IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 82608

KIMBERLY KLINE,

Appellant,

v.

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

Respondents.

Appeal From Order Denying Petition For Judicial Review
Second Judicial District Court
District Court Case No.: CV19-01683

RESPONDENTS' ANSWERING BRIEF

McDONALD CARANO LLP
Lisa Wiltshire Alstead (NSBN 10470)
Chelsea Latino (NSBN 14227)
Jane Susskind (NSBN 15099)
100 W. Liberty St., 10th Floor
Reno, Nevada 89501
Tel: (775) 788-2000
lalstead@mcdonaldcarano.com
clatino@mcdonaldcarano.com
jsusskind@mcdonaldcarano.com

Attorneys for Respondents City of Reno and Cannon Cochran Management Services, Inc.

NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Respondent City of Reno is a political subdivision of the State of Nevada and therefore a governmental entity that is exempt from the disclosures required by NRAP 26.1(a). Respondent Cannon Cochran Management Services, Inc. has no parent companies and no party owns ten percent (10%) or more in stock in the company.

In the course of the proceedings leading up to and including this appeal, Respondents have been represented by the law firm of McDonald Carano LLP.

Dated: March 3, 2022.

McDONALD CARANO LLP

By: /s/ *Lisa Wiltshire Alstead*

Lisa Wiltshire Alstead (NSBN 10470)
Chelsea Latino (NSBN 14227)
Jane Susskind (NSBN 15099)
100 W. Liberty St., 10th Floor
Reno, Nevada 89501
Tel. 775-788-2000
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

ROUTING STATEMENT

This administrative appeal is presumptively assigned to the Court of Appeals under NRAP 17(b)(9). However, this appeal raises as a principal issue a question of statewide public importance with the appellant asking the Court to interpret, for the first time, Senate Bill 289 ("S.B. 289"), which could affect all injured workers, insurers, and employers in Nevada. This warrants retention by this Court under NRAP 17(a)(12). There also exists a potential inconsistency between decisions of this Court and the Court of Appeals, as well as decisions of the district courts and appeals officers of the Nevada Department of Administration, as several workers' compensation cases involving the same issue are pending on the same or similar issues. Retention by this Court under NRAP 17(a)(12) will promote uniformity and provide guidance to this State's courts as to application, or inapplicability, of this new law to *closed* workers' compensation claims involving apportionment of a permanent partial disability ("PPD") award. Finally, retention is also warranted under NRAP 17(a)(11) because this appeal presents a question of first impression of statutory interpretation of S.B. 289 and its amendments to NRS 616C.490.

STATEMENT OF THE ISSUE

The main issue on appeal is whether applicable law and substantial evidence support the Appeals Officer Decision ("Decision"), as affirmed by the district court,

that self-insured respondent City of Reno ("City") and its third-party administrator, respondent Cannon Cochran Management Services, Inc. ("CCMSI," and collectively with the City, the "Respondents"), properly awarded appellant Kimberly Kline ("Kline") a six percent (6%) PPD award under NRS 616C.490 and NAC 616C.490 based on apportionment of seventy-five percent (75%) of Kline's twenty-seven percent (27%) whole person impairment ("WPI") as non-industrial and twenty-five percent (25%) as industrial for her cervical spine. A secondary issue on appeal is whether S.B. 289, which was enacted after an appeals officer entered the Decision on August 20, 2019, is an inapplicable change in the law where the bill's plain language confirms it only applies to workers' compensation claims *open* as of its effective date and where Kline's claim *closed* prior to its effective date.

STATEMENT OF THE CASE

This appeal arises out of a contested workers' compensation claim before the Nevada Department of Administration. The specific dispute involves the percentage of Kline's PPD award for her industrial injury. (*See* I Appellant's Appendix[1] ("AA") 6.) The City, through CCMSI, accepted Kline's claim for an injury that occurred on June 25, 2015, while she was working for the City as a parking enforcement officer.

[1] In violation of NRAP 30(a), Kline did not attempt to meet and confer with Respondents about a joint appendix. However, all documents necessary to rebut Appellant's position on appeal are included in the Appellant's Appendix and therefore Respondents have not filed a separate appendix.

(III AA 659.) Kline received medical treatment for back and neck pain under her claim, and ultimately was evaluated and rated for permanent impairment. (IV AA 769-770.)

At her first PPD evaluation, Kline was found to have a 25% WPI from the cervical spine, with 75% of the impairment apportioned as non-industrial. (IV AA 769-770.) Accordingly, CCMSI issued a determination letter on December 5, 2017, offering a 6% PPD award. (IV AA at 774.) Kline appealed, another doctor conducted a second PPD evaluation, and she was found to have a 27% WPI with none of the impairment apportioned as non-industrial. (VI AA 1356-1367.) Due to the large discrepancy between the two PPD ratings, on May 24, 2018, pursuant to NAC 616C.103, CCMSI determined to hold the disputed portion of the PPD award in abeyance until the dispute was resolved. (VI AA 1378.) An appeals officer ultimately affirmed the 6% apportioned PPD award in the Decision. (I AA 207-228.)

In the administrative proceedings, the appeals officer concluded that the apportionment of the PPD award was proper under the versions of NAC 616C.490 and NRS 616C.490 then in place which pre-dated S.B. 289. (I AA 216-221.) The district court reached the same conclusion, affirmed the administrative decision, and denied Kline's petition for judicial review. (I AA 1-16.) Respondents served notice of entry of the district court's order on February 11, 2021, and Kline filed this appeal on March 8, 2021. (I AA 50-74.)

STATEMENT OF FACTS

I. Background Facts

A. Kline's Initial Injury and Recovery

Kline worked as a parking enforcement officer for the City. On June 25, 2015, she was injured when her work vehicle was rear ended by another vehicle. (III AA 601.) This was her second motor vehicle accident within a month, the first of which occurred on or around June 3, 2015. (III AA 615.) Kline's prior injury from the first non-industrial accident was nearly resolved at the time of the second injury. (*Id.*)

Kline treated at St. Mary's Regional Medical Center for back and neck pain. (III AA 615-617.) Dr. Richard Law diagnosed her with an acute lumbar radiculopathy, sprain of the lumbar spine, and acute pain the lower back. (III AA 616.) On July 23, 2015, CCMSI accepted Kline's workers' compensation claim for cervical strain. (III AA 659.) Kline received medical treatment from Scott Hall, M.D., chiropractic care, and physical therapy. (*See generally* III AA 594-595.)

