determine an apportionment using the *Guides* as set forth in subsection 4, an apportionment may be allowed if at least 50 percent of the total present impairment is due to a preexisting or intervening injury, disease or condition. The rating physician or chiropractor may base the apportionment upon X-rays, historical records and diagnoses made by physicians or chiropractors or records of treatment which confirm the prior impairment.
> 6. If there are preexisting conditions, including, without limitation, degenerative arthritis, rheumatoid variants, congenital malformations or, for claims accepted under NRS 616C.180, mental or behavioral disorders, the apportionment must be supported by documentation concerning the scope and the nature of the impairment which existed before the industrial injury or the onset of disease.
> 7. A rating physician or chiropractor shall always explain the underlying basis of the apportionment as specifically as possible by citing pertinent data in the health care records or other records.

As detailed in the above subsection, both Dr. Anderson and Dr. Betz in the medical reporting, and Dr. Betz in his expert testimony, identified the x-rays, MRIs, historical records and diagnoses which established a prior impairment. This documentation supported the scope and nature of the impairments identified to be preexisting. Dr. Betz explained that medical records he reviewed showed that when Claimant initially treated with Dr. Hall, she complained of neck issues that resolved. Months later, she had new radiculopathy indicating a nerve root deficit. The new symptoms were consistent with compressed root nerves, disc osteophyte complex, and the combined pathologies with discs and growths compressed the spinal cord causing stenosis or narrowing. The fusion performed by Dr. Sekhon removed the osteophytes and fused the disc space, this addressed Claimant's pain by relieving pressure on the nerves.

At the hearing, in addition to identifying all medical records, MRIs, x-rays, historical records and diagnoses relied upon, relied upon, Dr. Betz testified as to how this medical documentation concerned the scope and nature of the impairment that existed before the industrial injury. Dr. Betz identified that the nature of the impairment is advanced degenerative spondylosis

at multiple levels, stenosis, and osteophytes. This is reflected MRI and x-ray dated April 21, 2017 and further in Dr. Sekhon's July 5, 2016 medical reporting. He explained the scope was based on the medical reporting was severe, multi-level, and involved neurological compromise. He concluded that the present impairment was due at least 50% to Claimant's preexisting impairment.

As such, the Appeals Officer concludes that Dr. Anderson and Dr. Betz in their medical reporting, and Dr. Betz in his expert testimony, established under NAC 616C.490(5) that at least 50% of the Claimant's impairment was due to the preexisting condition. Dr. Anderson and Dr. Betz further established that apportionment for the impairment is supported the medical documentation concerning the nature and scope of the impairment as required by NAC 616C.490(6). These medial opinions and the expert testimony are found credible and satisfy the requirements under NAC 616C.490(5)-(6) for appointment. Both physicians further explained the underlying basis for the apportionment by citing pertinent data and medical records in support of their apportionment analysis. Dr. Betz provided detailed expert testimony as to each record relied upon and how that contributed to his apportionment analysis. For these reasons, NAC 616C.490(7) has also been satisfied by the medical evidence and expert testimony of Dr. Betz. Finally, Dr. Betz provided credible expert testimony confirming that his apportionment analysis also satisfied the requirements of the AMA Guides at page 11. Dr. Betz verified there was documentation of the prior factor, that the current impairment is greater as a result of the prior factor, and that there is evidence indicating the prior factor causes or contributed to the present impairment based on a reasonable probability.

The Appeals Officer further concludes that Dr. Anderson and Dr. Betz correctly relied on the medical evidence to determine that apportionment was required in this claim. Claimant's argument that there was an obligation for these physicians to consider prior legal decisions or legal determinations made by the Appeals Officer for this Claimant, and to ignore certain medical evidence as part of their apportionment analysis, is unsupported by, and contrary to, NAC 616C.490. Dr. Anderson and Dr. Betz properly looked to the medical evidence as required by NAC 616C.490(5)-(6) to determine apportionment was necessary in this case.

