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

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|---|---|
| KIMBERLY KLINE,<br><br>Appellant,<br><br>vs.<br><br>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.,<br><br>Respondents. | Supreme Court No. 82608 |

# APPELLANT'S OPENING BRIEF

Petition for Judicial Review Decision of
The Honorable Connie Steinheimer of the Second Judicial District Court
Reviewing the Decision of the Honorable Rajinder Nielsen, Esq.,
Appeals Officer of the Department of Administration
Hearings Division, State of Nevada

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.l(a), and must be disclosed:

1. The Appellant, KIMBERLY KLINE, (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case.

2. The undersigned counsel of record for the Appellant, KIMBERLY KLINE, is the only attorney appearing on her behalf in this matter. Undersigned is the only attorney that appeared on behalf of the Appellant, KIMBERLY KLINE, before the District Court. Undersigned is the only attorney that appeared on behalf of the Appellant, KIMBERLY KLINE, in the administrative proceedings before the Appeals Officer.

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

DATED this 18 day of January, 2022.

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By: _____
HERB SANTOS, JR., ESQ.
Attorney for Appellant

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under NRAP 3A(b)(1) because the matter arises from a final order of the District Court and no other proceedings remain below on the discreet issues raised in this appeal. Also under NRS 233B.150, this Court has specific authority and jurisdiction to hear this appeal as it is an appeal from the District Court of an administrative judicial review matter. The District Court had jurisdiction under NRS 233B.130 and NRS 616C.370.

This appeal is timely as the District Court's Decision Denying the Petition for Judicial Review was filed on February 10, 2021. The Notice of Entry of Order was filed on February 11, 2021. The Notice of Appeal was filed by Appellant in the District Court on March 8, 2021.

## ROUTING STATEMENT NRAP 28(a)(5)

The matter is presumptively assigned to the Court of Appeals under NRAP 17(b)(9), administrative agency cases except those involving tax, water, or public utilities commission determinations.

## STATEMENT OF ISSUES PRESENTED

Whether S.B. 289 Section 1, which has modified NRS 616C.490 and provides statutory clarification and removes the prior confusion created by the administrative regulation at NAC 616C.490, should be applied in the instant matter as NAC 616C.490 has been superseded by statute with the enactment of S.B. 289 which the Legislative Counsel Bureau deemed effective May 21, 2021 for all open workers' compensation claims. Section 11 of S.B. 289 makes the statute applicable to all claims that are open on the date of its enactment. For purposes of the PPD, the issue is not closed until either the matter is not appealed with thirty (30) days or the injured worker accepts the PPD in a lump sum. ***NRS 616C.495.***

Whether the Appeals Officer's Decision and Order upholding

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apportionment of the Appellant's Permanent Partial Disability (PPD) award for her cervical spine workers' compensation claim from 25% down to 6%, a 75% reduction and which constituted a clear error of law and/or an abuse of discretion where the method of apportionment did not comply with NRS 616C.490 and NAC 616C.490(6)(7) and (8) because there is no evidence to demonstrate that the Appellant had an impairment prior to her industrial injury and, especially, what was "the scope and the nature of the impairment which existed before the industrial injury." NAC 616C.490(6). Further, the Appeal's Officer committed reversible error of law by disregarded her prior Decision in AO 56832-RKN which deemed the cervical disc herniations as within the scope of the claim. **AA 0379.**

## STATEMENT OF THE CASE

In this case the Appellant, KIMBERLY KLINE, seeks reversal on judicial review of a Decision and Order made by the Appeals Officer in a workers' compensation case, and a District Court's Order that denied her Petition for Judicial Review. The Appeals Officer erred under the clear and unambiguous provisions of NAC 616C.490. Specifically, NAC 616C.490(6) through (8) state as follows:

> 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.
> 8. If no documentation exists pursuant to subsection 6 or 7, the impairment may not be apportioned.

## STATEMENT OF FACTS

The Appellant suffered an industrial injury while in the course and scope of her employment with the Respondent on June 25, 2015. **AA 0383-**

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**0388.** The Appellant was rear ended in her work vehicle by another vehicle. **AA 0383-0388.** The Appellant presented to St. Mary's Regional Medical Center for treatment. **AA 0389-0392.** The initial assessment was acute lumbar radiculopathy, sprain of the lumbar spine, and acute pain in the lower back. **AA 0390.**

On June 30, 2015, the Appellant was seen by Dr. Hall at Specialty Health. **AA 0395.** The Appellant had complaints of neck discomfort that was described as moderate, diffuse, radiating into the right shoulder with associated stiffness and lumbar and thoracic pain. **AA 0395.** Dr. Hall assessed the Appellant as suffering from a sprain of the neck and sprain of the lumbar region. **AA 0396.** He recommended chiropractic care, returned the Appellant to work full duty, and advised her to return in two weeks. **AA 0396-0398.**