On October 28, 2015, Dr. Hall found Kline had reached maximum medical improvement ("MMI"), was stable with no ratable impairment, and released her to full duty with no restrictions. (III AA 696.) On November 6, 2015, CCMSI sent Kline a notice of intention to close her workers' compensation claim. (III AA 698.) In an appeal of this first claim closure notice, a Department of Administration

appeals officer determined that Kline's claim was closed prematurely and she was allowed additional treatment under the claim. (II AA 373-381.)

B. Additional Treatment, Disc Degeneration, and Spinal Surgery

On January 13, 2016, Kline saw Bryan Hansen, D.C., for chiropractic care. (II AA 502-504.) At the request of Dr. Hansen, Kline then had a magnetic resonance imaging ("MRI") study completed the same day at Reno Diagnostic Centers ("RDC"). (II AA 505.) The MRI found disc degeneration with large disc protrusions at the C5-C6 levels resulting in complete effacement of cerebrospinal fluid from the ventral and dorsal aspects of the cord with severe canal stenosis. (*Id.*). 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." (II AA 545.)

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 a relation to the industrial injury," also noting that Kline had sought orthopedic treatment before the June 2015 injury. (III AA 750 - IV AA 751.) Dr. Hall concluded that "all indications were [Kline] had recovered completely from the industrial injury on June 25, 2015 by the end of [O]ctober 2015." (IV AA 751.)

On July 5, 2016, Kline saw Lali Sekhon, M.D. who recommended a C4-C5 to C6-7 decompression and fusion surgery. (II AA 447-452.) On June 12, 2017, Dr. Sekhon performed a C4-5, C5-6, and C6-7 anterior cervical decompression, interbody fusion. (VII AA 1528-1533.) On September 11, 2017, Dr. Sekhon determined that Kline had reached MMI, had a ratable impairment, and he released her to full duty. (IV AA 954.)

C. Kline's PPD Evaluation Applied Apportionment

On November 10, 2017, Dr. Russell Anderson conducted a PPD evaluation. (IV AA 64-770.) Dr. Anderson concluded that Kline has a 25% WPI from the cervical spine. (IV AA 770.) Dr. Anderson's report also found Kline had underlying cervical spine issues that pre-dated her industrial injury, specifically addressing the January 2016 MRI[2] and radiography reports which show cervical spine degenerative discs with large protrusions at C5-6, C6-7, effacement of the CSF and severe canal stenosis. (IV AA 769.) Dr. Anderson stated, "It is not logical to believe that these findings are related to the car accident that she was involved in 6 months earlier." (*Id.*) Dr. Anderson thus apportioned 75% of the impairment as non-industrial. (IV AA 769-770) Dr. Anderson concluded that 25% of Kline's impairment was apportioned as industrial because:

[2] Dr. Anderson's report lists the date of the MRI as "1/3/2016." (IV AA 769.) This appears to be a typographical error and refers to Kline's January 13, 2016 MRI ordered by Dr. Hansen.

> [i] The Claimant had no documented cervical spine injury or pain immediately after the accident (symptoms began 6/30/2015). 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.

(IV AA 769.)

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.*) Dr. Anderson concluded that "apportioning this 75% of this claimant's impairment as non-industrial, we take 25% of this claimant's whole person impairment (which was 25% WPI), and we get 6% WPI related to this work injury (that occurred on 6/25/2015)." (IV AA 770.) On December 5, 2017, CCMSI issued a 6% PPD award letter to Kline based on Dr. Anderson's PPD evaluation. (IV AA 774.)

II. Procedural History

Kline appealed CCMSI's December 5, 2017 determination letter to the Hearings Division of the Department of Administration and, 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. (IX AA 2157-2159.) The City appealed this decision, commencing Appeal No. 1802418-RKN, and requested a stay of compliance pending the appeal hearing. (*Id.* at 2146-2153, 2155.) On appeal, the appeals officer initially entered a stay, which was then lifted on March 27, 2018, and, on April 4, 2018, CCMSI scheduled Kline for a second PPD evaluation. (VIII AA 1940-1941, 1958-1960; IV AA 790.) This April 4, 2018 scheduling letter also closed the claim as of the second PPD evaluation date (May 8, 2018) consistent with NRS 616C.235. (IV AA 790.)

On May 8, 2018, James Jempsa, M.D., performed the second PPD evaluation. (VI AA 1356-1367.) Dr. Jempsa found a 27% WPI and neglected to address apportionment. (*Id.* at 1367.) Because apportionment was not considered, CCMSI sent a follow up request asking Dr. Jempsa to review Dr. Anderson's PPD evaluation and address apportionment. (VI AA 1368.) 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." (VI AA 1380.)

On May 24, 2018, CCMSI gave notice to Kline that it was holding the disputed portion of the PPD award in abeyance pending a records review by Jay

Betz, M.D. (VI AA 1378.) Kline appealed this determination letter to the Hearings Division of the Department of Administration. (VIII AA 1895.)

On June 4, 2018, Dr. Betz provided his review. (VI AA 1395.) Dr. Betz noted that both Dr. Anderson and Dr. Jempsa agree there is a 12% WPI utilizing Table 15-7 of the of the Fifth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"), and that there is an 1% WPI for sensory deficit in the left C6 distribution. (VI AA 1398.) "However, there was a large discrepancy between the active range of motion findings." (*Id.*). Dr. Betz observed that Dr. Jempsa provided no discussion or explanation for the significant variation and noted that "[i]t is well recognized that patients learn from prior rating experience. This can have a great effect when findings are 'under the influence of the individual' such as active range of motion which requires the full effort and cooperation of the patient to be valid." (VI AA 1398-1400.) Dr. Betz states that, "absent an objective basis for the variation, Dr. Anderson's range of motion findings should have priority." (VI AA 1399.)