The Appeals Officer concludes that Dr. Anderson's apportionment of the Claimant's present impairment as 75% non-industrial and 25% industrial was proper and credible. Dr. Betz in his medical records review, and in his expert testimony, likewise confirmed he agreed with Dr. Anderson's apportionment of the impairment as 75% non-industrial and 25% industrial. Dr. Betz's testimony was uncontroverted, credible and reliable.

Finally, Dr. Jempsa's PPD evaluation is given no weight and is found to be erroneous for multiple reasons. First, as identified by Dr. Betz, Dr. Anderson's and Dr. Jempsa's PPD evaluations both utilized a range of motion method and both agreed there is a 12% whole person impairment utilizing Table 15-7 and both conclude there was 1% whole person impairment for sensory deficit in the left C6 distribution. However, the large discrepancy exists on range of motion findings of Dr. Anderson of 7% versus that of Dr. Jempsa of 16%. Dr. Betz testified that the AMA Guides (which must be followed in a PPD evaluation pursuant to NRS 616C.490) dictate in this situation. He states that at page 399 of the Guides, "'the physician should seek consistency when testing active motion . . .Tests with inconsistent results should be repeated. Results that remain inconsistent should be disregarded." He goes on to explain that a physician must recognize findings can be subjective under the influence of the individual and that "[i]t is well recognized that patients learn from prior rating experience" and that this can have a great effect on findings the individual can control such as range of motion testing. This calls question to the findings by Dr. Jempsa.

Dr. Betz also identifies that Dr. Jempsa's evaluation is questionable due to the failure to address apportionment. He notes that Dr. Anderson "correctly points out that the patient's cervical pathologies were primarily degenerative in nature and preexisting." This is supported by the Claimant's complete recovery from the industrial injury. "If the occupational incident had significantly aggravated the patient's preexisting pathologies the development of radiculopathy symptoms and findings would be expected in the first few days or weeks, not 5 months later." Dr. Betz concludes that the Claimant's need for surgery "was primarily the result of preexisting pathologies. Absent those preexisting pathologies the patient would not have been a candidate for

multilevel cervical discectomy and fusion. It is the fusion that now forms the basis for the patient's substantial permanent partial impairment."

Dr. Jempsa in his addendum stated that he did not apportion because the "claimant stated that she had no problems with her neck prior to her industrial injury on June 25, 2015. I have not received any medical records prior to the industrial injury of June 25, 2015." (Ex. I, p. 164.) As identified by Dr. Betz, the AMA Guides have no limitation that the medical records must pre-date the industrial injury or that an impairment rating have occurred. Rather, a physician must simply look for impairment and this can be evidenced in records post-dating the industrial injury. This is consistent with NAC 616C.490 which likewise looks to "impairment" based on the medical records with no requirement for a rating or for the records to pre-date the industrial injury. *Ransier* confirms apportionment is proper for a prior injury even when no prior rating or documents on the preexisting condition. *Ransier*, 104 Nev. at 744, 766 P.2d at 275. As detailed in Dr. Anderson's and Dr. Betz's reports, and Dr. Betz's testimony, the medical evidence depicts stenosis, spondylitis, and osteophytes which take years if not decades to form. These preexisting conditions were identified in the medical reporting. Dr. Jempsa's PPD evaluation and addendum are found not credible and contrary to the medical evidence and applicable law on apportionment. Dr. Jempsa's PPD rating of 27% is inconsistent with the medical reporting and fails to apportion as mandated by NAC 616C.490.

The Appeals Officer concludes that Dr. Anderson's and Dr. Betz's apportionment of the 25% whole person impairment as 75% non-industrial and 25% industrial is proper. The Claimant is entitled to a 6% PPD award after apportionment. The claim properly closed as of the date of Dr. Jempsa's PPD evaluation on May 8, 2018. Claimant is entitled to no additional benefits, medical treatment or compensation. Both the May 24, 2018 and June 13, 2018 determination letters are proper and affirmed. The July 19, 2018 Hearing Officer Decision is reversed.