The Appellant received chiropractic care from Dr. Maria Brady who is also from Dr. Hall's clinic. Dr. Brady assessed that the Appellant had spinal segment dysfunction at C6, C7, T1, T3, T4, L4, L5 and S1 that necessitated chiropractic adjusting at those levels. **AA 0399-0401**. The Appellant saw Dr. Brady again on July 7, 2015 and July 9, 2015, with complaints of worsening symptoms. **AA 0403-0410.** Dr. Brady provided chiropractic adjustments. **AA 0403-0410.**

The Appellant returned to see Dr. Hall on July 14, 2015. **AA 0411-0413.** The Appellant continued to have ongoing lumbar and neck pain, that was moderate to severe, associated sleep disruption and stiffness, and had minimal improvement with chiropractic care. **AA 0411.** Dr. Hall recommended the Appellant receive six physical therapy sessions. **AA 0412.**

The Appellant began physical therapy on August 5, 2015. **AA 0415-0417.** The Appellant received physical therapy treatment from August 5, 2015 through October 26, 2015. **AA 0415-0417, 0426-0431, 0435-0440,**

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**0442-0443, 0494-0497.** The Appellant was discharged from physical therapy on October 26, 2015 to a home exercise program. **AA 0497.**

The Respondent issued a notice of intention to close the Appellant's claim on November 6, 2015. **AA 0501.** This was the second time the Respondent tried to close the claim. **AA 0425.** The Respondent tried to close the claim while the Appellant was treating on August 27, 2015. **AA 0425.**

On January 13, 2016, the Appellant saw Dr. Hansen for chiropractic care for her neck pain. **AA 0502-0504.** Dr. Hansen's assessment was that the Appellant had cervical disc displacement, unspecified cervical region. **AA 0503.** Dr. Hansen felt that there was a high probability within a medical degree of certainty that the Appellant's injuries were related to the rear-end collision she had recently sustained. **AA 0504.** Dr. Hansen recommended non-surgical spinal decompression coupled with Class IV deep tissue laser therapy four (4) times per week for four (4) weeks, undergo re-examination, and continue with care two (2) times a week for two (2) weeks pending no unforseen issues or conditions. **AA 0506.**

The Appellant had an MRI on January 13, 2016, which revealed 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. **AA 0505.**

The Appellant returned to see Dr. Hansen on January 14, 2016. **AA 0507-0511.** Dr. Hansen referred the Appellant to Dr. Zollinger for evaluation and treatment as she was in a significant amount of pain with numbness in her left upper extremity. **AA 0507.** Dr. Hansen reviewed the MRI which revealed two large disc protrusions at C5-6 and C6-7 with pain consistent with C5-6. *ROA 306.* He again opined that the disc protrusions were directly related to the industrial accident. **AA 0512.**

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Pursuant to Hearing Number 55487-JL, the Respondent *was* ordered to forward the Appellant's MRI results to Dr. Hall and question him accordingly. **AA 0548-0550.** The Respondent was ordered to issue a new determination regarding the further disposition of the Appellant's claim upon receipt of Dr. Hall's response. **AA 0548-0549.**

The Respondent questioned Dr. Hall and on March 16, 2016, Dr. Hall responded. **AA 0551-0552.** Dr. Hall opined that it was likely that Appellant had disc degeneration prior to the industrial injury which may have been exacerbated by the industrial injury, but he noted no evidence of neurologic symptoms during his treatment of her industrial injuries. Dr. Hall found no objective evidence connecting the MRI findings from January 13, 2016 and the industrial injury. Notwithstanding the Appellant's complaints, Dr. Hall opined that the Appellant recovered completely from the industrial injury on June 25, 2015 by the end of October 2015. **AA 0551-0552.**

Due to the Appellant's ongoing complaints, she saw Dr. Sekhon on July 5, 2016 pursuant to a referral of Dr. Hansen. **AA 0447-0452.** Dr. Sekhon's impression was:

1. Cervical spondylosis, C4-5, C5-6 and C6-7 with cord compression C5-6 and C6-7;
2. Mobile spondylolisthesis at C4-5;
3. Failed conservative therapy; and
4. Minimal spondylosis, L3-4, L4-5 and L5-S1. **AA 0450.**

Dr. Sekhon noted that the Appellant stated that she never had these arm symptoms before these accidents and although she may have had preexisting spondylosis, the accident probably exacerbated her underlying stenosis. **AA 0450.** Dr. Sekhon offered to perform a C4-5, C5-6 and C6-7 anterior cervical decompression and instrumentation fusion. **AA 0450.**

On January 18, 2017, Appeals Officer Rajinder Nielsen, Esq., entered a Decision and Order which reversed claim closure without a PPD evaluation or rating and ordered the Respondent to rescind claim closure and provide the

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medical treatment recommended by Dr. Sekhon. **AA 0373-0382.**

Respondent timely appealed the Decision and Order to the District Court and a Petition for Judicial Review was ensued.