Dr. Betz's report carefully sets forth the medical evidence supporting his conclusion that Kline had a pre-existing condition:

> Dr. Anderson correctly points out that the patient's cervical pathologies were primarily degenerative in nature and pre-existing. 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 pre-existing 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.

(VI AA 1399.)

Dr. Betz's records review also confirms that Kline had a non-industrial car accident several months prior to the industrial accident, resulting in low back pain. (VI AA 1395.) An MRI taken one month prior to the industrial injury confirmed that Kline's herniated disc at L3-4 and L4-5 had nearly resolved in the interim. (*Id.*) Kline's symptoms reported after the June 25, 2015 industrial accident included neck, upper back and low back pain. (VI AA 1396.) Dr. Betz found that Kline's January 13, 2016 cervical spine MRI was remarkable for disc degeneration with large disc protrusions at C5-6 and C6-7. (*Id.*) Dr. Betz observed that Kline's neurosurgical consultation with Dr. Sekhon indicated Kline "had pre-existing spondylosis C4 through C7 with cord compression C5-6 and C6-7, mobile spondylolisthesis at C4-5 and failed conservative therapy." (VI AA 1397.) Dr. Sekhon also suggested that the industrial accident exacerbated her underlying stenosis. (*Id.*) Dr. Betz reviewed

x-rays taken on April 21, 2017 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." (*Id.*) 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 concluded his records review agreeing with Dr. Anderson's findings on apportionment and noting Dr. Anderson's conclusions "are well supported by the medical record, known pathologies, AMA guides and Nevada Administrative Code." (VI AA 1399.) Based on Dr. Betz's assessment, on June 13, 2018, CCMSI issued a determination offering Kline a 6% PPD award consistent with Dr. Betz and Dr. Anderson's findings. (IV AA 824.) Kline also appealed this determination.

A hearings officer conducted a hearing on July 12, 2018, addressing both the May 24, 2018, and June 13, 2018 determinations. (IV AA 807-809.) The hearings officer issued a Decision and Order reversing the determinations and finding "that no evidence has been presented to justify 75% apportionment and the Claimant is entitled to the 27% PPD award determined by Dr. Jempsa." (IV AA 807.) The City appealed this decision commencing Appeal No. 1900471-RKN. (I AA 207-228.)

On September 20, 2018, CCMSI issued a determination letter offering the undisputed 6% PPD award in lump sum and the 21% disputed amount in monthly

installments. (VI AA 1345.) Kline appealed this determination to the Hearings Division of the Department of Administration. (VI AA 1346-1347.) On December 27, 2018, a hearings officer entered a Decision and Order affirming and remanding the September 20, 2018 determination letter. (*Id.*) Kline appealed this decision to the Appeals Office commencing Appeal No. 1902049-RKN. (I AA 207-208.)

The appeals officer conducted a consolidated hearing on May 1, 2019, on Appeal Nos. 1900471-RKN, 1902049-RKN, and 1802418-RKN. (I AA 229.) Kline provided witness testimony at the appeal hearing and Dr. Betz was found to be qualified and admitted as an expert and provided expert testimony. (I AA 229 – II AA 365.) Kline offered no expert witness to rebut Dr. Betz's testimony. (*Id.*) Dr. Betz testified that Kline's cervical pathologies were primarily degenerative in nature and pre-existing, including Kline's spondylitis and stenosis. (II AA 257-264, 315, 317.) He explained:

> So, impairment simply means [a] derangement. It's a derangement of normal anatomy or physiology. ***And this patient did have a previous derangement of normal anatomy***. So by definition, she had a pre-existing impairment. ***It may not have been symptomatic***; I acknowledge that. ***It may not have required surgery at that time***; I acknowledge that. ***But there's no question, based on the subsequent imaging, subsequent opinion, that the patient had prior derangement***, prior-a prior condition that has now contributed mightily to her present impairment, because it resulted in a fusion.

(II AA 314-315.) (emphasis added). Dr. Betz noted that the workers' compensation apportionment regulation does not require that a prior impairment be ratable, just

that there is a pre-existing condition that is contributing significantly to the current impairment. (II AA 274, 315-316.)

Dr. Betz also explained that Kline's MRI revealed moderate posterior disc osteophyte complex (disc protrusions) through the C4 through C6 vertebrae, and he testified that osteophytes take years, if not decades, to develop. (II AA 257-258, 264-265.) Dr. Betz also testified that neither the first car accident several months before the industrial injury, nor the second car accident causing the industrial injury were likely to have caused Kline's disc protrusions. (II AA 290.) Dr. Betz explained that if the car accident was the cause of Kline's resulting conditions, as opposed to an aggravation of a pre-existing condition, the symptoms would have been immediate instead of having a gradual onset. (II AA 259-262.) Dr. Betz also testified as to each historical record, diagnosis, x-ray, and MRI that he relied upon to determine apportionment. (II AA 268-275.)

On August 20, 2019, the appeals officer issued the Decision finding "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." (I AA 213:19-21.) The appeals officer also concluded that Dr. Jempsa was not credible and his report was not given any weight because he failed to consider Kline's pre-existing condition as evidenced in the medical reporting. (I AA 220:4-18.) The appeals officer reversed the hearing officer's

decision dated July 18, 2018 and found that "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." (I AA 225.)

On August 28, 2019, Kline petitioned the district court for judicial review of the Decision. (I AA 173-199.) The district court denied Kline's petition in an Order entered on February 10, 2021, concluding that the Decision correctly applied NRS 616C.490 and NAC 616C.490, was supported by substantial evidence, was not an abuse of discretion, nor was it based on an error of law. (I AA 1-16.) This appeal followed. (I AA 54-74.)

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order denying Kline's petition for judicial review because substantial evidence and the applicable law, including the pre-S.B. 289 versions of NAC 616C.490 and NRS 616C.490, which apply to this *closed* claim, support the appeals officer's conclusion that apportionment of Kline's PPD award which resulted in a 6% WPI was proper.