IV. Apportionment is Required Under the Law of the Case

In a prior decision, Appeal No. 56832-RKN, the Appeals Officer determined the industrial injury aggravated a preexisting condition applying NRS 616C.175(1). The fact that the prior

decision concluded there was an aggravation of a preexisting condition does not preclude apportionment in a PPD evaluation of an impairment related to a preexisting condition. In fact, NRS 616C.490 and NAC 616C.490 apportionment of impairment related to a preexisting condition. Dr. Betz credibly testified that the industrial injury could not be the sole cause of Claimant's present impairment. Rather, Claimant that preexisting conditions and degenerative conditions that also contributed to Claimant's present impairment. Therefore, the Appeals Officer concludes that this decision is consistent with the law of the case set forth in the prior decision and that there must be apportionment in the PPD evaluation.

V. Claimant Shall Pay For Her Portion of the Expert Fees Incurred at Hearing

Prior to the appeal hearing, Claimant noticed the deposition of Dr. Betz. That deposition was continued multiple times by Claimant. The Claimant contended that the delay was due to the written discovery received by the Employer regarding their use of Dr. Betz as an expert. Ultimately, Claimant elected to question Dr. Betz at the time of hearing. The parties were each given equal time to examine and cross-examine Dr. Betz. Claimant elected to exceed her allotted time on cross-examination of Dr. Betz and agreed to pay for half of his fees incurred over the allotted time. The parties were ordered to share a half hour of Dr. Betz's time. Dr. Betz's rate for testimony is $750/hour. Therefore, Claimant's half of an half hour of time is $187.50. Claimant is hereby ordered to reimburse Employer's third-party administrator, CCSMI, within ten (10) days of entry of this order, for expert fees paid to Dr. Betz in the amount of $187.50.

DECISION

As to Appeal No. 1900471-RKN, the Hearing Officer Decision dated July 19, 2018 is hereby REVERSED. The underlying determinations dated May 24, 2018 and June 13, 2018 are AFFIRMED. Employer's third-party administrator properly offered Claimant a 6% PPD award following apportionment of the 25% PPD award as 75% non-industrial and 25% industrial, based on Dr. Anderson's PPD evaluation and Dr. Betz's records review report.

As to Appeal No. 1902049-RKN, this appeal is found to be resolved and the issue deemed moot pursuant to the parties' agreement as to payment of the installment payments pursuant to NRS 616C.380. The determination letter dated January 24, 2019 reflecting the parties' agreement was not appealed and is considered a final determination resolving the issue on appeal.

As to Appeal No. 1802418-RKN, the appeal is found to be resolved and the issue deemed moot pursuant to the Appeals Officer's Order Lifting the Stay and directing a second PPD evaluation. The completion of the second PPD evaluation by Dr. Jempsa resolved the issue on appeal rendering the appeal moot.

The claim was properly closed as of the May 8, 2018 date of Dr. Jempsa's PPD evaluation. Claimant was properly awarded a 6% PPD award, following apportionment of the 25% PPD award by Dr. Anderson, and as affirmed by Dr. Betz, which apportioned the whole person impairment as 75% non-industrial and 25% industrial. The Claimant may elect to accept her 6% PPD award in lump sum as awarded in the affirmed June 13, 2018, if she desires. Installment payments made since the date of offer can be properly deducted. The Insurer shall issue a lump sum offer with an updated calculation setting forth such deductions for installments paid.

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Claimant shall pay to Employer, through payment to third-party administrator, within ten days from the date of this order, the amount of $187.50 for expert fees incurred on behalf of Claimant at the appeal hearing.

DATED this 19th of August, 2019

Randolph Rea-Wells

APPEALS OFFICER

Submitted by:
LISA WILTSHIRE ALSTEAD
MCDONALD CARANO LLP

100 West Liberty St., 10th Floor
Reno, Nevada 89501

Notice: Pursuant to NRS 233B.130 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 by mail of this Decision.

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CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing ORDER was deposited into the State of Nevada Interdepartmental mail system, **OR** with the State of Nevada mail system for mailing via United States Postal Service, **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Suite 450, Carson City, Nevada, 89701 to the following:

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Dated this 21st day of August, 2019.

Brandy Fuller

Brandy Fuller, Legal Secretary II
Employee of the State of Nevada