On December 11, 2017, the Honorable Lynne Simons issued an order denying the Petition for Judicial Review. **AA 0579-0593.** The Court noted that the Appeals Officer gave the opinions of Dr. Hall no weight as it pertained to the scope of the claim and that Dr. Hall's opinions were inconsistent with the medical evidence. **AA 0590.** This decision was not appealed.

The Appellant completed her treatment and was eventually determined to be at maximum medical improvement. The Appellant was scheduled for a PPD evaluation to determine the extent of her impairment due to her industrial injury pursuant to NRS 616C.490. No claim closure letter was issued pursuant to NRS 616C.235.

The Appellant was seen by Russell Anderson, DC. Dr. Russell found a 25% whole person impairment. **AA 0456-0462.**. Dr. Russell stated that the MRI findings were not caused by the car accident. **AA 0769.** Dr. Russell then apportioned out 75% of the award which reduced the award from 25% to 6%. **AA 0770.** The Respondent then offered the Appellant the 6% PPD award on December 5, 2017. **AA 0568.**

The determination was timely appealed by the Appellant on December 13, 2017.

The Hearing Officer in HO 1801761-JL found a medical question pursuant to NRS 616C.330 and ordered a second PPD. **AA 0370-0372.** This was appealed by the Respondent.

The Respondent filed a motion for stay on February 14, 2018. **AA 2146-2153.**

The Appellant filed her Opposition on March 1, 2018. **AA 1946-1956.**

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Appeals Officer Nielsen granted the stay on March 9, 2018. **AA 1944-1945.**

On March 13, 2018, Appeals Officer Nielsen ordered a telephone conference between the parties and set it on March 23, 2018. **AA 1942-1943.**

After the telephone conference, Appeals Officer Nielsen entered an order where she rescinded the prior order granting the stay. **AA 1940-1941.**

On June 13, 2018, Appeals Officer Nielsen ordered a telephone conference between the parties and set it on July 11, 2018. **AA 1926.**

Pending the Appeal, Appeals Officer Nielsen ordered a second PPD examination. The Claimant underwent the second PPD on May 8, 2018 with Dr. James Jempsa. **AA 0811-0822.** Dr. Jempsa found a 27% whole person impairment. **AA 0822.** Dr. Jempsa did not apportion the rating. The Respondent questioned Dr. Jempsa as to why he did not apportion the rating. Dr. Jempsa provided his reasoning confirming that apportionment was not appropriate. **AA 0823.**

The Respondent then sought a review by Dr. Jay Betz. Dr. Betz agreed with Dr. Anderson and supported his opinion based upon Dr. Hall's opinion of March 16, 2016. **AA 0825-0830.**

On June 13, 2018, the Respondent issued a determination letter offering the Appellant a 6% PPD award. **AA 0824.** This was timely appealed by the Appellant.

A hearing was held on July 12, 2018. The Hearing Officer found that no evidence had been presented to justify a 75% apportionment and the Claimant was entitled to the 27% PPD award by Dr. Jempsa. **AA 0807-0809.** The Respondent timely appealed and the Appeals Officer reversed the hearing officer's decision. **AA 0207-0228.**

During the Appeals Hearing, Dr. Betz conceded the following conclusive facts:

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1. Dr. Betz was unable to apportion what pain was related to degenerative changes versus what was caused by the C5/6 and C6/7 herniations which were causing cord compression. **AA 0289.**
2. Dr. Betz conceded that if the C5/6 and C6/7 protrusions were caused by the industrial accident, it would change his opinion on apportionment. **AA 0292.**
3. Dr. Betz conceded that there was no evidence of a ratable impairment of the cervical spine prior to the industrial accident. **AA 0293.**
4. Dr. Betz confirmed that there were no prior records that supported an impairment to the cervical spine prior to the industrial injury. **AA 0294.**
5. Dr. Betz confirmed that there were no prior medical opinions that supported an impairment to the cervical spine prior to the industrial injury under the AMA Guides, 5th Edition. **AA 0294.**
6. Dr. Betz confirmed that there is not one medical record that documents that the Appellant had prior pre-industrial accident symptoms for her cervical spine. **AA 0300.**
7. Dr. Betz confirmed that there is not one medical record that the Appellant would have ever needed to have a cervical fusion surgery prior to the industrial accident. **AA 0300.**
8. Dr. Betz conceded that under the AMA Guides, 5th Edition, the rating doctor has to assess whether a condition was ever symptomatic and whether there was an aggravation and both he and Dr. Anderson found no evidence that any cervical pre-existing condition was ever symptomatic prior to the industrial accident. **AA 0304.**