Aware that she is unable to prevail based on the substantial evidence and law presented to the lower courts on appeal, Kline in her Opening Brief has largely abandoned her prior arguments replacing them with a new argument that assumes that the significant statutory amendments in S.B. 289 which became effective on

May 31, 2021, and which substantially modify apportionment, apply here. However, contrary to Kline's contentions and assumptions, S.B. 289 does not apply to her claim. S.B. 289's plain language at Section 11 provides that it applies ***prospectively*** to ***any claim "which is open on the effective date of this act."*** (I AA 49) (containing S.B. 289, § 11) (emphasis added.) The effective date of S.B. 289 is May 31, 2021.[3] Kline's claim ***closed*** as of the second PPD evaluation on May 8, 2018 with Dr. Jempsa. (IV AA 790.) As such, because Kline's claim closed prior to the effective date of S.B. 289, her claim is not subject to S.B. 289's amendments to the apportionment regulation and statute based on the plain language of S.B. 289's enactment provisions.

Further, the facts of this case are distinguishable from the two Court of Appeals cases that Kline relies upon for the proposition that the Court of Appeals has conceded to application of S.B. 289 as an intervening change in law by remanding appeals on the issue of apportionment to appeals officers. In the *Horton* and *Armstrong* appeals, the PPD award offer letters on appeal also noticed claim closure under NRS 616C.235. *See Argo Group v. Horton*, Case No. 81568 (Nev. Ct. App., May 25, 2021); *Armstrong v. Treasure Island Hotel*, Case No. 80461 (Nev.

[3] S.B. 289 § 12, 81st Leg. (Nev. 2021) (providing that the act is not effective until "passage and approval"). The Governor approved the bill on May 31, 2021. 2021 Nevada Laws Ch. 245 (S.B. 289).

Ct. App., May 25, 2021). Arguably in those cases because claim closure was on appeal, the claims had not *closed* with final decisions. Here, in Kline's case, claim closure was noticed under NRS 616C.235 in the April 4, 2018 determination scheduling a second PPD evaluation with Dr. Jempsa, which stated that the claim would close as of the date of Dr. Jempsa's PPD evaluation. (IV JA 790-792.) That letter was not on appeal and the claim closed prior to the appeals at issue, on May 8, 2018, which was the date of the PPD evaluation with Dr. Jempsa as found by the appeals officer. (I AA 224:21-22.)

With the appeals officer decision supported by the substantial evidence and applicable law to closed workers' compensation claims, the district court's order denying Kline's petition for judicial review should be affirmed.

ARGUMENT

I. Standard of Review

This is an appeal from a district court order denying a petition for judicial review of an administrative decision in a workers' compensation action. Kline asks this Court to review the agency's factual findings and conclusions of law. Based on the record before the agency, under NRS 233B.135, " [i]n a role identical to the district court's role, this court reviews an administrative decision to determine if the 'agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion,' or if it was otherwise affected by prejudicial legal error." *State Tax*

Comm'n v. Am. Home Shield of Nev., Inc., 127 Nev. 382, 385-86, 254 P.3d 601, 603 (2011) (quoting *Campbell v. State, Dep't of Tax'n*, 109 Nev. 512, 515, 853 P.2d 717, 719 (1993)).

NRS 233B.135 also provides that "[t]he 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). Rather, this Court reviews an agency's factual findings "for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (internal quotation marks omitted). Further, "an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." *Campbell,* 109 Nev. at 515, 853 P.2d at 719. Substantial evidence is that which "a reasonable mind might accept as adequate to support the appeals officer's conclusion." *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 520 (2009).

Here, the agency correctly applied the law and the substantial evidence supports its decision, thereby warranting affirmance under the deferential standard of review.

/ / /

/ / /

II. The Appeals Officer Decision is Supported by the Law and Substantial Evidence.

A. The Appeals Officer Decision is Consistent With the Applicable Versions of NRS 616C.490 and NAC 616C.490 and Contains No Error of Law.

Kline argues that because she had no ratable impairment or symptoms due to her pre-existing cervical spinal condition prior to the industrial injury, there must be no apportionment of the PPD award. This was not the law prior to the passage of S.B. 289, and Kline's reliance thereon improperly assumes application of S.B. 289. The prior version of NRS 616C.490(9) states:

> Except as otherwise provided in subsection 10, if 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.

NRS 616C.490(9) [effective through December 31, 2019].[4] 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).

[4] The general rule is that the law applicable to a workers' compensation claim is the law in place on the date of injury. NRS 616C.425(1) (stating, "[t]he amount of compensation and benefits and the person or persons entitled thereto must be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date").

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 that:

> 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**.

NAC 616C.490(4)-(5) (the applicable version of this regulation cited here is the version last revised on June 28, 2016) (emphasis added). The regulation goes on to provide guidance where the pre-existing condition is something like, as is the case here, degenerative arthritis:

> 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.

NAC 616C.490(6)-(8).

Kline now contends, without any support, that subsections (4) and (5) are applied together, that subsection (5) does not apply to subsections (6)-(8), and that the appeals officer therefore erred by finding that the medical opinions and expert testimony supporting apportionment are credible and satisfy the requirements under NAC 616C.490(5)-(6). (AOB at 20:14-22.) She further argues that the appeals officer's reading of the regulation is one of the reasons why S.B. 289 amended NRS 616C.490. (AOB 20:16-19.) While that may be the case, Kline's claim had closed ***prior*** to the amendments to NRS 616C.490, and therefore the prior version and the case law interpreting it must apply. (I AA 224:21-22; IV JA 790-792.) The Nevada Supreme Court has held that "the clause [in NAC 616C.490(6)] 'which existed before the industrial injury or the onset of the disease' ***refers to the impairment and***

not the documentation." *Ransier v. SIIS*, 104 Nev. 742, 744, 766 P. 2d 274, 275 n.1 (1988) (emphasis added).