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9. Dr. Betz conceded that the PPD completed by Dr. Jempsa (27%) is correct on apportionment if the disc protrusions were caused by the industrial accident. **AA 0312.**

Notwithstanding the lack of documentation required under the regulation the Appeals Officer accepted apportionment of nearly the entire 25% PPD in violation of the emphasized language of NAC 616C.490(8) set forth above and disregarded the second PPD finding of 27% which she had ordered under NRS 616C.360. Without any documentation or data upon which to base the apportionment, the first PPD doctor was merely speculating as to the scope and nature of the impairment as it may or may not have existed prior to the industrial accident and completely disregarded the law of the case that the disc herniations were caused by the subject industrial accident. Such speculation is simply not permitted in Nevada workers' compensation law. ***United Exposition Service Co. v. SIIS***, 109 Nev. 421, 424-425, 851 P.2d 423 (1993) (workers' compensation benefit determinations "cannot be based solely upon possibilities and speculative testimony.") Specifically under NAC 616C.490 (6)(7) and (8) speculation is not permitted and evidence of the scope and nature of **THE IMPAIRMENT** as it existed prior to the industrial injury must be present to justify and permit apportionment. The burden of proof and burden of persuasion is on the doctor and the insurer to show documentation (evidence) of what the nature and scope of the impairment was prior to the industrial accident because NAC 616C.490(8) is unambiguously clear that in the absence of such documentation (evidence) the rating cannot be apportioned. Couple this with the concessions of the Respondent's reviewing doctor which confirmed that there was no ratable impairment at the time of the industrial accident renders the Appeals Officer's decision fatally flawed, inconsistent with the law, and not supported by the evidence. The Appeals Officer ignored her prior findings and the

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requirements of NAC 616C.490(6) (7) and (8) and upheld the apportionment.

## SUMMARY OF THE ARGUMENT

Under the clear language of NRS 616C.490, effective May 31, 2021 and which applies to all open claims, there is no apportionment as was found by Dr. Jempsa.

> Section 1 of S.B. 289 states in relevant part as follows:
> THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:
> Section 1. Chapter 616C of NRS is hereby amended by adding thereto a new section to read as follows:
> ...
> 2. If no rating evaluation performed before the date of injury or onset of the occupational disease exists for apportionment of percentage of present and previous disabilities pursuant to subsection 1, the percentage of the present disability must not be reduced unless:
> (a) The insurer proves by a preponderance of the evidence that medical documentation or health care records that existed before the date of the injury or onset of the occupational disease that resulted in the present disability demonstrate evidence that the injured employee had an actual impairment or disability involving the condition, occupational disease, organ, anatomical structure or other part of the body that is the subject of the present disability; and
> (b) The rating physician or chiropractor states to a reasonable degree of medical or chiropractic probability that, based upon the specific information in the preexisting medical documentation or health care records, the injured employee would have had a specific percentage of disability immediately before the date of the injury or the onset of the occupational disease if, in the instant before the injury or the onset of the occupational disease, the injured employee had been evaluated under the edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment that had been adopted by the Division pursuant to NRS 616C.110.
> 3. The documentation or records relied upon pursuant to subsection 2 must provide specific references to one or more of the following:
> (a) Diagnoses;
> (b) Measurements;
> (c) Imaging studies;
> (d) Laboratory testing; or
> (e) Other commonly relied upon medical evidence that supports the finding of a preexisting ratable impairment under the specific provisions of the edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment that had been adopted by the Division pursuant to NRS 616C.110 at the time of that rating evaluation.
> 4. If there is physical evidence of a prior surgery to the same organ, anatomical structure or other part of the body being evaluated for

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the present disability but no medical documentation or health care records regarding that organ, anatomical structure or other part of the body can be obtained, the rating physician or chiropractor may apportion the rating provided that the applicable requirements of subsection 2, other than any requirement to:

(a) Have medical documentation or health care records; or

(b) Base a rating upon medical documentation or health care records,

are satisfied.

5. If there is no physical evidence of a prior surgery to the same organ, anatomical structure or other part of the body being evaluated for the present disability and no medical documentation or health care records of a preexisting whole person impairment for the identical condition, occupational disease, organ, anatomical structure or other part of the body being evaluated for the present disability exist for the purposes of subsection 1 or 2, the percentage of present impairment must not be reduced by any percentage for the previous impairment.

(The entirety of S.B. 289 is reproduced at AA )

Should the Court look at the language of NRS 616C.490 as it was at the time of the Appeals Hearing, the rules are equally as clear. Prior to SB 289, NRS 616.490(9) stated:

> "Where there is a previous disability, as the loss of one eye, one hand, one foot, or any other previous permanent disability, the percentage of disability for a subsequent injury must be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury."

Couple this clear rule that you determine the pre-existing impairment and subtract it from the rating with NAC 616C.490, the Appeals Officer's decision and order upholding the 6% PPD award constitutes a clear error of law. Further, there is no substantial evidence on the record taken as a whole, in particular there is no evidence required by NAC 616C.490(6) (7) and (8), to support the 75% reduction apportionment of the Appellant's PPD award from 25% to 6% as was done by the rating doctor and upheld by the Appeals Officer which constitutes an abuse of discretion.

Where there is an error of law or an abuse of discretion the administrative decision must be reversed under NRS 233B.135(3). Here we have both. The District Court erred in not granting the Petition for Judicial

Review and this court should REVERSE the District Court's decision.

## ARGUMENT

### I. STANDARD OF REVIEW

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

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

The court should not substitute its own judgment for that of the agency on questions of fact. NRS 233B.135(3). This court's role in reviewing an administrative decision is to "review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." ***Langman v. Nevada Administrators, Inc.***, 114 Nev. 203, 207, 955 P.2d 188 (1998). This Court has broad supervisory powers to ensure that all relevant evidence is examined and considered by the appeals officer 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, 560 P.2d 1352 (1977). If substantial evidence does not exist to support the Appeals Referee's findings of fact, then her decision should be reversed. ***Bullock v. Pinnacle Risk Mgmt.***, 113 Nev. 1385, 1388, 951 P.2d. 1036 (1997). Substantial evidence is "that quantity

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and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." ***Maxwell v. SIIS***, 109 Nev. 327, 849 P.2d 267, 270 (1993) (internal quotation marks and citations omitted). Where the findings of the Appeals Officer are against the manifest weight of the evidence, the findings should be set aside. ***Id.***

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

The Petitioner submits that the Appeals Officer has committed a material error of law and/or that the Appeals Officer's Decision and Order rests upon an abuse of discretion as it is not based upon substantial evidence on the record taken as a whole and therefore should be set aside.

## II. ABSENT ANY DOCUMENTATION TO ESTABLISH THE SCOPE AND NATURE OF ANY IMPAIRMENT IN THE APPELLANT'S CERVICAL SPINE THAT EXISTED PRIOR TO THE INDUSTRIAL INJURY, APPORTIONMENT IS NOT ALLOWED AND THE APPEALS OFFICER'S DECISION MUST BE REVERSED.

Nevada law is clear. When apportioning a pre-existing condition from a industrial condition, the rating doctor must determine the rating caused by the pre-existing condition and subtract that amount from the current rating. NRS 616C.490. First, there was no prior rating or award in this case. There is no documentation of any impairment of the Appellant's cervical spine. The medical evidence was clear that prior to the subject industrial accident, the Appellant had no cervical problems, pain treatment or injury to her cervical spine prior to the June 25, 2015 industrial accident. The first rating

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chiropractor (Dr. Anderson) stated in his report that

> The claimant had underlying cervical spine issues that pre-date this work related car accident and injury. Namely, the MRI and radiographic reports show cervical spine degenerative discs with large protrusions at C5-6, C6-7; effacement of the CSF, and severe canal stenosis (MRI of 1/3/2016). It is not logical to believe that these findings are related to the car accident that she was involved in 6 months earlier.
>
> ...
>
> 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.

The basis of the apportionment was based on the faulty conclusion that the two herniated discs were not caused by the industrial accident. The only evidence of a prior medical record which Dr. Anderson reviewed was for the lumbar spine, not the cervical spine.