The appeals officer expressly found that both Dr. Anderson and Dr. Betz identified the pertinent documentation, including x-rays, MRIs, historical records and diagnoses which established a prior impairment. (I AA 222.) The Decision stated that this documentation supported these doctors' conclusions as to the scope and nature of the pre-existing impairments. (*Id.*) Dr. Betz also testified as to the nature and scope of the pre-existing impairment, stating that "the nature of the [pre-existing] condition is multilevel-significant spondylolisthesis or degenerative disc disease. The nature was, I would say moderate to severe." (II AA 269:15-16.) Specifically, the appeals officer noted that Kline initially treated for neck issues that then resolved. (I AA 221.) Months later, she exhibited new symptoms indicating a nerve root deficit. (*Id.*) Based on the records from Dr. Sekhon, who performed Kline's spinal fusion surgery, in addition to MRI and x-ray records, 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. (*Id.* at 222.) The appeals officer thus concluded that Dr. Betz and Dr. Anderson established the underlying basis for apportionment as required by NAC 616C.490(5)-(7). (*Id.*)

The AMA Guides also provide a framework for apportionment, requiring that (1) there is documentation of the prior factor; (2) the current impairment is greater

as a result of the prior factor; and (3) there is evidence indicating the prior factor caused or contributed to the impairment based upon a reasonable probability. (*See AMA Guides*, *5th Ed.*, 1.6b, p. 11). Dr. Betz verified each of these requirements and cited the underlying documentation during his expert testimony, and the appeals officer found that the evidence and testimony supported apportionment. (I AA 222; II AA 269-273.) The appeals officer further concluded that Dr. Anderson's apportionment of Kline's impairment as seventy-five percent non-industrial and twenty-five percent industrial was proper and credible and was confirmed by Dr. Betz's medical records review and expert testimony. (I AA 223.) The appeals officer also noted that Dr. Betz's testimony at the hearing was uncontroverted, credible, and reliable. (*Id.*) The appeals officer's conclusions regarding apportionment required an application of the facts to the law. These mixed determinations are entitled to deference on appeal. *Hernandez v. State*, 124 Nev. 649, 647, 188 P.3d 1126, 1132 (2008) (abrogated on other grounds by *State v. Eighth Jud. Dist. Ct.*, 134 Nev. 104, 412 P.3d 18 (2018)).

In sum, prior to the passage of S.B. 289, NAC 616C.490(6) did not require that the documentation of a pre-existing condition predate the industrial injury for purposes of apportionment under NRS 616C.490. *See Ransier*, 104 Nev. at 744-45, 766 P.2d at 275. Thus, the district court properly found that the appeals officer did not commit an error of law in affirming apportionment where post-injury medical

documentation established that Kline had a pre-existing cervical condition that was non-industrial.

B. The Substantial Evidence Unequivocally Establishes That Apportionment of Kline's PPD Award Was Proper and the Appeals Officer's Credibility Determinations Are Entitled to Deference.

Here, the medical evidence establishes that Kline's present impairment is due in part to a pre-existing condition. As such, NRS 616C.490(9) required her PPD award to be reduced by the percentage of disability reasonably attributable to the pre-existing condition. The appeals officer reasonably concluded that the medical documentation and expert testimony here establish that the attribution of 75% of Kline's impairment to the pre-existing condition was proper. (I AA 223-224.) This fact-based conclusion is entitled to deference.

In her Opening Brief, Kline enumerates what she claims are nine "conclusive facts" conceded by Dr. Betz during his expert testimony at the July 12, 2018 Appeals Hearing. (*See* AOB at 8-9). These "facts" are inaccurate statements because they are taken out of context and fail to consider all of the testimony relied on by the appeals officer. Taken as a whole, Dr. Betz's testimony fully supports the appeals officer's Decision.

Each "fact" is reproduced here, accompanied by the contextual testimony conspicuously absent from Kline's Opening Brief:

> 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.

(AOB at 8) (citing II AA 289.). Dr. Betz's full answer to Kline's counsel's question was:

> Well, the evidence is she had herniations. She had some degenerative protrusions, As we all know, neck and spine pain is multi-factorial, it's impossible to assign, with any specificity, how much of it is disc related, how much of it is facet related, how much of it is ligament related, . . .

(II AA 289.) The issue here is not how much pain is due to degenerative changes and how much is due to herniations causing cord compression, but rather how much of the present impairment is reasonably attributable to the pre-existing condition. In the Decision, the appeals officer concludes that "[h]ere, the medical evidence establishes that the Claimant had a pre-existing condition which mandates the rating physician to apportion under NAC 616C.490(1)." (I AA 217.) The Decision cites medical reporting by Dr. Anderson and Dr. Betz, supported by Dr. Hall's March 16, 2016 opinion, and the January 13, 2016 MRI showing degenerative changes, as the basis for this conclusion. (*Id.*) The appeals officer also found based on the evidence that "Dr. Anderson's apportionment of the Claimant's present impairment as 75% non-industrial and 25% industrial was proper and credible." (*Id.* at 223.)

Kline further contends:

> 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.

(AOB at 8) (citing II AA 292). This is misleading. Despite repeated attempts by Kline's counsel at the hearing to get Dr. Betz to admit that the C5/6 and C6/7 protrusions were caused by the industrial accident, Dr. Betz ***never*** says this. Instead, when responding to Kline's counsel's hypothetical assumption that this was the case, Dr. Betz responded that he would alter his opinion on apportionment:

> [i]f I had evidence that the patient had immediate pain and found to have disc herniations in the weeks or months immediately following the accident, consistent with the accident, consistent with the symptoms then, absolutely, ***it's not the case here***, but absolutely.

(II AA 292.) (emphasis added). In fact, the appeals officer found it significant that there was ***no evidence*** that Kline had symptoms or examination findings of neck injury at time of her initial presentation to the emergency department and was not found to have acute injury related pathologies on MRI. (I AA 217.)

Kline relies heavily on the fact that there is no evidence of a ***ratable impairment*** to her cervical spine prior to the industrial accident, and that there is no documentation of an impairment that predates the industrial accident:

> 3. Dr. Betz conceded that there was no evidence of a ratable impairment to the cervical spine prior to the industrial accident. (AOB at 8) (citing II AA 293).
>
> 4. Dr. Betz confirmed that there were no prior records that supported an impairment to the cervical spine prior to the industrial accident. (AOB at 8) (citing II AA 294).

> 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. (*Id.*)
>
> 6. Dr. Betz confirmed that there is not one medical record that documents that the Petitioner had prior pre-industrial accident symptoms for her cervical spine. (AOB at 8) (citing II AA 300).

However, as explained by the appeals officer in applying the law to these facts, the AMA Guides neither require that medical records evincing a pre-existing impairment predate the industrial injury, nor that the pre-existing impairment was ratable. (I AA 220.) Similarly, prior to the passage of S.B. 289, NAC 616C.490 neither required a prior rating of a pre-existing impairment, nor that the records predate the industrial injury. (*See id.*) The appeals officer's conclusions are supported by Dr. Anderson's and Dr. Betz's reports, and Dr. Betz's expert testimony, all of which point to medical evidence of pre-existing stenosis, spondylitis, and osteophytes ***which take years if not decades to form***. (*Id.* at 223-224.)

Kline also contends:

> 7. Dr. Betz confirmed that there is not one medical record that the Petitioner would have ever needed to have a cervical fusion prior to the industrial accident. (AOB at 8) (citing II AA 300).

This selective citation, however, ignores Dr. Betz's other testimony that "I think it's highly likely that she would've ended up with a surgical fusion with or without the industrial accident" (II AA 301:13-15.) and that:

> Fusions are only done because there are degenerative changes associated with it or evidence of instability, typically again related to degeneration. ***So, fusion would not typically be the recommended procedure for an acute herniation causing neurologic impingement***."

(II AA 293:1-5) (emphasis added). Dr. Betz is clear that the industrial motor vehicle accident could not have been the primary cause of Kline's cervical spine condition:

> So, this patient clearly, clearly has a pre-existing condition. Okay? So, and ***we know that the fusion was done to address that pre-existing condition***. It may have been aggravated by the occupational incident. ***I think that's arguable but may have been***. I acknowledge it's a possibility. But clearly, ***the primary, if not 75% to 90% reason this fusion was performed was to address progressive symptoms related to multilevel degenerative disc disease***. . .

(*Id*. at 273:1-8) (emphasis added). When the whole of Dr. Betz's testimony is considered, it plainly supports the appeals officer's finding that Kline had a pre-existing condition and apportionment of her PPD award was therefore proper.

Next, Kline emphasizes the fact that:

> 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. (AOB at 8) (citing II AA 304).

However, as discussed above, the absence of symptoms prior to the industrial accident does not preclude apportionment under NAC 616C.490.

Finally, Kline again misstates Dr. Betz's testimony citing the fact that:

> 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. (AOB at 9) (citing II AA 312).

As Dr. Betz states repeatedly over the course of his testimony, his opinion based on the medical evidence is that the disc protrusions were ***not*** caused by the industrial accident. Indeed, the full exchange between Kline's counsel and Dr. Betz was actually:

> HERB SANTOS: Would it be fair to say that Dr. Jempsa's [sic] opinion would be correct on apportionment if the disc protrusions were caused by the motor vehicle?
>
> DR. JOHN BETZ: [laughs] ***Well, if red is determined is blue, then I guess so, but***–
>
> HERB SANTOS: That's all I have, thank you Doctor.
>
> APPEALS OFFICER: Let him finish his answer.
>
> DR. JOHN BETZ: Okay.
>
> APPEALS OFFICER: Finish your answer, Dr. Betz, please.
>
> DR. JOHN BETZ: I think that question [inaudible] ridiculous but if there – if it was proven somehow that all the patient's cervical pathologies, all the spurring, the osteophytes, the bulging, the spondylolisthesis, the spondylosis, they're all related to that incident, ***which is preposterous***, then yes, he's correct.

(II AA 312:5-21) (emphasis added).

Moreover, Kline is incorrect that the appeals officer's prior decision found that her disc protrusions were caused by the industrial injury. (AOB at 15:26-16:1.) Rather, the prior decision, which addressed whether claim closure was proper, observed that "Dr. Hansen felt there was a high probability within a medical degree of certainty that the Claimant's injuries were ***related to*** the rear-end collision she had recently sustained." (II AA 376.) Based in part on Dr. Hansen's opinion, the appeals

officer found that "[t]he substantial evidence supports a finding that the industrial accident aggravated the pre-existing condition and that the resulting condition was the substantial contributing cause of the resulting condition" and that Kline had "met her burden of proof with substantial evidence that she is not at maximum medical improvement and needs further treatment." (*Id.* at 380.) This decision ***predated*** the spinal fusion surgery and the PPD evaluations by Dr. Anderson and Dr. Jempsa, as well as the records review by Dr. Betz. The prior decision does not preclude the appeals officer from taking that subsequent medical history and documentation into consideration when reaching the Decision at issue here. Accordingly, the district court properly rejected Kline's argument with regard to issue preclusion and found that the appeals officer's Decision was not the result of reversible error nor was it 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. (I AA 188.)

Finally, the appeals officer's Decision sets forth the factual basis for each credibility determination. The Decision concludes that Dr. Anderson's and Dr. Betz's medical opinions and expert testimony were found credible and satisfy the requirements for apportionment under NAC 616C.490. (*Id.* at 222.) Specifically, the appeals officer found that both physicians explained the underlying basis for apportionment by citing pertinent data and medical records that supported their analyses. (*Id.*) The appeals officer further noted that Dr. Betz provided detailed

expert testimony as to each record relied upon and how that contributed to his apportionment analysis, as well as provided extensive testimony verifying that "there was documentation 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," as required by the AMA Guides. (*Id.*)

The appeals officer also sets forth the basis for giving no weight to Dr. Jempsa's PPD evaluation. First, Dr. Jempsa's range of motion findings were questionable because "[i]t is well recognized that patients learn from prior rating experience." Dr. Jempsa failed to apportion because Kline stated that 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. (*Id.* at 223.) The appeals officer concluded that this was also questionable because the medical evidence demonstrates pre-existing stenosis, spondylitis, and osteophytes, which form over the course of years, if not decades. (*Id.* at 224.) And, as discussed *supra*, NAC 616C.490 does not require that the evidence of a pre-existing condition predate the industrial injury. Thus, contrary to Kline's argument, the appeals officer's credibility determinations, which are supported by substantial evidence, ***may not be disturbed on appeal*** as requested by Kline. *See Law Offices of Barry Levinson, P.C.* 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). The Decision is supported by the substantial evidence as correctly affirmed by the district court.