NRS 616C.490, which applies and was amended for all open workers' compensation cases on May 31, 2021. First, since there was no prior rating, the percentage of the present disability cannot be apportioned unless the insurer proves by a preponderance of the evidence that medical documentation or health care records that existed before the date of the injury that resulted in the present disability demonstrate evidence that the injured employee had an actual impairment involving the part of the body that is the subject of the present disability. Second, there is no medical record prior to the industrial injury regarding the cervical spine. Third, there is no evidence of a prior surgery to the cervical spine. Under SB 289, NRS 616C.490(5) states

> If there is no physical evidence of a prior surgery to the same organ, anatomical structure or other part of the body being evaluated for the present disability and no medical documentation or health care records of a preexisting whole person impairment for the identical condition, occupational disease, organ, anatomical structure or other part of the body being evaluated for the present disability exist for the purposes of subsection 1 or 2, the percentage of present impairment must not be

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reduced by any percentage for the previous impairment.

The Appellant anticipates that the Respondent will argue that the amended NRS 616C.490 does not apply as it became law in 2021. SB 289 specifically states that the new law applies to all open workers' compensation claims. **AA 0049.** The claim was open as the issue of the PPD is being litigated. The Respondent may argue that the claim was closed when the Claimant was rated. This argument is misleading as the only benefit which is closed as of the date of the PPD examination is medical benefits as the Appellant was deemed to be stable and ratable at maximum medical improvement. The Respondent never issued a claim closure letter pursuant to NRS 616C.235. The closure of a claim pursuant to NRS 616C.235(1) is not effective unless notice is given as required by section 1. Since the claim never closed, SB 289 applies.

The Appellant notes that there have been at least two (2) recent appeals where this Court has issued orders remanding the issue back to the Appeals Officer due to the intervening change in controlling law.[1] In the event the Court decides to follow this path, the Appellant supports such direction. However, the Appellant respectfully submits that application of the prior language of NRS 616C.490 and the now superceded regulation NAC 616C.490 supports zero apportionment of the PPD rating of the Appellant.

For these reasons, apportionment is not allowed under Nevada law and the Appeals Officer's decision should be reversed.

## III. SINCE THE DISC HERNIATIONS WERE PREVIOUSLY FOUND TO BE INDUSTRIALLY CAUSED, THE PRE-EXISTING IMPAIRMENT WAS 0%, THUS APPORTIONMENT IS NOT ALLOWED AND THE APPEALS OFFICER'S DECISION MUST BE REVERSED.

In a prior decision by the Appeals Officer, she found that the disc

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[1] ***Argo Group v. Christine Horton***, Case No. 81568-COA and ***Armstrong v. Treasure Island Hotel, et. al.***, Case No. 80461-COA. AA

herniations were caused by the industrial injury. The Appeals Officer also relied on opinions which were previously determined, by this same Appeals Officer, to be untrustworthy. The Petitioner notes that the Appeals Officer specifically stated in her prior decision that

> "I also found the opinions of Dr. Sekhon and Dr. Hansen to be well reasoned. I specifically give more weight to the opinions of Dr. Sekhon and Dr. Hansen as opposed to Dr. Hall as the objective medical evidence supports Dr. Sekhon's and Dr. Hansen's medical expert opinions." *ROA 172.*
>
> "The substantial evidence supports a finding that the industrial accident aggravated the pre-existing condition and the resulting condition was the substantial contributing cause of the resulting condition. I found Dr. Hall's opinions to be inconsistent with the medical evidence and he failed to state his opinion(s) within a reasonable degree of medical probability. Therefore I give his opinions no weight." *ROA 174.*
>
> "Without evidence of a subsequent injury, I find that the condition claimed by the Claimant are casually related to the subject industrial accident." *ROA 174.*
>
> "...the Claimant's industrial condition are not MMI and provide all appropriate benefits to the Claimant as authorized by Nevada law for the C4-5, C5-6 and C6-7 cervical discs, including but not limited to the surgical recommendation by Dr. Sekhon, i.e., a C-4-5, C5-6 and C6-7 anterior cervical decompression and instrumentation fusion." *ROA 174-175.*

The Appeals Officer documented and accepted those objective medical findings in her prior decision but now, in the instant matter, relied on Dr. Betz's record review which did not accept those same findings to support a 75% apportionment. Dr. Betz, however, confirmed that if the disc herniations were caused by the industrial injury, the Claimant would have a 0% impairment for the pre-existing condition.

Issue preclusion bars re-litigation of the same issue when the following is met:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. ***University of Nevada v. Tarkanian***, 110 Nev. 581, 879 P.2d 1180 (1994); ***Executive Mgmt. v. Ticor Title Ins. Co.***, 114 Nev. 823,

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836, 963 P.2d 465, 473-74 (1998).

Issue preclusion may apply even though the causes of action are substantially different, if the same fact issue is presented. ***LaForge v. State, University System***, 116 Nev. 415, 997 P.2d 130 (2000).

In the present matter, the issue of scope and what was a pre-existing non-industrial condition and what was an industrial condition was decided in the prior AO and is identical to the issue in the current litigation of the rating of industrial versus non-industrial conditions. The prior AO was litigated and final when the petition for judicial review was denied. **AA 0579-0593.** The parties were the same parties to both matters and the issue of scope was actually litigated. The Appeals Officer should have found in the instant matter that the disc herniations were caused by the industrial accident and based upon Dr. Jempsa's medical report and Dr. Betz's concession that if the discs were industrial, there would have been no prior rateable impairment, the only conclusion was that there was no apportionment under both NAC 616C.490 and NRS 616C.490, both pre SB 289 and post SB 289.

For these reasons, apportionment is not allowed under Nevada law and the Appeals Officer's decision should be reversed.

## IV. ABSENT SUBSTANTIAL EVIDENCE TO SUPPORT HER DECISION, APPORTIONMENT IS NOT ALLOWED AND THE APPEALS OFFICER'S DECISION MUST BE REVERSED.

The substantial evidence of the record establishes that the Petitioner did not have any pre-injury impairment under the AMA Guides, 5th Edition. Apportioning the rating by 75% when it has already been determined that the industrial injury was the substantial contributing factor for the resulting condition is inconsistent. NRS 616C.175. Further, the rules on apportionment are clear and unambiguous and clearly instruct a rating physician or chiropractor that under the facts of this case, there would be no apportionment.

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The Appeals Officer has essentially re-opened the door on the scope of the claim which was already decided in AO 56832-RKN. The Appeals Officer previously found that Dr. Hall's opinions were inconsistent with the medical records. She also found that his opinions did not meet the legal standard. A testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury. ***United Exposition Co. v. SIIS***, 109 Nev. 421, 851 P.2d 423, 425 (1993). The Appeals Officer found that the opinions of Dr. Hall were not stated within a reasonable degree of medical probability. **AA 0380.** Given that she also found that Dr. Hall's opinions were inconsistent with the medical records, it is reasonable to conclude that any subsequent opinion by a rating physician should also be bound to those findings. **AA 0380.** Dr. Hall confirmed that the only records he reviewed and was provided by the Respondent was a visit to the chiropractor dated January 13, 2016 and the MRI dated January 13, 2016. **AA 0551.** The Respondent failed to provide Dr. Hall with the medical records through March 16, 2017 which would have been medical reports with Dr. Hansen for the following dates: January 14, 2016 (**AA 0506-0511**), January 15, 2016 (**AA 0513-0514**), January 18, 2016 (**AA 0515-0516**), January 19, 2016 (**AA 0517-0518**), January 20, 2016 (**AA 0519-0520**), January 21, 2016 (**AA 0521-0522**), January 25, 2016 (**AA 0523-0524**), January 26, 2016 (**AA 0525-0526**), January 27, 2016 (**AA 0527-0528**), January 28, 2016 (**AA 0529-0530**), February 1, 2016 (**AA 0531-0532**), February 2, 2016 (**AA 0533-0534**), February 5, 2016 (**AA 0534-0535**), February 8, 2016 (**AA 0536-0537**), February 10, 2016 (**AA 0537-0538**), February 12, 2016 (**AA 0539-0540**), February 16, 2016 (**AA 0540-0542**), February 19, 2016 (**AA 0542-0543**) and February 24, 2016 (**AA 0543-0545**).

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The Respondent had requested all medical bills from Dr. Hansen on February 22, 2016. **AA 1251.** At a minimum, the Respondent had all records from January 13, 2016 through January 21, 2016 as they time stamped the documents received on January 25, 2016. **AA 1236-1249.** The Respondent failed to provide Dr. Hall with these records which is one of the reasons which supports the Appeals Officer's Decision that Dr. Hall's opinions were inconsistent with the medical records. In the present matter, the Appeals Officer now supports her conclusions on medical statements that she previously found insufficient.

For these reasons, apportionment is not allowed under Nevada law and the Appeals Officer's decision should be reversed.

## V. THE APPEALS OFFICER'S DECISION RELIES ON OPINIONS WHICH EXCEED THE STATUTORY AUTHORITY OF NRS 616C.490.

NRS 616C.490(11) provides the Administrator the authority to create "reasonable regulations to carry out the provisions of this section." However, this Court may "declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious. ***Felton v. Douglas Cty.***, 134 Nev. 34, 38, 410 P.3d 991, 995 (2018) citing ***Meridian Gold Co. V. State ex rel. Department of Taxation***, 119 Nev. at 635, 81 P.3d at 519 (quoting ***State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.***, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)).