III. S.B. 289 and its Amendatory Provisions are Inapplicable to This Appeal.

Next, S.B. 289 and its significant amendments to the apportionment regulation NAC 616C.490 and statute NRS 616C.490, do not apply here. In her Opening Brief, Kline glaringly omits any analysis of the enactment provisions of the bill, hoping to apply the significant changes to apportionment in her favor. However, because Kline's claim is ***closed*** as opposed to ***open***, S.B. 289 is inapplicable and should not be considered in evaluating whether the district court properly affirmed the Decision.

A. The Plain Language of S.B. 289 Renders it Inapplicable to Closed Claims.

"When a statute's language is plain and unambiguous, we will give that language its ordinary meaning." *Valdez v. Employers Ins. Co. of Nevada,* 123 Nev. 170, 174, 162 P.3d 148, 151 (2007); *DeMaranville v. Employers Ins. Co. of Nevada*, 135 Nev. 259, 264, 448 P.3d 526, 531 (2019). Here, Kline concedes that S.B. 289, which modified NRS 616C.490, applies to all workers' compensation claims that are open on its effective date of May 31, 2021. (AOB at 1; I AA 49 (containing S.B. 289, § 12).)

Indeed, the plain language of Section 11 of S.B. 289 provides that "[t]he amendatory provisions of this act apply ***prospectively*** with regard to any claim pursuant to chapters 616A to 616D, inclusive, or 617 of NRS ***which is open on the effective date*** of this act." (I AA 49) (containing S.B. 289, § 11) (emphasis added).

Under this plain language, S.B. 289 has no application to workers' compensation claims that were closed as of May 31, 2021.

Kline glosses over the fact that her claim, under the plain language of S.B. 289, is not subject to the amendatory provisions. Here, as confirmed by the appeals officer, the claim closed on May 8, 2018, the date of the second PPD evaluation with Dr. Jempsa. (I AA 224:21-22; IV JA 790-792.) Claim closure is not on appeal and the claim closure determination is final. (I AA 207-208, 224); *see also* NRS 616C.315; NRS 616C.345 (setting the jurisdictional time frames for an appeal). Under its plain language, S.B. 289, which only applies to claims open on the effective date of the bill, does not apply to Kline's claim which closed on May 8, 2018, ***three years prior to S.B. 289's May 31, 2021 effective date.***[5]

B. Kline's Claim Remains Closed When No Appeal on Claim Closure Was Pursued and Revisiting Claim Closure is Jurisdictionally Barred.

NRS 616C.315 establishes that an injured worker has 70 days to appeal a written determination from an insurer or third-party administrator by which the worker is aggrieved. NRS 616C.315(3). An injured worker has 30 days to appeal a hearing officer decision resulting from a hearing on that determination. NRS 616C.345(1). The failure to timely file an appeal within these time frames is

[5] Because S.B. 289 is inapplicable, neither the amendments on apportionment to NAC 616C.490 and NRS 616C.490 nor the amendments to NRS 616C.495 under this bill apply here, contrary to Kline's assertions.

jurisdictional and mandatory and results in a hearing officer or appeals officer lacking subject matter jurisdiction to hear the issue. *See Reno Sparks Convention Visitors Auth. v. Jackson*, 112 Nev. 62, 67, 910 P.2d 267, 270 (1996). Also, "[t]he law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Hall v. State*, 91 Nev. 314, 314, 535 P.2d 797, 798 (1975).

Kline's failure to appeal claim closure is fatal to her argument that S.B. 289 applies here. While the underlying Decision on appeal addresses three separate Department of Administration appeals - Appeal Nos. 1900471-RKN, 1902049-RKN, and 1802418-RKN – none of these appeals are from the April 4, 2018 determination letter. That letter noticed claim closure effective as of the May 8, 2018 date of the Dr. Jempsa PPD evaluation, consistent with NRS 616C.235. (I AA 207-208; IV JA 790-792.) Rather, the determinations on appeal are dated December 5, 2017, May 24, 2018, June 13, 2018, September 20, 2018, and are on the issue of the PPD award only. (I AA 207-208.) The appeals officer further confirmed that Kline's claim closed on May 8, 2018, the date of Dr. Jempsa's PPD evaluation. (I AA 224:21-22.)

With no appeal of the April 4, 2018 determination closing the claim filed within the jurisdictional and mandatory time frames to appeal, and with the April 4, 2018 determination not being subject to the instant appeal, there is no jurisdiction

over the issue of claim closure. As the appeals officer correctly found, the claim previously closed when the April 4, 2018 determination became final with no appeal and ***closure of the claim occurred on May 8, 2018.*** Thus, although Kline's appeal of the apportionment of her PPD award was pending on May 31, 2021, when S.B. 289 passed, under the law of the case doctrine and the jurisdictional bars on time to appeal which render a determination final when not appealed, Kline's claim had already ***closed***. (*Id.*)

Finally, while the above precludes any consideration of claim closure in this appeal, the issue of claim closure was also waived when not raised on appeal either with the appeals officer or with the district court as demonstrated in the Decision and Order Denying Petition for Judicial Review. (I AA 1-15, 207-228); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989).

C. S.B. 289 Cannot Be Applied Retroactively to Kline's Workers' Compensation Claim.

Here, Kline essentially seeks to apply S.B. 289 ***retroactively*** to her claim, as her claim had closed and her PPD award was apportioned prior to S.B. 289's amendments to NRS 616C.490. (*See* AOB at 10.) This Court has held that there is a general presumption in favor of prospective application of statutes. *See Clark v. Lubritz*, 113 Nev. 1089, 1095, 944 P.2d 861, 864 (1997); *see also Castillo v. State*, 110 Nev. 535, 540, 874 P.2d 1252, 1256 (1994) ("[C]hanges in statutes are presumed

to operate prospectively absent clear legislative intent to the contrary.") (*disapproved of on other grounds by Wood v. State*, 111 Nev. 428. 430, 892 P.2d 944, 946 (1995)). This general rule that newly enacted statutes apply prospectively "unless the Legislature clearly indicates that they should apply retroactively or the Legislature's intent cannot otherwise be met" applies to workers' compensation statutes. *Valdez,* 123 Nev. at 179-180, 162 P.3d at154.