The plain language of NRS 616C.490 pre SB 289 mandates that the pre-existing condition be rated and then subtracted from the post injury rating. NAC 616C.490(5) was used by the Appeals Officer as authority to apportion the rating 75%. However, NAC 616C.490(5) is clearly applicable for situations where there was a prior PPD evaluation under section 4. NAC 616C.490(4) and (5) state as follows:

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> 4. Except as otherwise provided in subsection 5, if a rating evaluation was completed in another state or using an edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment other than the edition of the Guides as adopted by reference pursuant to NAC 616C.002 for a previous injury or disease involving a condition, organ or anatomical structure that is identical to the condition, organ or anatomical structure being evaluated for the present industrial injury or occupational disease, or 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.

Section 4 and Section 5 are applied together. Section 5 does not apply to Sections 6-8. Section 4 and Section 5 apply to situations where a rating was done in another state or using another edition of the ***AMA Guides***. This is one of the reasons why NRS 616C.490 was amended in 2021 as certain doctors and Insurers used this section for the arbitrary and speculative reductions of PPD awards. The Appeals Officer erred when she held that "the medial (sic) opinions and the expert testimony are found credible and satisfy the requirements under NAC 616C.490 (5)-(6) for appointment (sic). **AA 0193.**

Applying NAC 616C.490(5) to the PPD rating is reversible error and using it in conjunction with NAC 616C.490(6) not only conflicts with the existing statutory provisions of NRS 616C.490, but results in a conclusion which exceeds the statutory authority of the agency.

For these reasons, apportionment is not allowed under Nevada law and the Appeal's Officer's decision should be reversed.

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## CONCLUSION

In accordance with the above, the Appeals Officer's Decision and Order in this matter rests on errors of law and an abuse of discretion. Under SB 289, NRS 616C.490(2) governs apportionment of PPD awards. Since there was no prior rating for the cervical spine, the percentage of the present disability cannot be apportioned because there is no physical evidence of a prior surgery to the cervical spine and there is no medical documentation or health care records of a preexisting whole person impairment for cervical spine, the percentage of present impairment cannot be reduced by any percentage for the pre-existing condition.

Under the prior language of NRS 616C.490 and NAC 616C.490, because there was no documentation of a prior cervical condition and a complete analysis demonstrating the scope and nature of any impairment in her cervical spine existing prior to the Appellant's June 25, 2015 industrial injury as required by NAC 616C.490(6), no apportionment is permitted as a matter of law under NAC 616C.490(8). Period. Further, there is no substantial evidence on the record as a whole to support the Appeals Officer's determination that apportionment of the 25% PPD down to 6% was proper. IT IS ALL SPECULATION not permitted under the United Exposition case cited herein. Finally, the Appeals Officer applied a regulation section which is not applicable.

The Appeals Officer's Decision and Order rests upon an errors of law and is arbitrary and capricious and it must be reversed under NRS 233B.135(3). The Appeals Officer's Decision is also erroneous in view of the reliable, probative and substantial evidence on the whole record and results in an abuse of discretion as alleged by the Appellant. Finally, the Appeals Officer's refusal to take into account her prior Decision renders a re-litigation of the scope of the claim which is another reversible error of law.

The Petition for Judicial Review should have been granted, the matter reversed and remanded, and the Appellant awarded the 27% PPD found by Dr. Jempsa without apportionment.

WHEREFORE, the Petitioner respectfully asks that the Court REVERSE the District Court denial of the Appellant's Petition for Judicial Review, REVERSE the Appeal's Officer's Decision and reinstate the Hearing Officer's Decision, instructing the Respondent to offer the Appellant the un-apportioned 27% PPD award pursuant to Dr. Jempsa.

RESPECTFULLY SUBMITTED this 18 day of January, 2022.

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**ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF THE NEVADA RULES OF APPELLATE PROCEDURE**

Herb Santos, Jr., Attorney for Appellant, by signing below, hereby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman size 14 font;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7284 words;

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

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Rules of Appellate Procedure.

DATED this 18 day of January, 2022.

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

The undersigned does hereby certify that the preceding document, ***RESPONDENT'S OPENING BRIEF***, filed in Supreme Court case number 82608, does not contain the social security number of any person.

DATED this 18 day of January, 2022.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 18, 2022, I filed the foregoing Appellant's Opening Brief through the Supreme Court of Nevada's electronic filing system along with the Appellant's Appendix. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

LISA WILTSHIRE ALSTEAD, ESQ.
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and that on said date a copy of the same was deposited in the United States Mail with first class postage fully repaid addressed to the following:

LISA WILTSHIRE ALSTEAD, ESQ.
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DATED this 18 day of January, 2022.

Jimayne Merkow