Moreover, under Nevada's workers' compensation statutes, "the amount of compensation and benefits and the person or persons entitled thereto must be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date." NRS 616C.425(1); *see also State Ind. Ins. Sys v. Conner*, 102 Nev. 335, 337, 721 P.2d 384, 385 (1986) ("[E]ntitlement to benefits is determined as of the date of injury.")

Here, the plain language of S.B. 289 precludes retroactive application and the Legislature's intent is unequivocal. (I AA 49) ("The amendatory provisions of this act apply ***prospectively*** with regard to any claim. . . which is ***open*** on the effective date of this act.") Thus, the versions of NRS 616C.490 and NAC 616C.490 in effect on the date of injury must control here.

Accordingly, with Kline's date of injury as June 25, 2015, for purposes of this appeal, the relevant portion of the version of NRS 616C.490 in effect on the date of injury was Subsection (9). The versions of NAC 616C.490 and NRS 616C.490 cited

supra in Section II.A are the applicable versions to this appeal. The appeals officer correctly applied these prior versions of NAC 61C.490 and NRS 616C.490 to this *closed* claim consistent with amendatory provisions of S.B. 289, which precludes application to closed claims, and NRS 616C.425(1), which establishes the applicable law is that in place on the date of injury.

D. The Court of Appeals Remand Orders Cited By Kline Are Inapposite.

Kline cites two recent orders issued by the Court of Appeals that remanded workers' compensation appeals involving apportionment of PPD awards in light of the passage of S.B. 289. (AOB at 15, n.1.) Kline states that she would support a similar remand of this case to the appeals officer "due to the intervening change in controlling law." (*Id.*) Although the new legislation took effect after the Court of Appeals issued the orders reversing and remanding the district courts' grant of the petitions for judicial review of the appeals officer decisions regarding apportionment, the petitions for rehearing in those cases[6] were pending when the legislation took effect. Most importantly, the issues on appeal in those cases included claim closure, so there was an open question as to whether the plain language of S.B. 289 applies in those cases. Here, however, Kline's claim closed as of May 8, 2018, and claim closure is not on appeal. (*See* Section III.B *supra*.)

---

[6] *Argo Group v. Horton*, Case No. 81568-COA, 5/21/2021 Order; *Armstrong v. Treasure Island Hotel, et al.*, Case No. 80461-COA, 5/21/2021 Order.

Specifically, in *Horton*, claim closure had not previously been noticed or occurred, but rather, claim closure was noticed with the July 8, 2019 PPD award letter that was on appeal. *See Argo Group v. Horton,* Case No. 81568 at I JA 24, 63-70 (this case was subsequently pushed down to the Court of Appeals and assigned Case No. 81568-COA and an Order Vacating Prior Order, Vacating District Court order and Remanding issued on August 26, 2021, by the Court of Appeals as to the intervening change in law under S.B. 289.) Likewise in *Armstrong*, the September 8, 2017, and January 31, 2018 PPD award letters on appeal notice claim closure with the award. *See Armstrong v. Treasure Island Hotel*, Case No. 80641 at I JA 085, 114-125, 270-271 (this case was subsequently pushed down to the Court of Appeals and assigned Case No. 80461-COA and an Order Vacating Prior Order, Vacating District Court order and Remanding issued on August 26, 2021, by the Court of Appeals as to the intervening change in law under S.B. 289). As such, claim closure had not occurred, or remained a live issue on appeal, because it was noticed in the letters on appeal. Accordingly, the claims in *Horton* and *Armstrong* arguably remained ***open*** on the effective date of S.B. 289 with claim closure not fully adjudicated. Therefore, unlike *Horton* and *Armstrong*, Kline's claim was ***closed*** as of the effective date of S.B. 289, as claim closure was noticed in a determination letter that she did not appeal and which is not on appeal here.

IV. Alternatively, if S.B. 289 is Found to be Applicable, this Matter Should be Remanded for Rehearing.

Should the Court find any merit to Kline's position that S.B. 289 applies, this matter should be remanded to the appeals officer for a new hearing which considers the new law on apportionment. Apportionment remains available under S.B. 289, but a different analysis of the medical evidence and new burden of proof apply and would need to be considered at hearing by an appeals officer as set forth in Section 1 of S.B. 289. (I AA 18-20) (containing S.B. 289, § 1.)

CONCLUSION

Respondents respectfully request that this Court affirm the district court's order denying Kline's petition for judicial review.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 3rd day of March, 2022.

McDONALD CARANO LLP

By: */s/ Lisa Wiltshire Alstead*

Lisa Wiltshire Alstead (NSBN 10470)
Chelsea Latino (NSBN 14227)
Jane Susskind (NSBN 15099)
100 W. Liberty St., 10th Floor
Reno, Nevada 89501
Tel: 775-788-2000
Attorneys for Respondents

ATTORNEY'S CERTIFICATE

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 10,613 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number 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 this

/ / /

/ / /

/ / /

/ / /

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: March 3, 2022.

McDONALD CARANO LLP

By: /s/ *Lisa Wiltshire Alstead*

Lisa Wiltshire Alstead (NSBN10470)
100 W. Liberty St., 10th Floor
Reno, Nevada 89501
775-788-2000
lalstead@mcdonaldcarano.com
Attorneys for Respondents

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano LLP; that on March 3, 2022, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system. Participants in the case who are registered as users will be served by the E-Filing system. A copy will also be mailed to:

Nevada Department of Administration
Appeals Division
1050 E. William Street, Suite 450
Carson City, NV 89701

Dated: March 3, 2022.

/s/ *Pamela Miller*
An Employee of McDonald Carano LLP

4879-5121-6914, v. 1